

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-2625/19
Appellant: Lend Lease Project Management & Construction
(Australia) Pty Limited
Respondent: Charles Usher
Date of Decision: 19 December 2019
Citation: [2019] NSWCCMA 198

Appeal Panel:
Arbitrator: John Wynyard
Approved Medical Specialist: Dr Roger Pillemer
Approved Medical Specialist: Dr Margaret Gibson

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 22 August 2019, Lend Lease Project Management & Construction (Australia) Pty Limited (the appellant employer) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr PL Harvey-Sutton, an Approved Medical Specialist (AMS), who issued an Amended Medical Assessment Certificate (MAC) on 19 August 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 assessment was made on the basis of incorrect criteria,
 - 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 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). "WPI" is reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 27 June 2019, the delegate of the Registrar referred this matter to an AMS on the following bases:
 - Pursuant to the Table of Disabilities the loss of use of the right leg at or above the knee including any loss below the knee and the back caused by injury on 29 March 2000.
 - A whole person impairment assessment from injury to the left lower extremity on 21 September 2005.
7. The face of the referral noted prior awards of 15% WPI for a right lower extremity injury of 17 August 2007 and a total of 11% WPI due to an injury on 15 December 2009, which consisted of 6% WPI for injury to the lumbar spine and 5% WPI for injury to the cervical spine.
8. The referral was made pursuant to Consent Orders issued on 27 June 2019.
9. Mr Usher had been employed with Lend Lease since 26 April 1984, working for various subsidiary companies. Mr Usher had been working for the present respondent since 2000. Although the company names had changed since 1984, the ABN of the company had remained the same.
10. He said that he had a number of injuries to his left and right knee, to his back and his neck over the course of his employment, working as a labourer, leading hand, safety officer, foreman and site manager.
11. He said that on 9 September 1987 he sustained a “minor” left knee injury at work from which he “fully recovered” within a short period of time¹.
12. He said that over the years he had a number of other injuries to both knees in respect of which some were reported, but none were ever the subject of a claim. He said that in 1992 he had a left knee arthroscopy with Dr James O’Brien, Orthopaedic Surgeon. That surgery was confirmed by Dr O’Brien in his report of 13 July 2000² in which Dr O’Brien reported that there was “a good result” from the arthroscopy.
13. On 29 March 2000 Mr Usher suffered injuries when he jumped off a ladder, which had shifted whilst he was climbing into a ceiling space. He injured his right knee and his back.
14. He went back to Dr O’Brien following this accident. An arthroscopy was performed on 15 August 2000 to the right knee which was an arthroscopic meniscectomy and chondroplasty. In his statement, Mr Usher said that over the course of the next few days the pain in his back “settled down.”
15. Dr O’Brien’s operation report of the same date noted a “quite marked erosion which was a surprise involving both the patella femoral and the medial compartments and there were multiple splits in the lateral tibial plateau”³.
16. With regard to his left knee, Mr Usher said that he injured it in April 2003 and June 2004 whilst on scaffolding stairways. He made no claim in regard to those incidents and he said the pain in his knees soon went away.

¹ Appeal papers page 44 Statement of Mr Usher 11 September 2018

² Appeal papers page 131

³ Appeal papers page 133

17. On 21 September 2005, the date of the second referred accident, Mr Usher was working at the Telstra Pitt Street Exchange when he stepped on a steel section lying on the floor as a result of which he fell against the wall, striking his left shoulder and left knee. He was referred to Dr O'Brien and advised on 4 October 2005 that he might have sustained a lateral meniscal tear in the left knee.
18. After further investigations on 9 December 2005, Mr User underwent a left knee arthroscopic meniscectomy and chondroplasty at Sydney Adventist Hospital with Dr O'Brien.
19. In a subsequent report dated 5 September 2006, Dr O'Brien said that the surgical procedure on 9 December 2005 confirmed a medial compartment arthritis and a medial meniscal tear with earlier arthritic changes in the lateral compartment of the knee⁴.
20. Following the left knee injury of 21 September 2005, Mr Usher said that he had several incidents where his knee had given way and he has fallen over.
21. Mr Usher then described an injury on 17 August 2007 to his right knee when he slipped over on a wet floor whilst in the course of his employment. Mr Usher eventually ceased work for unrelated reasons in 2011. He said that the condition of his knees over the years had continued to deteriorate and he came to total knee replacements. The left knee replacement took place on 7 March 2012 and the right on 14 November 2012.
22. Mr Usher resolved his claim for lump sum compensation with the respondent arising from the injury of 17 August 2007 to the right knee in a Complying Agreement of 15% WPI dated 10 May 2019.
23. With regard to the injury to the back of 15 December 2009, he entered into a Complying Agreement for a total of 11%.
24. With regard to the injury of 29 March 2000, the AMS certified 20% impairment to the back and 25% loss of use of the right leg at or above the knee including any loss below the knee. In respect of each injury she certified that there was "nil" proportion to be deducted. However, in certifying the total impairment loss, whilst she confirmed the 20% impairment to the back, she reduced the 25% loss of use of the right leg to 15%.
25. With regard to the injury of 21 September 2005, the AMS found that Mr Usher had suffered 15% WPI, from which she made no deduction pursuant to s 323 of the 1998 Act.

PRELIMINARY REVIEW

26. 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.
27. The appellant employer requested that Mr Usher be re-examined by an AMS who is a member of the Appeal Panel. Although a demonstrable error was found, a re-examination was not necessary as the Panel had sufficient evidence with which to issue the fresh certificate.

⁴ Appeal papers page 142

EVIDENCE

Documentary evidence

28. 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

29. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

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

FINDINGS AND REASONS

31. 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.
32. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 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.

Appellant employer's submissions

33. The appellant employer submitted that the AMS had fallen into error in four respects. These were:
- (a) that she had failed to make any relevant diagnoses;
 - (b) she failed "to give proper consideration" to the evidence regarding the referred back injury;
 - (c) similarly, she failed "to give proper consideration" to the subsequent right knee injury of 17 August 2007;
 - (d) that she failed to make any deduction pursuant to s 323 of the 1998 Act regarding both knee injuries.

Diagnosis

34. We were referred to chapter 1.6b of the Guides which states:
- "b. Assessors are required to exercise their clinical judgement in determining a diagnosis when assessing permanent impairment and making deductions for pre-existing injuries/conditions."
35. We were also referred to *Johnson v Workers Compensation Commission*⁵.

⁵ [2019] NSWSC 347 (*Johnson*)

Back injury

36. The appellant employer submitted that the history recorded by the AMS was inconsistent with evidence that was before her. The appellant employer kindly set out that evidence.
37. The report of Dr O'Brien of 13 July 2000⁶ was referred. He recorded that Mr Usher had injured himself when he jumped down from a ceiling space on a ladder:
- “...and hurt his back initially which settled over several days but he has continued to have pain in his right knee”.
38. As has been seen, Dr O'Brien was principally concerned with management of Mr Usher's knees.
39. On 4 August Dr James Bodel, who had been retained by the respondent, stated that Mr Usher landed heavily on his feet and jarred his back, in relation to the same incident⁷.
40. Dr Bodel noted that Mr Usher did not go off work and said:
- “Within 7 – 10 days the back had completely recovered”
41. Reference was also made to a report of Dr James Vote, Orthopaedic Surgeon of 2 March 2001.⁸ He said that following the injury, Mr Usher experienced back pain and some discomfort in the right knee. He was initially more concerned about his back than his knee and Dr Vote recorded that no treatment was sought. He said:
- “Over a period of 2 – 3 weeks his back settled”.
42. The appellant employer also referred to the statement by Mr Usher of 11 September 2018, in which he said that following the injury:
- “Over the course of the next few days the pain in my back settled down.”
43. The appellant employer submitted that those histories contradicted the history that the AMS took of Mr Usher having ongoing stiffness in the back notwithstanding the improvement following the injury. The AMS said that following the incident of 29 March 2000:⁹
- “He said that although over the course of the next few days the pains in his back improved but he continued to have ongoing stiffness in his back.”
44. The appellant employer submitted that the AMS should have accepted the documentary accounts, and thus found that the back injury had resolved. In any event it was submitted that the assessment of 20% WPI of the back was inconsistent with the evidence.
45. The appellant employer then referred to the later back injury of 15 December 2009, in respect of which the complying Agreement of 10 May 2019 was entered into for 6% WPI. The appellant employer submitted that the AMS “did not record a proper history” regarding the back symptoms caused by the injury of 15 December 2009, nor did she address whether any of the impairment she found had been contributed to by that prior injury.

⁶ Appeal papers page 131

⁷ Appeal papers page 287

⁸ Appeal papers page 290

⁹ Appeal papers page 22

46. The AMS took the following history of the 2009 back injury:¹⁰

“On 15 December 2009, he slipped on the floor of a basement which was wet due to the fire sprinkler activating and fell over and struck his head on the ground and passed out. He sustained injury, including a concussion, blurred vision and a fracture of the sacral spine at S2/3. He indicated that he was off work for one day after that fall before returning to work the day after.”

47. In answer to the templated question as to whether any deduction should be made pursuant to s 323, the AMS said:¹¹

“I have not identified any previous injury, pre-existing condition or abnormality which gave rise to impairment either of the right knee and/or the left knee or back.”

48. Paragraph 8 of the MAC is a templated paragraph regarding the evaluation of permanent impairment. Paragraph 8g is entitled:

“g. Indicate whether there has been any further injury subsequent to the subject work injury. If this injury has caused any additional impairment this should not be included with the assessment of impairment due to the subject work injury.”

49. The response by the AMS was¹²:

“There have been further work accidents, as noted above.”

Right knee injury

50. The appellant employer referred to the documentary evidence regarding the injury to the right knee on 29 March 2000. Reference was made to five reports by Dr O’Brien. Reference was also made to Mr Usher’s statement, to which we have already referred.

51. We were referred to the operation report dated 15 August 2000 by Dr O’Brien. A subsequent report of 25 January 2001 noted residual symptoms in the right knee associated with arthritis. The two later reports of 11 September 2007 and 19 December 2007 related to the injury of 17 August 2007 when Mr Usher fell on the staircase. The Complying Agreement dated 10 May 2019 indicated an acceptance that there had been a 15% WPI caused to the right lower extremity by that incident.

52. In taking the history of the injuries the AMS did not refer to the 17 August 2007 injury. When discussing subsequent accidents, the AMS said¹³:

“In relation to the reference to the accident on the Certificate of Determination of 17 August 2007, he was at 1 Distillery Drive, Piermont, in the external roof area plant room of the building. The access steel staircase was wet and he slipped. He fell forwards, landing heavily on and twisting his right knee. *I would interpolate and note that I have been requested to assess his right knee under the Table of Disabilities arising from an accident of 29 March 2000.*” (Emphasis added).

53. The comment would appear to indicate that the AMS did not consider that the injury of 17 August 2007 was relevant to her determination.

¹⁰ Appeal papers page 23

¹¹ Appeal papers page 26

¹² Appeal papers page 26

¹³ Appeal papers page 23

54. The appellant employer submitted that the “original MAC” showed an assessment of 25% loss of efficient use of the right leg at or above the knee with no deduction, whereas the amended MAC as we have observed showed that there was 15% total loss with no explanation given as to the difference.
55. The appellant employer then submitted that the AMS had fallen into error in failing to make a deduction pursuant to s 323 of the 1998 Act in her assessment of the right knee injury of 29 March 2000. We were referred to *Campbelltown City Council v Vegan*, cited above, and to the well-known case of *Cole v Wenaline Pty Ltd*¹⁴.
56. On 15 August 2000, Dr O’Brien reported that on arthroscopy Mr Usher had “quite marked erosion which was a surprise involving both the patellofemoral and the medial compartments and there were multiple splits in the lateral tibial plateau.”

Left knee injury

57. The same approach was taken by the appellant employer to this injury. We were referred to an Employees Compensation Claim form signed 22 November 2005 with a date of injury 21 September 2005, which gave a consistent history of injury on that date and identified the left knee as the part of the body affected¹⁵. Mr Usher said that the knee was not normal before the accident, saying:

“I had hurt the knee before on the last project, but at the time of the injury it was working OK.”

58. He was also asked in the claim form whether he had suffered similar related injuries and he answered:

“Hurt left knee on scaffold stairway in June 2004 and in April 2003 but not lost time taken on any incident above”.

59. The appellant employer also referred to the earlier report of Dr O’Brien dated 13 July 2000 which recorded that Mr Usher had a good result from his left knee arthroscopy in 1992. It noted that on 4 October 2005 Mr Usher reported the onset of left knee pain four weeks earlier, and Dr O’Brien considered the possibility of a meniscal tear.
Dr O’Brien referred to the arthroscopy on 9 December 2005, which confirmed medial compartmental arthritis, a medial meniscus tear, and early arthritic changes.
60. The appellant employer conceded that the AMS acknowledged that Mr Usher had injured his left knee in 1987 and had undergone a left knee arthroscopy in 1992. She was satisfied that Mr Usher had recovered from both events.
61. The AMS had fallen into error, it was submitted, because she made no reference to the other injuries that were mentioned in the claim form and accordingly she should have made a deduction under s 323 of the 1998 Act.
62. There was evidence, it was submitted, that would support a deduction with regard to the left knee injury. The appellant employer relied on the report of Dr Robert Breit, Orthopaedic Surgeon, of 8 May 2016.¹⁶ Dr Breit took into account the previous arthroscopy in 1992, and an MRI following the left knee injury in 2005 (which showed significant degenerative disease). That was sufficient evidence to displace the statutory presumption of 10%, he said, and suggested 1/3rd. Dr Breit did not have access to the claim form, which told of the earlier left knee problems.

¹⁴ [2010] NSWSC 78 (*Cole*)

¹⁵ Appeal papers page 54

¹⁶ Appeal papers page 307

Respondent's submissions

Diagnosis

63. The respondent, Mr Usher, submitted that the Guides did not require a diagnosis on 29 March 2000. He submitted further that, even if there was such a requirement, it was reasonable to infer that the AMS adopted the surgical findings of Dr O'Brien in the arthroscopy carried out on 15 August 2000, regarding the right knee.
64. Mr Usher also submitted that there was radiological evidence before the AMS in the form of a CT scan of 9 May 2006 which showed degeneration in the L5/S1 disc and mild left L4/5 facet degeneration¹⁷.
65. Mr Usher submitted that it could not be inferred from the evidence to which the appellant employer referred, that his back symptoms had completely resolved shortly after his fall on 21 September 2000. Dr Bodel, who was retained by the respondent, was incorrect when he recorded that the back had completely recovered. It was submitted Dr Bodel's opinion was out of step with the other evidence, and also inconsistent with the CT scan to which he had just referred.
66. Mr Usher also submitted that the 20% permanent impairment of the back assessed pursuant to the Table of Disabilities was similar to that of Dr Conrad in that no error had been demonstrated.

Right knee

67. Mr Usher submitted that the appellant employer's submissions were misconceived.
68. It was submitted that the subsequent injury was not a pre-existing injury, and therefore s 323 could not apply. Mr Usher speculated that the AMS may have been thinking that there had been no difference demonstrated between the surgery on the right knee by Dr O'Brien on 1 August 2000 and that revealed in an updated MRI scan following the 17 August 2017 injury.
69. Mr Usher submitted, again on a speculative basis, that it may have been that the AMS intended to deduct the difference between 25% and 15% as a s 323 deduction. If that were so, Mr Usher did not wish to appeal the amended MAC.

Left knee

70. Mr Usher submitted that although there had been earlier problems with the left knee, including the arthroscopy in 1992, there had been a successful recovery from that treatment. There was no evidence, it was submitted, to rebut Mr Usher's evidence of a full recovery from those earlier problems. No evidence had been put forward in the form of clinical notes to substantiate the allegation by the appellant employer that the left knee had been symptomatic prior to the injury on 21 September 2005.
71. Mr Usher said that in any event the condition of his left knee prior to that date did not prevent him from performing very heavy and physically demanding work which he described in his statement.
72. Mr Usher concluded by submitting that the appellant employer had approached the decision of AMS with an eye too keenly attuned to the perception of error, and even if there was an error in the reasoning process by the AMS (which was not conceded), such an error, as we understood the submission, was minor and did not constitute a demonstrable error requiring the revocation of the certificate.

¹⁷ Appeal papers page 141

DISCUSSION

Diagnosis

73. In *Johnson Garling J* was dealing with a case where a claimant had suffered a 17% WPI as a result of a psychological injury, as found by the AMS. The Appeal Panel reduced that amount to 6% because the claimant had exacerbated his condition by the differing 11% WPI in the employment of another employer subsequent to employment with the respondent employer. The case turned on the question of whether the subsequent injury had severed the causal chain. In the course of his reasons Garling J considered submissions made regarding diagnosis. At [54] he said:

“On the diagnosis issue, I accept the plaintiff’s submission that a certificate, whether of an AMS or else of an appeal panel, which finds the existence of an identifiable percentage of whole person impairment of a claimant must set out the medical condition which has caused that impairment. This may well be a straightforward task and readily apparent where there is an identifiable physical injury with obvious sequelae.”

74. His Honour then considered the situation pertaining to a psychiatric injury. He said at [56]:

“Unless a Certificate shows the injury or diagnosed condition in the way described, then the basis of any conclusion as to whole person impairment will not be exposed. Neither the claimant nor the employer will be able to discern the rationale for the ultimate conclusion as to percentage impairment.....”

75. His Honour however was satisfied that in the circumstances of the case it could be readily inferred that the diagnosis was apparent, being a chronic Post-Traumatic Stress Disorder, and that ground failed¹⁸.

76. In the case before us, the AMS described Mr Usher’s March 2000 injuries in her summary:

“[Mr Usher] injured his right knee and an arthroscopy and a medial meniscectomy on the right knee was performed about 15 August 2000.”

77. The AMS summarised the left knee injury of 21 September 2005 by saying¹⁹:

“As a result of the injury to his left knee on 21 September 2005, he underwent a left knee arthroscopic medial meniscectomy and chondroplasty...”

78. In describing the details of the investigations, the AMS noted the reports which confirmed the degenerate osteoarthritic nature of the pathology.

79. The AMS failed to mention the injury to the back in that summary, and in fact only referred to it when discussing the opinions of other medical practitioners at [10c] of the MAC²⁰. She said:

“In relation to the assessment of the back, Dr Conrad assessed 25% permanent impairment. My quantum of assessment is mildly less based on the history given by Mr Usher to me and the accompanying documentation and my clinical assessment.”

¹⁸ At [59]

¹⁹ Appeal papers 26

²⁰ Appeal papers 27

80. The assessment was made pursuant to the Table of Disabilities, this injury being on 29 March 2000.
81. In the field of orthopaedics, injuries to the knee and to the back fall into that category described by Garling J in *Johnson* as being straightforward. The diagnosis is a readily identifiable physical injury with obvious sequelae. Accordingly, we reject this submission.

Back

82. We reject the appellant employer's submission that the AMS failed to give proper consideration to the evidence regarding her assessment for the back injury. This submission is based upon an assumption that the weight of the contemporaneous documentary evidence should have caused the AMS to reject the history she obtained from Mr Usher as to his March 2000 back injury.
83. There is a presumption of regularity that the AMS would have read the material that had been referred to her.²¹ The assumption that underlined the appellant employer's submission was either that the apparent contradictions were not discussed with Mr Usher, or that the AMS ignored them. It is apparent that the AMS accepted the history given by Mr Usher during the assessment. An AMS is entitled to do so, particularly as she had the opportunity to elicit more precise facts than were apparent from the evidence relied upon by the appellant employer. The fact that Mr Usher told Dr O'Brien (whom he was consulting with regard to his right knee injury) that his back symptoms had settled does not mean that they had entirely settled. He could still have been experiencing the on-going stiffness he described to the AMS. This is particularly so where Mr Usher appeared to be a stoic character who preferred to work through a lot of his injuries.
84. We also reject the submission that the later back injury of 15 December 2009 was relevant to the task of the AMS. The back injury referred to the AMS was that of 29 March 2000. The submission that the AMS fell into error because she did not address whether any of the impairment found related to the 2009 back injury is misconceived.
85. When requested to assess an impairment caused by an injury at a certain date, an AMS is required to make an assessment pursuant to s 323 as at that date. In the present case, any impairment found as at 8 May 2000 that was due s 323, (or its then equivalent, s 68A of the 1987 Act), was to be deducted.
86. Accordingly, any subsequent injury to the back, such as that of 15 December 2009, could not affect the impairment assessed as a result of the injury referred to the AMS, that of 29 March 2000. The AMS was correct when she answered the templated question that there had been subsequent work accidents, but did not make any other comment. The subsequent accidents of course did cause additional impairment, as has been seen from the prior awards described on the face of the referral. They were not however relevant.

Right knee injury

87. The appeal against the assessment regarding the effect of the subsequent right knee injury of 17 August 2007 fails for the same reasons. The AMS was required to assess the loss of use of the right leg at above the knee caused by the same injury of 29 March 2000. The subsequent history of the injury of 17 August 2007 was irrelevant.

²¹ *Bojko v ICM Property Service Pty Ltd* [2009] NSWCA 175; *Jones v The Registrar Workers Compensation Commission* [2010] NSWSC 481

88. We note the reference to an “original” Medical Assessment Certificate, and our enquiries showed that the difference between the Amended MAC and the original MAC is that contained in the Certificate pursuant to the Table of Disabilities. A 25% loss was found for the injury to the right leg at or above the knee but, without explanation or any indication that there had been any deduction for previous injuries, a 15% assessment had been included in the total. We are satisfied that this inconsistency constitutes a demonstrable error. Indeed, Mr Usher argued but faintly that it was not.
89. Section 323 of the 1998 Act provides as follows, relevantly:
- “(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.”
90. As noted, the reports of Dr O’Brien of 13 July 2000, 15 August 2000 5 January 2001 all reported the development of early symptoms of arthritis, and the arthroscopy report showed a degree of erosion that surprised the treating surgeon. We concur that those findings would justify the presence of a pre-existing condition which would contribute to the assessment of the permanent loss of the efficient use of the right leg at or above the knee.
91. Whilst we cannot speculate on the reasons why the AMS issued a second MAC showing a deduction of 10% from her original assessment of 25% loss of use, the deduction coincides with our view as to an appropriate fraction of 1/3rd, rounded up. The results of the arthroscopy militate against a finding of 1/10th, and the subsequent history demonstrates the accuracy of Dr O’Brien’s opinion on 15 August 2000, when he said that Mr Usher’s prognosis was poor. Dr O’Brien said that he would be advising Mr Usher how to treat his arthritis conservatively, but that the end stage management would be a total knee replacement.

Left knee

92. We are also satisfied that there has been a demonstrable error made with regard to the deduction pursuant to s 323 of the left knee injury of 21 September 2005. Mr Usher submitted that the arthroscopy performed by Dr O’Brien on 9 December 2005 demonstrated a “trauma induced medial meniscal tear.” Whether it was or not, the MRI of the left knee of 11 October 2005 - three weeks following the injury - showed “there are prominent medial compartment degenerative changes including full thickness articular loss”.
93. This indicates grade IV osteoarthritis with bone on bone contact, which in fact equates to 20% whole person impairment according to Table 17-31 of AMA 5²².

²² At page 544

94. These findings were confirmed by the notes of Dr O'Brien's surgical operation, which showed bare bone on both the femoral and tibial surfaces of the medial compartment of the left knee. The advanced degenerative changes in the left knee are obviously longstanding. We concur with the appellant employer that the statutory deduction of 1/10th is not appropriate, as there is evidence to suggest a greater deduction. We concur with the opinion of Dr Breit that an appropriate deduction would be 1/3rd.

Further error

95. As we are revoking the MAC, we are able to correct other errors that we have found within it.²³ In reviewing the MAC we noted a discrepancy regarding the assessment of the left lower extremity.
96. In explaining her assessment, the AMS said at paragraph 10a:
- "80 points results in a fair result and 20% Whole Person Impairment..."
97. When considering the opinions of other specialists at paragraph 10c the AMS said:
- "In relation to the left knee, Dr Breit assessed a 15% Whole Person Impairment. I agree."
98. In her Table 2 Certificate, the AMS certified that the left lower extremity had suffered a 15% WPI.
99. Dr Breit assessed a "good" result from the total knee replacement in his report of 8 May 2018. We concur that such a result pursuant to AMA5 would yield a 15% entitlement. We note that the AMS found that the result from the total knee replacement was only "fair", which we agree would entitle Mr Usher to a 20% WPI finding. The AMS gave no reasons as to why she assessed 15% in the light of her earlier finding of 20%. However, her explanation for according 20% was clear. She had applied the relevant guide line and come to a figure of 80, which the Panel confirms is a finding of a "fair result." She said:²⁴
- "Assessed under whole person permanent impairment, for a total left knee replacement under Table 17-35 rating knee replacement on page 549 of the AMA5 Guides:
- (a) Pain 30 points
(b) Range of motion 25 points for 120° of flexion
(c) Stability there was no anteroposterior or mediolateral instability and thus there is 25 points.
In total there are 80 points."
100. Accordingly, the Panel is satisfied that the 15% assessed was inadvertent, and that the AMS intended to award an assessment in accord with her finding.
101. We accordingly also revoke her Table 2 Certificate to correct the error. The one third deduction we have found appropriate pursuant to s 323 will be deducted from 20%.
102. For these reasons, the Appeal Panel has determined that the MAC issued on 19 August 2019 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

²³ See *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC 1053

²⁴ Appeal papers page 27

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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 2625/19

Applicant: Lend Lease Project Management & Construction (Australia) Pty Limited

Respondent: Charles Usher

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 PL Harvey-Sutton and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table – 2 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)
Left lower extremity	21.9.2015	Chapter 2 pp 13-23	Chapter 17 pp 523-560	20%	1/3	13%

The above assessment is made in accordance with the Guidelines for the Evaluation of Permanent Impairment for injuries received after 1 January 2002

WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received before 1 January 2002

Matter Number: 2625/19
Applicant: Lend Lease Project Management & Construction (Australia) Pty Limited
Respondent: Charles Usher

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 PL Harvey-Sutton, and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Assessment in accordance with the Table of Disabilities for injuries received before 1 January 2002

Table - 1

Body Part (describe the body part as per Table of Disabilities) e.g. right leg at or above the knee	Date of injury	Total amount of permanent % loss of efficient use or impairment	Proportion of permanent impairment due to pre-existing injury, abnormality or condition	Total permanent % loss of efficient use or impairment attributable to this injury (after deduction of any pre-existing impairment in column 4.)	Body Part (describe the body part as per Table of Disabilities) e.g. right leg at or above the knee	Date of injury
Back	29.3.2000			20%	Nil	20%
Right leg at or above the knee including any loss below the knee	29.3.2000			25%	1/3	(rounded) 17%

John Wynyard
Arbitrator

Dr Roger Pillemer
Approved Medical Specialist

Dr Margaret Gibson
Approved Medical Specialist

19 December 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.*

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

