# WORKERS COMPENSATION COMMISSION

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

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| **Matter Number:** | **M1-3174/19** |
| **Appellant:** | **Nicholas Savage** |
| **Respondent:** | **That's Power Pty Ltd t/as Powertruss** |
| **Date of Decision:** | **26 November 2019** |
| **Citation:** | **[2019] NSWWCCMA 174** |

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| **Appeal Panel:** | |
| **Arbitrator:** | **Ross Bell** |
| **Approved Medical Specialist:** | **Dr Margaret Gibson** |
| **Approved Medical Specialist:** | **Dr Mark Burns** |

### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 September 2019 Nicholas Savage lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Robert Ivers, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 6 August 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 respondent also submits that the MAC contains a demonstrable error.

4. 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.

5. 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.

6. 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

7. It is convenient to extract the history reported by the AMS at Part 4 of the MAC,

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:

> [Mr] Savage told me that on 5 June 2017, he was at work installing a roof truss along with a colleague. He was using an Acrow prop to jack up some loaded trusses. He and his companion were using an extension bar in order to rotate the Jack. Whilst pulling on the bar Mr Savage experienced 'sharp' pain extending into the posterior aspect of both legs. He was able to continue working, though mainly performing lighter duties. He went home and tried to work the following day though there was persisting pain. He presented to the Manning Base Taree Hospital and was given pain medication and placed off work for a few days. He was subsequently reviewed by his local GP and underwent some scans including an MRI examination. He was conscious of persisting back and left leg pain.
>
> He was referred back to his spinal surgeon, Dr Edgar, neurosurgeon, in August 2017 and underwent some CT nerve root injections. On 5 October 2017 he underwent surgery in the form of a laminectomy discectomy, again targeting the L4/5 level. (There was an episode of post-operative cellulitis which settled).
>
> Following the operation, he underwent physiotherapy and his back pain improved though he had persisting leg pain. He tried work placement and restructured his duties for about 6 months, without success. He has continued physiotherapy and acupuncture. He has undergone two epidural steroid injections, to no avail. He has no further appointment to see his surgeon. He is under the care of his local GP."

## PRELIMINARY REVIEW

8. 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.

9. 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 for the reasons given below.

## EVIDENCE

### Documentary evidence

10. 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

11. The parts of the medical certificate given by the AMS are set out, where relevant, in the body of this decision.

## SUBMISSIONS

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

### Appellant

13. In summary, the appellant submits that the AMS has erred in applying a deduction to the assessment under s 323 of the 1998 Act. The AMS has applied an "apportionment" which is not a valid process on the authority of *Cole v Wenaline Pty Ltd* (2010) NSWSC 78.

14. There is no evidence for a deduction under s 323 of the 1989 Act, and the AMS has not satisfied the authority of *Fire & Rescue NSW v Clinen* [2013] NSWSC 629 because he has not explained how a previous injury or condition contributes to the current impairment.

15. Mr Savage was working and pain free before the injury. There should be no deduction, or at most a deduction of 1/10.

**Respondent**

16. The respondent also submits that the AMS did in fact fall into error in applying s 323 of the 1998 Act. The Panel should make its own assessment of the proper deduction.

17. A deductible proportion should be applied because the appellant was not symptom free before the subject injury. Dr Rowe applies a deduction of 1/2 and is the only medico-legal assessor to correctly address the issue.

18. Should the Panel make its own deduction this should be no less than 3/4 because of the pathology due to the previous injury and surgery at the same lumbar level

**Unrelated submissions for the respondent**

19. The respondent makes additional submissions that do not address the appellant's grounds of appeal, but purport to raise new issues and requesting the Panel consider making changes to the assessments of the AMS regarding the activities of daily living (ADLs); and TEMSKI scarring.

20. These submissions are not properly part of the Opposition to an appeal. They do not adhere to the Guideline of the Commission for lodging a medical appeal requiring the opposition to appeal to address the grounds of appeal as set out by the appellant.

21. Nevertheless, because the issues raised are easily dealt with and do not require the involvement of the appellant the Panel deals with them below.

**FINDINGS AND REASONS**

22. 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.

23. 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.

**Activities of daily living**

24. As to the submission made by the respondent as part of its Opposition, the Panel notes that the AMS took a history that Mr Savage's personal care has been affected, which is consistent with 3% Whole Person Impairment (WPI) according to the Guidelines. There is no merit to this point raised by the respondent, and had it been properly appealed would be destined to fail, because there is no error apparent.

**Scarring**

25. The respondent also raises an issue as to the scarring finding of 1% (TEMSKI) by the AMS, submitting that the scarring from the previous surgery in 2014 should be the basis of a deduction. The respondent points to no evidence to support such a deduction. The Panel notes that Dr Edger, in his 2017 surgery report saw internal scarring, but there is nothing about external scarring. Had this point been the subject of appeal it would not have been successful due to the absence of any error.

**Section 323 of the 1998 Act deduction**

26. The parties agree that the AMS has erred in making a deduction to the assessment of 10% WPI, explained as representing DRE Lumbar Category III following the surgery in 2014. The AMS explains,

> "I note the pre-existing condition affecting the lumbar spine and the requirement for surgery. I note that Mr Savage required surgery for radiculopathy but was asymptomatic leading up to the work injury which is being assessed. If the lumbar spine was assessed immediately before the work injury, the most appropriate method of assessment would be to utilise DRE lumbar category 3, which would provide 10% WPI. This implies that there was a 10% impairment of the spine prior to the work injury."

27. The above approach of "Apportionment" and deducting an assessment of WPI due to the previous surgery is not in accordance with s 323 which governs deductions for pre-existing elements in this jurisdiction, as discussed below. The Panel notes that s 323 requires a deduction to be expressed as a fraction representing the proportion of the impairment due to any pre-existing injury, condition or abnormality which contributes to the impairment. The approach of the AMS constitutes a demonstrable error on the face of the Certificate.

**Discussion and findings**

28. If a ground of appeal is successfully made out and an error identified, the Panel must correct the error or errors found "applying the WorkCover Guides fully" (see *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499).[1] The Panel is able to make the assessment and correct the error in regard to the deduction under s 323 without recourse to further examination of Mr Savage.

29. The Panel is satisfied that the impairment is permanent, and the injury has reached maximum medical improvement. There is no subsequent injury.

30. For a deduction to be properly made under s 323 there must be evidence that there is a pre-existing injury; condition; or abnormality and that this element contributes to the impairment[2] and "assumption will not suffice".[3]

31. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526 Campbell J explained the requirement (emphasis in original),

> "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 the *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 the pre-existing abnormality."

32. A pre-existing condition can be asymptomatic before the injury providing the evidence establishes that it existed before the injury and that it forms part of the impairment.[4]

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[1] See also *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792.
[2] *Cole v Wenaline Pty Ltd* (2010) NSWSC 78.
[3] *Fire & Rescue NSW v Clinen* [2013] NSWSC 629.
[4] *Vitaz v Westform (NSW) Pty Limited* [2011] NSWCA 25

33. The respondent submits that Dr Rowe's deduction of 1/2 should be accepted or, if not, a deduction of at least 3/4 applied by the Panel. Dr Rowe says,

> "Dr Bodel has made no deduction for pre existing impairment but in my view, this is not a sustainable finding in the presence of a marked and significant degenerative change in the lower back. Dr Bodel had stated that the previous surgery of the back is not contributing to his level of impairment, and whilst this may be true, there is in my view a considerable pre existing impairment from the underlying degenerative change for which he underwent such previous surgery."

34. Dr Rowe does not explain how he arrived at the deduction of 1/2 and the evidence does not allow that degree of accuracy in the Panel's view. There is evidence of degenerative change from an earlier injury requiring surgery in 2014, but Mr Savage was able to perform at a high level up to the time of the subject injury in June 2017. The AMS notes,

> "Mr Savage was involved in a motor vehicle accident in 2002 and sustained an injury to his back. He was conscious of back pain and left sciatica extending into the posterior aspect of the calf. He underwent surgery to his lumbar spine on 24 June 2014 by Dr M Edger. According to the operative notes, the target for the surgery was the L4/5 level. Mr Savage states that his back improved following the surgery such that he was pain-free leading up to the work injury in 2017. He states that he was able to play competition soccer and perform extensive motorbike riding, without difficulty."

35. Degenerative change and internal scarring from the 2014 surgery were noted by Dr Edger in his operation report of 4 October 2017 for the latest surgery. The Panel is satisfied that this is enough to establish that a proportion of the impairment is due to the pre-existing degenerative change.

36. Beyond this it is difficult to ascertain the extent of the contribution. There is no evidentiary basis for a deduction of 1/2, or 3/4, as submitted by the respondent. As noted by the AMS, Mr Savage was functioning well before the subject injury. The picture is too uncertain to establish a specific proportion.

37. In these circumstances s 323(2) should be considered. A deduction of 1/10 is not at odds with the evidence, and the Panel finds this deduction appropriate.

38. Applying a 1/10 deduction to the 17% WPI assessed by the AMS, which was not appealed, gives 15.3 rounded to 15% WPI for the lumbar spine as reflected in the Panel's new Certificate below

39. For these reasons, the Appeal Panel has determined that the MAC issued on 6 August 2019 is revoked. A new Certificate is provided below.

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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Lucy Golic
Dispute Services Officer
**As delegate of the Registrar**

# WORKERS COMPENSATION COMMISSION

## APPEAL PANEL
## MEDICAL ASSESSMENT CERTIFICATE

**Matter Number:** **3174/19**
**Appellant:** **Nicholas Savage**
**Respondent:** **That's Power Pty Ltd t/as Powertruss**

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 Robert Ivers 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 NSW Workers Compensation Guidelines** | **Chapter, page, paragraph, figure and table numbers in AMA5 Guides** | **% WPI** | **WPI deductions pursuant to s 323 for pre-existing injury, condition or abnormality** (expressed as a fraction) | **Sub-total/s % WPI** (after any deductions in column 6) |
|---|---|---|---|---|---|---|
| Lumbar spine | 05/06/2017 | Chapter 15 Page 24 | Page 384; Paragraph Table 4.27; 4.34; and 4.2 | 17 | 1/10 | 15.3 rounded to 15 |
| Scarring (TEMSKI) | 05.06.2107 | Table 14.1 | | 1 | n/a | 1 |
| **Total % WPI (the Combined Table values of all sub-totals)** | | | | | **16%** | |

**Ross Bell**
Arbitrator

**Dr Margaret Gibson**
Approved Medical Specialist

**Dr Mark Burns**
Approved Medical Specialist

26 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*.

L Golic

**Lucy Golic**
**Dispute Services Officer**
As delegate of the Registrar