WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-5743/19**
Appellant:	**Toll Group Pty Ltd**
Respondent:	**Robert Smith**
Date of Decision:	**3 June 2020**
Citation:	**[2020] NSWWCCMA 97**

Appeal Panel:	
Arbitrator:	**Marshal Douglas**
Approved Medical Specialist:	**Dr Roger Pillemer**
Approved Medical Specialist:	**Dr Margaret Gibson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 19 March 2020, Toll Group Pty Ltd (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Yui-Key Ho, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 20 February 2020.

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 *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act). An Appeal Panel determines its own procedures in accordance with the WorkCover Medical Assessment Guidelines.

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

RELEVANT BACKGROUND

6. Mr Robert Smith (the respondent) filed an Application to Resolve a Dispute (ARD) with the Commission on 30 October 2019 seeking determination of various claims for compensation that he had made against the appellant, including a claim for compensation for 16% whole person impairment. He described the injury to which his claims related in the ARD as "aggravation, acceleration, exacerbation or deterioration of a disease". He specified in the ARD that the date on which his injury occurred was 7 February 2018. He described the circumstances in which his injury occurred in this way:

"the nature and conditions of the applicant's employment, the applicant was required to up and down stairs with a trolley that had a load of bulk mail which would weigh between 50-60 kg. The applicant would participate in these were duties for approximately three times per day and as a result suffered an aggravation, acceleration, exacerbation or deterioration of a degenerative disease process in the applicant's left hip".

7. In an unsigned statement that was attached to the ARD the respondent said he started working as a contract carrier with "Toll" in 2000. He said that he had commenced employment with a company called DX Travcour, which he said was taken over by "Toll Priority".

8. Following the respondent initiating the proceedings in the Commission, the matter was referred to an arbitrator, who on 15 January 2020 made awards, with the consent of the parties, with respect to the respondent's claims for weekly payments of compensation and compensation for respondent's costs of treatment of his injury. The arbitrator remitted the matter to the Registrar "for referral to an approved medical specialist to assess the applicant's permanent impairment as a result of an injury to his left lower extremity (hip) and TEMSKI as a result of an injury deemed to have been suffered on 7 February 2018".

9. On 20 January 2020, a delegate of the Registrar referred to the AMS the following medical dispute between the parties:

"MEDICAL DISPUTE REFERRED FOR ASSESSMENT (s319 1998 Act)

 the degree of permanent impairment of the worker as a result of an injury (s319(c))
 whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion (s319(d))
 whether impairment is permanent (s319(f))
 whether the degree of permanent impairment of the injured worker is fully ascertainable (s319(g))

Date of Injury: 7 February 2018- deemed

Body part/s referred: left lower extremity (hip)
Scarring (TEMSKI)"

10. As mentioned, the AMS issued a MAC on 20 February 2020 in response to that referral, in which he certified that the degree of permanent impairment of the respondent as a result of the respondent's injury on 7 February 2018 was 15% whole person impairment. This comprised 15% whole person impairment relating to the respondent's left hip, less one tenth of that that the AMS certified was due to a pre-existing condition, plus 1% whole person impairment for scarring.

11. As a point of clarity, the Appeal Panel notes that the appellant has, confusingly, been named differently in the material that is before the Appeal Panel. The name the respondent nominated for the appellant in the ARD was "Toll Express Parcels", which seems to be a business name. In its reply to the ARD, the appellant used the name "Toll Group Pty Ltd", which is how the arbitrator named the appellant in the certificate of determination issued on 15 January 2020. In its appeal against the MAC, the appellant used the name "Toll Global Logistics", which again might possibly be a business name under which the appellant trades. In the decision of the Commission by which the Appeal Panel was constituted, the appellant was referred to as "Toll Global Logistics". It would seem though that the correct identity of the appellant is Toll Group Pty Ltd.

PRELIMINARY REVIEW

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

13. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination. This is because the material before the Appeal Panel is sufficient for it to determine the appeal. The Appeal Panel also notes that neither party requested the respondent be re-examined by an AMS member of the Appeal Panel.

EVIDENCE

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

THE MAC

15. The AMS examined the respondent on 13 February 2020. The history the AMS obtained included that the respondent commenced his employment with the appellant in 2000 and that the respondent first noticed pain in his left hip "well over a year before 10 January 2017". That was around the time the respondent first had an x-ray done of his left hip. The AMS recorded that the x-ray "was already showing moderate OA changes of the left hip while the right hip remained normal". The AMS further noted that a second x-ray done on 12 February 2018 revealed "obvious deterioration".

16. Within the history the AMS set out in the MAC, the AMS noted that the work the respondent did required him "to transfer freight from general post office in Sydney every day and he has to climb several flights of stairs with the heavy load of all the freight he carried". The AMS noted the respondent told him that he may have had to do that activity three times a day and that every time he did he had to walk sideways with his left leg going downstairs and his right leg controlling the trolley with weight that could be 50 kilograms or more.

17. The AMS noted that the respondent was ultimately referred to Dr Anthony Keeley, whom the Appeal Panel notes is an orthopaedic surgeon. The AMS noted that Dr Keeley operated on the respondent on 13 November 2018, replacing the respondent's left hip. The AMS noted that immediately before the operation a further x-ray had been taken of the respondent's left hip which revealed advanced osteoarthritic changes in the hip.

18. The AMS noted that the respondent considered the surgery was successful and that the respondent has experienced minimal pain since surgery but has had a little discomfort around the back of his left hip and also over the right sacro-iliac joint area. The AMS noted that the respondent returned to work seven weeks after his surgery.

19. The AMS recorded his findings from his examination of the respondent in the following terms:

> "He is quite a big guy, 120 kilograms in weight with a height of 6 feet 2 inches. The scar is a bit obvious but it is not tender to touch and not adhering to anything. The hip has very good range of movement. The right hip flex to 110º and the left is a bit less, about 100º. Abduction and adduction are similar to the other side, 40º of abduction and 30º of adduction. External rotation at 90º of flexion is 30º on the right and 20º on the left and internal rotation was 20º on the right and 15º on the left. There is no fixed flexion contracture and the left leg is probably about <5 mm longer than the other side. Neurovascular examination is all normal."

20. As said, the AMS assessed the degree of the respondent's permanent impairment from his injury to be 15% WPI. He provided the following explanation for his assessment:

> "To assess the whole person impairment, he has a very good result with the total hip replacement. Using AMA Guide 5th Edition, Table 17-34, for pain he will score 40 points, no limping will be 11 points, no supportive aid is 11 points, distance walked unlimited is 11 points, stair climbing is normal and 4 points, putting on shoes on socks with ease is 4 points, sitting in any chair for one hour is 4 points, public transport is possible and 1 point. For deformities there is no fixed deformities in any direction so that will score 5 points.
>
> Range of movement, flexion is >90º and is 1 point, abduction is >15º and is 1 point, adduction also >15% and is 1 point, external rotation is 0 points, internal rotation is >15º and is 1 point and when added togther that will score 4 points. Altogether he scored 95 points.
>
> Using AMA Guide 5th Edition, Table 17-33, a total hip replacement of 95 points will have a good result with a 15% whole person impairment.
>
> Looking at the scar using the TEMSKI scale, at the most I will assess it as 1% so altogether there is 16% whole person impairment.
>
> In my opinion, there should be contribution from pre-existing condition even though the other hip is functioning well without obvious problems. I think with his age and size and all the potential possibility of injury outside work, a deduction of 1/10th for pre-existing condition is appropriate and that will leave behind a 15% whole person impairment."

21. The Appeal Panel notes that the respondent's lawyers had qualified orthopaedic surgeon Dr James Bodel to provide forensic medical reports, on which the respondent relied to support his claim for compensation. The appellant had qualified orthopaedic surgeon Dr Richard Powell to provide forensic medical reports on which it relied to oppose the respondent's claim. Dr Bodel's reports are both dated 2 September 2019 and Dr Powell's are dated 31 January and 15 October 2019. All reports were provided to the AMS.

22. The AMS noted that his opinion with respect to whether any proportion of the respondent's permanent impairment is due to a pre-existing condition differed from what Dr James Bodel had assessed on this issue, which was that no part of the respondent's permanent impairment was due to a pre-existing condition. The AMS also took the view that his opinion with respect to this issue conflicted with the view Dr Powell had expressed. The AMS said this about that:

> "I cannot agree with Dr Bodel either because in his argument he agreed this is an aggravation from a pre-existing condition because the x-ray done in January 2017 already shows reasonable degree of arthritis.
>
> Dr Powel deducted 10 out of 10 for pre-existing condition and Dr Bodel deducted 0% while I take the 1/10th policy and deduct 1/10th to be related to pre-existing condition and that explains the difference between our opinion."

SUBMISSIONS

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

24. In summary, the appellant submits that the AMS did not explain sufficiently the causal connection between the respondent's impairment and his work injury and did not consider whether any part of the respondent's impairment was due to the respondent's "extensive martial arts training and activities". The appellant submits that the AMS, by not sufficiently explaining the connection between the respondent's impairment and his work injury, did not abide the requirements of s 325(2)(c) of the 1998 Act and Clause 1.6(c) of the Guidelines. The appellant submits that the AMS assumed and deemed the respondent's symptoms and impairment to be due to the respondent's employment. The AMS, by so assuming, applied an incorrect test when assessing the respondent's impairment from the respondent's injury.

25. The appellant also submits that the AMS did not consider "a number of the medical legal opinions", which had "deducted the proportion of the [respondent's] impairment on account of the [respondent's] extensive involvement in martial arts". The appellant submits that the AMS considered only "hypothetical factors" and did not consider "actual, pre-existing factors" when "calculating his deduction". The appellant submits that it was open to the AMS to conclude that the respondent "had a pre-existing injury arising from his history of martial arts" and the AMS should have assessed that the proportion of the respondent's impairment that was due to that previous injury was greater than 10%.

26. In reply, the respondent submits that the AMS said in the MAC that he had based his assessment on the history obtained, his examination of the respondent and his review of the radiological investigations and medical reports on file, and consequently the AMS thereby confirmed that he had reviewed all the material with which he was briefed, which included materials relating to the respondent's past activities. The respondent submits that the AMS provided an adequate and sufficient explanation for the assessment he made. The respondent submits that the clinical and medical evidence did not establish that his martial arts history caused a pre-existing condition that contributed to his level of impairment. The respondent submits that "the AMS sufficiently addressed the questions on the [respondent] having any pre-existing condition or abnormality that warranted a greater reduction than 1/10th as given by the AMS". The respondent submits that the deduction was based upon the AMS's clinical judgment and discretion consistent with case law and the Guidelines. The respondent submits that he ceased "all karate/martial arts exercise in or around 2008" and the evidence did not support that his prior activities with respect to martial arts and weight training contributed to his condition or impairment.

FINDINGS AND REASONS

27. 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.

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

29. The injury the respondent suffered was the aggravation, acceleration, exacerbation and deterioration of an idiopathic constitutional disease in the respondent's left hip, that disease being osteoarthritis. Based on the evidence before the Appeal Panel, it is impossible to know exactly when that disease became present in the respondent's left hip. As much as can be said, based on the evidence is that it was not present at the time the respondent commenced his employment with the appellant in 2000 and it was unlikely to have been present in 2008, given that the respondent first consulted his GP regarding left hip pain on 15 July 2015.[1] In other words, it is likely that the disease would have become present in the respondent's left hip at some time between 2008 and 2015, and probably closer to 2015. The relevance of 2008 is that it was around this time that the respondent ceased martial arts and weights training and commenced the activity of moving heavy mail bags using a trolley.[2]

[1] ARD p 12-15, 65
[2] ARD p 65, 67

The respondent said at [63] in his unsigned statement that he ceased "weight training and martial arts training in 2008 due the hours I was working".

30. All that accords with the history Dr Bodel obtained when he examined the respondent on 27 May 2019.

31. The Appeal Panel notes that attached to the appellant's Reply is a report that Ms Kylie King prepared on 21 November 2019 for the appellant relating to an "online investigation" she did of the respondent. That report included several screen shots from social media associated with the respondent and social media associated with a business with which the respondent is involved. Those photos show the respondent observing others participating in martial arts activities and weight training activities. There is a photo depicting the respondent lifting a bar loaded with what seems to be very heavy weights and a picture depicting him kicking with his right leg a large bag positioned upright on the floor. The photo of the respondent lifting weights does not indicate the date on which he did that. The picture of him kicking a bag is accompanied by a caption to the effect that the respondent is now able to kick following his left hip replacement in November 2018.

32. With respect to the period preceding the respondent's left hip replacement, nothing within Ms King's report contradicts, in the Appeal Panel's view, the evidence provided by the respondent in his unsigned statement and the history obtained by Dr Bodel to the effect that the respondent did not engage in weight training or martial arts after 2008.

33. The Appeal Panel also observes that the appellant had posed to Dr Powell this question: "we do ask that you seek details about the worker's weight training and martial arts activities would be significant within the context of the conditions, and rapid deterioration of the hip such as noted by Dr Bodel in his report" (verbatim). In his report of 15 October 2019, Dr Powell provided this response to that question: "Mr Smith confirmed that he is a regular gym goer, where he undertakes a weight programme, though has modified this and avoids heavy lifting or impact activities. He advised me that he attends the gym on a daily basis".

34. In the Appeal Panel's view that history obtained by Dr Powell from the respondent also does not contradict what the respondent said in his unsigned statement. This is because the answer that Dr Powell provided does not indicate whether the respondent carried out that activity preceding his hip replacement, as distinct from whether the respondent engaged in the activity after his hip replacement surgery.

35. The Appeal Panel considers, contrary to what the appellant has submitted, that the evidence does not establish that the respondent engaged in martial arts or weight training in the period between the onset of the idiopathic disease of osteoarthritis in the respondent's left hip and the date on which the respondent had hip replacement surgery. It follows that the evidence does not establish that the respondent engaged in that activity at a time when the disease was active in his left hip. Hence, because the respondent did engage in such activity during this time, such non-existent activity necessarily could not have contributed to any aggravation, acceleration, exacerbation or deterioration of the disease.

36. The Appeal Panel is of the view that at exactly the time the idiopathic disease of osteoarthritis became present in the respondent's left hip, which was sometime after 2008 and more likely nearer 2015 when the respondent first experienced symptoms in his left hip, the heavy nature of the work the respondent was then performing for the appellant acted upon and thereby aggravated and accelerated and caused a deterioration of the disease. That activity precipitated symptoms for the respondent from the idiopathic disease. That is to say, it would have brought on the respondent's symptoms from the disease earlier than what the respondent otherwise would have likely experienced symptoms and made the respondent's symptomatic experience from the disease worse than what would have otherwise been the case had he not been doing that activity.

37. Given that the respondent's work activity only aggravated and accelerated and caused a deterioration of the disease from the time the disease manifested in the respondent's left hip, the disease necessarily did not exist prior to the respondent's work injury, that injury being the aggravation, acceleration, and deterioration of the disease.

38. Therefore, the AMS did make an error in his assessment because he treated the disease of osteoarthritis as being a pre-existing condition.[3] That however was not a matter that the appellant raised in its grounds of appeal. The appellant did not identify that as an error in the submissions it made, and hence, consistent with s 328(2) of the 1998 Act, that cannot be a basis upon which the Appeal Panel concludes that the MAC contains a demonstrable error or a basis on which the Appeal Panel can conclude that the AMS based his assessment on incorrect criteria.

39. As the Appeal Panel understands the substance of the appellant's submissions, it is such that its submissions include a ground of appeal that the AMS erred and applied incorrect criteria by not attributing more than 10% of the respondent's overall permanent impairment to the underlying disease and also did not explain sufficiently why he attributed 90% of the respondent's overall impairment as being due to the respondent's work activity. In the Appeal Panel's view the AMS's reasoning for assessing that the degree of the respondent's permanent impairment that is due to the respondent's work injury is 90% and the degree due to the underlying osteoarthritis is 10% was sparse and what reasoning he did provide was flawed. Essentially, his reasoning was that the apportionment was on account of "age and size" of the respondent and "all the potential possibility of injury outside work". The AMS considered because of those factors, a "1/10th policy" ought to apply.

40. The Appeal Panel observes that the respondent's permanent impairment of his left hip is due to the respondent now having an artificial joint in his left hip. He also has an impairment as a consequence of scarring from the procedure that was required to install the artificial joint. What has occurred in this case is, as has been discussed above, that a constitutional condition in the form of osteoarthritis commenced spontaneously in the respondent's left hip. The exact date upon which that occurred cannot be known, but it was at some point between 2008 and 2015, and most likely closer to 2015. As soon as the disease became present, the respondent's heavy work acted upon the disease initiating the symptoms and aggravating, accelerating and worsening the disease and the symptoms from it. That is to say, the respondent's work brought on the respondent's symptoms earlier than what would otherwise have been the case if he were not engaged in such work activity and also worsened the respondent's symptomatic experience from the disease than what would otherwise be the case if he were not engaged in heavy work.

41. The respondent's work activity therefore resulted in the respondent needing surgery earlier than what would otherwise have been the case to replace his diseased left hip joint with an artificial joint so as to abate the respondent's symptoms. It seems to the Appeal Panel that, in those circumstances, the degree of the respondent's permanent impairment that results from his injury, being the aggravation, acceleration, exacerbation and deterioration of the underlying constitutional osteoarthritis that occurred spontaneously, is of the order of 90%. That is to say because the respondent's injury brought on his symptoms earlier and made them worse than what would otherwise have been the case had he not been working for the appellant, and because this resulted earlier than what would otherwise have been the case in his having an artificial joint in left hip, from which his impairment arises, the assessment that the AMS ultimately made of the degree of the respondent's permanent impairment resulting from his injury was correct.

[3] See *Cullen v Woodbrae Holden Pty Ltd* (2015) NSWSC1416 at [43], [56] and [57]

42. Thus, notwithstanding that the AMS did make an error by not providing a sufficient explanation for his assessment that the degree of the respondent's permanent impairment due to the respondent's injury is 90% of his overall impairment, and notwithstanding that the AMS also made a further error, which neither party identified, by concluding that a proportion of the respondent's permanent impairment was due to a pre-existing condition, the ultimate assessment of the AMS made that the respondent has 15% whole person impairment as a result of his injury is correct.

43. For these reasons, the Appeal Panel has determined that the MAC issued on 20 February 2020 should be confirmed.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar