WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION OF THE APPEAL PANEL IN RELATION TO A MEDICAL DISPUTE

Matter Number:	**M1-1217/19**
Appellant:	**Stephen John Husband**
Respondent:	**Broken Hill City Council**
Date of Decision:	**2 September 2019**
Citation:	**[2019] NSWWCCMA 131**

Appeal Panel:	
Arbitrator:	**Marshal Douglas**
Approved Medical Specialist:	**Dr John Brian Stephenson**
Approved Medical Specialist:	**Dr Margaret Gibson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 July 2019, Stephen John Husband (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Greggory Burrow, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 5 June 2019.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act). An Appeal Panel determines its own procedures in accordance with the WorkCover Medical Assessment Guidelines.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. The appellant worked for the Broken Hill City Council (the respondent) between 1980 and 10 October 2014. He was initially employed as a plant operator but also did labouring work. The nature of the work he did from 1984 however was as a cleaner. He was appointed as a "ganger cleaner" in 1987.

7. On 6 September 2018, relying on a report his solicitor obtained from occupational physician Dr Tim Anderson, dated 20 August 2018, he claimed compensation of $38,500 from the respondent under s 66 of the Workers Compensation Act 1987 (the 1987 Act) for 23% whole person impairment (WPI). The claim form he provided specified a date of injury of "October 2014".

8. On 27 November 2018, the respondent's solicitors notified the appellant's solicitors that the respondent's insurer disputed liability for the claim the appellant made on the following grounds:

> "a. To the extent your client alleges impairment resulting from frank injuries occurring in 1981 and 1984 state cover is not the insurer that is liable to respond to the claim.
>
> b. To the extent your client alleges injury in the nature of a disease (or the aggravation of a disease) deemed to have occurred in October 2014, that you client does not suffer permanent impairment resulting from such an injury resulting from such an injury meeting the threshold set by s 66(1) of the 1987 Act."

9. On 13 March 2019, the appellant filed an Application to Resolve a Dispute (ARD) with the Commission seeking determination of his disputed claim for compensation. On 16 April 2019, Arbitrator Mr Young issued an "amended direction" remitting the matter to the Registrar so that the Registrar could refer the matter to an AMS to assess a medical dispute relating to the degree of the appellant's permanent impairment resulting "from injury to the [appellant's] cervical spine, lumbar spine and upper extremities (shoulders) for the deemed date of injury of October 2014".

10. The arbitrator included within the amended direction, at [4], the following note:

> "It is noted that the [appellant] relies on the nature and conditions of his employment with the respondent in the period from 1981 to the deemed date of injury in October 2014 but does not rely on the frank injuries sustained in 1981 and 1984 as being the cause of his injury. The AMS is directed, concordant with s 323 of the 1998 Act, to exclude from his assessment any impairment arising from the frank injuries sustained in 1981 and 1984."

11. A delegate of the Registrar then duly referred the medical dispute to the AMS and, as mentioned above, the AMS provided the MAC in response to that referral on 5 June 2019.

PRELIMINARY REVIEW

12. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.

13. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the appellant to undergo a further medical examination. This is because the material before the Appeal Panel is sufficient to enable the Appeal Panel to re-assess the medical dispute that has been referred for assessment and there is therefore no purpose served in requiring the appellant to undergo a further medical examination.

EVIDENCE

14. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

MEDICAL ASSESSMENT CERTIFICATE

15. The AMS obtained the following history with respect to the circumstances in the appellant's injury occurred, which he set out within part 4 of the MAC:

> "Acknowledging this claim is related to the cervical spine, lumbar spine and both shoulders and the deemed injury date is October 2014, and explaining to Mr Husband that his injuries the WCC has determined that his injuries are due to the nature and conditions of employment, he then focused specifically on 2 work incidents, mentioned in the Amended Direction of 16/04/2019.
>
> He was determined to explain to me that he first experienced neck pain when operating a Trackscavator which he operated all day in forward and reverse, and because of the configuration of the fixed seat had to rotate his neck around to reverse the vehicle many times during the course of a normal work day.
>
> He says he reported his symptoms to his supervisors but treated the neck pain himself with simple Panadol. This occurred in 1981.
>
> He tells me, there was a second, more dramatic event in 1984 when he was involved with road sealing, standing on the back of a truck spreading aggregate which was coated with creosote and kerosene. The board that he was standing on gave way and he fell onto the road, was smothered with aggregate and suffered both chemical and thermal burns to much of his body and his face. He describes that he 'swam out' of the molten aggregate and was taken by ambulance to Broken Hill Hospital but apparently not admitted.
>
> Thereafter, he attended Broken Hill Hospital Outpatients for daily dressings and was unfit for work for about 6 weeks. During this period, he noted symptoms about both shoulders.
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> While his symptoms improved, he moved to administration which he describes as a cleaning supervisor, but he corrected me in my assumption that this was an office-based job, telling me he performed normal cleaning duties as well as supervised rostering and other administrative type tasks. He continued until 2014.
>
> Over the last 38 years then, he has had intermittent non-operative treatment including physio, massage, acupuncture and simple analgesia. He has not consulted a Spinal, Orthopaedic or Shoulder Surgeon."

16. It is apparent that this history the AMS obtained was based on the AMS's interview with the appellant.

17. The AMS recorded within part 5 of the MAC the following findings from his examination of the appellant:

> "Mr Husband stands 178cm tall, weighs 105kg and appears stocky.
>
> He sat comfortably, rose cautiously and when dressing and undressing was protective and cautious.
>
> Inspection of his gait showed that it was staggered and wide based but there was no limp, and he did not use a brace, stick or orthosis.

Cervical Spine Examination of the neck showed normal alignment. There was guarding but no spasm. Neck range of motion was reduced by one third. There was no cervical nerve root tension, no evidence of upper extremity radiculopathy, no wasting of the arm or forearm musculature and the biceps and triceps jerks were present and symmetrical.

There was no dermatomal sensation loss of the upper extremities and no radicular power loss.

Lumbar Spine

Examination of the lumbar spine showed normal alignment with no paraspinal spasm or guarding. Lumbar range of motion was reduced by one quarter within range pain, straight leg raise test for sciatica was negative. The knee and ankle jerks were present and symmetrical.

There was no wasting of the quadriceps or calves. I noted Mr Husband was able to stand on his toes and heels, but when formally tested demonstrated weakness of both the ankle dorsiflexion and plantar flexion in a delayed, non-organic way.

He complained of altered sensation bilaterally over the inner aspect of the ankle in a nondermatomal pattern.

Straight leg raise was 80° bilaterally and produced back pain with no sciatica.

Upper Extremities

Examination of the upper extremities shoulder motion showed slight reduction of active range of motion. I noted there was some discrepancy in the examination with initial forward elevation limited to 80° bilaterally, but on repeat testing he could lift his arm to 150°. Shoulder motion was thereafter symmetrical and included:

Flexion 150°
Extension 30°
Abduction 150°
Adduction 10°
External rotation in abduction 80°
Internal rotation in abduction 70°

Examination of the elbows, wrists and hands showed full range of motion."

The AMS noted that a CT scan done of the appellant's cervical spine on 9 September 2015 was reported to reveal spondylosis with disc space narrowing.

18. The AMS at part 7 of the MAC, under a sub-heading "summary of injuries and diagnoses" said this:

> "Mr Husband has degeneration of the cervical and lumbar spine and probable rotator cuff degeneration on the basis of the clinical findings today and the limited radiology performed to date. According to his history, these conditions were significantly initiated by the 2 work incidents, 1981 and 1984, where the amended request of 16/04/2019 has specifically told me to exclude any assessment of impairment arising from the frank injuries of 1981 and 1984."

The AMS assessed the appellant's permanent impairment relating to his cervical spine to be 7% WPI. With respect to his lumbar spine, the AMS assessed the appellant's permanent impairment to be 5% WPI. With respect to each upper extremity, the AMS assessed the appellant's permanent impairment to be 4% WPI. The AMS stated in the MAC that he had taken into account the following in assessing the appellant's permanent impairment as such:

> "There is a history of a cervical and lumbar spine symptoms, shoulder complaints and loss of active range of motion on examination today. There is no evidence of radiculopathy of the cervical or lumbar spine conditions."

19. Of particular importance to this appeal, the AMS said within part 11 of the MAC the following with respect to the extent to which the appellant's permanent impairment was due to the previous injuries the appellant suffered in 1981 and 1984:

> "a. In my opinion the worker suffers from the following relevant previous injuries, pre-existing conditions or abnormalities:
>
> (i) The WCC amended request has specifically instructed me to 'exclude from assessment any impairment arising from the frank injuries sustained in 1981 and 1984'. I believe they were significant in the current presentation and was certainly where Mr Husband developed most of his neck pain, a great deal of his back symptoms and his bilateral shoulder symptoms. Furthermore, Mr Husband worked for the Council in a heavy labouring capacity for a limited period 1980-84 before was placed on somewhat lighter duties.
>
> b. The previous injury, pre-existing condition or abnormality directly contributes to the following matters that were taken into account when assessing the whole person impairment that results from the injury, being the matters taken into account in 10a, and in the following ways:
>
> With regard to the nature and conditions of work Mr Husband worked for a fairly short period of time in the hard-labouring duties with the Council, and then was placed on relatively lighter duties thereafter. Work history is therefore not consistent with a relative contribution causing cervical and lumbar degeneration of 9/10, in contrast there is a significant constitutional and background component to his ongoing problems.
>
> c. Whilst the extent of the deduction is difficult or costly to determine the available evidence is that the deductible proportion is large and a deduction of one tenth is at odds with the available evidence. In my opinion the deductible proportion is one half for the following reasons: There is a significant element of background, degenerative, constitutional disease as commented upon by the multiple physicians quoted above."

20. The AMS, after making a deduction under s 323(1) of the 1998 Act for the proportion of the appellant's permanent impairment that he found was due to the appellant's previous injuries, assessed the degree of the appellant's permanent impairment resulting from his injury that was deemed to have occurred in October 2014 to be 11% WPI, and certified accordingly.

SUBMISSIONS

21. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel, and are paraphrased by the Appeal Panel immediately below by way of providing a summary

22. The appellant submits that the history the AMS set out in the MAC did not accord with or wrongly characterised his evidence as contained in his signed statements. The appellant submits that the AMS did not take into account all the evidence when determining what proportion of his permanent impairment was due to the previous injuries he suffered in 1981 and 1984. The appellant submits that the deduction to be made under s 323 "is 1/10th of the assessment impairment unless that is at odds with the available evidence". The appellant submits that there was "now no sound basis for departing from the ordinary reduction of 10% [as prescribed by s 323 of the 1998 Act and SIRA]".

23. The respondent submits that the AMS found, consistent with the evidence that the appellant suffers from constitutional degenerative change. The respondent submits that the deduction the AMS made under s 323(1) for the proportion of impairment due to the injuries the appellant suffered in 1981 and 1984 was correct having regard to the evidence with respect to the constitutional degenerative change from which the appellant suffered and to what the appellant told the AMS regarding the significance of his previous injuries.

FINDINGS AND REASONS

24. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment but the review is limited to the grounds of appeal on which the appeal is made.

25. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons.

26. The documents attached to the ARD reveal that the appellant made his claim for compensation under s 66 by way of completing a "permanent impairment claim" that his solicitor signed on 6 September 2018. That form had attached to it the report of occupational physician Dr Tim Anderson dated 20 August 2018. The form detailed that the "body system affected by the injury" was the "lower back, neck and upper limbs" of the appellant. The evidence does not reveal that there was any further information or detail that the appellant provided at that time regarding the injury he suffered for which he claimed compensation.

27. Dr Anderson in his report of 20 August 2018 advised he had diagnosed the appellant with "extensive degenerative changes in his spinal column". Dr Anderson said, "there is a component of naturally occurring degenerative change although there seems to be no specific history of dysfunction associated with this as opposed to a work-related phenomenon". Dr Anderson said "there appears to be a very direct relationship to the accelerated deterioration of any underlying degenerative condition in the spinal column with his occupation". He also said, "my reading of the situation is that Mr Husband had degenerative changes throughout his spinal column and that this situation was markedly aggravated in the cervical and lumbar spine by specific elements of his occupation". He said, "there appears to be a very direct relationship to the accelerated deterioration of any underlying degenerative condition in the spinal column with his occupation".

28. Dr Anderson did not take a history of the appellant having suffered an injury to his shoulders nor did he diagnose the appellant as having any pathology in his shoulders, but he said the appellant had

> "gross restriction of movement of the shoulders. It is considered that this is directly related to the chronic effects of the deterioration from his cervical spine."

29. What Dr Anderson describes, with those words, is in substance that the appellant, as a result of the injury to his cervical spine, had developed a condition in his shoulders in the form of a restriction of movement.

30. As earlier mentioned, the respondent's insurer's solicitors in a letter to the appellant's solicitors of 27 November 2018 notified the appellant that the insurer disputed liability to pay the appellant's claim for compensation. It did so, insofar as the appellant's claim involved compensation for frank injuries in 1981 and 1984, because it was not on risk at that time and, insofar as his claim related to injury in the nature of disease (or the aggravation of a disease), because he did not suffer permanent impairment that would entitle him to compensation under s 66(1) of the 1987 Act.

31. In Part 4 of the ARD the appellant described his injury as being "to his cervical spine, lumbar spine and shoulders during the course of his employment with the employer". The appellant also detailed sustaining injuries in 1981 whilst operating heavy machinery and in 1984 when a safety mechanism failed whilst he was pouring aggregate from a machine.

32. The Appeal Panel observes that based on the material the appellant filed with the ARD, there was no evidence he had suffered an injury to his shoulders arising out of or in the course of his employment with the respondent. Rather, the report of Dr Anderson revealed that as a consequence of the injury he suffered to his cervical spine, he had developed a condition in his shoulders in the form of restricted range of movement.

33. As also mentioned earlier an arbitrator issued an amended direction on 16 April 2019 containing a note that the appellant was relying on "the nature and conditions of his employment" for the period 1981 to October 2014 and did not rely upon "frank injuries" that the appellant had suffered in 1981 and 1984. The arbitrator also directed the matter be remitted to the Registrar so that the Registrar could refer the matter to an AMS so as to assess a medical dispute relating to the degree of permanent impairment that "results from injury to the [appellant's] cervical spine, lumbar spine and upper extremities (shoulders) with a deemed date of injury of October 2014".

34. The Appeal Panel observes that the arbitrator provided no reasons for making the direction and the Appeal Panel infers from that, that the direction was issued at the request of and therefore with the consent of the parties. Given that, and given the direction made by the arbitrator was to enable the Registrar to refer a medical dispute to an AMS that involved an injury to the "upper extremities (shoulders)", the Appeal Panel also infers that the parties had by the time the arbitrator made the direction agreed that the appellant suffered an injury to his shoulders, within the meaning of s 4 of the 1987 Act, due to the "nature and conditions of his employment with the respondent in the period from 1981 to the deemed date of injury".

35. Nothing was said in the amended direction as to what the nature of that injury was to the appellant's shoulders in terms of the pathology comprising it.

36. To summarise thus far, the medical dispute that was referred to the AMS involved an injury to the appellant's cervical spine, lumbar spine and upper extremities that was caused by the nature and conditions of the appellant's employment after 1981. That is something different from the injury that was diagnosed by Dr Anderson, which was an injury to the lumbar spine and cervical spine, that included a condition of restricted movement in the appellant's upper extremities consequent upon the injury to the cervical spine.

37. The Appeal Panel considers that the injury the subject of the medical dispute that was referred to the AMS to assess, insofar as it related to an injury to the cervical and lumbar spine, was that articulated by Dr Tim Anderson in his report of 20 August 2018, being the acceleration and deterioration of underlying naturally occurring degeneration in the appellant's cervical and lumbar spine. The appellant's permanent impairment claim form that his solicitor signed had Dr Anderson's report attached to it, and hence the report formed part of the appellant's claim. It was that claim to which the respondent's solicitors responded by their letter of 28 November 2018.

38. There is very little in the evidence in terms of what the prior frank injuries were that the appellant suffered to his cervical spine in 1981 and to his lumbar spine in 1984. Noting that the respondent's solicitors described in their letter of 27 November 2018, when denying liability on behalf of the respondent, that the prior injuries the appellant had suffered were frank injuries, coupled with the fact that the arbitrator also described those injuries, seemingly with the consent of the parties, as frank injuries, the Appeal Panel infers that each of the prior injuries occurred in a specific incident.[1]

39. The appellant revealed in his statements attached to the ARD that his work with the respondent initially involved his operating a trackscavator that had a fixed seat which required him to turn his neck around in order to operate the machine. Based on the evidence that is before the Appeal Panel, the Appeal Panel considers that in all likelihood the injury the appellant suffered in a specific incident in 1981 to his neck occurred while he was operating the trackscavator and would have involved some aggravation of early underlying degeneration that then existed in the appellant's cervical spine.

40. The evidence does not reveal that there was any radiological investigation done of the appellant's cervical spine until 11 June 2015, when an x-ray was done. That x-ray revealed moderate to severe multilevel degenerative changes in the appellant's cervical spine at that time.

41. The Appeal Panel observes that the appellant was born on 28 July 1953. Hence, at the time he suffered a "frank" injury to his cervical spine in 1981 he was less than 30 years of age.

42. The appellant says in the statement he signed on 24 July 2015 that he had persisting pain in his neck after the injury, for which he took Panadol, but he was not at the time referred for any physiotherapy or chiropractic treatment. He says that in 1984 he sought treatment from a chiropractor and had massage therapy.

43. With respect to the injury the appellant suffered in a specific incident in 1984 to his lumbar spine, the appellant recounts in his statement of 6 June 2018 that he fell from the back of a truck that was tipping blue metal. In the process, he became covered in blue metal which caused him serious burns as well as a back injury. He describes experiencing back pain from that date.

44. As far as can be ascertained from the evidence, there was no radiological investigation done of the appellant's lumbar spine until a CT scan was done on 5 February 2013. That revealed degeneration at all levels of his lumbar spine.

45. The Appeal Panel observes that at the time the appellant suffered injury to his lumbar spine in that specific incident in 1984 the appellant would have been either 30 or 31 years of age.

46. The appellant in the statements he signed on 24 July 2015 and 6 June 2018 reveals that when he initially commenced employment with the respondent in 1980, he did labouring and operated machinery including the trackscavator. He was transferred to work in the stores department in 1981 where he was required to do heavy lifting. It would seem however, noting the work he was doing in 1984 when he suffered injury to his lumbar spine, that until 1984 his work still involved him doing duties as a labourer and plant operator.

47. In 1984 he was transferred to work as a cleaner in the administration building where he says that he was required to do a lot of heavy lifting and twisting. In 1987 he was appointed to the position of "ganger cleaner" and was then required to organise functions, events and meetings which he says involved heavy work in the form of moving furniture, lifting chairs and setting up for functions.

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[1] See *Wyong Shire Counsel v Paterson [2005]* NSWCA74 at [38] and *Sedrak v Rooty Hill RSL Club Ltd [2014]* NSWWCCPD40 at [39]

48. Having regard to the extent of the degeneration that the report on the cervical spine x-ray of 11 June 2015 revealed was then present in the appellant's cervical spine (being some 30 years after the frank injury to his cervical spine), and noting that the appellant was less than 30 years of age at the time he suffered the frank injury to his cervical spine, and there being no other evidence to reveal the extent of the degeneration in his cervical spine that existed at that time, the Appeal Panel considers that, in all likelihood, at that time the appellant suffered the frank injury to his cervical spine he had only very mild degeneration in his cervical spine that would have been consistent with his then age. The Appeal Panel considers that what occurred when the appellant suffered an injury in the single incident in 1981 was that there was some aggravation of what at that time was very mild degenerative disease in the appellant's cervical spine.

49. Having regard to what the report on the lumbar spine CT that was done on 5 February 2013 reveals was then present in the appellant's lumbar spine (being some 30 years after he suffered injury), and noting the appellant was 31 or 32 years of age at the time he suffered injury in the singular incident in 1984, and there being no other evidence of any radiological investigation done after he suffered the 1984 injury, it seems to the Appeal Panel that in all likelihood that at the time the appellant suffered that injury in that singular incident in 1984 to his lumbar spine the appellant had very mild degenerative changes only in his lumbar spine, consistent with his age. That mild degeneration would have been aggravated in that singular incident.

50. The work that the appellant did over the course of the next 30 plus years after suffering these "frank" injuries included, until he suffered the injury to his lumbar spine, labouring work and operating machinery and, after 1984, it included heavy lifting whilst employed as a cleaner. The Appeal Panel considers that this work would have resulted in acceleration and deterioration of the mild degeneration that was in the appellant's cervical spine and lumbar spine at, respectively 1981 and 1984. Indeed, that is what the AMS found the injury to be and it would seem, given what has been set out earlier, this is what the parties have agreed the injury to be insofar as it relates to the appellant's cervical and lumbar spine.

51. In the Appeal Panel's view, consistent with the appellant's submissions, the AMS did not have proper regard to the nature of the work the appellant did after 1981 when assessing the extent to which the injuries the appellant suffered in a single incident in 1981 to his cervical spine and in the single incident in 1984 to his lumbar spine contribute to the permanent impairment he now has.

52. In the Appeal Panel's view, the situation was the same with respect to the appellant's rotator cuff. In other words, as at 1981, having regard to the appellant's then age, and the work in which he was engaged before 1981, it is probably the case that he would have very mild degeneration in the rotator cuffs at that time. His work thereafter has resulted in a deterioration and acceleration of that degeneration.

53. As indicated in the discussion above, the appellant's claim at the time he made his claim for compensation under s 66 related to an injury to his cervical spine, including a condition in his shoulders consequent upon that injury, and an injury to his lumbar spine. By the time it came before the arbitrator, there was agreement, it seems, that the appellant's claim related to an injury, as that term is defined in s 4 of the 1987 Act, from the nature and conditions of his employment to his cervical spine, lumbar spine and to his upper extremities (shoulders). In other words, his claim with respect to his upper extremities was now that he had suffered an injury to his shoulders, as distinct from the condition of restricted movement in his shoulders being a consequence of the injury to his cervical spine.

54. The AMS made a diagnosis, based on his clinical findings, that it was likely the appellant had degeneration in his rotator cuffs. It is implicit from the MAC, that the AMS considered that the appellant's work after 1981 aggravated and accelerated and resulted in a deterioration of that degeneration in the appellant's shoulders. In the Appeal Panel's view, that is what occurred. That is, the injury the appellant suffered insofar as it related to his upper extremities was the aggravation, acceleration and deterioration of mild pre-existing degeneration in his rotator cuffs.

55. With respect to the deduction that an Approved Medical Specialist (an AMS) is to make under s 323(1), the authorities are consistent and clear as to the approach an AMS must adopt. That is, the level of a worker's post-injury impairment as at the time of assessment must be firstly determined. Secondly, a worker's prior injury or pre-existing condition or abnormality must be identified. Thirdly, it must be determined whether a proportion of a worker's post-injury impairment is due to that prior injury or pre-existing condition. Lastly, the extent to which a worker's post-injury impairment is due to the prior injury or pre-existing condition or abnormality must be determined.[2]

56. The Court of Appeal held in *Ryder v Sundance Bakehouse*[3] that the pre-existing condition that a worker has or the worker's prior injury must make a difference to the outcome in order that a worker's impairment can be found to be due to it.[4] The extent to which it does make a difference, there must be a deduction.

57. The third and fourth stages of this process cannot be done based on assumption or hypothesis. It must be able to be demonstrated from the evidence what the proportion is of a worker's impairment that is due to the pre-existing condition or previous injury. In accordance with s 323(2) of the 1987 Act if the extent to which a deduction is to be made under s 323(1) would be too difficult or costly to determine because of the absence of medical evidence or some other reason, the deduction must be assumed to be 10% so long as that assumption is not at odds with the evidence.

58. As indicated earlier, the evidence with respect to what actually occurred in the incident in 1981 in which the appellant suffered injury to his cervical spine is scant. It involved a single incident. The Appeal Panel has found that, in all likelihood, the single incident occurred whilst the appellant was working the trackscavator and turning his neck. There is no radiological evidence to indicate the extent of the degeneration the appellant had in his cervical spine at that time, but the Appeal Panel considers, for reasons already stated, that it was likely to have been mild.

59. As already explained, the appellant in all likelihood only had mild degeneration in his lumbar spine at the time he suffered injury in 1984.

60. The same applies for his rotator cuffs.

61. The injury the appellant suffered that is the subject of the medical dispute referred for assessment was, insofar as it related to his cervical and lumbar spine, the acceleration and deterioration of what in 1981 was mild pre-existing degeneration and, insofar as it related to his upper extremities, the aggravation, acceleration and deterioration of what in 1981 was mild degeneration in the appellant's rotator cuffs. The mechanism of injury was the tasks the appellant carried in his employment between 1981 and October 2014, which were arduous.

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[2] See *Cole v Wenaline Pty Ltd [2010]* NSWSC78 and *Ryder v Sundance Bakehouse* [2015] NSWSC526
[3] [2015] NSWSC526
[4] IBID

62. As mentioned earlier, the Appeal Panel accepts the appellant's submission that the AMS, when obtaining a history, did not have proper regard to his written statements and consequently did not have proper regard to the work that the appellant did subsequent to his suffering the "frank" injuries in 1981 and 1984. The Appeal Panel considers that the AMS finding that there was "a significant element of background, degenerative, constitutional disease" was wrong.

63. In the Appeal Panel's view, it is too difficult to determine the exact extent to which the appellant's previous injuries to his cervical spine in 1981 and to his lumbar spine in 1984 and the pre-existing degeneration he had in his rotator cuffs contribute to his present impairment. Noting that the previous injuries to his cervical spine and to his lumbar spine occurred in single incidents and involved aggravation of mild degeneration in his cervical spine and of mild degeneration in his lumbar spine, and noting that the appellant only had mild degeneration in the rotator cuffs, and noting too that he continued doing arduous work for 30 or so years thereafter, the Appeal Panel considers that the proportion of the appellant's present permanent impairment due to these prior injuries and the pre-existing condition of his rotator cuffs would have been modest. Given that, and because it is too difficult to determine exactly what proportion of his permanent impairment is due to the previous injuries and pre-existing condition, the Appeal Panel considers that the AMS ought to have assumed, consistent with s 323(2) that it was 10%, and the AMS erred by not doing so. In the Appeal Panel's view, the AMS also erred in concluding such an assumption was at odds with the evidence.

64. The Appeal Panel, for completeness, observes that the appellant's submission that "the ordinary reduction" is 1/10th is wrong. That is inconsistent with the authorities.[5] There is no "ordinary reduction". Further, the appellant's submission that there is to be a deduction of 1/10th unless that is at odds with the available evidence is also wrong, given that this assumption only arises if the situation is that it is too difficult or costly to determine the deduction to be made. Further, the appellant's submission at 9(a) that the AMS was required to make a deduction with respect to the "degree of permanent impairment that pre-existed the injury" is also wrong, in that the deduction is to be for the extent to which the prior injury contributes to his present permanent impairment.

65. The Appeal Panel however considers that these incorrect statements within the appellant's submissions were really due to inapt and infelicitous expression. The Appeal Panel has treated the appellant's submissions to be, in substance, firstly, that the AMS erred by not having proper regard to the work the appellant did after 1981 when obtaining a history, with the consequence that the deduction the AMS made did not correctly reflect the proportion of the appellant's permanent impairment that was due to his previous injuries in 1981 and 1984 and due to the pre-existing condition in his rotator cuffs, and secondly, that the AMS ought to have assumed the deduction to be 10% in accordance with s 323(2) of the 1998 Act.

66. The Appeal Panel also notes that in his submissions the appellant said that the AMS had assessed he had a total of 22% WPI. That is incorrect, as indicated above, the AMS assessed his impairment to be 7% with respect to the cervical spine, 5% with respect to the lumbar spine and 4% for each upper extremity, which amounts to 20% WPI.

[5] See *Cole v Wenaline Pty Ltd* and *Ryder v Sundance Bakehouse*

67. As the Appeal Panel has found that the AMS made an error with respect to the deduction that was made under s 323(1), with the consequence that the MAC contains a demonstrable error, the Appeal Panel must reassess the medical dispute that was referred to assessment. In doing this, the Appeal Panel has relied upon the findings the AMS made from his examination of the appellant. The Appeal Panel has done so because there was no error, in the Appeal Panel's view, with respect to the manner in which the AMS conducted his examination or with the findings he made from that examination. The Appeal Panel also observes that neither party raised in their respective submissions any issue with respect to the manner in which the AMS conducted his examination or with his findings from his examination.

68. Based on the AMS's findings, the Appeal Panel assesses, as did the AMS, that the appellant has 7% WPI with respect to his cervical spine, 5% WPI with respect to his lumbar spine and 4% WPI with respect to each upper extremity, totalling 20% WPI. As is apparent from the above discussion, the Appeal Panel considers that a proportion of the appellant's permanent impairment is due to the injury he suffered to his cervical spine in 1981 and to his lumbar spine in 1984 and to the pre-existing condition he had in his rotator cuffs. However, the extent of the deduction to be made on account of that, in accordance with s 323(1) of the 1998 Act, is too difficult to determine and, consistent with s 323(2) of the 1998 Act, the Appeal Panel assumes it is 10%, which for reasons outlined above, is not at odds with the evidence.

69. For these reasons, the Appeal Panel has determined that the MAC issued on 5 June 2019 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT* 1998.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **1217/19**
Applicant: **Stephen John Husband**
Respondent: **Broken Hill City Council**

This Certificate is issued pursuant to s 328(5) of the *Workplace Injury Management and Workers Compensation Act* 1998.

The Appeal Panel revokes the Medical Assessment Certificate of Dr Greggory Burrow and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - Whole Person Impairment (WPI)

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in WorkCover Guides**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Sub-total/s % WPI (after any deductions in column 6)**
Cervical spine	October 2014	Chapter 4	Chapter 15	7%	1/10th	18%
Lumber spine				5%		
Left upper extremity (shoulder)		Chapter 2	Chapter 16	4%		
Right upper extremity (shoulder)				4%		
Total % WPI (the Combined Table values of all sub-totals)					**18%**	

Marshal Douglas
Arbitrator

Dr John Brian Stephenson
Approved Medical Specialist

Dr Margaret Gibson
Approved Medical Specialist

2 September 2019

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT* 1998

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar