WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-6346/19**
Appellant:	**Trustees of the Roman Catholic Church for the Diocese of Lismore.**
Respondent:	**Trudy Williams**
Date of Decision:	**9 June 2020**
Citation:	**[2020] NSWWCCMA 99**

Appeal Panel:	
Arbitrator:	**Arbitrator Paul Sweeney**
Approved Medical Specialist:	**Dr John Ashwell**
Approved Medical Specialist:	**Dr Mark Burns**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 31 March 2020, the Trustees of the Roman Catholic Church for the Diocese of Lismore (the appellant) lodged an application to appeal against the decision of approved medical specialist. The medical dispute was assessed by Dr Alan Home, an approved medical specialist (AMS), who issued a medical assessment certificate (MAC) on 4 March 2020.

2. The appellant relies on the following grounds of appeal under s327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - 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 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. Trudy Williams (the respondent) was employed by the appellant as an assistant in nursing at the Crowley Village in Ballina. On 31 August 2014, she was required to transfer a female patient to a wheelchair. While she was attempting to adjust the wheelchair, the patient fell onto the respondent causing injury to her back.

7. Except for short periods in 2018 and 2019, the respondent has been unable to return to the full duties of an assistant nurse. Since April of 2019, however, she has been employed as a caseworker with the Aboriginal Homecare Service at its establishment at Alice Springs.

8. The respondent was initially treated by Dr Mellor. When her symptoms did not improve, she was referred to Dr Richard Laherty, a neurosurgeon in Brisbane. Dr Laherty advised her that he did "not have a good surgical remedy to offer".

9. In 2015, the respondent worker came under the care of Dr Neil Cleaver, an orthopaedic surgeon. He thought that she may benefit from disc replacement of her lower lumbar discs. He advised her to lose weight and continue with conservative treatment.

10. On 9 October 2015, the respondent worker underwent bariatric surgery under Dr Leiw at John Flynn Hospital. While she lost weight following the surgery, her back pain persisted. In August of 2017, Dr Cleaver performed disc replacement surgery at L4/5 and L5/S1. Unfortunately, the respondent worker has continued to experience back pain since the surgery.

11. On 13 May 2019, the respondent worker saw Dr Geoffrey Miller at the request of her solicitors. On 19 May of 2019, Dr Miller provided a report in which he expressed the opinion that the respondent suffered 20% whole person impairment as a result of her injury. He assessed total whole person impairment at 22% but made a deduction pursuant to s 323 of the 1998 Act of 1/10th based on the respondent's "pre-existing underlying constitutional change".

12. While the appellant initially disputed liability on the basis of the opinion of Dr Casikar, a neurosurgeon, at a telephone conference in the matter it conceded liability for injury. By the Certificate of Determination of Arbitrator Bell on 13 January 2020, the claim for permanent impairment compensation was resolved on the terms that the matter would be remitted to the Registrar for referral to an Approved Medical Specialist to determine the degree of whole person impairment suffered by the respondent as a result of:

> "Injury to her lumbar spine on 31 August of 2014 in the nature of an aggravation of a previously symptomatic degenerative changes in the lumbar spine."

13. The Registrar referred the medical dispute to Dr Alan Home, an occupational physician, who assessed the respondent worker and issued the MAC in this matter. Dr Home certified that the respondent suffered 22% whole person impairment. He assessed 24% whole person impairment of the lumbar spine and deducted 1/10th pursuant to s 323 for a pre-existing injury condition or abnormality.

14. It is the deduction made by Dr Home, pursuant to s 323, that gives rise to this appeal.

PRELIMINARY REVIEW

15. 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.

16. As a result of that preliminary review, the panel determined that it was unnecessary for the worker to undergo a further medical examination. As the only ground of appeal related to the application of s 323 and the quantum of the deduction for a pre-existing condition or abnormality, a further examination of the respondent by a member of the panel was unlikely to assist it in its deliberations. The panel noted that the respondent worker had repeatedly told doctors that she had a poor recollection of back pain prior to the injury.

EVIDENCE

17. The appeal panel has before it all the documents which were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

18. The parts of the MAC given by the AMS which are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

19. Both parties made written submissions. They are not repeated in full but have been considered by the panel. The appellant submitted that the deduction of 1/10th made by the AMS pursuant to s 323 was "inadequate". It submitted that a deduction "of at least 25 per cent WPI" should be made in the circumstances of the case.

20. The first error allegedly made by the AMS related to the application of s 323(2). There was no "evidentiary basis" for the application of this provision. The appellant continued:

> "The appellant submits that no evidentiary basis to satisfy the above provision was apparent. The AMS was in possession of radiological imaging revealing the extent of the pre-existing condition, the clinical notes confirming the nature, type and chronicity of the symptoms experienced by the worker before the injury, and commentary from the two qualified experts in relation to the extent and nature of the pre-existing symptoms/condition."

21. The appellant contended that the AMS had given no reasons whatsoever why it was difficult to calculate the appropriate deduction pursuant to the section.

22. Secondly, the appellant submitted that the evidence before the AMS "reveals that a 1/10th deduction was at odds with the evidence" and a greater deduction was required. In support of this submission, the appellant referred to entries in the clinical notes produced by the respondent's general practitioner, which unambiguously recorded a history of back pain and a referral for x-rays of her lumbar spine in 2013.

23. Thirdly, the appellant submitted that the AMS had given disproportionate weight to the fact that the respondent worker has no "functional or employment-related disability" before the accident. The appellant submitted:

> "That the worker's functional ability before the injury, did not of itself determine what contribution the pre-existing condition had made to the need for surgery and subsequent impairment. In relying solely on that matter, the appellant submits that the AMS fell into error."

24. The appellant emphasised that the injury agreed by the parties constituted an aggravation of a degenerative condition. It argued:

> "Noting the nature and extent of the pre-existing difficulties flowing from the pre-existing condition, as recorded by Dr Casikar and the GP in the clinical notes, the appellant submits that the ultimate need for surgery received a large contribution (greater than 1/10th) from that pre-existing condition."

25. By her submission, the respondent submitted that:

> "This is exactly the type of case which would attract the operation of 323(2)."

26. The respondent relied upon the reasoning of Schmidt J in *Cole V Wenaline Pty Limited* [2010] NSWSC 78. She continued:

> "In summary, the fact that the respondent worker had previous back problems is not evidence that a greater than 10 per cent deduction is required in the case. The appellant cannot point to any other objected evidence which would persuade an assessor from altering the apportionment beyond 10 per cent."

27. The respondent submitted that the appeal should be dismissed and the determination of the AMS of 22% whole person impairment affirmed.

FINDINGS AND REASONS

28. The role of the medical appeal panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation. However, in *Versace v Australia Best Tyres & Auto Pty Limited* [2016] NSWSC 1540 (2 November 2016) Schmidt J, held that the section did not permit the panel to review the determination of the AMS without first identifying error.

29. 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.

30. In considering the submissions of the appellant, it is necessary to bear in mind the nature of the statutory obligation of the AMS to provide reasons. It is evident from reasoning of the High Court of Australia, in *Wingfoot Australia Partners Pty Limited v Kocak* 88 ALJR 52, that it is only necessary for the MAC to explain the actual path of reasoning of the AMS in sufficient detail to enable a court or an appeal panel to determine whether there is error in its findings. In *Wingfoot*, it was said that:

> "The function of a medical panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise."

31. The reasoning in *Wingfoot* has been applied to medical assessments under the NSW Workers Compensation legislation: see, for example *El Masri v Woolworths Ltd* [2014] NSWSC 1344 (26 September 2014).

32. It is first necessary to ascertain whether the AMS applied subs 323(2) in determining the appropriate deduction for the respondent's undoubted pre-existing condition. Both parties appear to accept that he did, but the AMS does not specifically refer to the subsection in his reasons. The doctor addressed the question of a deduction thus:

> "It is then necessary to determine the correct deduction using Section 323 of the WCIM Act. A one tenth deduction is reasonable for the pre-existing symptomatic degenerative disease. A greater deduction cannot be determined on the basis of the available information including the documented history of chronic back pain. It is noted in this respect that whilst it is documented that Ms Williams experienced chronic back pain prior to the accident, she was able to continue employment as an assistant nurse, involving heavy manual handling work.

> Therefore, I am not satisfied there was a significant functional or employment disability prior to the subject accident.
>
> Deducting one tenth from 24% equals 2.4%, leaving 21.6%, which rounds up to 22% whole person impairment"

33. The appellant has specifically referred to the conclusion of the AMS that "a greater deduction cannot be determined on the basis of the available information". This was tantamount to a conclusion that the true deduction was "too difficult to determine". One can readily assume that a deduction of 10% for a pre-existing condition or abnormality in a MAC or a medical report is made pursuant to s 323(2). In some cases, that assumption might be inconsistent with a close reading of the MAC. While the panel was initially inclined to the view that the AMS had made a deduction pursuant to the subsection, on reflection it is by no means clear that this is, in fact, the case.

34. Plainly, the AMS carefully considered the history of chronic low back pain in the clinical notes of the Bullinah Aboriginal Health Service. He gave them greater weight because he had formed the view that the worker's account of her past medical history was inconsistent with the written record. The AMS said this:

> "I rely upon the evidence of the medical file in this circumstance. The worker concedes she has a poor memory."

35. It was the AMS's consideration of this record that led him to conclude that an appropriate deduction was 10%. He does not say that it was too difficult or costly to determine the appropriate deduction. Rather, he states that the evidence available does not warrant a greater deduction than 10%. In the opinion of the panel, it is likely that the AMS concluded that the evidence did not prove a deduction of more than 10%. He applied s 323(1) and not s 323(2).

36. It must be borne in mind that s 323 is a disentitling provision. While the issue of onus is rarely of importance in a medical appeal, the principles enunciated a very long time ago in *Watts v Rake* (1960) 108 CLR 158 and *Purkess v Crittenden* 114 CLR 164 have application to an evaluation under s 323. These principles are relevant to the assessment of lump sum compensation under the Workers Compensation Act is also of ancient lineage: see *Sadler v Commissioner for Railways* (NSW) (1969) 123 CLR 216. It is necessary for a respondent to point to appropriate evidence to support a deduction. It is entirely plausible that the AMS concluded that the evidence adduced in relation to pre-existing back pain did not prove a greater deduction than 10%. If so, he applied subs 323(1).

37. It is, of course, also necessary for an appellant to prove the existence of error. As the panel does not accept that the employer has established that the AMS made a deduction pursuant to s 323(2), the appellant fails on this issue. It will, however, consider the quantum of the deduction below.

38. The second error alleged by the respondent is that the AMS erred in applying s 323 by primarily relying on the fact that there was no evidence of "functional or employment-related disability prior to the accident". The appellant submits that the worker's functional ability prior to the injury does not determine the contribution the pre-existing condition made to the need for surgery and the subsequent impairment. It is true that s 323(1) requires the AMS to determine the contribution, if any, of the pre-existing condition to the impairment.

39. It is quite clear from the case law that this determination must be based on fact, not assumptions or hypotheses: see *Pereira v Siemens Limited* [2015] NSWSC 113 at [81] and the cases referred therein. In circumstances where the radiological evidence of pre-existing degenerative condition was not compelling and where the worker's evidence was not entirely reliable, the worker's functional capacity prior to the injury is important in evaluating the nature and extent of the pre-existing condition.

40. The clinical notes of the Bullinah Aboriginal Health Service, while detailing a history of longstanding back pain, also reveal that the respondent was very physically active in the years before the injury. By way of example, the entry of 28 March 2014 refers to back pain, but it also contains a history that the respondent had lost 20 kg of weight in the last year and was "working out, running and boxing". There are earlier references to her playing sport, "doing boxercise" and running. These activities provide important insights into the medical condition of the respondent's back prior to the injury. In the opinion of the panel, it was undoubtedly open to the AMS to give this evidence weight in his assessment of the pre-existing condition.

41. The panel does not accept, however, that the AMS based his assessment of the contribution made by the respondent's pre-existing condition solely on her functional capacity before the injury. That part of his report that deals with a deduction for pre-existing condition or abnormality must be read in the context of the entirety of the MAC. The AMS also set out the radiological evidence available at the assessment in chronological order in his MAC under the subheadings *Pre-Accident* and *Post-Accident*. Plainly, he considered and compared the pre and post injury radiological evidence of the respondent's lumbar spine. This is also important evidence.

42. Then, the AMS considered the opinions of the other specialist medical practitioners, who addressed the questions of causation and apportionment. He expressed his disagreement with the opinion of Dr Casikar and his agreement with the opinion of Dr Miller that there should be a 10% deduction for a pre-existing condition in this case.

43. In these circumstances, the panel does not accept that the AMS has fallen into the error alleged by the appellant. He has considered all the available evidence relevant to the issue of a deduction pursuant to s 323 but has given appropriate weight to the evidence of the applicant's functional capacity.

Quantum of the Deduction

44. It is evident from the discussion in *Vannini v Worldwide Demolitions* [2018] NSWCA 324 (17 December of 2018) that:

> "A finding as to *the* proportion of permanent impairment due to previous injury, pre-existing condition or abnormality involves matters of degree and impression. The applicable standard of the 'proportion' of contributory contribution under s323 permits some latitude of opinion such as to admit a range of legally-permissible outcomes."

In the circumstances, it may be difficult for a party aggrieved by the quantum of the deduction made by an AMS to prove demonstrable error.

45. Nonetheless, the panel discussed the quantum of the deduction made by the AMS at length. Bearing in mind what was said as to the onus of proof above, the panel concluded that the reasoning of the AMS on this issue did not give rise to a demonstrable error. As always, there is scope for differences of opinion as to the quantum of the deduction pursuant to s 323. It is possible that both the deduction made by the AMS and the one argued for by the appellant of 20% are reasonably available in the circumstances. The panel concluded, however, that in the absence of proof of significant degenerative changes in pre-injury radiology, the evidence was more consistent with a deduction of 10%.

46. The appellant has failed to demonstrate that there is a demonstrable error on the part of the AMS in the deduction he made for pre-existing injury condition or abnormality. For these reasons, the appeal panel has determined that the MAC issued on 4 March 2020 should be confirmed.

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*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar