WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-619/19**
Appellant:	**Secretary, Department of Education**
Respondent:	**Julie Smith**
Date of Decision:	**18 October 2019**
Citation:	**[2019] NSWWCCMA 147**

Appeal Panel:	
Arbitrator:	**Catherine McDonald**
Approved Medical Specialist:	**Dr David Crocker**
Approved Medical Specialist:	**Dr Roger Pillemer**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 11 July 2019 the Secretary, Department of Education (the Department) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Jonathan Negus, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 14 June 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, being that in s 327(3)(d). The Appeal Panel has conducted a review of the original medical assessment but limited to the ground of appeal on which the appeal is made.

4. The Workers compensation medical dispute 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 Workers compensation medical dispute assessment guidelines.

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

RELEVANT FACTUAL BACKGROUND

6. Ms Smith is a teacher. She suffered an injury to her neck picking up books on 8 December 1986. In October 1987, Dr J Bosanquet undertook an anterior discectomy and fusion at C6/7. She told the AMS that after that surgery she had a complete recovery of symptoms though, in the years following, she had occasional neck and arm pain if she carried anything beyond her capacity.

7. In 2005, Ms Smith moved to a new school campus and did a lot of lifting and carrying. Soon afterward she lost power and control in her right hand. After rest her function returned. When she lost power in her right hand again, she was referred to Dr B Owler, neurosurgeon, on an urgent basis.

8. On 29 July 2008, Dr Owler undertook a right C6/7 and C7/T1 posterior lamino-forminotomy with rhizolysis of C7 and C8.

9. On 13 February 2009, Dr Owler undertook a re-exploration of the right C7/T1 lamino-forminotomy and rhizolysis of C8.

10. At the time of the examination by the AMS, Ms Smith had been working two days per week and was on long service leave.

11. On 9 April 2019 the parties entered into Consent Orders to facilitate referral to an AMS. The parties agreed that the AMS was to assess:

    a. the applicant's loss of the right arm and loss of the left arm resulting from the injury on 8 December 1986 (for the purpose of the applicant's claim for compensation under s16 of the 1926 Act);

    b. the degree of the applicant's permanent impairment resulting from the applicant's injury on 17 October 2018 to her neck.

12. The applicant made a claim for compensation on 17 October 2018 in respect of permanent impairment arising from a disease injury. Pursuant to s 16 of the *Workers Compensation Act 1987* (the 1987 Act), the deemed date of injury was the date of the claim for permanent impairment compensation, confirmed by the Court of Appeal in *Stone v Stannard Brothers Launch Services Pty Ltd (Stone)*.[1]

13. The AMS assessed 30% loss of use of the right arm as a result of the neck injury in 1986. He assessed 32% permanent impairment in respect of the injury to her cervical spine deemed to have been suffered on 17 October 2018. He did not make any deduction under s 323 of the 1998 Act. He allowed 1% for scarring under the TEMSKI.

PRELIMINARY REVIEW

14. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.

15. 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 because there is sufficient information in the file to deal with the appeal.

EVIDENCE

16. 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.

17. 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.

[1] [2004]NSWCA 277; (2004) DDCR 701.

SUBMISSIONS

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

19. In summary, the Department submitted that a deductible under s 323 of the 1998 Act must be applied to the assessment of Ms Smith's cervical spine injury because of the injury in 1986 and surgery in 1987. The Department noted that s 323(1) says:

> "In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality."

20. The Department noted that the deduction is to be applied in respect of any previous injury, regardless of whether compensation is payable under the 1987 Act. It referred to *Cole v Wenaline Pty Ltd*[2] (*Cole*) to argue that if a pre-existing condition contributes to permanent impairment, a decision [sic] is required even if the condition was asymptomatic before the injury. The AMS assessed permanent impairment of the right arm which was a result of the cervical spine injury on 8 December 1986 so that a deduction was required.

21. The Department noted that Dr M Davies, who examined Ms Smith on its behalf, attributed one half of Ms Smith's condition to the injury in December 1986 and half to the nature and conditions of her employment after 2002. It relied on *Wentworth Community Housing Limited v Brennan*[3] and said that given the significance of the deductible applied by Dr Davies, it cannot be assumed that the AMS had read his report, resulting in error.

22. The Department referred to Dr Bodel's report dated 1 April 2019 and said that the assessment in DRE cervical category III indicated that he considered that a significant portion of the permanent impairment suffered by Ms Smith was caused by the 1986 injury. The AMS said that he agreed with Dr Bodel but the Department argued that he has failed to properly consider his report.

23. The Department argued that the correct assessment was in DRE cervical category IV and that the combination of the relevant values led to an assessment of 32% WPI and that a deduction of 50% in respect of the 1986 injury should be applied.

24. The Department said that only the scarring from the posterior surgery should be considered but conceded that the scarring from that surgery would be likely to be assessed at 1% WPI. It said that the assessment should comprise:

    (a) 30% loss of use of the right arm as a result of the injury in 1986;

    (b) 16% WPI as a result of the injury as a result of the nature and conditions of employment including a 50% deductible, and

    (c) 1% WPI as a result of scarring from the posterior surgery.

25. In reply, Ms Smith, through her counsel Mr Levick, conceded that the failure to make a deduction in respect of the 1986 injury from the assessment of WPI was a demonstrable error. Mr Levick argued that the fact that the pre-existing condition was asymptomatic was a relevant consideration, citing *Cole*.

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[2] [2010] NSWSC 78.
[3] [2019] NSWSC 152

26. Mr Levick submitted that Dr Bodel had carefully analysed the contribution from the post-1987 injury and subsequent surgery. Initially, Dr Bodel had assessed 31% WPI, including 1% for scarring. In his further report, he assessed 23% WPI including 1% for scarring. The effect of that reassessment was to apply a "notional deductible proportion of 26.5%" to the overall impairment rating for the cervical spine of 30% so that a deduction of 25% was consistent with the reasoning of Dr Bodel and consistent with Ms Smith's evidence about the success of the first surgery.

27. Ms Smith conceded that the appeal should be allowed and the assessment should comprise:

    (a) 30% loss of use of the right arm as a result of the injury in 1986;

    (b) 24% WPI as a result of the injury as a result of the aggravation of disease with a deemed date of 17 October 2018, and

    (c) 1% WPI as a result of scarring from the surgery resulting from the disease injury.

FINDINGS AND REASONS

28. 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.

29. In *Campbelltown City Council v Vegan*[4] 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.

The MAC

30. The AMS recorded a history of the injury on 8 December 2016 as a result of which Ms Smith underwent:

> "a C6/7 ACDF by Dr Bosanquet after which she had a complete recovery of symptoms and went back to normal duties 6 weeks later.
>
> In the intervening years, she has had occasional arm and neck pain if lifting or carrying anything beyond her capability. She had occasional physio but did not pay much attention to these minor issues."

31. The AMS set out the onset of bad headache and shoulder blade pain after the move to a new school campus in 2005. During the Christmas holidays, Ms Smith lost all power and control in her right hand. Those functions returned after rest. By the end of the following year, after long periods using a computer, Ms Smith suffered extreme pain. When she again lost control of her right hand, Ms Smith was referred to Dr Owler on an urgent basis. The AMS summarised her treatment:

> "When her right hand lost all power again, she was referred to a Physiotherapist by her GP who then recommended that she see Dr Owler urgently. She saw him 2 days later and he admitted her to hospital on the next day, on 29/07/2008, to perform nerve conduction studies and an EMG confirming 2 level nerve compression so he undertook a right C6/7 and a C7/T1 posterior lamino-foraminotomy with rhizolysis of C7 and C8. This relieved the pain while in hospital but she did not fully recover the use of the right

[4] [2006] NSWCA 284.

hand and so she went back to see Dr Owler who on 13/02/2009 undertook a re-exploration of the right C7/T1 laminoforaminotomy and rhizolysis of C8.

She had some resolution of her loss of motor skills but not a full recovery. She had gone back to work 5 days a week but was in pain at the end of the day and at the end of the week and had to spend a lot of time lying down outside of work, so she reduced her hours and it seemed to settle. She has found herself now on 2 days a week which manages her symptoms well. She is currently on long service leave."

32. The AMS summarised Ms Smith's injuries and his diagnoses:

> "Julie Smith is a 63 year old lady who suffered an injury to her cervical spine on 08/12/1986 while working for the Department of Education. She underwent surgery in October of 1987 with fusion of C6/7 which resolved her symptoms entirely.
>
> In 2005, she underwent a further injury which led to her requiring further surgery to decompress C6/7 and C7/T1 which was initially completed on 29/07/2008 and then a re-exploration on 13/02/2009 to relieve pressure on the C7/C8 nerves.
>
> She has been left with radicular symptoms and signs of her right arm as well as reduced power and function of her right upper limb affecting her ADLs and her work."

33. The AMS assessed 30% loss of use of the right arm and 0% loss of use of the left arm as a result of the injury on 8 December 1986, which he said was assessed under the Table of Disabilities. He set out his assessment in respect of whole person impairment deemed to have been suffered on 17 December 2018:

> "DRE — Table 15-3
> • DRE IV — Spinal fusion surgery — 25%
>
> Table 4.2: Modifiers for DRE categories following surgery
> • Residual symptoms – Cervical -3%
> o Reduced sensation and motor on right in affected levels
> • Second and further levels – Cervical – 1% each level
> o Initial level - C6/7 fusion
> o Second level - C7/T1
> • Second operation – Cervical – 2%
> o 2 9/07/2008
> • Third and subsequent OT – Cervical – 1% each
> o 13/02/2009
>
> ADLs — Paragraphs 4.34 7 4.35 — Guidelines 4th edition
> • Restricted with usual household tasks restricted — 2%
>
> 25% (DRE) ADDED with 2% (ADLs) = 27%
> 3% (Radiculopathy) ADDED
> 1% (second level) ADDED
> 2% (second operation) ADDED
> 1% (third operation)
> 27% COMBINED with 7% = 32%
>
> Scarring TEMSKI 1% - she has 3 scars as described in my findings and I believe as 'best fit' 1% is warranted."

34. The AMS referred to Dr Bodel's report dated 1 April 2019 and said that he agreed with his opinion and conclusions except with respect to the left arm.

Medico-legal reports

35. In his first report dated 10 September 2018, Dr Bodel said that Ms Smith suffered an injury to her neck, being a rupture of the C6/7 disc with right arm brachialgia. From about 2004 onwards, she suffered recurrences associated with the nature and conditions of her employment which led to two further surgical procedures. He assessed 25% loss of efficient use of the right arm or greater part thereof under the *Workers Compensation Act 1926* (the1926 Act) and 5 % loss of efficient use of the left arm. He assessed 30% WPI with respect to Ms Smith's cervical spine and added 1% for scarring under the TEMSKI. He said there was no deduction for pre-existing impairment

36. In his report dated 1 April 2019, Dr Bodel acknowledged that his first report had incorrectly assessed the level of impairment and that

> "The rating that should apply therefore is only for the effect of the nature and conditions of this lady's work subsequently which led to the further two surgical procedures which are two posterior decompressive laminectomies and foraminotomies, but do not include the previous fusion."

37. Dr Bodel then assessed Ms Smith's impairment without regard to the 1986 injury and surgery so that he assessed her in DRE cervical category III and included a rating in respect of two surgical procedures only. He said:

> "If I now address the issues that you have raised, the first is that you have enquired as to why there is 'no deduction for pre-existing impairment'. I have, I believe, covered that issue now in that in this circumstance, the pre-existing fusion at the C6/7 level is not a compensable matter. The date of injury, 08 December 1986, cannot attract a rating of Whole Person Impairment because it predates 01 July 1987. The new existence of that fusion therefore is not something that can be taken into consideration in the overall level of Whole Person Impairment assessment.
>
> The pathology at the C5/6 level and at the C6/7 level which required the two further surgical procedures have arisen as a consequence of the nature and conditions of work in the environment of a pre-existing fusion at that level."

38. By arguing that Dr Bodel has accepted a "notional deductible proportion" Mr Levick's submissions accept that Dr Bodel's method of assessment is incorrect.

39. Dr Davies assessed Ms Smith on behalf of the Department and prepared a report dated 26 July 2010. He said:

> "Ms Smith's current condition relates both to the work incident that occurred in 1986 and also to the nature and conditions of her employment, particularly after 2004. Her duties after 2004 caused an aggravation of her earlier work injury and also aggravated the degenerative changes that had developed secondary to that injury."

40. Dr Davies assessed 32% WPI. Without giving detailed reasons, he said:

> "I would attribute one-half of this to the injury in 1986 and the nature and conditions of her employment between that injury and January 2002 and the remaining half to the nature and conditions of her employment after January 2002."

Statement and treating doctors' reports

41. Ms Smith said in her statement[5]:

> "Between October 1987 up until 1999 I considered my spinal fusion to be successful, suffering only periodic pain as a result of actions that aggravated my neck including among other things, long hours at the computer, marking work and carrying crates of textbooks.
> In 1999, I moved into a new purpose-built school, this required teaching staff including myself to order, take delivery and unpack all the resources required to run a senior campus college for 800+ students.
>
> During this time, the nature of my work caused aggravation to my neck."

42. Ms Smith described the contribution of subsequent work events to her injury. Her statement is consistent with the histories provided to the AMS and other doctors.

43. Dr Owler described his first consultation with Ms Smith in his report dated 28 July 2008. He noted that Ms Smith had a "two and a half week history of severe right upper limb pain" and said:

> "The background is that of an anterior cervical discectomy and fusion in 1997 [sic]. Surgery went well and she made a good recovery. She occasionally has right upper limb pain from time to time but it normally settles spontaneously."

44. Dr Owler referred Ms Smith to Dr N Mahant for nerve conduction studies. Dr Mahant said in his report dated 29 July 2008:

> "She has had intermittent symptoms over the last two and a half years but nowhere near as severe as the recent problem."

Section 323 deduction

45. The parties agreed that Ms Smith suffered two separate injuries – an injury in 1986 and an injury as a result of her employment after 2002, being the aggravation of a disease.

46. The AMS was required to assess any loss of use of Ms Smith's right and left arms resulting from injury before 1 January 2002 under s 16 of the 1926 Act.[6] No compensation was payable under the 1926 Act in respect of a neck injury but the loss to Ms Smith's arms was suffered as a result of the 1986 injury to her neck – she did not suffer any injury to her right or left arms. The AMS made an assessment which is not the subject of appeal by either party and the assessment need not be further considered.

47. Because the parties agreed that Ms Smith suffered two injuries, the AMS was required to consider a deduction under s 323 of the 1998 Act. Ms Smith conceded that the AMS was in error not to allow a deduction under s 323 in respect of the 1986 injury. The dispute between the parties is as to the extent of the deduction.

48. The AMS was alerted to the need to consider a deduction by the reference to two injuries in the referral, by the report of Dr Davies, by the second report of Dr Bodel to which he specifically referred and by Question (e) under the heading Evaluation of Permanent Impairment in the MAC form. The AMS was in error not to consider and make a deduction under s 323.

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[5] At [14]-[16]
[6] 1987 Act, Schedule 6 Part 6 clause 4.

49. Section 323(1) provides:

> "In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality."

50. In *Cole*, Schmidt J said:

> "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." [7]

And

> "What s 323 required, however, was that the evidence be considered, so that it could be determined, firstly, what the level of impairment after the second injury was. Secondly, whether a proportion of that impairment was due to the first injury. Thirdly, what that proportion was. Undoubtedly in undertaking this exercise, the medical members of an Appeal Panel must utilise their medical judgement, knowledge and experience. Nevertheless, all stages of the statutory exercise must be undertaken in the light of the evidence and without the making of assumptions not provided for by the section."[8]

51. The AMS was required to assess Ms Smith as she presented on the day of the examination and to make an assessment of permanent impairment. He made that assessment in accordance with the Guidelines. He was then required to make a deduction in respect of the impairment suffered as a result of the 1986 injury.

52. The method of assessment by Dr Bodel in his 1 April 2019 report is incorrect, in that he made an assessment excluding the effects of the 1986 injury rather than making a deduction for them.

53. Ms Smith regarded the surgery in 1987 as successful and she was able to work without restriction until about 2005. That is supported by the contemporaneous reports at the time of the onset of severe pain in 2008. She had intermittent problems but not a complete recovery.

54. As a result of the work she was required to do from 2002 in setting up a new school campus, undertaking fundraising activities and sitting for long periods at a computer, she suffered a further injury being the aggravation of a disease. The 1986 injury contributes to her overall impairment. Dr Davies' assessment of a 50% contribution is at odds with her history. The Panel determines that a deduction of one quarter is appropriate to reflect the contribution of the 1986 injury.

[7] At [30].
[8] At [38].

55. For these reasons, the Appeal Panel has determined that the MAC issued on 14 June 2019 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **619/19**
Applicant: **Julie Smith**
Respondent: **Secretary, Department of Education**

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 [insert name of Doctor] and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - Whole Person Impairment (WPI)

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in the Guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA 5 Guides**	**% WPI**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Sub-total/s % WPI (after any deductions in column 6)**
1.Cervical spine	17 October 2018	Chapter 4, pp 24-30, Table 4.2	Table 15-3	32%	¼	24%
2. TEMSKI	17 October 2018	Chapter 14 pp 73-76, Table 14.1		1%		1%
Total % WPI (the Combined Table values of all sub-totals)					**25%**	

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

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received before 1 January 2002

Matter Number: **619/19**
Applicant: **Julie Smith**
Respondent: **Secretary, Department of Education**

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 [insert name of Doctor] and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

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

Body Part (describe the body part as per Table of Disabilities) e.g. right leg at or above the knee	**Date of injury**	**Total amount of permanent % loss of efficient use or impairment**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Total permanent % loss of efficient use or impairment attributable to this injury** (after deduction of any pre-existing impairment in column 4.)
Right arm	8 December 1986	30%	0	30%
Left arm	8 December 1986	0%	0	0%

Catherine McDonald
Arbitrator

Dr David Crocker
Approved Medical Specialist

Dr Roger Pillemer
Approved Medical Specialist

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar