WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-2926/19**
Appellant:	**Wendy Joy Holtham**
Respondent:	**Menzies Property Services Pty Limited**
Date of Decision:	**24 February 2020**
Citation:	**[2020] NSWWCCMA 29**

Appeal Panel:	
Arbitrator:	**R J Perrignon**
Approved Medical Specialist:	**Dr Philippa Harvey-Sutton**
Approved Medical Specialist:	**Dr John Ashwell**

BACKGROUND TO THE APPLICATION TO APPEAL

1. The appellant worker, Ms Holtham, injured her left knee on 14 July 1999, when she slipped and fell down some stairs at work. In 2002 she came to left knee arthroscopy at the hands of Dr Johnson, and again in June 2003 at the hands of Dr Jones. In July 2004 she came to total left knee replacement surgery. Due to symptoms in the right knee, she came to right knee arthroscopy in June 2007 at the hands of Dr Jones, and to total right knee replacement surgery in March 2008.

2. By a Medical Assessment Certificate dated 29 April 2009, Approved Medical Specialist Dr Higgs assessed a 27% loss of efficient use of the right leg at or above the knee as a result of injury on 8 February 2001, after deducting 1/10th for pre-existing degenerative pathology of the right knee, and a developmental bipartite patellar anomaly. Notwithstanding the date of injury, Dr Higgs took a history that right knee pain had occurred when the worker had attempted to favour her left knee, which had been injured in 1999.

3. On 11 November 2019, Approved Medical Specialist Dr Yiu-Key Ho assessed a 30% whole person impairment (13% right knee; 20% left knee) as a result of injury on 14 July 1999. Though the right knee was not injured on that date, he found there was a causal nexus between the condition of the right knee and injury to the left knee on 14 July 1999. He assessed:

    (a) the right knee at 20% whole person impairment, from which he deducted 1/3rd for pre-existing osteoarthritis to arrive at 13% whole person impairment, and

    (b) the left knee at 30% whole person impairment, from which he deducted 1/3rd for pre-existing osteoarthritis to arrive at 20% whole person impairment.

4. The appellant worker appeals from Dr Ho's assessment of both knees, on the bases that he failed:

    (a) correctly to apply the points system at Table 17-35(b) and (c) in the *American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th edition* (AMA 5), as reproduced in the *NSW Workers Compensation Guidelines for the Assessment of Permanent Impairment* (4th edition) (the Guidelines),

    (b) to give reasons for assessing a 1/3rd deduction in respect of each knee - though the appellant concedes that some deduction was required in respect of each, and

    (c) to assess scarring.

5. On 10 January 2020, the Registrar by his delegate was satisfied that the ground of demonstrable error was made out in respect of the assessment of the right knee, and referred the matter to this Appeal Panel for determination. He declined the appellant's application to refer the matter of scarring for reconsideration by the Approved Medical Specialist, as the Registrar had not referred scarring to the Approved Medical Specialist for assessment.

6. On 12 February 2020, the Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Guidelines. It identified certain errors of the kind asserted by the appellant. It was unnecessary to refer the worker for examination, because the errors were capable of correction without further examination.

Submissions

7. The Appeal Panel has had regard to the written submissions filed by both parties. It is unnecessary to set them out here in full, but appropriate to summarise them as follows.

8. The appellant worker submits that the Medical Assessment Certificate demonstrates error for the following reasons:

    (a) Accepting as correct the range of movement of both knees measured by the Approved Medical Specialist, and applying the points system in Tables 17-35 (b) and (c), the right knee should have been scored at 36 points, and the left, 31 points, resulting in a 30% whole person impairment for each knee. The Approved Medical Specialist was in error in assessing a 20% whole person impairment (left knee), though correct in assessing a 30% whole person impairment (right knee).

    (b) Dr Ho failed to give reasons for

        (i) scoring 13 points for the right knee in respect of range of motion under Table 17-35(b), and 11 points for the left, and

        (ii) his scores for range of motion and stability under Table 17-35(c).

    (c) While the appellant concedes that some deduction for a pre-existing condition was appropriate in respect of each knee, Dr Ho failed to give reasons for assessing the deduction as 1/3rd. It was incumbent on him to give adequate reasons, particularly as Approved Medical Specialist Dr Higgs only deducted 1/10th in respect of the left knee in his Medical Assessment Certificate of 29 April 2009, and as Dr Ho found that both knees had deteriorated since Dr Higgs' assessment.

(d) Notwithstanding that injury occurred in 1999, and that scarring due to bilateral total knee replacement surgeries was not assessable under the Table of Maims which applied to injuries prior to 2002, Dr Ho should have assessed the scarring for the purpose of assessing impairment of the whole person, having regard to the fact that surgical scars were evident and remarked on by Dr Higgs when he assessed the worker in 2009.

9. The respondent submits in summary as follows:

(a) Dr Ho scored 20 points for each knee. By necessary implication, he did not consider a score of 10 points appropriate.

(b) It was open to him to conclude that a score of 51 points for the right knee was a fair result, and to assess 20% whole person impairment accordingly. Dr Hopcroft, who was qualified by the appellant, considered that both knee replacements constituted a good result.

(c) The Approved Medical Specialist has adequately explained his findings in respect of range of motion and his assessments.

(d) Dr Ho adequately explained the reasons for making deductions of 1/3rd in respect of each knee. It was open to him to make those deductions notwithstanding Dr Higgs' assessment of a 1/10th deduction in 2009 for the left knee, and Dr Ho was not obliged to justify his assessment with more detailed explanations than he gave.

(e) The following submissions of the appellant are contradicted by the findings of her own qualified expert, Dr Hopcroft. Whereas he assessed a 28% whole person impairment (15% for each knee), the appellant submits that an assessment of at least 31% is warranted. Whereas he did not assess scarring, the appellant submits that the Approved Medical Specialist should have done so. Whereas he considered that a good result had been achieved in respect of each knee, the appellant submits that it was a poor result.

Reasoning of the Approved Medical Specialist

10. Dr Ho examined the worker on 31 October 2019. Only the knees had been referred to him for assessment of whole person impairment as a result of injury on 14 July 1999.

11. He took a history of injury to the left knee on 14 July 1999, and of subsequent surgical interventions. He recorded [4]:

> "Certainly there was severe patellofemoral joint OA and then she ended up with left knee replacement in July 2004. Due to favouring the use of the left knee, she started to complain about a problem of the right knee. In June 2007 she had arthroscopy by Dr Jones and March 2008 she had a right knee replacement."

12. Doing our best, we interpret that passage to mean that right knee symptoms onset before June 2007 as a result of favouring the injured left knee, though Dr Ho does not appear to express a view as to the date of onset. As it stands, that finding explains why he proceeded to assess the right knee.

13. On examination, he measured the range of movement of both knees, noting extension lags of 15 degrees on the left and 10 degrees on the right, and fixed flexion contractures of 5 degrees on the right and 10 degrees on the left.

14. He noted a number of investigations, including plain x-rays of the left knee (September 2001) and right knee (February 2007). The former described "severe patellofemoral joint OA on the lateral side with features of bipartite patella and also chronic subluxation of the patella". The latter reported "similar changes as the other knee and severe patellofemoral joint OA on the lateral facet."

15. He diagnosed [7] either "bilateral knee problems with some sort of pre-existing osteoarthritis mainly affecting the patellofemoral joint and aggravated by the work injury on 14 July 1999, resulting in left knee problems requiring total knee replacement."

16. He explained his calculations as follows [10b – emphasis added]:

> "To assess whole person impairment using AMA Guide 5th Edition, Table 17-35, **she has constant pain so the right knee will score 20 points for that**. The range of movement on the right knee scores 13 points, it is stable so it scores 10 and 15 points, altogether it is 58 points. These is extension lag of 10 degrees so that will be minus 10 points and then a fixed flexion contracture <10 degrees so that will be 2 points. Alignment is zero degrees, so **she ended up 51 points on the right knee**.
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> **On the left knee there is constant pain so it is 20 points**, for the range of movement she scored 11 points and it is stable so there is another 10 and 15 points in relation to antero-posterior and medio-lateral, so that will give rise to 56 points. This knee has more extension lag and is 15 degrees so is minus 10 points and there is a 10 degrees fixed flexion and that is minus 5 points. **This will leave behind 41 points** which [sic, so] according to Table 17-33, **the right knee 51 points will give rise to a fair result with a 20% whole person impairment**.
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> **The left knee is 41 points and that will be a poor result with 30% whole person impairment."**

17. The appellant submits (submissions, par 2) that the bilateral 'constant' pain referred to by the Approved Medical Specialist is synonymous with 'continual' pain referred to in Table 17-35 AMA 5, discussed below. Notwithstanding the respondent's disagreement with the general thrust of the appellant's first three paragraphs, we do not understand it to submit to the contrary in this respect at least. Whether it does or not, having regard to the context, we are persuaded that the two expressions were intended by Dr Ho to be synonymous, and interpret his reasons accordingly.

18. Like Dr Powell, who had been qualified by the insurer, Dr Ho deducted 1/3rd for pre-existing conditions in each knee. He explained his reasons as follows [10b and c]:

> "In my opinion there should be contribution from pre-existing condition because the pre-operative x-ray is showing bipartite patellae, features of chronic subluxation of the patella and ended up with severe lateral patellofemoral joint OA. I would deduct 1/3rd to be relating to pre-existing conditions as the injury would not be on [sic] the only factor causing such significant degenerative changes at the first presentation when the patient was only in her forties.
>
> ….
>
> I tend to agree with Dr Powell in using deduction of 1/3rd for pre-existing condition. … I do not agree with Dr Hopcroft because he has not deducted any whole person impairment from [sic, for] pre-existing conditions, which I do not think is appropriate because there are all the radiological features of significant pre-existing problems even on the initial x-ray when she presented."

19. Unfortunately, the Approved Medical Specialist did not specify which knee he was referring to. As he has made the same deduction for each knee, we interpret his reasons as referring to both, notwithstanding his use of the singular (x-ray), in the passage quoted.

Consideration and findings

Grounds (a) and (b) – proper application of Table 17-35

20. The assessment of the lower extremities is governed by Chapter 3 of the Guidelines. For the assessment of impairment following total knee replacement, points are scored in accordance with Table 17-35 of AMA 5, which is reproduced in corrected form in the Guidelines. The Table is divided into six rows, identified by the letters a to f inclusive. Points are scored in accordance with the criteria in rows a (pain), b (range of motion) and c (stability). Points are deducted in accordance with the criteria in rows d (flexion contracture), e (extension lag) and f (alignment).

21. The aggregate obtained by his method is converted to whole person impairment in accordance with Table 17-33, as follows:

    (a) 85-100 points is categorised as a 'good result' attracting 15% whole person impairment.

    (b) 50-84 points is categorised as a 'fair result' attracting 20% whole person impairment.

    (c) Less than 50 points is categorised as a 'poor result' attracting a 30% whole person impairment.

22. As explained in his reasons, Dr Ho scored 51 points for the right knee, and 41 for the left. This put the right knee in the 'fair result' category attracting 20% whole person impairment, and the left knee in the 'poor result' category attracting 30% whole person impairment. The appellant does not complain of the left knee result (30%), but asserts that the result for the right knee (20%) was in error.

23. In assessing the right knee, Dr Ho allowed 20 points for constant pain, 13 points for range of motion, 10 points for anteroposterior stability and 15 points for mediolateral stability. The sum of these came to 58 points.

24. He then deducted 10 points for an extension lag of 10 degrees, and 2 points for a flexion contracture of less than 10 degrees. He made no deduction for alignment of zero degrees. He subtracted 12 points from 58 points to arrive at 51 points for the right knee.

25. Even if (contrary to our finding below) the points which he allowed and subtracted were correct, 12 points subtracted from 58 leaves 46 points, which equates to a 'poor result' attracting 30% whole person impairment. In finding that the right knee attracted 51 points, the Approved Medical Specialist was in error, and the Medical Assessment Certificate must be set aside.

26. In any event, Table 17-35(a) allows only 10 points for continual pain. In allowing 20 points, the Approved Medical Specialist was in error. For that reason also, the Medical Assessment Certificate must be set aside.

27. The remaining points scored and deducted by the Approved Medical Specialist are provided for in Table 17-35 (b to f). We can discern no error respect of them. The deductions, in particular, accorded with his measurements.

28. When 10 points for continual pain is substituted for the 20 points allowed by the Approved Medical Specialist, the total score for Table 17-35 rows (a), (b) and (c) is 48 points.

29. Deducting 12 points from 48 points results in a score of 36 points for the right knee. This equates to a 'poor result' in Table 17-33, attracting 30% whole person impairment. The Medical Assessment Certificate must be set aside and a new certificate issued to reflect this.

30. Though nothing turns on it, we note in passing that Dr Ho made the same error in respect of the left knee, according 20 points for continual pain instead of the 10 points allowed by Table 17-35(a). It follows that his score of 41 points for the left knee should have been 31 points. As both scores - 41 points and 31 points - are less than 50, and attract a whole person impairment of 30%, the error has not affected the result. There is no need to correct the assessment of 30% whole person impairment (left knee).

31. Contrary to the respondent's submissions, the fact that the appellant's own assessor assessed a lesser impairment than that now sought by the appellant does not prevent the findings above. The Approved Medical Specialist was not bound by the assessment of any other assessor. The task of this Panel is to discern, not whether the Approved Medical Specialist should have assessed the appellant differently from any other assessor or in accordance with any other assessment, but whether there was error in the manner in which the Approved Medical Specialist made his assessment and, if so, to correct it. For the reasons given, we are satisfied there was error in his assessment of the right knee.

32. As the appellant has succeeded in challenging the results for the right knee, it is unnecessary to consider the additional assertion that no reasons were given for differing scores for range of motion as between the two knees, motion and for his assessment of maximum movement and stability bilaterally.

Ground (c) – deductions for pre-existing osteoarthritis

33. As indicated, the Approved Medical Specialist found that the injurious event of 14 July 1999 aggravated pre-existing osteoarthritis in the left knee, and deducted 30% for pre-existing arthritis in both knees. The appellant asserts that this demonstrates error, because it was attended by inadequate reasons, and because Approved Medical Specialist Dr Higgs had deducted only 1/10th in 2009 when assessing the right knee, and Dr Ho had found that the condition of the knee had since deteriorated.

34. The appellant concedes that some deduction of lesser magnitude was appropriate in respect of each knee.

35. The left knee x-ray of September 2001 demonstrated "severe patellofemoral joint OA on the lateral side with features of bipartite patella and also chronic subluxation of the patella". Degeneration of this degree takes many years to evolve. It was well open to the Approved Medical Specialist to conclude that the osteoarthritis pre-dated injury in 1999, and that it was advanced before that date. His finding that it continued to contribute to impairment implies a finding that it contributed substantially – in this case, 1/3rd - to the need for total knee replacement surgery. In our view, that implied finding was also well open on the evidence, having regard to the severity of the pre-existing condition, and we can discern no error.

36. The earliest x-ray of the right knee available to the Approved Medical Specialist was taken in February 2007. That demonstrated "similar changes as the other knee [in September 2001] and severe patellofemoral joint OA on the lateral facet."

37. As indicated, the Approved Medical Specialist did not make a finding as to precisely when the right knee became symptomatic. Approved Medical Specialist Dr Higgs had assessed the right knee on 29 April 2009, following examination on 20 April 2009. He recorded that "the right knee symptoms were experienced many years prior to [making a claim in 2007]. The exact date of symptoms has not been recalled. However the agreed date of injury is 08/02/01."

38. That was evidence from which it was open to Dr Ho to infer that the right knee had been symptomatic from at least 8 February 2001. Together with evidence that there was severe osteoarthritis by at least February 2007, it was open to the Approved Medical Specialist to infer that right knee osteoarthritis pre-dated injury in 1999, though the evidence did not necessarily compel that conclusion.

39. There was no evidence, however, to demonstrate the degree of osteoarthritis present before injury in 1999, or the precise degree to which the use of the right leg to favour the injured left knee had aggravated or accelerated any pre-existing change. That made it difficult to determine the degree of contribution by the pre-existing condition to the need for total right knee replacement in 2008, and therefore to the resulting impairment of the right knee. In those circumstances, the only available course was to deduct 1/10th. The deduction of 1/3rd was without evidentiary foundation, and demonstrates error.

Ground (d) – scarring

40. The task of the Approved Medical Specialist was to assess the body system and body parts referred to him for the assessment of whole person impairment. The body system referred was the upper extremities. Within that, the body parts referred were the left and right knees. There was no referral of the skin system for assessment. In the circumstances, it was beyond the power of the Approved Medical Specialist to assess scarring of the skin, and his failure to do so does not demonstrate error. That is so, whether or not Dr Higgs observed scarring on examination in 2009, and whether or not scarring was assessable under the Table of Maims.

Conclusion

41. For the reasons given above, the appeal is allowed in part. The Medical Assessment Certificate of Dr Ho dated 11 November 2019 is set aside and replaced with the attached Medical Assessment Certificate.

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **2926/19**
Applicant: **Wendy Joy Holtham**
Respondent: **Menzies Property Services Pty Limited**

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 Ho and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in SIRA 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)**
Right lower extremity	14/07/1999	Chapter 3	Tables 17-35 and 17-33	30%	1/10	27%
Left lower extremity	14/07/1999	Chapter 3	Tables 17-35 and 17-33	30%	1/3	20%
Total % WPI (the Combined Table values of all sub-totals)						**42%**

R J Perrignon
Arbitrator

Dr Philippa Harvey-Sutton
Approved Medical Specialist

Dr John Ashwell
Approved Medical Specialist

24 February 2020

I CERTIFY THAT HIS 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*.

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar