WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4424/19**
Appellant:	**Stephen Talevski**
Respondent:	**Otis Elevator Company Pty Limited**
Date of Decision:	**30 January 2020**
Citation:	**[2020] NSWWCCMA 13**

Appeal Panel:	
Arbitrator:	**R J Perrignon**
Approved Medical Specialist:	**Dr John Ashwell**
Approved Medical Specialist:	**Dr Philippa Harvey-Sutton**

BACKGROUND TO THE APPEAL

1. The appellant worker, Mr Talevski, appeals from the Medical Assessment Certificate of Approved Medical Specialist Dr Gibson dated 18 October 2019.

2. On 26 May 2010, Mr Talevski injured his right knee at work, while removing old tracks on an escalator.

3. By a Medical Assessment Certificate dated 18 October 2019, Dr Gibson assessed a 10% whole person impairment (right lower extremity) as a result of injury on 26 May 2010.

4. In doing so, she assessed a 12% whole person impairment, from which she deducted 1/10th for the effects of what she found was a subsequent injury to the right knee on 4 June 2013 while working for the same employer. This yielded 11% whole person impairment. From this, Dr Gibson deducted a further 1/10th for the effects of degenerative change which was present prior to injury on 26 May 2010, yielding 10% whole person impairment (right lower extremity).

5. The appellant alleges error only in respect of the deduction of 1/10th for the effects of further injury on 4 June 2013. He does not criticise the initial assessment of 12%, or the deduction of 1/10th for pre-existing degenerative change. He says that, omitting the deduction for the effects of further injury on 4 June 2013, the appropriate assessment is 11% whole person impairment (right lower extremity).

6. On 13 December 2019, the Registrar by his delegate was satisfied that the ground of demonstrable error was made out, and referred the matter to this Appeal Panel for determination.

7. On 20 January 2020, the Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the *NSW workers compensation guidelines for the evaluation of permanent impairment* (*Guidelines*). Though it identified error of the kind asserted by the appellant, it was unnecessary to refer the worker for examination by a member of the Panel, as the error was capable of correction without further examination.

Submissions

8. The Appeal Panel has had regard to the written submissions filed by both parties. It is unnecessary to set them out here in full, but appropriate to summarise them as follows.

9. The appellant worker submits that the Medical Assessment Certificate demonstrates error and the application of incorrect criteria, for the following reasons.

    (a) On 4 June 2013, the worker aggravated the condition of his right knee when he twisted it at work.

    (b) Section 66 of the *Workers Compensation Act 1987* provides that where 'an injury … results in a degree of permanent impairment', a worker is entitled to compensation for that permanent impairment.

    (c) A loss results from injury where the injury contributes to the loss: *Sutherland Shire Council v Baltic General Insurance Company Ltd* (1996) 12 NSW CCR 716. Just as death or incapacity results from injury where a common sense chain of causation is established between them (*Kooragang Cement Pty Limited v Bates* (1994) 24 NSWLR 452), so permanent impairment results from injury in the same circumstances. Just as treatment costs result from injury wherever it is established that injury materially contributed to the need for surgery, whether or not other causes also contributed (per Roche DP in *Murphy v Allity Management Services* [2015] NSWWCCPD 49, so permanent impairment results from injury in the same circumstances.

    (d) Here, the whole of the 12% impairment assessed by Dr Gibson is attributable to injury on 26 May 2010, because the injury on 26 May 2010 materially contributes to that impairment, and there is no intervening cause which breaks the chain of causation, of the kind discussed in *GIO v Aboushadi* [1999] NSWCA 396, in the context of tort law.

    (e) Where an injury contributes materially to impairment as here, no deduction is available for the effects of an intervening injury, even if the latter aggravates the effect of the former: *Johnson v NSW Workers Compensation Commission* [2019] NSWSC 347 *(Johnson)*; *Nicol v Macquarie University* [2018] NSWSC 530 (*Nicol*).

    (f) By selecting 1/10th as the appropriate deduction in circumstances where she found the appropriate deduction difficult to ascertain, the Approved Medical Specialist adopted the provisions of section 323 of the Workplace Injury Management and Workers Compensation Act 1998. Those provisions did not apply in respect of a subsequent injury, and the Approved Medical Specialist erred in purporting to apply them.

    (g) The reasons given by the Approved Medical Specialist for making the deduction she did were 'difficult to follow'.

10. The respondent submits in summary as follows.

    (a) The Registrar referred the matter to the Approved Medical Specialist for assessment of whole person impairment (right knee) as a result of injury on 26 May 2010 only. The Approved Medical Specialist found that the worker suffered a further injury to his right knee on 4 June 2013.

    (b) Because Dr Kalnins had found no restriction of extension when he examined the worker soon after injury on 26 May 2010, the Approved Medical Specialist reasoned that the restriction of extension which she observed must have developed after the further injury on 4 June 2013, and inferred that the latter injury further damaged the right knee and caused progression of underlying degenerative change.

(c) It follows that the Approved Medical Specialist found that the injurious event of 4 June 2013 constituted a new injury and a *novus actus,* which changed the pathology and broke the chain of causation, entitling her to take into account its effects in making her assessment.

Reasoning of the Approved Medical Specialist

11. The Approved Medical Specialist examined the worker on 10 October 2019. Dr Gibson took a history of injury to the right knee on 26 May 2010 and also on 4 June 2013 (par 4). After each of these events, the worker had taken a week off work and returned to work on light duties. On 5 September 2017, his employment was terminated on medical grounds.

12. She noted that the worker's general practitioner had referred him to Dr Kalnins, who reported on 25 June 2010 that, despite a slight effusion and tenderness over the medial and lateral joint lines, flexion was possible to 135 degrees with pain. Dr Kalnins expressed the view that the events of 26 May 2010 had significantly aggravated pre-existing degenerate change in the patellofemoral and medial tibiofemoral compartments.

13. On examination, Dr Gibson noted restrictions of movement in the right knee, including a restriction in flexion to 105 degrees.

14. She noted (par 6) three scans of the right knee. A report of a bone scan conducted on 23 February 2000 demonstrated degenerative change in both knees. An MRI of the right knee performed on 16 June 2010 demonstrated degenerative change in the medial and patellofemoral compartments. Plain x-rays of both knees performed on 21 May 2012 demonstrated severe osteoarthritis in the knee joints and patellofemoral joints.

15. The Approved Medical Specialist diagnosed pre-existing degenerative change in the right knee. She also found that there had been a further injury to the right knee in 2013, which (par 7):

> 'produced further damage to the right knee and subsequently there has also been progression of the underlying degenerative change'.

16. As indicated, the Approved Medical Specialist assessed current impairment at 12% (right upper extremity). She then reasoned as follows (par 10b):

> "However, there was a subsequent work-related injury to the right knee in 2013. I note Mr Talevski had no restriction of extension when seen by Dr Kalnins soon after the subject accident, but since then the restriction has developed. However, the subject work injury of 26 May 2010 had caused acute trauma to the knee and also likely accelerated the underlying degenerative change. Therefore, the quantum of the effect of this subsequent (2013) injury is difficult to determine, based on the available documentation. In the circumstances, at least a 10% deduction would be reasonable to account for this subsequent injury. Therefore 12% - 1.2% (rounded to 1%) = 11%WPI."

17. Though not entirely clear, we interpret this passage to mean as follows:

- Injury on 26 May 2010 caused acute trauma to the right knee and accelerated pre-existing degenerative change.
- The current restriction in flexion (105 degrees) was not evident when Dr Kalnins measured flexion of 135 degrees in June 2010.
- The increased restriction therefore results from the events of 4 June 2013.
- As the effects of the latter event were difficult to quantify, it was appropriate to deduct 1/10th from the assessment to take account of them, yielding 11% whole person impairment (right lower extremity).

18. As indicated, the Approved Medical Specialist then made a further deduction of 1/10th for the effects of pre-existing degenerative change, yielding the assessed 10% whole person impairment (right lower extremity).

Consideration and findings

19. The appellant alleges that the Approved Medical Specialist erred in making a deduction for the effects of injury on 4 June 2013, but does not divide his submissions into discreet grounds of appeal. In our view, taken as a whole, his submissions support two allegations of error, each of which is addressed separately below.

Ground 1: whether permanent impairment measured by the Approved Medical Specialist resulted from injury on 26 March 2010

20. As indicated, the Approved Medical Specialist assessed a 12% whole person impairment as a result of injury on 26 May 2010, and deducted 1/10th for the effects of a subsequent aggravation on 4 June 2013. The appellant alleges that she erred in making any deduction, because where, as here, the injury in question materially contributes to permanent impairment, that permanent impairment is compensable notwithstanding the effects of subsequent injury.

21. The issue as to whether permanent impairment results from injury, notwithstanding a subsequent aggravation, was considered by the Supreme Court in *Johnson,* on appeal from a decision of the Medical Appeal Panel. The findings in *Nicol* were also considered in *Johnson*.

22. In *Johnson*, an Approved Medical Specialist had assessed a 19% whole person impairment (psychological) as a result of injury on 30 April 2014, and deducted 10% for a pre-existing injury or condition, yielding a 9% whole person impairment. The purportedly pre-existing injury or condition had in fact occurred in later employment between 2016 and 2017. The parties agreed that the deduction had been made in error. The Appeal Panel set aside the assessment. It found that, of the 19% whole person impairment assessed by the Approved Medical Specialist, one-third at most resulted from injury in 2014, with the remainder resulting from the later injury. The panel issued a new certificate assessing a 6% whole person impairment.

23. On appeal to the Supreme Court, Garling J found that, in the absence of a finding that the later injury severed the causal chain between impairment and injury on 30 April 2014, the Panel was obliged to conclude that the assessed impairment resulted from injury on the latter date, without any process of apportionment. He reasoned as follows (par 63-70):

> "63. … the AMS concluded that the plaintiff's chronic condition caused by her NSW Education injury was exacerbated by the later Hostel injury. Although the Panel found error in the AMS Certificate, that error arose because of the incorrect use by the AMS of the mechanism provided for in s 323 of the 1998 Act. Instead of applying s 323 according to its terms (which relate to a pre-existing condition) the AMS had applied those provisions to the subsequent Hostels injury. …
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> …..
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> 66. It is significant that the Panel did not conclude that the later injury was of a kind or nature that severed the causal chain between the NSW Education injury and the plaintiff's impairment. If it had come to such a conclusion, then it was obliged to find that there was no impairment as a result of the NSW Education injury. However, to the contrary, it concluded that the plaintiff's impairment resulted from the NSW Education injury and the later Hostels injury.

67. The task required by ss 9 and 9A of the 1987 Act is for a determination to be made about whether the relevant employment was a substantial contributing factor to the injury. If it was, then the AMS or the Panel is to assess the permanent impairment, by a clinical assessment of the claimant, as they present on the day of the assessment having regard to the matters set out in Clause 1.6 of the Guidelines. That task does not involve any process of apportionment between injuries.

68. Section 323 of the 1998 Act provides an exception to that general approach, but only in the limited circumstances which that provision contemplates. Here those provisions did not apply.

69. For these reasons, I am satisfied that the Panel's Certificate contained an error on the face of it, and the plaintiff is entitled to succeed on her claim.

70. It follows from this conclusion that, in accordance with the law and in the circumstances which applied at the time the Panel made its assessment, the correct decision which it ought to have reached was that the whole person impairment of the plaintiff was 19% and not 6%."

24. The decision of the Supreme Court was affirmed on appeal, save that the Court of Appeal found that the Supreme Court should simply have remitted the matter to the Appeal Panel for assessment according to law, without expressing an opinion as to quantum: *Secretary, New South Wales Department of Education v Johnson* [2019] NSWCA 321 (per Emmett AJA at par 78, and Simpson AJA at par 139, with both of whom MacFarlan JA agreed).

25. Emmett AJA reasoned (at [153]-[155] – emphasis added):

"153. In common law contexts, an injury or incapacity may be attributable, in the legal sense, to more than one cause operating concurrently.[1] There is no difference between the legal view of causation in tort and causation in the field of workers compensation, subject to the qualification that, in a claim for workers compensation, it is unnecessary to prove that the incapacity was the natural and probable consequence of the injury. That is to say, the question of foreseeability does not arise. **It is sufficient that the incapacity results from the injury by a chain of legal causation unbroken by a *novus actus interveniens.*[2]**

154. Two causation tests are involved in a medical assessment of permanent impairment under Pt 7 of Ch 7 of the Management Act. The first test arises from the provisions of ss 9 and 9A of Compensation Act. That is to say, it must be shown that the injury that gave rise to the impairment in question arose out of or in the course of employment that and that the employment was a substantial contributing factor to the injury. **The second test arises from the provisions of ss 319(c) and 326(1)(a) of the Management Act. That is to say, it must be shown that the permanent impairment is as a result of the injury.**

155. The phrase 'the degree of permanent impairment of the person as a result of an injury' appears in both ss 319(c) and s 326(1)(a) of the Management Act. That composite phrase requires an enquiry as to the causal connection between the degree, or percentage, of assessed permanent impairment of a worker, on the one hand, and the compensable injury, on the other. **That is to say, it was necessary for the AMS and the Appeal Panel to assess the degree, or percentage, of whole person impairment of the Worker that was caused by or is attributable to the First Injury. In doing so, common law principles of causation in tort are to be applied."**

[1] See *Baker v Willoughby* [1970] AC 467 at 492.
[2] See *Busby v Morris* [1980] 1 NSWLR 81 at [19].

26. He summarised the applicable common law tests of causation as follows (at [70], [71]):

> "70. The question for determination by the Appeal Panel was the degree of permanent impairment now suffered by the Worker as a result of the First Injury. That question was one of fact and the Appeal Panel's reasoning was consistent with conventional principles of causation. There are three possible categories where an earlier injury is followed by a later injury, as follows:[3]
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> - Where the later injury results from a subsequent accident that would not have occurred had the victim not been in the physical condition caused by the earlier accident, the second injury should be treated as having a causal connection with the earlier accident.
>
> - Where an earlier injury is exacerbated by a subsequent injury, there will be a causal connection between the original injury and the subsequent damage unless it can be shown that some part of the subsequent damage would have been occasioned even if the original injury had not occurred.
>
> - Where a victim, who had previously suffered an injury, suffers a subsequent injury and the subsequent injury would have occurred whether or not the victim had suffered the original injury and the damage sustained by reason of the subsequent injury includes no element of aggravation of the earlier injury, there will be no causal connection between the original injury and the damage subsequently sustained.
>
> 71. There has been no finding that the Second Injury resulted in greater permanent impairment than would have been sustained by the Worker if she had not sustained the First Injury. There has been no finding that the current level of permanent impairment suffered by the Worker is the result of aggravation of the First Injury by the Second Injury. There has been no finding that the incident while employed by Hostels occurred only because of the First Injury. Rather, the findings demonstrate that the Second Injury resulted from the subsequent incident that occurred while the Worker was employed by Hostels and the Second Injury would have occurred even if the First Injury had not occurred, such that the Second Injury and First Injury are causally independent of each other. In those circumstances, it was necessary for the Appeal Panel to assess the extent of continuing permanent impairment of the Worker that is attributable to the First Injury."

27. Simpson AJA reasoned similarly (at [132]-[134]):

> "132 The consequence of those authorities is that, in the circumstances of this case, a necessary part of the Appeal Panel's task was to consider, in the light of the medical evidence, into which of the three *Oakley* categories the respondent's case fell. That analysis was not undertaken by the Appeal Panel.
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> 133 The appellant's argument proceeded on the assumption (unwarranted in my opinion, and without adequate analysis) that only the third Oakley category was relevant.

[3] See *State Government Insurance Commission v Oakley* (1990) 10 MVR 570; [1990] AustTorts Reports 81-003, p. 67, and 57.

> 134 It may be accepted that the first *Oakley* category can be excluded. There is no reason in the evidence to think that the injury the respondent alleged she suffered in her employment at Aboriginal Hostels would not have occurred but for the injury suffered at Fairvale High School. At least, it may be assumed that the events that she claimed gave rise to that injury would have occurred, regardless of the history of her previous injury. But there is much in the evidence that would support the application of the second *Oakley* category. While the events at Aboriginal Hostels would, in all probability, have occurred had the respondent been in normal health, there was medical evidence that the respondent was, by reason of events at Fairvale High School, in a vulnerable position, leaving her exposed to a greater level of damage resulting from subsequent events. That issue was not addressed by the Appeal Panel."

28. Applying the principles enunciated by the Court of Appeal in *Johnson*, the task of the Approved Medical Specialist was to determine whether the assessed permanent impairment resulted from injury on 26 May 2010. That involved a finding as to whether a chain of causation existed between the two, unbroken by any intervening event. By assessing an 11% whole person impairment resulting from injury in 2010, the Approved Medical Specialist found, at least by necessary implication, that the injurious event of 26 May 2010 materially contributed to the whole of the impairment assessed by her. She made no express finding that the events of 4 June 2013 broke that chain of causation and, in our view, there is no basis on which such a finding can be implied.

29. On the contrary, Dr Gibson found that the events of 4 June 2013 aggravated the effects of the earlier injury. That falls into the second of the *Oakley* categories summarised by Emmett AJA. There is nothing in the evidence to satisfy us that "some part of the subsequent damage would have been occasioned even if the original injury had not occurred" on 26 May 2010. Accordingly the requisite causal nexus is established, and the entirety of the permanent impairment assessed by the Approved Medical Specialist is attributable to injury on 26 May 2010.

30. For those reasons, the deduction of 1/10th for the effects of aggravation on 4 June 2013 demonstrated error, and the Medical Assessment Certificate must be set aside.

31. Under the heading, "*Worker's Contentions as to application of principles*", Emmett AJA also observed (at [53] – emphasis added):

> "53 The Worker claims lump sum compensation in relation to permanent impairment of a psychological or psychiatric character. **Such impairment is of [a] different character from what might be described as a physical impairment, such as to a limb of a worker. Where a limb is the subject of permanent impairment as the result of a compensable injury to that limb, it would be relatively straight forward to determine the degree of that impairment even if another injury to the same limb resulted in further impairment**. However, the assessment of psychological impairment is not quite as straight forward."

32. As indicated, the Approved Medical Specialist measured restricted flexion to 105 degrees. Because Dr Kalnins had measured greater flexion (135 degrees) on 25 June 2010, Dr Gibson reasoned that the further restriction which she measured must have resulted from the aggravation injury on 4 June 2013.

33. Even assuming that the Approved Medical Specialist was entitled to exclude from her assessment any part of the impairment which did not result from injury on 26 May 2010, the conclusion to which she came was not reasonably open to her. The mere fact that both flexion and extension range had decreased since Dr Kalnins' examination in June 2010 and 15 May 2012 (report dated 24 May 2012) neither compelled nor justified a finding that the decrease resulted from injury on 4 June 2013. It might equally have resulted from normal use

of the injured limb, or from a progression of the underlying osteoarthritis, or both. The Approved Medical Specialist failed to have regard to these possibilities. In the circumstances, there was no evidentiary basis for preferring a hypothesis that the decrease resulted from injury on 4 June 2013. For those reasons, it was not open to the Approved Medical Specialist to attribute the decrease of movement to the events of 4 June 2013, or to find that the decrease bore no causal nexus with injury on 26 May 2010.

34. The attribution of the decreased right knee movement to the injury on 4 June 2013, and the implied finding that it did not result from injury on 26 May 2010, also demonstrated error requiring the certificate to be set aside.

Ground 2: whether deduction of 1/10th was authorised by the legislation

35. Simpson AJA summarised the effect of Section 323 of the 1998 Act in the following way (at [95]):

> "Section 323 provides for deduction in the assessment of the degree of permanent impairment resulting from an injury to take account of 'any proportion of the impairment that is due to any previous injury', whether or not that impairment is compensable. By subs (2), if the calculation of such a deduction will be difficult or costly to determine, it is to be assumed, for the purpose of avoiding disputation, that the deduction is 10% of the impairment 'unless this assumption is at odds with the available evidence.'"

36. The Approved Medical Specialist did not expressly refer to section 323 in making a deduction for the effects of injury on 4 June 2013. However, by selecting 1/10th as an appropriate deduction because it would be difficult to quantify, she impliedly purported to apply a deduction pursuant to section 323.

37. Section 323 is applicable only in respect of previous injury or pre-existing conditions or abnormalities. It is not available to take account of supervening events, such as that which occurred on 4 June 2013. The selection of 1/10th as an appropriate deduction where quantification is difficult or costly is only available pursuant to section 323.

38. It was not open to the Approved Medical Specialist to select a deduction of 1/10th simply because quantification was difficult. By purporting to apply section 323, or adopting a quantification analogous to that provided by the section, the Approved Medical Specialist fell into demonstrable error. For that reason also, the certificate must be set aside.

Conclusion

39. For those reasons, the appeal is allowed. The Medical Assessment Certificate of Dr Gibson dated 18 December 2019 is set aside and replaced with the attached Medical Assessment Certificate.

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: **4424/19**
Applicant: **Stephen Talevski**
Respondent: **Otis Elevator Company Pty Limited**

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 Gibson and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

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**	**WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality (expressed as a fraction)**	**Sub-total/s % WPI (after any deductions in column 6)**
1. Right Lower Extremity (knee)	26/5/10	Ch 3, pp13-23	AMA 5 Ch 17 Table 17-10 page 537	12	$1/10^{th}$ = 1.1% rounded to 1%WPI	11
Total % WPI (the Combined Table values of all sub-totals)					**11**	

R J Perrignon
Arbitrator

Dr John Ashwell
Approved Medical Specialist

Dr Philippa Harvey-Sutton
Approved Medical Specialist

30 January 2020

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