WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-2405/19**
Appellant:	**Briben Group Pty Ltd atf Briben Unit Trust**
Respondent:	**Martiza Valdivia Chavez**
Date of Decision:	**4 November 2019**
Citation:	**[2019] NSWWCCMA 158**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr James Bodel**
Approved Medical Specialist:	**Dr Mark Burns**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 17 July 2019 Briben Group Pty Ltd (the appellant**)** lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr David Crocker, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 5 July 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 grounds of appeal on which the appeal is made.

4. The WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the WorkCover Medical Assessment Guidelines.

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

RELEVANT FACTUAL BACKGROUND

6. On 8 June 2015 Martiza Chavez (Mrs Chavez/the respondent) suffered the onset of pain in her lower back when she was lifting a bucket from the floor to a sink in the course of her employment with the appellant. The bucket and its contents were estimated as weighing at least 20 kg.

7. Mrs Chavez was taken to St George Hospital where she was provided with pain relief. An MRI examination was carried out on 10 June 2015 and Mrs Chavez was referred to a neurosurgeon, Dr Saeed Kohan, who recommended a cortisone injection. The injection did not significantly reduce the pain. Further conservative measures did not relieve the symptoms and in July 2016 Mrs Chavez underwent an L5/S1 decompression with microdiscectomy performed by Dr Kohan. The operation provided relief for some months but her symptoms returned.

8. A CT guided injection in relation to the right L5/S1 facet joint on 9 August 2017 provided short-term pain relief.

9. On 26 March 2018 Dr Kohan performed a right S1 rhizolysis at St George Private Hospital with some symptomatic relief.

10. On 14 March 2019 Mrs Chavez was examined by Dr Pillemer, orthopaedic surgeon, at the request of Mrs Chavez's solicitors for the purpose of assessing whole person impairment WPI. Dr Kohan assessed Mrs Chavez as within DRE Lumbar Category III, warranting an assessment of 10% WPI. Dr Pillemer added 2% for interference with activities of daily living and 5% in respect of residual radiculopathy following surgery to yield a final total of 16% WPI. Dr Pillemer made no deduction for any pre-existing condition.

11. Mrs Chavez's solicitors made a claim for lump-sum compensation based on the report of Dr Pillemer. The insurer arranged for Mrs Chavez to be examined by Dr Lloyd Hughes, orthopaedic surgeon, who examined Mrs Chavez on 9 April 2019. Dr Hughes noted the history of injury. He also recorded that the Commission had issued a Certificate of Determination recording that Mrs Chavez had suffered an injury on 8 June 2015 which consisted of the aggravation of degenerative changes in the lumbar spine. He felt that the current diagnosis was one of degenerative disc disease of the lumbar spine with any aggravation having resolved.

12. Dr Hughes assessed Mrs Chavez as falling within DR E Lumbar Category III and assessed 16% WPI. His reasoning was similar to that of Dr Pillemer with respect to the assessment of lumbar spine impairment. Although he was of the opinion that any aggravation resulting from the work injury had resolved, he suggested that one half of his assessment should be deducted in respect of a pre-existing condition of degenerative disc disease.

13. In reliance on Dr Hughes' report and assessment, the appellant disputed the extent of impairment.

14. An Application to Resolve a Dispute was filed in the Commission seeking lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) resulting from injury to the lumbar spine on 8 June 2015. The appellant filed a Reply disputing the extent of impairment and the entitlement to lump-sum compensation.

15. The medical dispute was referred to an AMS, Dr David Crocker, who examined Mrs Chavez on 24 June 2019. The AMS assessed Mrs Chavez as falling within DRE Lumbar Category III and assessed 16% WPI. The AMS made no deduction for previous injury, pre-existing condition or abnormality.

PRELIMINARY REVIEW

16. 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.

17. 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 was sufficient evidence by way of medical reports, statements and clinical investigations to enable a determination to be made.

Fresh evidence

18. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.

19. The appellant seeks to admit the Certificate of Determination dated 1 March 2016 in proceedings between the present parties together with the statement of reasons.

20. The appellant submits that the evidence is relevant to establish that the injury which was the subject of the referral was an injury within s 4(b)(ii) of the 1987 Act. The appellant submits that the evidence was not included in the Reply filed on behalf of the appellant in the proceedings because "it was deemed at the time of the ARD reply that the submitted evidence was sufficient. The submission of the above is relevant to further support the existence of pre-existing condition/contributory impairment."

21. The respondent does not directly oppose the introduction of that material but notes that:

> "This document merely serves to confirm that the worker was in fact injured on 8 June 2015 and goes on to describe the nature of the injury as one 'which consisted in the aggravation of degenerative changes in the lumbar spine'.
>
> It is conceded that this is a relevant finding of injury made by the Arbitrator, nevertheless it is open to the AMS to determine on the question of causation to what extent there has been any disturbance of the L5/S1 and L4/5 discs as a result of this aggravation."

22. The Appeal Panel determines that the Certificate of Determination and reasons should not be received on the appeal because the material was available to the parties prior to the medical assessment and therefore cannot come within s 328(3) of the 1998 Act.

23. The Appeal Panel notes that the respondent agrees that the injury which was referred was by way of an aggravation of a pre-existing degenerative condition.

EVIDENCE

Documentary evidence

24. 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

25. The AMS assessed lumbar spine WPI:

> "It is evident that decompressive surgery has been required. This equates with a DRE category III rating i.e. 10-13% WPI. When taking into account limitations with respect to activities of daily living, I consider that a base determination of 12% is appropriate.
>
> It is considered that residual radiculopathy is present. The criteria contained in the NSW Workers Compensation Guidelines need to be taken into account in this respect (Chapter 4, 4.27, page 27). It is considered that the following two criteria are met:
>
> - Reproducible impairment of sensation that is anatomically localised to an appropriate spinal nerve root distribution (major criterion).
>
> - Findings on imaging study consistent with the clinical signs (minor criterion).

The guidelines indicate that two or more criteria need to be satisfied with at least one of these being a major criterion. As such, the criteria are appropriately met.

When surgery has been required, 4.37, Table 4.2, page 29 of the NSW Workers Compensation Guidelines needs to be taken into account. When there is residual radiculopathy 3% WPI is accrued. When a second operation has been undertaken, a 2% WPI applies.

The 3% and 2% need to be added which gives 5%. This is then combined with the findings of 12% this calculation equates with a 16% WPI."

26. With respect to deduction pursuant to s 323 of the 1998 Act the AMS reported: "It is my opinion that there is no evidence of contributory impairment that needs to be taken into account by way of any deductions."

27. The AMS noted that Dr Pillemer and Dr Hughes had both assessed 16% WPI. The AMS noted that Dr Hughes had assessed a 50% deduction in respect of pre-existing degenerative changes.

28. Under the heading "Deduction (if any) for the proportion of the impairment that is due to previous injury or pre-existing condition or abnormality" the AMS reported: "It has been indicated that it is my opinion that there is no evidence of contributory impairment that needs to be taken into account by way of any deductions."

SUBMISSIONS

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

30. In summary, the appellant submits that the AMS fell into demonstrable error in deciding that there was "nil evidence of contributory impairment". The appellant pointed to evidence of the existence of pre-existing degenerative changes prior to the injury identified as an aggravation of those changes. There was evidence in the form of the opinion of Dr Hughes that the pre-existing pre-existing changes contributed to the impairment.

31. In reply, the respondent submits that it was open to the AMS on the evidence to conclude that there was no evidence of contributory impairment.

FINDINGS AND REASONS

32. 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.

33. In *Campbelltown City Council v Vegan*[1] 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.

34. The appellant noted that Dr Hughes in his report dated 17 April 2019 had summarised the radiological reports and had come to the conclusion that a 50% deduction should be made, taking into account pre-existing degenerative changes.

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[1] [2006] NSWCA 284

35. The respondent conceded that the Arbitrator has determined that the injury "consisted in the aggravation of degenerative changes in her [Mrs Chavez's] lumbar spine". The respondent submitted "it is open to the AMS to determine on the question of causation to what extent there has been any disturbance of the L5/S1 and L4/5 discs as a result of this aggravation."

36. The respondent submitted that "there is no evidence to support a deduction by reason of any pre-existing lumbar degeneration."

37. The respondent noted that the opinion of the AMS was supported by the opinion of Dr Pillemer in his report dated 14 March 2019 "who took no history of any prior impairment", noting that Mrs Chavez "had none of the above problems prior to injury on 8 June 2015".

38. The respondent noted that the AMS had recorded that:

> "radiological investigation had demonstrated the presence of an L5/S1 disc protrusion with compromise of the right S1 nerve root. The disc bulge had also been evident at the L4/5 level. Ms [sic] Chavez has required two surgical interventions and injection procedures in relation to the above. It is evident that residual radiculopathy is present, in particular a right S1 sensory radiculopathy."

39. The respondent submitted that Mrs Chavez had no impairment to the lumbar spine prior to the present injury which was contributing to the current impairment. The respondent submitted "she been working full-time with the employer since 2013 and all prior jobs involved physical work."

40. The respondent submitted:

> "It is generally accepted that the approach to section 323 WIM [the 1998 Act] is that set out in *Cole v Wenaline Pty Ltd*[2] *(Cole)*:
>
>> 'The assessment of the extent to which a prior injury or pre-existing condition contributes to impairment must be based on evidence relevant to the likely effects of that condition or injury to the worker's present impairment. In a deduction under section 323 (1) for the proportion of impairment due to prior factors must be based on evidence and not hypothesis or assumption" (emphasis in the submission)'." (Emphasis added by respondent

41. Although this appears to be a summary of Schmidt J's words in *Cole* rather than a quote, the Panel accepts that this is the appropriate approach to be adopted with regard to s 323.

42. Schmidt J said in Cole:

> "[29]….The section is directed to a situation where there is a pre-existing injury, pre-existing condition or abnormality. For a deduction to be made from what has been assessed to have been the level of impairment which resulted from the later injury in question, a conclusion is required, on the evidence, that the pre-existing injury, pre-existing condition or abnormality caused or contributed to that impairment.
>
> [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

[2] [2010] NSWSC 78

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."

43. The respondent pointed to the apparent contradiction in the opinion of Dr Hughes who regarded any consequences of the aggravation injury to have ceased but who nevertheless attributed 50% of the assessed impairment to that aggravation.

44. The Panel accepts that in concluding that "there is no evidence to support a deduction by reason of any pre-existing lumbar degeneration" the AMS fell into error. The conclusion that there was no evidence to support a deduction by reason of any pre-existing lumbar degeneration was not open on the evidence.

45. In *Vitaz v Westform (NSW) Pty Ltd*[3], Basten JA said (at [43]) (McColl JA and Handley AJA agreeing):

> "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. In the absence of any medical evidence establishing a contest as to whether the pre-existing condition did contribute to the level of impairment, the complaint about a failure to give reasons must fail. An approved medical specialist is entitled to reach conclusions, no doubt partly on an intuitive basis, and no reasons are required in circumstances where the alternative conclusion is not presented by the evidence and is not shown to be necessarily available."

46. In the present case the report of Dr Hughes together with the report of the MRI scan on 10 June 2015 and the reports of the treating neurosurgeon, Dr Kohan, fairly raised the issue of whether the pre-existing condition contributed to the assessed level of impairment.

47. The treating neurosurgeon, Dr Kohan, in his report dated 11 June 2015, noted the sudden onset of a sharp stabbing pain in Mrs Chavez's lower lumbar region. He noted the MRI scan as showing the presence of "broad-based disc bulge at L5/S1 with no acute component." He commented; "However, there is a lateral recess stenosis and entrapment of the S1 nerve root bilaterally but particularly on the right side." His diagnosis was; "right S1 radiculopathy secondary to lateral recess stenosis with combination of broad-based disc bulge and facet hypertrophy".

48. Dr Kohan reported: "Fortunately there is no acute disc disruption or herniation, however, she does have broad-based disc bulge and lateral recess stenosis which is likely to have been aggravated by her activities on Monday."

49. The MRI dated 10 June 2015 in evidence report relevantly details:

> "A degenerative spondylosis at L4 and L5/S1.
>
> The L5/S1 disc is desiccated and has a mild diffuse posterior bulge, annulus tear/fissure. It leads to narrowing of both sub articular recesses in combination with flaval hypertrophy, with the potential to cause mild irritation/impingement on the S1 nerve roots in the recesses. There is also mild narrowing of the dural sac. No significant foramen stenosis. Some sclerosis seen in the pars regions L5 but no definite open pars defect is seen. Both facet joints at this level show mild OA.

[3] [2011] NSWCA 254 (*Vitaz*)

> At L4/5 disc signal and height is well-maintained. There is flaval hypertrophy contributing to a mild degree of recess narrowing bilaterally with some potential for minimal/minor irritation of the L5 nerve is in the recesses. Neither foramen significantly narrowed.
>
> Minimal/minor bulge of the disc at L3/4, no central stenosis and no foramen stenosis. No significant disc changes at L1/L2, L2/L3. An osseous haemangioma in the L2 vertebra."

50. The AMS reported at paragraph 6 (Details and Dates of Special Investigations): "Earlier in the certificate has been outlined the radiological investigations available for inspection. Based upon review of these where the report is available, I am generally in agreement with the radiologist's comments."

51. The report of the MRI examination was made two days after the onset of symptoms on 8 June 2015. It clearly establishes the presence of a pre-existing degenerative condition in the lumbar spine. The report of the independent medical expert, Dr Hughes, provided expert opinion that the pre-existing condition contributed to the overall impairment assessed at examination.

52. The diagnosis reported by Dr Kohan included the effect of degenerative changes including facet hypertrophy. That diagnosis and the report of the MRI scan gave some measure of support to the opinion of Dr Hughes.

53. It was open to the AMS to give no weight to the opinion of Dr Hughes or to disagree with it, but it was incorrect to say that there was no evidence to support a deduction by reason of any pre-existing lumbar degeneration. The weight to be given to that evidence was a different matter and required consideration by the AMS.

54. For this reason, the Panel accepts that ground of demonstrable error has been made out because it was not open on the whole of the evidence for the AMS to conclude that there was no evidence to support a deduction by reason of any pre-existing lumbar degeneration.

55. The AMS reached a conclusion with respect to the overall level of impairment upon examination that Mrs Chavez suffered 16% WPI as a result of injury to the lumbar spine on 8 June 2015. That conclusion is supported by the clinical findings and symptoms noted upon examination and is supported by the opinions of Dr Pillemer and Dr Hughes. Neither party disputed that assessment.

56. The Panel accepts that the evidence establishes that level of impairment. It is then necessary to review the evidence to determine whether a deduction is required pursuant to s 323 (1) of the 1998 Act.

57. Section 323 of the 1998 Act provides:

> "323 DEDUCTION FOR PREVIOUS INJURY OR PRE-EXISTING CONDITION OR ABNORMALITY
>
> (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.
>
> (2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.

Note: So, if the degree of permanent impairment is assessed as 30% and subsection (2) operates to require a 10% reduction in that impairment to be assumed, the degree of permanent impairment is reduced from 30% to 27% (a reduction of 10%).

(3) The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter.

(4) The Workers Compensation Guidelines may make provision for or with respect to the determination of the deduction required by this section."

58. The Panel is satisfied on the basis of the report of the MRI scan dated 10 June 2015 and the reports of Dr Kohan that Mrs Chavez, immediately prior to the subject injury, had developed significant pathology in the lumbar spine, particularly at the L4/5 and L5/S1 levels. The nature of the pathology is described in the MRI report.

59. The Panel is satisfied that the significance of the pathology present prior to the subject injury goes beyond merely predisposing Mrs Chavez to injury but was of such a degree so as to impair the capacity of the lumbar spine to withstand stress and/or strain imposed upon it, notwithstanding that the pathology was asymptomatic. The displacement of the L4/5 and L5/S1 discs is attributable both to the pre-existing degenerative condition and the subject injury.

60. Mrs Chavez was correctly assessed as falling within DRE Lumbar Category III. Her overall assessment takes into account the two surgical procedures performed to alleviate the symptoms arising from the lumbar pathology.

61. The requirement for that surgery is directly related to the onset of symptoms as a result of the subject injury but that onset of symptoms is also partially attributable to the pre-existing pathology in the lumbar spine as disclosed in the report of the MRI scan.

62. In that respect, the pre-existing condition was a "contributing factor causing the assessed permanent impairment" (*Vitaz*) and the extent of that contribution has to be assessed.

63. The Panel notes the opinion of Dr Pillemer with regard to the deduction pursuant to s 323 but is of the opinion that the pre-existing pathology did contribute to the overall level of impairment assessed.

64. It is not easy to see how Dr Hughes arrived at his conclusion that one half of the impairment was due to the pre-existing condition when he was of the opinion that any effects of the subject injury had ceased. The assessment of 50% is excessive having regard to the ability of Mrs Chavez to perform reasonably arduous duties up to the date of the subject injury and the absence of symptoms up to that time.

65. The extent of the appropriate deduction is difficult to determine in the understandable absence of imaging prior to the subject injury, the pathology being asymptomatic. A deduction of 10% is appropriate having regard to the significant role of the lifting/twisting injury that led to the onset of symptoms.

66. For these reasons, the Appeal Panel has determined that the MAC issued on 5 July 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*.

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: **2405/19**
Applicant: **Martiza Valdivia Chavez**
Respondent: **Briben Group Pty Ltd atf Briben Unit Trust**

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 WorkCover Guides	Chapter, page, paragraph, figure and table numbers in AMA 5 Guides	% WPI	Proportion of permanent impairment due to pre-existing injury, abnormality or condition	Sub-total/s % WPI (after any deductions in column 6)
1. Lumbar spine	8/06/2015	Chapter 4, 4.27, 4.37, Table 4.2, Pp 24-30	Chapter 15, 15.4, Table 15-3, pp 384-388	16%	1/10	14% (after rounding)
Total % WPI (the Combined Table values of all sub-totals)					**14%**	

Mr William Dalley
Arbitrator

Dr James Bodel
Approved Medical Specialist

Dr Mark Burns
Approved Medical Specialist

4 November 2019

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

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar