WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-2330/19**
Appellant:	**Leanne Doreen Ross**
Respondent:	**State of New South Wales**
Date of Decision:	**16 December 2019**
Citation:	**[2019] NSWWCCMA 185**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr Richard Crane**
Approved Medical Specialist:	**Dr J Brian Stephenson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 11 October 2019 Leanne Doreen Ross lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Greggory Burrow, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 19 September 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 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).

PRELIMINARY REVIEW

6. 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.

7. 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 no request was made, and we consider that we have sufficient evidence to enable us to determine the appeal.

EVIDENCE

Documentary evidence

8. 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.

SUBMISSIONS

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

10. In summary, the appellant submits that the AMS erred in the manner in which he applied a deduction pursuant to section 323 of the 1998 Act because he considered causation and based on his findings on causation proceeded to make an additional deduction. Other errors in the assessment were also noted and will be dealt with more fully below.

11. In reply, the respondent submits that, although the approach adopted by the AMS was "somewhat unorthodox", it did not amount to an error.

FINDINGS AND REASONS

12. 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.

13. 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.

14. The AMS obtained the following history:

> "In May 2016, Ms Ross underwent left total knee replacement for arthritis with Dr Mamo, Orthopaedic Surgeon. She was off work for 5 months and returned to normal duties as a cleaner. In February 2017 she had an episode of right foot plantar fasciitis, had a steroid injection which helped her pain considerably and she returned to normal duties. At that stage, she had no problems with her left total knee replacement.
>
> In the period of February-March 2017, she was performing particularly busy duties…where she had to do repetitive mopping, changing up to 100 mop-heads per day. She developed pain in her left knee, without specific trauma…had continuing pain and was unable to continue working.
>
> She was subsequently referred to Dr Matthews, Orthopaedic Surgeon at Wagga and he diagnosed tibial tray loosening of the knee replacement without infection, and she underwent subsequent revision surgery in February 2018. There were no postoperative complications, but she has been unable to return to work."

15. Present symptoms were described as follows:

> "Ms Ross experiences marked pain…which is constant, worse with weather change or excessive walking…The pain can keep her awake at night on occasions. She…can walk for 50 metres but tends to use a walking stick in the right hand. She is unable to run, manage uneven ground, squat, or kneel. She cannot manage a flight of stairs."

16. The AMS summarised her condition as follows:

> "Ms Ross had a well- functioning total knee replacement prior to the WCC injury date of 18/04/2019, where she had increasing pain in her knee replacement, that became noticeable particularly with heavy workdays, mopping the Orthopaedic Department floors. There was no specific fall or traumatic injury as such.
>
> She came under the care of Dr Mathews, Orthopaedic Surgeon who confirmed aseptic loosening of the tibial tray and performed revision surgery, this was complicated by a postoperative DVT which required anticoagulation medication for 6 months.
>
> She is left with ongoing symptoms and disability."

17. The AMS assessed 15% WPI. His reasons for his assessment were stated as follows:

> "She had a well - functioning total knee replacement before the deemed date of the work injury of 18/04/2017 by the WCC, subsequently has gone on to require revision total knee replacement surgery, she has reached MMI and no further surgery is planned for the short or medium term.
>
> Ms Ross has had a revision total knee replacement, using revised AMA Table 17-35 she scores 45, with reference to AMA-5 17-33 this is a poor result, resulting in 30% WPI. In contrast, she had no significant symptoms prior to the knee becoming painful and probably would have scored 15% WPI. The difference then is 15% WPI."

18. The AMS then commented on other medical opinions, stating:

> "Dr John Walsh, Orthopaedic Surgeon, 23/08/2018 confirmed the diagnosis of asymptomatic loosening of the previously successfully functioning total knee replacement, and confirmed that simple mopping at work, albeit at a higher level, would not have led to the loosening. Dr Walsh confirmed that the current revision result appears to be 'good' and confirmed a whole person impairment for a fair result TKR: 20% whole person impairment, finding moderate pain. In contrast, Ms Ross assessed her pain with me today at severe, resulting in 0 points. This accounts for our difference in assessment of permanent impairment related scoring the result of the revision knee replacement…
>
> Dr Endrey-Walder, General Surgeon 30/04/2018 confirmed that Ms Ross suffered 'Injury to her previous left total knee replacement, confirming that she was symptom free prior to the period leading up to April 2017 and felt that the 'mechanism of injury' relates to a twisting motion of the lower limbs'. I would have [a] very significant difference of opinion regarding the causation of the aseptic loosening. There is certainly no medical evidence that these type of light duties work (by way of mopping) leads to increased rates of loosening in total knee replacements.
>
> Dr Endrey-Walder confirms a knee replacement revision rating at a fair result, finding 20% whole person impairment, I would disagree with this quantum, according to the scoring that I made of the revision replacement today."

19. The AMS added:

> "It is my opinion that the knee replacement never achieved adequate bony ingrowth, (that is she was asymptomatic of lack of bony ingrowth of the tibial tray) and she suffered aggravation of this condition during the mopping work duties therefore a deduction due to pre-existing disease needs to be incorporated with any assessment of impairment."

20. The AMS then turned to consider any deductible proportion of the impairment due to any pre-existing condition or abnormality. He said:

> "In my opinion the worker suffers from the following relevant previous injuries, pre-existing conditions or abnormalities: Pre-existing, well- functioning total knee replacement, albeit with probable lack of bony ingrowth on the tibial tray.
>
> 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) She had a pre-existing, well- functioning total knee replacement. The pre-existing impairment prior to the knee replacement becoming symptomatic was 15% WPI. Her current impairment is 30% WPI, resulting in a change of 15%. It is my opinion that this change has not been caused by simply mopping at work, but that mopping at work aggravated previously unstable but asymptomatic poor ingrowth of the tibial plateau component and the relative input to this would suggest that the mopping activity, as well as being minor compared to the failure of the knee replacement to achieve osseous ingrowth. The deductible proportion, therefore, is ½ .
>
> (ii) (ii) SIRA 1.27 – the degree of permanent impairment resulting in pre-existing impairment should not be included in the final calculation of permanent impairment, if those impairments are not related to the compensable injury. The pre-existing impairment was 15% WPI. The impairment resulting from the total knee replacement becoming unstable is 15% WPI. Of this,1/2 is due to work, (the mopping activity) and 1/2 is due to the failure of the prosthesis to adequately ingrow (deductible proportion-pre-existing condition, albeit asymptomatic)."

21. After deducting 50% from the impairment rating of 15%, the resulting WPI was 8%.

22. The appellant's submissions may be summarised as follows:

    a. The approach adopted by the AMS in making the deduction was incorrect;

    b. Based on the claimant's evidence and details recorded by the AMS a deduction of 50% is excessive;

    c. A deduction of 10% is appropriate when relying on the evidence and 323(2);

    d. The arbitrator determined that as result of excessive mopping the claimant injured her left knee consistent with pleadings and the evidence such that it was not open to the AMS to determine causation and then make deductions pursuant to s323 based on his findings on causation;

    e. The AMS said that making a deduction was difficult and seeks to rely upon s323 (2). If the AMS is relying on s323 (2) a deduction of only 10% should be made from the 30% WPI, which leaves the claimant with a WPI of 27%WPI;

    f. It was not open to the AMS to:

        a. Determine the claimant had a WPI of 30% due to the total revision of the left knee;

        b. Then determine pursuant to s323 that the claimant had a pre-existing 15% WPI (50% due to the initial knee replacement);

c. Then deduct 15% (50%) from his initial WPI assessment; and

d. Then consider causation and then deduct another 50% of the assessable impairment of 15%, which leaves the claimant with an assessable impairment of 8% relying upon s323 (2).

23. We accept the appellant's submissions for reasons that follow.

24. To begin with, it is useful to consider the "Reconsideration of Oral Certificate of Determination" issued by the arbitrator on 11 September 2019.

25. He specifically rejected the opinion of Dr Walsh, adding:

> "He [Dr Walsh] said: 'When one stands on two legs and rotates the body, most of the movement occurs in the spine and only about a third of the movement occurs at the knee. I disagree that this motion would have caused the loosening of the prosthesis.'
>
> Inherent in those reasons however is a concession that the mopping motion involved motion of the knee.
>
> I accept the evidence of Mrs Ross – indeed it has not been denied - that the onset of her symptoms commenced after two weeks of working in the orthopaedic ward when she had been constantly twisting her knee in the mopping motion she described. Moreover, the symptoms became so severe that she was confined to a wheelchair, as Dr Walsh recorded.
>
> Although Dr Walsh opined that the mopping motion was not causative, when viewed against his concession that the knee was involved in one third of bodily movement needed to achieve the mopping motion, and his further concession that Mrs Ross was in effect not given a return to appropriate work, I do not accept his opinion, with respect. Moreover, he made no explanation as to the accepted temporal connection between the onset of symptoms and the mopping motion.,"

26. It is clear from the arbitrator's determination that he accepted that the mopping work caused the injury to the appellant's knee.

27. The AMS appears to have looked at the failure of the prosthesis to adequately ingrow in isolation, that is, as a separate and distinct event on its own.

28. The findings of the arbitrator as to causation of the injury in our view effectively show that the injury to the appellant's knee resulted from certain activities at work which damaged the prosthesis.

29. The AMS rejected the opinion of Dr Endrey-Walder as to the aseptic loosening, adding "There is certainly no medical evidence that these type of light duties work (by way of mopping) leads to increased rates of loosening in total knee replacements."

30. This is inconsistent with the arbitrator's findings.

31. In our view, the AMS was correct in his primary assessment. Following the initial knee replacement, there was a good result, giving 15% WPI. Examination revealed a poor result following the second knee replacement, giving 30% WPI.

32. As he said, "The pre-existing impairment prior to the knee replacement becoming symptomatic was 15% WPI. Her current impairment is 30% WPI, resulting in a change of 15%."

33. Thus, the total impairment is 15% WPI.

34. There was no basis, as the appellant submitted, for the AMS to "consider causation and then deduct another 50% of the assessable impairment of 15%."

35. As regards the appellant's submission that the deduction is excessive and should only be 10%, we do not agree.

36. It is true that the appellant was functioning reasonably well following her initial knee replacement, but it was her work activities that were found to have in effect damaged the prosthesis, which in turn led to the second knee replacement.

37. Thus, the significance of the first knee replacement cannot be underestimated, and in our view a deduction of 10% as submitted by the appellant would be against the weight of the evidence.

38. We accept that the AMS said that "making a deduction was difficult," seeming to imply that he was adopting the provisions of section 323 (2). However, in our view, this was merely an error in the language he used and is clearly inconsistent with his overall findings.

39. *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 (*Cole*) is the perennially cited authority on the construction and application of section 323. In summary, Schmidt J said that the section "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…contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences (our emphasis) of the earlier injury…"

40. Conversely, *Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254 (*Vitaz*) is cited as authority for the principle that "if a pre-existing condition is a contributing factor causing permanent impairment, (our emphasis) a deduction is required, even though the pre-existing condition had been asymptomatic prior to the injury."

41. We therefore accept that the deduction made by the AMS was appropriate.

42. For these reasons, the Appeal Panel has determined that the MAC issued on 19 September 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: **2330-19**
Applicant: **Leanne Doreen Ross**
Respondent: **State of NSW**

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 Greggory Burrow, 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. 1. Left lower extremity	18/04/2017	Chapters 1, 3, modified AMA table ` 17–35, table 3.5, para 1.27, 28	Chapter 17	30%	One half	15%
2.						
3.						
4.						
5.						
6.						
Total % WPI (the Combined Table values of all sub-totals)					**15%**	

Ms Deborah Moore
Arbitrator

Dr Richard Crane
Approved Medical Specialist

Dr J Brian Stephenson
Approved Medical Specialist

16 December 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