

# WORKERS COMPENSATION COMMISSION

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

---

**Matter Number:** M1-3010/20  
**Appellant:** Gianni Sipione  
**Respondent:** Hobbs Plumbing and Drainage Company  
**Date of Decision:** 10 February 2021  
**Citation No:** [2021] NSWCCMA 28

---

**Appeal Panel:**  
**Arbitrator:** Marshal Douglas  
**Approved Medical Specialist:** Dr John Brian Stephenson  
**Approved Medical Specialist:** Dr Tommasino Mastroianni

---

### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 14 October 2020, Gianni Sipione (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Mohammed Assem, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 16 September 2020.
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 WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of *Workplace Injury Management and Workers Compensation Act 1998* (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*, 4<sup>th</sup> ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5<sup>th</sup> ed (AMA 5).

### RELEVANT FACTUAL BACKGROUND

6. In February 2015, the appellant commenced employment as an apprentice plumber with Hobbs Plumbing and Drainage Company (the respondent). On 16 March 2016, whilst working for the respondent, he lifted a wheelbarrow filled with concrete weighing between 50 and 100 kilograms. As a consequence of doing that, he suffered an injury to his left hip and groin.

7. The appellant subsequently had an adductor tenotomy done, following which he was largely bed ridden for two weeks but when mobilising had to use crutches. He experienced pain in his lower back at this time.
8. Following the adductor tenotomy, he had physiotherapy that placed strain on his left hip and back and caused him pain in his left hip and back. He had cortisone injections to his left hip.
9. On 31 July 2018, he had a left hip arthroscopy, acetabular osteochondroplasty and labral repair. He had to use crutches for a period of time to mobilise following that surgery. He also had further physiotherapy following the surgery.
10. Due to the injury to his left hip, which caused him pain that was worse when he placed weight on his left leg, he walked with a limp, and that increased his pain in his lower back.
11. On 15 July 2019, he consulted orthopaedic specialist Dr Eugene Gehr, on referral from his solicitors. Dr Gehr provided a report to his solicitors on the same day and a separate "PI assessment medical report". Dr Gehr diagnosed that the appellant had a left hip labral tear associated with a chondral flap that required surgery. Dr Gehr also said that the appellant "since the time of the accident, had a lumbar spine soft tissue injury" and diagnosed that the appellant had a soft tissue injury of his lumbar spine with left radiculopathy. Dr Gehr assessed that as a result of the appellant's injury, the appellant had 10% whole person impairment (WPI) relating to his left hip, 7% WPI relating to his lumbar sacral spine and 1% WPI due to scarring from surgery to his hip, combining to 22% WPI.
12. It is apparent from the material before the Appeal Panel, that at some time in the period 15 July and 24 September 2019 the appellant made a claim against the respondent for compensation for permanent impairment from his injury.
13. On 24 September 2019, the respondent's insurer denied being liable to pay the appellant compensation for his injury. The insurer disputed that the appellant suffered an injury to his lumbar spine as a consequence of the incident on 16 March 2016 or that as a consequence of that incident, had developed a condition in his lumbar spine. The insurer, relying on a report its solicitors obtained from orthopaedic surgeon Dr Thomas Silva dated 13 September 2019, who had examined the appellant on 4 September 2019, contended that the appellant's degree of permanent impairment from his injury was 6% WPI, which meant that under s 66(1) of the *Workers Compensation Act 1987* the appellant was not entitled to compensation for permanent impairment from his injury because it did not exceed 10% WPI.
14. On 29 May 2020, the appellant's solicitors completed and registered with the Commission an Application to Resolve a Dispute (ARD) seeking determination of the appellant's disputed claim for compensation from the respondent for 22% WPI resulting from his injury on 16 March 2016. The appellant's injury was described in the ARD as being "injury to left hip and groin following lifting wheelbarrow full of wet cement and consequential lumbar spine injury".
15. The matter was referred to arbitrator Mr John Isaksen who on 12 August 2020 determined that the appellant had a consequential condition affecting his lumbar spine as a result of the injury he sustained to his left hip on 16 March 2016. The arbitrator then remitted the matter to the Registrar so that the Registrar could refer it to an AMS to assess the medical dispute relating to the degree of permanent impairment the appellant had from his injury.
16. On 19 August 2020, a referral was duly issued to the AMS to assess that medical dispute. As mentioned, the AMS issued a certificate with respect to that dispute on 16 September 2020. He certified the degree of the appellant's permanent impairment from his injury was 14% WPI.

## **PRELIMINARY REVIEW**

17. 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.
18. As a result of that preliminary review, the Appeal Panel came to the view, for reasons set out below, that firstly, the MAC does not contain a demonstrable error and, secondly, the AMS applied the correct criteria to assess the medical dispute that had been referred to him. The Appeal Panel therefore lacks the power to require the appellant to undergo a further medical examination.<sup>1</sup>
19. Moreover, absent the Appeal Panel finding that the MAC contains a demonstrable or that the AMS made the assessment based on incorrect criteria, the Appeal Panel must confirm the MAC. The Appeal Panel therefore will not re-assess the medical dispute. There is therefore no utility in examining the appellant.

## **EVIDENCE**

20. 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**

21. The AMS made the following findings from his examination of the appellant:

“Mr Sipione appeared well and in no apparent physical distress. He sat comfortably throughout the interview. He mobilised with a normal gait. He was cooperative throughout the examination. He was informed at the time of examination not to engage in any manoeuvre beyond what he could tolerate or which may cause harm or injury. His height was 164 cm and he weighed 102 kg.

### Lumbar spine

There were no scars or deformities. There was tenderness over the lumbar facet joints. There was no muscle guarding or spasm.

In forward flexion, he had difficulty reaching just below his knees. Extension was reduced to three-quarters of normal range with pain reported. Lateral flexion and rotation were normal.

He did not have any difficulty climbing on or off the examination couch. Active straight leg raising in the supine position was 60° and 50° on the left. Neural tension signs were negative.

His knee and ankle jerk reflexes were brisk and symmetrical. Power and tone were normal. Sensation was reported to be reduced at the left L5 dermatomal distribution. There was 1.5 cm atrophy of his left calf compared to the right. There was no significant measurable difference in circumference of his thighs.

### Left hip

He had healed arthroscopic surgical scars that were barely visible. There was a more significant scar in his groin measuring approximately 4 cm that he sometimes finds irritable. There was light pigmentation but no contour defect, no adherence to underlying structures and no impact on his activities of daily living.

---

<sup>1</sup> *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792

Hip movements were restricted in flexion 100°, extension 0°, adduction 20°, abduction 30°, external rotation 40°, internal rotation 10°.

He had a similar restriction of internal rotation to his uninjured right hip to 10°. All other right hip movements were within normal limits.

There was no tenderness over the greater trochanter. Trendelenburg sign was negative. His gait was normal. He was able to stand on his heels and toes. The remainder of the examination was unremarkable.”

22. Based on those findings, but also the history he had obtained and his review of the radiological investigations and medical documentation that had been provided, the AMS assessed the degree of the appellant’s permanent impairment to be 14% WPI. He provided this explanation for his assessment in part 10 of the MAC:

“a. My opinion and assessment of whole person impairment

Mr Sipione has low back pain with radiculopathy giving a DRE Lumbar Category II or 10% whole person impairment. Although he reported difficulty vacuuming and mowing the lawn, he was capable of working as a full-time plumber. I have therefore awarded a 1 % whole person impairment for a minor limitation to his activities of daily living, giving an 11 % whole person impairment.

With regard to his left hip, he had a restriction hip flexion was 90° giving 5% LEI. Although internal rotation was reduced to 10° there was a similar restriction in his uninjured 'normal' and asymptomatic right hip. He was therefore awarded 5% left LEI or 2% WPI. In addition, he was awarded 1 % for scarring (TEMSKI).

b. An explanation of my calculations (if applicable)

- DRE Lumbar Category III =11%WPI
- L) Hip ROM =2%WPI
- Scarring TEMSKI =1%WPI

**Total Whole Person Impairment =14%WPI”**  
(Bold as per original; footnotes omitted)

23. Within part 10 of the MAC he also noted that his assessment of the appellant’s permanent impairment differed from the assessments Drs Gehr and Silva had respectively made. The AMS provided the following observations with respect to that:

“Dr Gehr, Orthopaedic Surgeon, examined him on 15 July 2019. He obtained a similar restriction in hip movements with slighter greater restriction in abduction and adduction compared to what I observed at the time of my assessment. He did not compare to the opposite side.

...

Dr Gehr also noted the presence of lumbar radiculopathy due to positive irritation signs and reduced sensation. Dr Gehr proceeded to award 12% whole person impairment for lumbar spine radiculopathy, 10% for the left hip and 1 % for scarring to obtain a whole person impairment of 22%.

Dr Silva, Orthopaedic Surgeon, examined him on 13 September 2019. He did not identify any focal neurological deficits or any signs of radiculopathy. He concluded that he has a DRE Lumbar Category I or 0% whole person impairment. He also awarded a 0% whole person impairment for surgical scars to his left groin.

With regard to the left hip, he obtained a reduction in hip flexion, internal rotation and abduction. He did not compare to the opposite side where he was consistently documented to have a restriction in right hip internal rotation. He therefore obtained 6% whole person impairment for the left hip and did not apply any deductions.”

## **SUBMISSIONS**

24. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
25. In summary, the appellant submits that the AMS failed to assess the six principal directions of motions of the left hip and, as a consequence, failed to add the impairment values with respect to each of those directions when rating his impairment, which was contrary to the instructions provided in [3.17] of the Guidelines and within section 17.2f on page 533 of AMA5. The appellant submits that the AMS only considered his restriction in movement of flexion and internal rotation and did not consider the other directions of motion. In his submissions, the appellant observed that there was evidence, in the form of Dr Gehr’s report, relating to his range of motion in the planes of extension, adduction, abduction and external rotation.
26. In reply, the respondent submits that the AMS neither failed to examine the six principal directions of motion of the left hip nor failed to add the impairment values for those planes of motion that attracted a rating for impairment. The respondent submits that based on the AMS’s findings relating to the appellant’s range of motion in the planes of extension, adduction, abduction and external rotation, there was no assessable impairment and hence there was no impairment values to add with respect to these planes when assessing the appellant’s impairment relating to his left hip. The respondent submits that the AMS was correct not to add any value for the restriction the appellant had in internal rotation of his left hip because the AMS found the appellant had a similar restriction in his uninjured right hip and, in that circumstance, consistent with [2.20] of the Guidelines, the appellant did not have any impairment as a consequence of any restriction of internal rotation of his left hip.
27. The respondent also submits that the MAC contains a demonstrable error because the AMS assessed the appellant’s flexion of his left hip to be 100 degrees, but within Part 10 of the MAC said that the appellant’s restriction in hip flexion was 90 degrees and “incorrectly assessed” the appellant had 5% lower extremity impairment as a consequence of that. The respondent submits that in accordance with Table 17-9 of AMA 5, a hip flexion of 100 degrees does not attract any rating. The respondent submits that the “MAC should also be reflected to 0% WPI to the left lower extremity”.

## **FINDINGS AND REASONS**

28. 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.
29. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons.
30. In the Appeal Panel’s view it is abundantly clear from what the AMS recorded in the MAC relating to his examination of the appellant’s left hip that the AMS measured the appellant’s range of movement in the six principal directions of motion of the left hip. Table 17-9 of AMA 5 stipulates how a worker’s impairment is to be rated with respect to restricted range of motion of the worker’s hip. The four planes of motion with respect to which the appellant submits that the AMS failed to measure, and consequently failed to add impairment values when assessing his permanent impairment, being extension, adduction, abduction and external rotation, do not, based on the AMS’s findings, attract a rating for permanent impairment under Table 17-9.

31. The Appeal Panel notes that the AMS found that the appellant's movement in internal rotation of his left hip was restricted to 10<sup>0</sup>, which would, without more, attract a rating of 2% WPI under Table 17-9. However, the AMS also found that the appellant's right hip movement in the plane of internal rotation was also restricted to 10<sup>0</sup>. Consistent with [3.17] of the Guidelines, and noting that there is no history of the appellant having suffered injury in his right hip before or after the incident on 16 March 2016, the AMS did not rate the appellant as having any impairment with respect to restricted movement of internal rotation of his left hip. The rationale behind that is that in a circumstance where there is an uninjured joint then movement of that uninjured joint serves as a "base line" of what a worker's movement in the injured joint would most likely have been immediately before the injury occurred to the joint. What is being done is establishing the impairment of a worker as a consequence of an injury to a joint by comparing the function of that injured joint after injury with what the function of the joint was likely to have been before the injury. If there is no history of injury to the contralateral joint before or after the injury to the joint that has been referred for assessment, then the best method by which that is done is to use the uninjured contralateral joint as a "base line" of what the worker's impairment in his or her injured joint was most likely to have been before the injury.
32. The Appeal Panel observes, consistent with what the respondent has highlighted in its submissions, that there is some ambiguity in the MAC as to what restriction the AMS found the appellant to have with respect to flexion of his left hip. The AMS recorded he found from his examination that the restriction was 100<sup>0</sup>, but in Part 10 of the MAC, where he explains how he has assessed the appellant's impairment, he indicated the appellant had restriction in hip flexion of 90<sup>0</sup>. If the appellant's hip flexion was 100 degrees, then that attracts no rating for impairment under Table 17-9, whereas if it was 90 degrees it attracts a rating of 2% WPI.
33. That was not a matter however that was raised by the appellant in its submissions. The Appeal Panel can only consider the grounds on which an appeal is made, being those matters alleged by the appellant.<sup>2</sup> Given that the appellant did not raise the issue that the AMS may potentially have assessed him as having impaired movement in terms of flexion of his left hip that was inconsistent with the AMS's findings from examination, and given that the respondent has not appealed against the MAC, the Appeal Panel cannot consider that issue when determining whether the AMS applied incorrect criteria to assess the medical dispute or whether the MAC contains a demonstrable error.
34. Hence, based on those matters that the appellant raised in his submissions in support of the grounds for appeal relied on, the Appeal Panel does not consider the AMS assessed the appellant's permanent impairment based on incorrect criteria or that the MAC contains a demonstrable error.
35. For these reasons, the Appeal Panel has determined that the MAC issued on 16 September 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 Bhasin

**Gurmeet Bhasin**  
**Dispute Services Officer**  
As delegate of the Registrar



<sup>2</sup> See *Cullen v Woodbrae Holdings Pty Ltd* [2015] NSWSC 1416 at [36], *Ingham Enterprises Pty Ltd v Lakovska* [2014] NSWCA 194 at [40]