WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1533/19**
Appellant:	**SAI Global Ltd**
Respondent:	**Milad Sefin**
Date of Decision:	**5 September 2019**
Citation:	**[2019] NSWWCCMA 132**

Appeal Panel:	
Senior Arbitrator:	**Mr Glenn Capel**
Approved Medical Specialist:	**Dr Roger Pillemer**
Approved Medical Specialist:	**Dr Mark Burns**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 19 June 2019, SAI Global Ltd (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Mohammed Assem, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 28 May 2019.

2. The appellant relies on the following ground 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 the 1998 Act. An Appeal Panel determines its own procedures in accordance with the SIRA 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. Milad Sefin (the respondent) sustained an injury to his back on 4 February 2009 when he lifted a heavy bag. Liability was accepted by QBE Workers Compensation (NSW) Ltd. On 9 March 2011, a Complying Agreement was executed by the parties in respect of 6% whole person impairment of the lumbar spine.

7. The claim was transferred to AAI Ltd t/as GIO (the insurer) in August 2017, and weekly payments ceased on 28 December 2018 in accordance with s 39 of the *Workers Compensation Act 1987* (the 1987 Act).

8. On 12 December 2018, the respondent' s solicitor served a notice of claim for lump sum compensation on the insurer in respect of injuries to the lumbar and thoracic spines. The insurer denied liability in respect of the thoracic spine in a dispute notice issued pursuant to s 78 of the 1998 Act on 8 January 2019.

9. An Application to Resolve a Dispute (the Application) claiming lump sum compensation was registered in the Commission on 29 March 2019. At a telephone conference on 29 April 2019, the claim in respect of the thoracic spine was withdrawn and the matter was remitted to the Registrar for referral to an AMS to assess the whole person impairment of the respondent's lumbar spine due to injury sustained on 4 February 2009. The AMS, Dr Assem, issued his MAC on 28 May 2019.

PRELIMINARY REVIEW

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

11. As a result of that preliminary review, the Panel determined that it was not necessary for the worker to undergo a further medical examination because it was satisfied that there was sufficient material available to the Panel to deal with the appeal.

EVIDENCE

Documentary evidence

12. 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.

Respondent's evidence

13. In his statement dated 29 October 2018, the respondent described the circumstances of his injury on 4 February 2009, his symptoms and his treatment. He stated that he had never been involved in any accidents prior to his work injury or subsequent accidents.

14. The earliest diagnostic tests comprise the CT scan dated 21 February 2009 and the MRI scan dated 25 March 2009. The CT scan showed mild to moderate spondylosis with impingement at L5 and mild osteoarthritis in the sacroiliac joints. The MRI scan showed a prolapse and extrusion at L4/5 on the L5 nerve root and an annular tear at L5/S1.Similar pathology was reported in the later diagnostic tests.

15. Despite there being multiple copies of the clinical notes from the Glenmore Park Mediclinic, the entries only commence from 5 February 2009, so they do not represent a complete record of the respondent's past health issues.

16. On 13 September 2007, Dr Agaiby referred the respondent for five sessions of physiotherapy under Medicare. The doctor noted that the respondent was troubled by chronic neck and back pain.

17. According to the list of prescriptions, the respondent was prescribed Mobic in January 2007, May 2007, August 2008 and March 2009.

18. In a letter of referral to Dr Guirgis dated 14 September 2011, Dr Tefaili recorded that the respondent had a history of back pain in 2006.

19. Dr Guirgis provided a number of opinion reports, but most of these do not record a history. In his report dated 31 August 2018, the doctor described the circumstances of the respondent's back injury and he indicated that there was no previous or subsequent condition in the respondent's back. He assessed 21% whole person impairment without any deduction pursuant to s 323 of the 1998 Act,

20. In his report dated 8 February 2019, Dr Guirgis advised that there was no evidence of underlying changes when the respondent sustained his injury to warrant a deduction for a pre-existing condition. He assessed 21% whole person impairment.

21. Dr Davies provided a report on 30 January 2017, but he focussed on the work injury and he did not record a history of any prior back symptoms. The physiotherapy reports are of more recent origin and merely describe the treatment provided to the respondent.

22. Dr Patrick reported on 15 November 2018, He recorded details of the respondent's work injury and noted that the respondent had no previous relevant injury. It is unclear whether he had access to all of the diagnostic tests as the schedule that he refers to in his report was not attached to his report.

23. Dr Patrick diagnosed a significant back injury that required surgery and he assessed 15% whole person impairment of the lumbar spine and 5% whole person impairment of the thoracic spine, for a combined total of 19% whole person impairment. The doctor declined to make any deduction for a pre-existing condition because the respondent had been working for the appellant without difficulty for 12 years prior to his work injury.

Appellant's evidence

24. Professor Ehrlich reported on 18 January 2011. As his two earlier reports are not in evidence, the history that he obtained from the respondent is unknown. He assessed 6% whole person impairment and he made no deduction for any pre-existing condition. No assistance is provided by his last report dated 19 August 2014.

25. Dr Bruce reported on 14 August 2018 and 8 January 2019. He recorded a history of the circumstances of injury, the respondent's symptoms and his treatment. The respondent told the doctor that he had no previous episodes of low back pain and no previous relevant injury or illness. The doctor reviewed all of the diagnostic scans including the CT scan dated 21 February 2009 and the MRI scan dated 25 March 2009,

26. Dr Bruce diagnosed an acute disc prolapse at L4/5 on a background of pre-existing lumbar spondylosis and intervertebral disc degeneration, which made him vulnerable to injury. He assessed 16% whole person impairment, but he applied a one-tenth reduction due to the radiological evidence of pre-existing pathology, resulting in an assessment of 14% whole person impairment. There was no evidence of any injury to or impairment of the respondent's thoracic spine.

Medical Assessment Certificate

27. Dr Assem provided his MAC on 28 May 2019. He recorded that the respondent felt sharp pain in his back radiating down his right leg when he picked up a bag of computer components weighing approximately 15 kg on 4 February 2009. He consulted Dr Agaiby and diagnostic tests confirmed a right paracentral L4/5 disc prolapse and extrusion compressing the proximal right L5 nerve root, together with an annular tear at the L5/S1 level. He was off work intermittently but he was eventually terminated. He worked with Finsair as a software engineer for 14 months until he was no longer able to cope. He had not worked since June 2014. Further tests arranged by Dr Guirgis showed a deterioration of the lumbar pathology.

28. Dr Assem noted that the respondent was referred to Dr Davies, who performed a laminectomy and rhizolysis of the L5 nerve roots on 21 September 2017. There was no significant improvement in his condition and he continued to have ongoing pain in his lower back with a shooting pain in his right leg. He took medication and received physiotherapy treatment and hydrotherapy.

29. Dr Assem reported the respondent's symptoms and past history as follows:

- "Present symptoms:
  Mr Sefin complains of constant pain across his lower back that he rates as 7/10 on a visual analogue scale. The pain is now radiating down both legs. There is a shooting pain in his buttock, going to the right big toe. His symptoms are worse when sitting, standing or walking for long periods. He has pain when coughing and sneezing. There were no neurological symptoms involving the bowel or bladder.

- **Details of any previous or subsequent accidents, injuries or condition:**

  Mr Sefin denied any previous accidents, injuries or complaints involving his lower back. There were no other relevant medical or surgical conditions reported."[1]

30. Dr Assem recorded his findings on examination as follows:

"FINDINGS ON PHYSICAL EXAMINATION

Mr Sefin appeared to be in some discomfort. He ambulated with a slow cautious gait. He sat throughout the interview. He was informed at the time of the examination not to engage in any manoeuvre beyond what he could tolerate which may cause harm or injury.

Lumbar Spine

There was a fine healed 6cm surgical scar. There was slight tenderness on palpation and some guarding present. Cervical movements were globally restricted to one quarter of normal range in flexion, extension, lateral flexion and rotation.

He had some difficulty climbing on and off the examination couch due to reported weakness in his legs. Active straight leg raising in the supine position was 40° on the left and 30° on the right. Neural tension signs were negative.

His knee and ankle jerk reflexes were brisk and symmetrical. Power and tone was normal. Sensation was globally reduced to the entire right leg and to a certain extent the left leg but it was more pronounced over his right big toe and in the distribution of the L5 nerve root."[2]

31. Dr Assem provided a diagnosis as follows:

- "summary **of injuries and diagnoses:**

  On 4 February 2009, Mr Sefin sustained a work-related injury to his lower back causing a right paracentral L4/5 disc prolapse and extrusion compressing the proximal right L5 nerve root. On 21 September 2017, he underwent a laminectomy and rhizolysis of the L5 nerve roots without any significant benefit.

- **consistency of presentation:**

  There were no inconsistencies in his physical presentation."

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[1] MAC, p 3
[2] MAC, p 3 - 4

32. The doctor gave his reasons for assessment as follows:

> "**a. My opinion and assessment of whole person impairment**
>
> Mr Sefin underwent surgery for chronic low back pain with radicular symptoms in his lower extremities. He is therefore entitled to a DRE lumbar category III or 10% whole person impairment. In addition, he is entitled to 2% whole person impairment for a moderate limitation in activities of daily living.
>
> He has radiological evidence of pathology at the L4/5 level. An MRI scan on 14 March 2018 demonstrated a small central disc extrusion at L4/5 with mild narrowing of the canal. A repeat MRI scan on 14 February 2019 showed an L4/5 broad based disc bulge with a prominent right foraminal component, causing mild right neuroforaminal narrowing and likely touching the exiting nerve root. At L5/S1, there is a small disc annular tear. Although he had global sensory loss involving his entire right leg, it was more pronounced over his big toe in the L5 dermatome distribution. I have therefore given him the benefit of the doubt, and accept that he has radiculopathy after surgery giving 3% whole person impairment.
>
> He was approximately 39 years old when he sustained an injury to his lower back and denied any previous accidents, injuries or complaints involving his lumbar spine. I therefore did not consider that there were any deductions applicable.
>
> **b. An explanation of my calculations (if applicable)**
>
> DRE Lumbar III = 10% WPI
> +2% for Moderate limitation in ADL's = 12% WPI
> +3% for Radiculopathy after surgery = 15% WPI"[3]

33. Dr Assem had regard to the views of Drs Bruce and Guirgis. He took issue with Dr Bruce's deduction of one-tenth for pre-existing degenerative condition as he believed that there was no evidence to support such a deduction. He disagreed with Dr Guirgis' assessment because the respondent had only had surgery at a single level. He was in agreement with the assessment provided by Dr Patrick.

34. Dr Assem made no deduction in accordance with s 323(2) of the 1998 Act.

SUBMISSIONS

35. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.

Appellant's submissions

36. In summary, the appellant's solicitor, Mr Elder, submits that the AMS made a demonstrable error in his failure to make a deduction in accordance with s 323 of the 1998 Act.

[3] MAC, p 5

37. Mr Elder submits that the AMS recorded that the respondent denied any previous accidents, injuries or complaints involving his lower back and he was asymptomatic prior to the work injury. However, a review of the medical evidence shows that the respondent was referred for physiotherapy to treat “chronic back and neck pain” on 13 September 2007, a letter of referral to Dr Guirgis recorded that the respondent had a history of back pain that commenced in 2006, and the respondent had been prescribed anti-inflammatory medication to treat back pain since 2006.

38. Mr Elder submits that the failure by the AMS to refer to the relevant information disclosing evidence contrary to the respondent’s history represents a demonstrable error in accordance with *Wentworth Community Housing Ltd v Brennan*[4].

39. Mr Elder submits that the first post injury scan taken on 21 February 2009 showed evidence of mild osteoarthritic changes and spondylosis and on the balance of probabilities, the respondent would have experienced back pain associated with degenerative changes in his lumbar spine prior to his workplace injury. The MAC should be revoked and the Panel should apply a one-tenth deduction, resulting in an assessment of 14% whole person impairment.

Respondent’s submissions

40. The respondent’s counsel, Mr Baran, submits that Professor Ehrlich, who examined the respondent and reported on 18 January 2011 and 19 August 2014, was unable to make any deduction in respect of any pre-existing condition or impairment. Dr Bruce made a one-tenth deduction on the basis of pre-existing spondylosis and disc degeneration.

41. Mr Baran submits that the CT scan dated 21 February 2009 showed mild osteoarthritis and mild to moderate spondylosis. The MRI scan dated 25 March 2009 showed no significant bony stenosis and desiccation at L3/4. The MRI scan dated 28 February 2012 showed no abnormality apart from the injured part of the respondent’s back.

42. Mr Baran submits that Dr Guirgis, in a report dated 17 June 2013, recorded a history that the respondent had muscular pains in his neck and upper back in 2006. He was prescribed Voltaren cream and tablets but had no x-rays. After receiving treatment, he was able to work and he was symptom free until the work injury.

43. Mr Baran submits that the AMS had regard to the opinion of Dr Bruce, the CT scans and the MRI scans. It was open to him to make no deduction for any pre-existing condition. The history recorded by Dr Guirgis of some aches and pains that quickly resolved does not lead to the conclusion that the AMS should have made a deduction in an otherwise asymptomatic spine.

44. Mr Baran submits that reliance by the appellant on *Brennan* is flawed, as that decision concerned a jurisdictional error by the Registrar as the gatekeeper rather than a Medical Panel Decision. Further, it dealt with a different section of the 1998 Act and concerned a psychological injury.

45. Mr Baran submits that the documents relied upon by the appellant to justify a deduction are unsafe and unsatisfactory. A mere referral for physiotherapy on 13 September 2007 is consistent with general aches and pains and does not disclose anything of significance. The appellant also ignores the fact that Dr Guirgis had taken a full history that the respondent had no active pre-existing condition. He was the only doctor to pay close attention to this issue, unlike the presumptive reasoning of Dr Bruce. Finally, the mere fact that the respondent took anti-inflammatory medication and had no further treatment is entirely inconsistent with an active pre-existing condition.

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[4] [2019] NSWSC 152, (*Brennan*)

46. Mr Baran submits that the AMS took into account all of the material relevant to whether or not there was a pre-existing condition and he rightly formed the view that no deduction should be made. The authorities show that an actual pre-existing condition must be taken into account[5] and it must take an active causative role[6]. The history of trivial symptoms in an otherwise asymptomatic back does not reach the requisite standard for the AMS to form the view that the impairment to be assessed was in part due to any pre-existing condition. The appeal should be dismissed and the MAC confirmed.

FINDINGS AND REASONS

47. 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.

48. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW*[7]. The Court held that while prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gateway, it can consider other grounds capable of coming within one or other of the s 327(3) heads, if it gives the parties an opportunity to be heard.

49. In *Campbelltown City Council v Vegan*[8], the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

50. Though the power of review is far ranging it is nonetheless confined to the matters which can be the subject of appeal. Section 327(2) of the 1998 Act restricts those matters to the matters about which the AMS certificate is binding.

51. In this matter, the delegate of the Registrar has determined that he is satisfied that one of the grounds of appeal under s 327(3)(d) is made out. The Panel has accordingly conducted a review of the material before it and reached its own conclusion.

Section 323 deduction

52. Section 323 of the 1998 Act provides:

> "323 (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.
>
> (2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence."

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[5] *Cullen v Woodbrae Holdings Pty Ltd* [2015] NSWSC 1416, per Beech-Jones J [46].
[6] [2015] NSWSC 526 (*Ryder*)
[7] [2008] NSWCA 116
[8] [2006] NSWCA 284

53. The principles regarding deductions pursuant to s 323 of the 1998 Act have been canvassed in a number of Supreme Court and Court of Appeal decisions. These warrant some comment.

54. In *Matthew Hall Pty Ltd v Smart* [9], Giles JA (Mason P and Powell JA agreeing) stated:

> "The background to the original s68A, in the decisions referred to in the passage next set out, was explained in *D'Aleo v Ambulance Service of New South Wales* (NSWCA, 12 December 1996, unreported). In that case the appellant had pre-existing degenerative changes to her back, although they were asymptomatic.
> It was argued that a pre-existing condition which was asymptomatic and had not resulted in any prior impairment in the sense of physical disability or incapacity was insufficient to attract s68A. Cole JA, with whom Handley JA and Cohen AJA agreed, said -
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>> 'The terms of s68A(1) are in my judgment tolerably clear. The employer who is liable in respect of an injury causing permanent impairment of the back, neck or pelvis is not liable in respect of "any proportion of the loss that is due to" the factors referred to in (a) and (b). The circumstances referred to in (a) are those in respect of which compensation has been paid or is payable under Division 4. The approach of the courts in *Rodios v Trefel* [(1937) 11 WCR NSW 285], *King v Hayward* [(1943) 67 CLR 488] and *TAFE v Pitt* [(1993) 9 NSWLR CCR 309] is negated. However, the legislature went further by enacting (b). Prior non-compensable injuries, pre-existing conditions or abnormalities result in a deductable [sic] proportion being determined for which the employer liable in respect of the injury causing the permanent impairment of the back, neck or pelvis is not to be responsible. The words "any pre-existing condition" in my view include a degenerated back caused by the advent of age. Insofar as the permanent impairment of the back as found is due to that pre-existing condition, an appropriate deduction for the effects of the pre-existing condition is to be made. In the circumstances mentioned in subs (8), it is 10%.'
>
> In *Government Cleaning Service v Ellul* (1996) 13 NSW CCR 344 at 349 it had been said that s68A(1) was not concerned with any pre-existing condition or abnormality which was not causing any permanent impairment. Cole JA went on in *D'Aleo v Ambulance Service of New South Wales* to explain that, read in context, this meant that unless the pre-existing condition was a contributing factor causing permanent impairment, s68A(1)(b) had no application; so read, it was consistent with the view his Honour had earlier stated. In the result, therefore, it did not matter that the pre-existing condition had been asymptomatic, provided that the permanent impairment of the back as found was to some extent due to the pre-existing condition.
>
> The same, in my view, must be said as to the current s68A(1). It does not matter that the pre-existing condition was asymptomatic, and if the loss is to some extent due to the pre-existing condition there must be deduction of the deductible proportion for that loss. But it is necessary that the pre-existing condition was a contributing factor causing the loss. And, of course, it is necessary that there was a pre-existing condition."[10]

[9] [2000] NSWCA 284 (*Smart*).
[10] *Smart*, [30] – [32].

55. In *Cole v Wenaline Pty Limited* [11], Schmidt J stated:

> "Section 323 does not permit that assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will always, 'irrespective of outcome', contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality. The extent that the later impairment was due to the earlier injury, pre-existing condition or abnormality must be determined. The only exception is that provided for in s 323(2), where the required deduction 'will be difficult or costly to determine (because, for example, of the absence of medical evidence)'. In that case, an assumption is provided for, namely that the deduction 'is 10% of the impairment'. Even then, that assumption is displaced, if it is at odds with the available evidence."[12]

56. In *Vitaz v Westform (NSW) Pty Ltd* [13], Basten JA discussed the principles regarding deductions pursuant to s 323 of the 1998 Act when reviewing the submissions made to the Appeal Panel in that matter and he stated:

> "The appeal to the Appeal Panel did not expressly identify an erroneous failure to give reasons. Rather, the submissions on the appeal, which appear to set out the grounds of challenge, complained that there can be no deduction under s 323, as a matter of law, in the absence of a pre-existing physical impairment. It was further submitted, by reference to the opinion of three medical commentators in a local publication:
>
> > 'If a worker develops permanent pain and symptoms due to work consistent with spondylosis (sic) in the neck region, that condition might be assessed at DRE II. Although the spondylosis (sic) is likely to have been degenerative, if there were no symptoms in the period prior to the work-related complaint, then there was no rateable impairment at that time. So, nothing would be subtracted from the current impairment'.
>
> That opinion contained a legal assumption which is inconsistent with the approach adopted by this Court in, for example, *D'Aleo v Ambulance Service of New South Wales* (NSWCA, 12 December 1996, unrep) (quoted by Giles JA, Mason P and Powell JA agreeing, in *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284; 21 NSWCCR 34 at [30]-[32] and, more recently, by Schmidt J in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [13]). The resulting principle is that if a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury…"[14].

57. This principle was confirmed in *Ryder*, where Campbell J was called upon to review a MAC and the decision of a Medical Appeal Panel confirming the AMS's deduction of 10% pursuant to s 323 of the 1998 Act.

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[11] [2010] NSWSC 78 (*Cole*)

[12] *Cole*, [30].

[13] [2011] NSWCA 254 (*Vitaz*).

[14] *Vitaz*, [42] – [43].

58. His Honour confirmed that whether there was a pre-existing condition that contributed to the post injury impairment was a question of fact[15]. Further, it was inappropriate to assume that if there was a pre-existing condition or injury, it must contribute to the impairment[16]. He continued:

> "……. Where the issue is whether any proportion of the permanent impairment resulting from the work injury is due to a pre-existing condition, it is not necessary that the condition, pre-injury, of itself, would have given rise to a rateable percentage impairment by application of the diagnosis-related evaluation of impairment prescribed by the WorkCover *Guides*.
>
> In the present context, the critical question is the causation question which, expressed by adapting the terms of the statute is whether a portion of the 15 per cent whole person impairment Ms Ryder suffered as a result of her work injury was due to a pre-existing condition or abnormality i.e. degenerative disc disease. The argument advanced on behalf of Ms Ryder is effectively that the proportion must be capable of assessment in accordance with the *WorkCover Guides* for s 323(1) to be satisfied. With respect, this overlooks the requirement that the section must be read as a whole and in its legislative context. Although s 323(2) does not use the word 'proportion' it addresses the idea that in some, perhaps many, if not most, cases it may be 'difficult or costly to determine' the relevant proportion. In that event, a rule of thumb ('assumption') of 10 per cent is to be adopted.
>
> I acknowledge that the express words of s 323(1) require that some definite part, even if it is difficult or costly to assess in precise terms, of the impairment has been caused by, in this case, a pre-existing condition. But the interpretation adopted by the Court of Appeal is that the section is engaged if the pre-existing condition, or previous injury where applicable, is a concurrent necessary condition, with the work injury, of the *degree* of permanent impairment."[17]

59. The Panel notes that the AMS recorded that the respondent denied "any previous accidents injuries or complaints involving his lower back" and there were no other relevant medical or surgical conditions. This history is incorrect.

60. Unfortunately, little guidance is provided by the clinical notes of the treating doctors, as the individual entries only commence after the work injury. However, the notes show that the respondent was prescribed anti-inflammatory medication at around the time that he was referred for physiotherapy treatment for "chronic back pain, neck pain". This referral does not suggest treatment for minor general aches and pains as submitted by Mr Baran. The letter to Dr Guirgis also referred to a history of back pain in 2006. This material contradicts the respondent and raises doubts about the reliability of his evidence.

61. Whilst it is true that Professor Ehrlich did not make any deduction in respect of any pre-existing condition or impairment, no definite view can be draw regarding his opinion in the absence of his earlier reports. It may well have been the case that he also obtained an incorrect history from the respondent, which would most likely have coloured his opinion. Dr Patrick's assessment is also compromised by an incorrect history.

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[15] *Smart,* [33].
[16] *Cole*, [28] – [30].
[17] *Ryder*, [41] – [43].

62. Although Mr Baran submits that Dr Guirgis recorded a detailed history regarding neck and upper back pain and having short term treatment in 2006 in a report dated 17 June 2013, this report is not before the Panel and was not before the AMS. Therefore, no weight can be given to this submission or any other submissions relating to this report. Leave was not sought to rely on this report as fresh evidence, but in any event, it is doubtful that leave would have been given as this report was in existence and most likely in the possession of the respondent's solicitor before the examination by the AMS.

63. The Panel disagrees with Mr Baran's submission that the respondent only had some past aches and pains in his back. The reference to treatment for "chronic back pain" in September 2007 suggests otherwise.

64. The Panel notes that the respondent failed to disclose his past issues with his back to any of the doctors, so it is not surprising that deductions for pre-existing pathology were not applied.

65. Whilst it is true that the AMS had regard to the opinion of Dr Bruce, the CT scans and the MRI scans, he was not told by the respondent that he had any past issues. This would have affected his reasoning processes.

66. The CT scan dated 21 February 2009 showed right L5 impingement due to a moderate disc osteophytic complex, which was degenerative in nature. This was pre-existing pathology that was contributing to his condition. The MRI scan dated 25 March 2009 showed disc desiccation and bulging, and a slight prolapse had developed. Therefore, there was degenerative changes at the level of the injury and on the side of the pathology.

67. The Panel is satisfied that the extent of the pathology shown in the CT scan dated 21 February 2009 and the MRI scan dated 25 March 2009 was sufficient to play a causative role in the ultimate degree of whole person impairment. In the circumstances, a minimum deduction of one-tenth in accordance with s 323(2) of the 1998 Act and in accordance with the authorities discussed above is warranted.

68. For these reasons, the Appeal Panel has determined that the MAC issued on 28 May 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **1533/19**
Applicant: **Milad Sefin**
Respondent: **SAI Global Ltd**

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 Mohammed Assem 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 AMA 5 Guides**	**% WPI**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Sub-total/s % WPI (after any deductions in column 6)**
1.Lumbar Spine	4 February 2009	Para 1.28, p 6; Para 4.27, p 27; Para 4.35, p 27; Table 4.2, p 29.	Table 15-3, p 384	15%	One-tenth	13.5%, rounded up to 14%
Total % WPI (the Combined Table values of all sub-totals)					**14%**	

Mr Glenn Capel
Senior Arbitrator

Dr David Pillemer
Approved Medical Specialist

Dr Mark Burns
Approved Medical Specialist

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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar