WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-560/19**
Appellant:	**Liljana Popcevski**
Respondent:	**Impact International Pty Ltd**
Date of Decision:	**11 September 2019**
CITATION:	**[2019] NSWWCCMA 133**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr David Crocker**
Approved Medical Specialist:	**Dr Brian Noll**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 4 April 2019 Liljana Popcevski, the appellant, lodged an Application to Appeal against the Decision of an Approved Medical Specialist. The medical dispute was assessed by Dr Gregory McGroder, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 7 March 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 Guides 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 8 February 2019 a delegate of the Registrar referred this matter for assessment by an AMS of whole person impairment caused by injury to the right lower extremity, the left lower extremity and scarring (TEMSKI) by an injury which occurred on 12 November 2010.

7. Ms Popcevski was employed as a process worker. On 12 November 2010 she fell and struck the bottom of her left patella on the edge of a pallet while falling forward and also

hitting her head on a machine. She had no trouble with either knee before that date, she said, but she experienced significant pain and swelling in her left knee thereafter, and sought medical treatment. Investigations demonstrated pre-existing osteoarthritis and effusion. Physiotherapy did not improve her situation and she came to surgery with Dr Davè, Orthopaedic Surgeon on 8 June 2011 in the form of a partial medial meniscectomy and chondroplasty.

8. At operation Dr Davè noted grade 3 chondral changes in the patello-femoral joint, grade 4 chondral changes in the medial compartment, and grade 2 chondral changes in the lateral compartment.

9. This surgical procedure did not assist Ms Popcevski and Dr Davè recommended a left knee replacement towards the end of 2011, which did not take place until 4 May 2013.

10. Around that time she noticed the onset of symptoms in her right knee, for which she sought treatment. Imaging showed arthritis in the right knee. Her symptoms increased and Dr Davè recommended a right knee replacement which took place eventually on 14 May 2016.

11. She advised the AMS that neither procedure has given her a good result, and particularly her right knee was worse than her left.

12. Towards the end of 2018 Dr Davè advised that there was nothing further of a surgical nature that could be offered. Follow up x-rays showed the replacements were in a satisfactory position.

13. The AMS assessed a 20% WPI for the right lower extremity for which he deducted nine tenths, leaving an entitlement of 2%. For the left lower extremity, he found 20% WPI from which he deducted one half, leaving an entitlement of 10%. No WPI was allowed in relation to the scarring. The combined value of the assessment accordingly resulted in a figure of 12% WPI.

PRELIMINARY REVIEW

14. The appellant, Ms Popcevski, did not request to be re-examined by a Panel AMS.

15. 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.

16. The Panel noted that, contrary to Practice Direction 3 (5), the appellant had failed to lodge a statement with her original pleadings. Accordingly we issued the following direction on 4 July 2019:

> "No statement was made by Ms Popcevski in contravention of Practice Direction No. 3(5). However, the evidence contained an the earlier MAC of Dr John M Harrison dated 9 November 2012 recorded that Ms Popcevski is a process worker who has been working for the respondent for 30 - 31 years. There was a small break away from the company for a year or two, and then Ms Popcevski returned. We are unaware of when that did occur, nor as to the precise details of her employment with this respondent.
>
> The parties' attention is drawn to the decision of *Cullen v Woodbrae Holdings Pty Ltd*[1]. In view of this decision, the Appeal Panel is unable to proceed with the matter until a statement is lodged with details of employment.

The appellant is to lodge and serve a statement by the appellant along with submissions as to the effect of the above authority by **17July 2019**.

The respondent is to lodge and serve submissions in reply by **31 July 2019.**

[1] [2015] NSWSC 1416."

17. On 8 July 2019 Mr Glicerio De Paz, the Dispute Services Officer from the Commission, received the following email from the appellant's legal advisors:

"Dear Glicerio,

We refer to the above matter and to the Direction of Arbitrator Wynyard dated 4 July 2019.

We are aware that our client is currently overseas, returning to Australia on 17 September 2019.

Our client is uncontactable during this time and we are therefore unable to obtain further instructions, or a statement as per the Direction.

We respectfully seek that this matter be stood over until our client's return on a date after 17 September 2019.

I have copied in the solicitor for the Respondent into this email.

Your favourable consideration is appreciated.

Please do not hesitate to contact me should you wish to discuss the above further.

Kind regards,
Rebekah"

18. The appellant's legal advisors were not kind enough to explain why it was that their client was "uncontactable". The Panel thereupon caused the following email to be sent to the appellant's legal advisors on 15 July 2019:

"Thank you for your email of 8 July 2019.

You will observe, as we stated in our Direction of 4 July 2019 that the matter had been prosecuted in contravention of Practice Direction No. 3(5).

The applicant now seeks a further indulgence which under the circumstances we are not prepared to grant.

If the request for further directions is not met by the due date, the Panel will proceed on the evidence presently before it."

19. On 19 July 2019 the Panel received four pages of submissions from Counsel. We were advised that:

- Having identified the issue, the Panel was obliged to give the appellant an opportunity to address it. (We would observe that we have done so).
- The appellant would not be afforded natural justice if we now determined the appeal in the light of her failure to respond.
- The Panel had raised the issue "appropriately."

- Reference was made to *Bindah v Carter Holt Harvey Woodproducts* [2013] NSWSC 1290 and [2014] NSWCA 264, noting the Medical Appeal Panel was constituted in that case by the same members of the present Panel, and that it is using its best endeavours to properly determine the medical dispute.

- Reference was made to s 66A Evidence Act 1995 in furtherance of a submission that the hearsay rule does not apply to representations about a person's health.

- Counsel then referred to the evidence currently before us, submitting that there should be either no deduction under s 323, or a 1/10th deduction pursuant to s 323 (2).

- This was because the evidence demonstrated that the appellant was 28 years old when she commenced work with the respondent, with whom she then worked for the next 30 – 31 years. (We would observe that it was this allegation that caused us to seek further evidence from the appellant, as it does not appear that the work she did was continuously with the respondent, which had implications regarding the application of the principle in *Cullen.* This difficulty will be considered below).

EVIDENCE

Documentary evidence

20. 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

21. 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

22. Both parties made written submissions which have been considered by the Appeal Panel.

FINDINGS AND REASONS

23. 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.

24. 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.

25. The AMS noted at the outset of his reasons:[2]

> "Ms Popcevski said that she was not having any trouble with either knee at the time of her injury on 12 November 2010."

[2] Appeal papers 23

26. The AMS made the following diagnoses[3]:

> **"Summary of injuries and diagnoses:**
>
> In a fall at work on 12 November 2010 Ms Popcevski sustained an injury to her left knee.
>
> This was an aggravation of pre-existing degenerative changes in the knee and she had an arthroscopy followed by a total knee replacement performed on 4 May 2013.
> She also had degenerative changes in her right knee on the background of a previous arthroscopic procedure. The degenerative changes gradually worsened and on 14 May 2016 she had a right total knee replacement."

27. The AMS noted Ms Popcevski's work history. He said:

> "Ms Popcevski worked at Impact International Pty Ltd for 33 years as a process worker."

28. Ms Popcevski did not seek to challenge the assessments of 20% in relation to each knee injury. The issues raised concerned the deduction made pursuant to s 323 of the 1998 Act.

29. The AMS recorded[4]:

> "Details of previous accidents:
>
> **"Details of any previous or subsequent accidents, injuries or condition:** She had an arthroscopy involving her right knee in 1998 or 1999. She said she cannot remember what this was for and what was done but she said that she must have had a good result because she cannot remember this."

30. In giving his reasons for making a deduction the AMS said[5]:

> "**11. DEDUCTION (IF ANY) FOR THE PROPORTION OF THE IMPAIRMENT THAT IS DUE TO PREVIOUS INJURY OR PRE-EXISTING CONDITION OR ABNORMALITY**
>
> a. In my opinion the worker suffers from the following relevant previous injuries, pre-existing conditions or abnormalities:
>
> > (i) Prior to the injury on 12 November 2010 Ms Popcevski had pre-existing osteoarthritic changes in both knees, on the right more so than the left.
> >
> > On the left the changes were noted on an athroscopy performed shortly after the injury and it is noted that the knee replacement that was performed because of the arthritic changes was requested within a year of the injury, suggesting that the degenerative changes were significant and the main cause for the knee replacement.
> >
> > On the right, it is noted that an arthroscopy was performed 10 years prior to the accident and I expect that the arthritic process began then and subsequently pre-existed the date of injury to the left knee, being 12 November 2010. Clinical evidence of arthritis was noted in the right knee by examining doctors just over a year following the injury to the left knee.

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[3] Appeal papers 26
[4] Appeal Papers 24
[5] Appeal Papers 29

b. The previous injury, pre-existing condition or abnormality directly contributes to the following matters that were taken into account when assessing the whole person impairment that results from the injury, being the matters taken into account in 10a, and in the following ways:

> (i) Cartilage intervals involving both knees prior to the accident would have resulted in the impairment if it had been assessed at that time. It is noted that the request for the knee replacement on the left was within a year of the injury, suggesting that the requirement for the knee replacement was due in no small part to the presence of the underlying degenerative changes. On the right it is noted that the arthritic changes gradually worsened over the years and it is noted that there was no injury to the right knee but the replacement was required because of the slowly increasing osteoarthritic changes.

c. Whilst the extent of the deduction is difficult or costly to determine the available evidence is that the deductible proportion is large and a deduction of one tenth is at odds with the available evidence. In my opinion the deductible proportion is one-half on the left and nine-tenths on the right for the following reasons:

> It is noted that a previous surgical procedure was performed on the right knee and it is noted that there was no injury to the right knee. The reason the knee replacement was performed was because of increasing degenerative changes which were well established prior to the accident. Clinical evidence of arthritis was noted in the right knee just over a year following the injury to the left knee. I expect that this lady would have required a knee replacement on the right around the time that she had it. Injury has been found, however, and under the circumstances I have made a significant deduction of nine-tenths.
>
> On the left, it is clear that Ms Popcevski had significant arthritis at the time of the accident as demonstrated by the arthroscopy, her investigations and the clinical findings. It is noted that the knee replacement was requested within a year of the injury, demonstrating that the arthritic change was severe and that this was the cause of the knee replacement being performed. There was, however, an injury to the right knee and because of this I have limited my deduction to one-half.
>
> (Ms Popcevski suggested in her submissions that a typographical error had been made in the final sentence by the AMS, and that in fact he should have referred to the left knee. This would appear to be correct)."

SUBMISSIONS

Ms Popcevski

31. In her submissions, Ms Popcevski asserted:

> "The appellant had undergone an arthroscopy of her right knee in 1998 or 1999 (over ten years before the injury of 12 November 2010). She worked for the Respondent as a process worker for 33 years (both before and after 1998/99) without any interference to her capacity to work. After the injury of 12 November 2010, the Appellant was on and off selected duties until she resigned in 2016."

32. Ms Popcevski alleged that the AMS had fallen into error in a number of respects in paragraph 11a of the MAC.

33. Firstly, Ms Popcevski submitted that the use of the word "main cause" to the left TKR was unwarranted. Ms Popcevski conflated that term to mean "main contributing factor", as employed in the 1987 Act.

34. Secondly, Ms Popcevski asserted that the AMS had asked the wrong question. Ms Popcevski submitted:

> "19. The question for the AMS pursuant to section 323 was NOT what contribution was made by the pre-existing degenerative changes to the need for left TKR: the question for the AMS was whether pre-exiting abnormality or condition was causing the Appellant any WPI prior to 12 November 2010." (As written)

35. These two issues had imported into the reasons given by the AMS, the question of causation regarding the left knee, it was alleged.

36. A similar error was alleged regarding the reasons given by the AMS for his assessment of the right knee. Again, it was submitted that the AMS asked the wrong question. It was "speculation" on the part of the AMS to find that the onset of arthritis in the right knee had begun following the previous arthroscopy. The AMS had not addressed the proper issue, it was asserted, which was "whether the Appellant was suffering the consequences of any pre-existing abnormality or condition of her right knee before 12 November 2010." Reference was made to the evidence that showed no symptomatic condition prior to that date.

37. Ms Popcevski then submitted that the AMS had made further errors in paragraph 11b.

38. He had done so, it was submitted, by asserting that cartilage intervals full in both knees would have resulted in a finding of impairment had they been assessed at or prior to the injury.

39. This error was perpetuated, it was claimed, by the comment that the requirement for the left total knee replacement was due "in no small part" to the presence of the underlying degenerative change.

40. The AMS further strayed into the area of causation, it was submitted, by his finding that there was "no injury to the right knee."

41. In considering paragraph 11c, Ms Popcevski repeated her submission regarding the injury to the right knee, saying that as a result of his finding there was no injury, the AMS had deducted 90% of his assessment, notwithstanding his later comment that "injury has been found, however." This was said to be a "confused and inappropriate approach" by the AMS to his task.

42. It was further submitted that the AMS "seems" to have imported the provisions of s 9A(2)(d) of the 1987 Act when he found that the total right knee replacement would have been required at about the same time it was performed.

43. "In any event" Ms Popcevski submitted that the AMS had fallen into error by not applying the principles in *Cole v Wenaline Pty Ltd*[6] *,* and he had assessed the s 323 deductions "completely on incorrect bases."

44. In paragraph 11c it was alleged that the AMS had repeated the errors he made in the earlier subparagraphs of paragraph 11. It was submitted that the AMS had asked himself the wrong question. Ms Popcevski said:

> "… the question is not whether the left TKR was caused by the pre-existing

[6] [2010] NSWSC 78 (*Cole*)

degenerative changes; the question is whether the Appellant was suffering the consequences of an pre-existing condition or abnormality prior to the injury of 12 November 2010 [sic].”

The respondent

45. The respondent answered by submitting that an asymptomatic pre-existing degenerative condition could be the subject of a deduction pursuant to s 323 relying on *Vitaz v Westform NSW Pty Ltd*[7].

46. It was submitted that the AMS had not intruded upon the area of liability and that the terminology used of “main cause” was not consonant with the language used in s 4(b)(ii) of the 1987 Act.

47. The respondent pointed to the evidence of degenerative changes in both knees including the right knee arthroscopy some 10 years prior to the injury.

DISCUSSION

The causation question

48. In *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd*[8] Emmett JA, Meagher and Smart JJA, agreeing said:

> “110. However, that is not to say that there is no scope for an approved medical specialist or Appeal Panel to make findings of fact necessary for the performance of the function that they are given under the [1998] Act. Questions of causation are not foreign to medical disputes within the meaning of that term when used in the [1998] Act. A medical dispute is a dispute about or a question about any of the matters set out in s 319. Those matters include the degree of permanent impairment of a worker **as a result of** an injury, and whether any proportion of permanent impairment is **due to** any previous injury or pre-existing condition or abnormality. The words in bold in relation to each of those matters call for a determination of a causal connection. Thus, the language of causal connection is squarely within the definition of "medical dispute". Having regard to the conclusive effect of s 326, it is desirable to avoid drawing a rigid distinction between jurisdiction to decide issues of liability and jurisdiction to decide medical issues. There is no bright line delineating causation from medical evidence. Issues of causation may well involve disputes between medical experts that must be resolved by an approved medical specialist or by an Appeal Panel (see *Zanardo v Tolevski*[2013] NSWCA 449 at [35]).
>
> 111. It is for the Commission to determine whether a worker has suffered an injury within the meaning of s 4 of the Compensation Act….”

49. Applying the dicta of Emmett JA, a finding that there had been no injury by an AMS would have been made without power, leading to the revocation of the MAC. Thus, had the AMS found that employment had not been the main contributing factor to the injury, or that employment was not a substantial contributing factor to the injury, as was alleged by the appellant, the MAC would have been revoked.

50. However, when the AMS said that the degenerative changes were the “main cause” for the left knee replacement in paragraph 11A, he was discussing a medical issue, that is to say, he was defining the pre-existing condition about which he was making a s 323 deduction. There

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[7] [2011] NSWCA 254 (*Vitaz*)

[8] [2014] NSWCA 264 (*Bindah)*

is no suggestion that he was ignoring the ambit of his referral from the delegate of the Registrar of 8 February 2019.

51. Similarly the finding by the AMS that a total right knee replacement would have been required at about the same time in any event was not, as was submitted, the incorporation of a finding that employment had not been a substantial contributing factor into his reasons. He was, as the subheading to paragraph 11c indicated, giving his reasons as to why a deduction of 1/10th was at odds with the available evidence.

52. The appellant sought to establish error by reference to the well-known case of *Cole,* and we were referred to paragraph 30 of that decision, in which Schmidt J said:

> "30 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."

53. The alleged assumptions or hypotheses referred to by the appellant were generally speaking the findings made by the AMS as to her pre-existing condition. She submitted on two occasions that the AMS had asked the wrong question. She argued that the question should have been whether the pre-existing abnormality or condition was causing any WPI prior to the injury date of 12 November 2010, or, as she later phrased it, whether she was suffering from the consequences of any pre-existing condition or abnormality prior to the injury date. (We assume that latter phrasing was her intention).

54. These submissions must be rejected. In *El Cheikh v Diamond Formwork (NSW) Pty Ltd (in liquidation)*[9] Schmidt J referred to her decision in *Cole* at [126]:

> "126. As discussed in Cole v Wenaline Pty Limited at [30], in the case of a workplace injury caused by an exacerbation or acceleration of a pre-existing condition, what must be determined by a medical specialist under s 323 is:
> - Firstly, what the extent of the resulting impairment is.
> - Secondly, whether the pre-existing condition contributed to the impairment.
> - Thirdly, if it did, what proportion of the impairment was due to the pre-existing condition."

55. In *Ryder v Sundance Bakehouse*[10] Campbell J said [at 45]:

> "What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if that proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of degree of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the degree of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to pre-existing

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[9] [2013] NSW SC 365 (*El Cheikh)*
[10] [2015] NSWSC 526 (*Ryder*)

abnormality. To put it another way, the Panel must be satisfied that but for the pre-existing abnormality, the degree of impairment resulting from the work injury would not have been as great."

56. In *Vitaz* Basten JA said, McColl JA and Handley AJA agreeing, at [43]:

> "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".

57. Accordingly, the relevant question is as to whether the degree of impairment found by the AMS has been contributed to by the appellant's pre-existing condition. That condition has been identified by all medical opinions as being degenerative change in the form of arthritis.

58. With regard to the left knee we found the findings on arthroscopy, some seven months following the injury, to be compelling. Dr Davè found grade 4 medial compartment chondral changes which would not have been present but for the fact of significant pre-existing degenerative change. Similarly, bone on bone loss of cartilage would not have occurred without a long period of degeneration. The imaging studies before the AMS also indicated significant pre-existing osteoarthritic conditions. Chondral loss grading is as follows:

- Grade 1: early articular cartilage damage to the surface and softening
- Grade 2: pitting and fissuring of the cartilage surface
- Grade 3: articular cartilage damage with fissuring down to the bone
- Grade 4: complete wear of the cartilage surface and exposed bone

59. Regarding the right knee the radiological evidence too was compelling. However the history of its onset differs from that regarding the left knee. The appellant submitted that the AMS had found there was no injury to the right knee. This is in fact technically correct. Although Part 4 of the ARD pleaded that the appellant had injured both knees on the pallet edge on 12 November 2010, this history was not repeated to any medical specialist.

60. The s 287A notice challenging the WPI assessment referred to a questionnaire answered by Dr Davè in which he was asked whether the request for treatment to, amongst other things, the right knee, was related to the work injury to the left knee in 2010. Dr Davè circled the "no" answer to that question, but the following question asked how he considered the injuries were related to the 2010 injury, and he answered again in handwriting "she was limping and favouring knee".

61. Dr P Endrey-Walder, on 18 February 2014 said[11]:

> "Her last follow-up [with Dr Davè] was a month ago '*and I said the pain hasn't improved much, I have a lot of pain on the inside* (medial) *I also complained that I'm getting pain at the right knee also. He said, for some people it takes longer for the pain to settle. With the right knee its because I put more weight on it.'* I learn from Ms Popcevski today that she in fact had arthroscopy on her right knee about 10 years)."

62. Dr Endrey-Walder's opinion[12] as to the right knee was:

> "It is much more likely than not that this lady has had some degenerative changes in the right knee over the years, and the overload of the right leg since the injury to the left knee would certainly account for the pain there, as also noted by Dr Davè."

[11] Appeal papers 49
[12] Appeal Papers 51

63. Associate Professor Paul Miniter was retained as a medico-legal referee for the respondent. He gave three reports; 24 January 2012, 30 May 2017 and 4 August 2017.

64. In his report of 30 May 2017[13] he noted specifically that Ms Popcevski remembered falling on the front of her left knee on the pallet and that "the right knee was not injured".

65. On 4 August 2017[14] Associate Professor Miniter said:

> "One is puzzled that the right knee, that is the knee that was not injured in the first place, has been regarded as an exacerbation of pre-existing pathology in relation to the left knee which, as I understand it, was the knee that was originally injured. The reason that I felt that there was no evidence of impairment relating to this matter was for the reasons that I have previously given: there is no evidence in the literature that having pathology in one knee causes aggravation to the other knee".

66. The opinion was referred to by the respondent's insurer in its s 74 notice of 31 August 2018[15] as the basis for claiming that there should be a significant s 323 deduction, which appears to be something of a non sequitur. However, it does underline the evidence that the right knee was not injured in the original fall, as claimed in the pleadings.

67. The medical evidence accordingly supports a finding that Ms Popcevski did not injure her right leg in the manner that was described at Part 4 of the ARD, but rather that it was a consequential condition caused by placing more weight on it following the left knee TKR. This was indeed conceded by the appellant in her submissions.

68. It was accordingly clear that the respondent has never denied liability in relation to the injury to the right knee, and the submissions by Ms Popcevski must accordingly be rejected. The AMS stated quite clearly that injury had been found, as he was bound to in view of the fact that the matter had been referred to him.

69. When considering the amount of a deduction, it is incumbent upon an AMS to consider all the evidence. One of the relevant matters is indeed whether a worker was asymptomatic prior to his/her injury. Thus, in *El Cheikh,* the amount of the deduction was reduced, as the AMS had not taken into account the fact that the worker had been doing arduous work for many years without suffering any symptoms.

70. The AMS has acknowledged that the appellant was asymptomatic and in a comprehensive and thorough statement of reasons has explained his assessment. The medical specialists on the Panel concur that the deductions are appropriate, notwithstanding that the appellant was asymptomatic prior to her injury.

71. Ms Popcevski submitted that the AMS had fallen into error with regard to the right knee as he had "speculated" that the arthritic changes began following the arthroscopy to which he had referred. There is evidence that such an arthroscopy occurred. This is one of the areas in which a statement from the appellant in accordance with Practice Direction Number 3(5) would have been of some assistance.

72. The earliest reference to the arthroscopy came from Dr John Harrison. The appellant was referred for a general medical assessment on 19 November 2012 for an opinion as to whether the proposed treatment was reasonably necessary to the left knee. In his reasons Dr Harrison, the AMS said[16]:

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[13] Appeal Papers 162
[14] Appeal papers 169
[15] Appeal papers 138
[16] Appeal papers 145

> "Although she did not volunteer it to me when specifically asked about prior knee injuries, when I examined her I noticed arthroscopy scars at her right knee and on questioning about that, she remembered that she had had a right knee arthroscope done by Dr Davè for some knee pain problems probably around 1998 or 1999 (but she was not exactly aware of what the pathology was and said she had not had any problems of pain or discomfort in her right knee troubling her after that surgery had been undertaken).

73. As we indicated in our direction of 4 July 2019, there is one aspect regarding the provisions of s 323 that we regarded as potentially being relevant. The submissions received from Counsel in answer to our direction suggested that we could obtain from the histories given to the medical practitioners whose reports were before the AMS, evidence as to the continuity of the appellant's employment with the respondent.

74. The AMS took the following history:

> "Ms Popcevski worked at Impact International Pty Ltd for 33 years as a process worker. Her injury occurred on 12 November 2010 and she was on and off selected duties until 2016 when she resigned."

75. The evidence before us did not confirm that history. If it had, then as we noted in our Direction to Ms Popcevski, she may have had the benefit of the principle in *Cullen.*

76. *Cullen* was a case similar to the present in which the applicant suffered a severe degenerative condition, but in his hips and not his knees as Ms Popcevski did.

77. Mr Cullen had been employed by the same employer from 1978 to 2004. At [52] Beech-Jones J said:

> "Mr Dodd submitted that the nature of the injury was one to which s 15 or s 16 applied in that it was one that involved, in the case of s 15, a "gradual process" of onset of the disease or, in the case of s 16(1), consisted of the aggravation, acceleration, exacerbation or a deterioration. In both cases he submitted that gradual process or aggravation related to the entire period in which his client was employed by Woodbrae. He contended that it followed that, in order for s 323 to be applicable, it was necessary for there to be evidence capable of supporting a finding that as at the time his client commenced employment in 1978 he was subject to an existing injury, condition or abnormality. As stated, Mr Blount accepted that was the case but contended that there was such evidence."

78. It can be seen that no deduction can be made in a case to which s 15 or s 16 of the 1987 Act applies. Those sections are procedural, and are applicable where the provisions of s 4(b) of the 1987 Act apply. It is clear that Ms Popcevski also suffered from the same disease-related condition. It can further be seen that the provisions of s 323 do not apply in such circumstances in relation to any onset or aggravation of a disease process during the course of her employment. Evidence had to be available of the existence of the injury, condition or abnormality that predated the commencement of her employment . The distinguishing feature between Mr Cullen's case and that of Ms Popcevski is that Mr Cullen had a continuous period of employment, whereas the evidence shows that Ms Popcevski's employment with the respondent was broken. The question then arose as to what the period had been in Ms Popcevski's case. That it was not continuous was clear from the various references to it in the evidence.

79. As indicated, Ms Popcevski was assessed in 2012 by an AMS, Dr Harrison, for a general medical assessment. On 9 November 2012, he took a history that Ms Popcevski:[17]

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> ".... Is a right-handed process worker, who started full-time with Impact International of Smithfield 30 – 31 years ago. She had a small break away from the firm for a year or two and then went back....."

80. On 26 June 2012 Dr P Endery-Walder took a history that Ms Popcevski had been employed 26 years by the respondent[18].

81. On 24 January 2012 Dr Paul Miniter took a history:

> "[Ms Popcevski] has worked with this company in its various guises for the last 26 years."

82. The Panel was accordingly unable to determine the period for which the appellant had been working continuously for the respondent. The expression "various guises" raises the possibility that the work was done by various corporate entities over the years, in which case the Panel would have sought submissions from the parties as to the effect of *Cullen*. Similarly, submissions would have been needed as to the effect of the broken period of employment, had that been the case.

83. The issue, however, has not been before us in the final analysis, and we are left to consider the grounds upon which Ms Popcevski relied.

84. For the reasons given above, the issues raised by the appellant have not established the application of incorrect criteria or demonstrable error on behalf of the AMS.

85. For these reasons, the Appeal Panel has determined that the MAC issued on 7 March 2019 should be confirmed.

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

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