WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1562/19**
Appellant:	**Matthew Slater**
Respondent:	**A & A Reid Enterprises Pty Ltd**
Date of Decision:	**13 August 2019**
Citation:	**[2019] NSWWCCMA 112**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr John Brian Stephenson**
Approved Medical Specialist:	**Dr Roger Pillemer**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 27 May 2019 Matthew Slater (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Robert Breit, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 9 May 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 WorkCover Medical 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 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, 4th* ed 1 April 2016 (the Guides) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). "WPI" is reference to whole person impairment.

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 WorkCover Medical Assessment Guidelines.

7. The appellant did not seek to be re-examined by a Panel AMS, no doubt because the grounds raised depended on evidence already before the Panel.

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.

Medical Assessment Certificate

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

SUBMISSIONS

10. Both parties made written submissions which have been considered by the Appeal Panel.

RELEVANT FACTUAL BACKGROUND

11. On 15 April 2019, a delegate of the Registrar referred this matter to an AMS for assessment of WPI caused to the left upper extremity and scarring (TEMSKI) by injury on 6 October 2017.

12. Mr Slater was employed as a meat carter since about 2007, having commenced with the employer in about May 2017. His duties involved delivering meat to butchers by truck and carrying the meat and carcasses to the butchers' premises. He would have to carry trays or tubs of meat or carcasses which could weigh up to 90 kg.

13. On 6 October 2017 whilst carrying a carcass on his shoulder he slipped and fell on a ramp, landing on his outstretched left hand and immediately felt a snapping sensation in his left wrist. He attended his local doctor and x-rays were taken which revealed serious arthritis of the radio-scaphoid joint with a non-united scaphoid fracture internally reduced with a self-cannulated screw. There was also avascular necrosis and fragmentation of the proximal pole of the scaphoid.

14. Mr Slater was referred to Dr Michael Dowd, Hand and Plastic Surgeon, who had operated on the left scaphoid fracture a few years before.

15. On 29 November at Macquarie University Hospital Mr Slater came to a left scaphoidectomy and capitolunate fusion. He progressed well and follow-up x-rays demonstrated that the fusion was complete by March 2018. He was discharged from Dr Dowd's care in July 2018.

16. The earlier scaphoid fracture treated by Dr Dowd occurred when Mr Slater was 16, in 2005. He fractured the left scaphoid in a skateboard accident and after immobilisation and plaster, the fracture did not unite. Dr Dowd then carried out a bone graft and Mr Slater was in plaster then for a further four months. He did not experience any symptoms from his wrist until the subject accident.

17. The AMS assessed at 13% WPI in relation to the injury to the left upper extremity from which he deducted ¼ leaving an entitlement to 10%. The AMS found that there was no WPI with regard to the scarring.

FINDINGS AND REASONS

18. 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.

19. 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.

20. The issues raised in the appeal concerned firstly the nil impairment assessment for Mr Slater's scarring and secondly the extent of the deduction pursuant to s 323 of the 1998 Act.

Section 323 deduction

21. In taking the history the AMS said[1]:

> "Details of any previous or subsequent accidents, injuries or condition:
> There is a very important past history of a skateboarding injury at the age of 16. He had a scaphoid fracture that was treated by Dr Dowd, there was a bone graft (which indicates a significant problem already) and screw fixation to that area stating that he had no problems thereafter and that he had been working as a meat carter for 10 years without any difficulty."

22. The AMS noted the investigations taken again on 6 October 2018 to the left upper extremity. He said[2]:

> "6 October 2017 X-ray left elbow, forearm, wrist, and hand – Only the wrist shows the abnormality as indicated under history. This is evidence of longstanding pathology related to the original scaphoid fracture, avascular necrosis, non-union, and bony collapse.
>
> 6 October 2017 Left wrist CT – This confirms the findings of the CT with severe radio-scaphoid arthritis, the un-united fragmented osteonecrotic scaphoid, as well as evidence of instability.
>
> X-rays of the left hand, there is a series from 3 January 2018 until 2 July 2018 on a monthly basis. They are follow-up x-rays of the capitolunate fusion. It has fused. The scaphoid has been excised."

23. At paragraph 11 the AMS explained the basis for the ¼ deduction he made[3]:

> "a. In my opinion the worker suffers from the following relevant previous injuries, pre-existing conditions or abnormalities:
>
> The initial x-ray shows a very longstanding non-union of the scaphoid with avascular necrosis and marked scapho-radial arthritis, all of which result from the original fracture at about the age of 16.
>
> The marked radiological changes mean that symptomatology was not far off and this type of surgery inevitable as a result of the original injury. It is therefore apparent that the original fracture non-union etc has contributed significantly to the current impairment.

[1] Appeal Papers 19
[2] Appeal Papers 20
[3] Appeal Papers 22 - 23

On the other hand, one also has to take into consideration that he had been able to work as a meat carter which certainly does indicate a lack of symptomatology. I would therefore consider that one quarter is an appropriate deductable quantum."

24. Dr Min Fee Lai on 27 November 2018 allowed a 1/10th deduction pursuant to s 323 whilst Dr Kim Edwards, General Surgeon for the respondent in his report of 8 February 2018 suggested one half.

Submissions

25. The appellant submitted that it would be too difficult to assess the amount of the deduction accurately, given that the radiological scans taken following the subject accident did not confirm the extent of the pathology prior to it. Mr Slater referred to the specific mechanics of the injury whereby he put his weight on his left wrist after falling whilst carrying a carcass on his right shoulder. It was argued that a fall of that nature would have caused significant weight to be suddenly forced on the left hand at an awkward angle.

26. Mr Slater submitted that the assessment had been made on the reduced range of movement as a consequence of the fusion surgery, which he argued would not otherwise have been necessary but for the subject fall. Mr Slater pointed to his symptom free use of the left wrist in his employment as a butcher which was arduous and required the lifting of heavy weights. These matters mitigated against any deduction more than 1/10th.

27. We were referred to *Pereira v Siemens Limited*[4] and the dicta of Garling J. Mr Slater argued that notwithstanding the presence of the pre-existing pathology, the circumstances of the subject injury meant that it could not be established that there was contribution from the pre-existing pathology to the cause for the need for surgery. He argued that it was more likely that surgery would have been required regardless of any pre-existing pathology, due to the mechanism of the injury.

28. Mr Slater suggested the deduction made by the AMS was based on hypothesis and assumption, rather than on the mechanism of the injury which directly led to the need for surgery.

29. The respondent referred to the evidence of the injury of 2005 and referred to the reasons given by the AMS. The respondent discussed the assessment made by Dr Lai of 1/10th but submitted that the contention that the mechanism of the fall was the sole cause of the injury had not taken into account the pathology immediately revealed on the date of the subject accident. We were referred to *Ryder v Sundance Bakehouse*[5] and the well-known case of *Cole v Wenaline Pty Ltd*[6] . Accordingly, a deduction was available even though the pre-existing conditions had been asymptomatic prior to the subject injury.

DISCUSSION

30. Section 323 provides relevantly:

> **"323 Deduction for previous injury or pre-existing condition or abnormality**
>
> (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury(whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.

[4] [2015] NSWSC 1133 (*Pereira*)
[5] [2015] NSWSC 526 (*Ryder*)
[6] [2010] NSWSC 78 (*Cole*)

(2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence."

31. The authorities relied on by both parties are uncontroversial. A deduction may not be made on the basis of hypothesis or assumption and it must be established on the available evidence that the pre-existing injury or condition contributed to the WPI caused by the subject injury. Further, it is uncontroversial that previously asymptomatic conditions can be the subject of a s 323 deduction. It is also correct that all of the evidence must be considered including the fact that the condition was asymptomatic prior to the subject injury[7].

32. The present case is an illustration of those principles. The AMS clearly acknowledged the evidence that Mr Slater had been working in an industry that required arduous physical labour and that although he had had a serious injury when he was 16, nonetheless whilst he was doing that difficult work, his wrist was asymptomatic.

33. The AMS has also however acknowledged the significance of the pre-existing condition. True it is that it was revealed in the x-rays that were taken on the same day as the subject injury, but the Panel experts note that the findings on the x-ray showed arthritis of the wrist, avascular necrosis, non-union and bony collapse. These conditions could not have been caused by the violence of the subject injury which occurred only some hours beforehand. The AMS was correct to find that the long standing non-union scaphoid, the avascular necrosis and the marked scapo-radial arthritis were the result of the original fracture.

34. The Panel experts also agree with the opinion of the AMS that those marked radiological changes indicate that his wrist would have become symptomatic in any event, and would have led to the type of surgery that he eventually undertook.

35. In the absence of the evidence as to the lack of symptoms experienced up to the subject incident by Mr Slater, a much greater deduction than ¼ would have been appropriate.

36. Accordingly, this ground is dismissed.

Scarring

37. On examination, the AMS said[8]:

> "He describes his 7-cm scar on the dorsal aspect of the wrist as pretty good, there is an old volar scar from his original scaphoid surgery. The dorsal scar is only visible on quite close inspection, there are no adverse features at all."

38. In his Reasons for Assessment, the AMS said:[9]

> "The scarring under the TEMSKI scale does not justify any quantum."

Submissions

39. Mr Slater submitted that the guidelines concerning the assessment of a scar were capable, within the discretion given by the "best fit" instruction, of carrying an assessment greater than 0%. Mr Slater submitted that the scar was visible, that he was aware of it, there were trophic changes and that it was slightly pigmented and adherent to the underlying tissue.

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[7] See eg *El Cheikh v Diamond Formwork (NSW) Pty Ltd (in liquidation)* [2013] NSWSC 365 (*El Cheikh*)
[8] Appeal Papers 20
[9] Appeal Papers 22

40. This description was taken from Dr Lai's opinion of 27 November 2018.[10] Dr Lai found[11]:

> "Examination of his left hand dorsum revealed a dorsal slightly pigmented scar measuring 6cm long x 5mm wide which extended from the wrist crease into the middle finger metacarpal ray. There was mild adherence to the underlying tissues present."

41. Dr Lai said[12]:

> "The assessment of your client's left hand /wrist scarring will be according to the TEMSKI table on page 74, WCG4 with the use of the "best fit" principle (clause 14.8, page 638, WCG4).
>
> From your client's history and my physical examination, your client is aware of the scar which is slightly pigmented and adherent to the underlying tissue. The scar is also slightly atrophic. Therefore, it is my opinion that his best fit would be in 1% whole person impairment column."

42. The respondent submitted that it did not appear that Dr Lai noted the original scar from the surgery in 2005.

43. The respondent also referred to the description of the scar by Dr Edwards who said[13]:

> "On examination of his left wrist. There was a well healed 7cm incision on the dorsal aspect of the wrist. The incision was fine and barely visible. It was hard to make out the scar. There was no tethering and no tenderness.
>
> There was also a 2cm incision on the ventral aspect of the wrist from his operation in 2005."

44. The respondent also submitted that the evidence suggested that the scarring is as a result of standard surgical procedure which was uncomplicated.

Discussion

45. Chapter 14 of the Guides governs the assessment for scarring.

46. The TEMSKI scar was shorthand description for the Table of Evaluation of Minor Skin Impairment. The table has five columns which provide for assessments of 0, 1, 2, 3 - 4 and 5 - 9 WPI depending upon the criteria that is set out therein. The criteria overlaps to some degree and the footnote to the table provides:[14]

> "This table uses the principle of 'best fit'. You should assess the impairment to the whole skin system against each criteria and then determine which impairment category best fits (or describes) the impairment. Refer to 14.8 regarding application of this table."

47. Chapter 14.8 confirms that the principle of "best fit" is to be applied and if the skin disorder did not meet all of the criteria within the impairment category details of reason were to be given as to why.

[10] Appeal Papers 41
[11] Appeal Papers 44
[12] Appeal Papers 49
[13] Appeal Papers 188
[14] Guides 74

48. Chapter 14.6 provides:

> "14.6 A scar may be present and rated as 0% WPI.
>
> Note that uncomplicated scars for standard surgical procedures do not, of themselves, rate an impairment."

49. An AMS has a wide discretion in applying the table, which is summarised by the use of the word "best fit" in both the footnote to the table and at Chapter 14.8 of the Guides.

50. Although Dr Lai alleged that Mr Slater was aware of the scar, he did not mention it in his statement[15]. Neither did Dr Lai mention that Mr Slater was conscious of the scar when recording his complaints regarding the injury, or when she was physically examining the scar. It is a little unclear with respect as to what was meant by the phrase "from your client's history and my physical examination, your client is aware of the scar."

51. The assessment of 0% was within the discretion provided by the Guides.

Other matters

52. The Panel experts however are concerned by the comment made by the AMS in explaining his calculation. He said[16]:

> "There has, been an excision of a carpal bone, however paragraph 16.7b page 505 and Table 16-27 indicate 'carpal bone (isolated)'. That represents the same situation as had previously occurred with the same table and distal clavicular excision (isolated) which meant that where other procedures were carried out this component could not be applied. That was corrected in the fourth edition of the SIRA Guides however it was not corrected with respect to an isolated carpal bone excision and therefore I may not apply a quantum."

53. With respect, the AMS is in error in that conclusion. In Mr Slater's situation, the excision of the carpal bone in the surgery described, even though described as being "isolated" can in fact be combined with a reduced rate of movement as noted. Excision of the carpal bone does give a 10% upper extremity impairment pursuant to AMA 5, table 16-27[17].

54. At chapter 2.14 of the Guides[18], the following applies:

> "As noted in AMA 5 s 16.7B 'arthroplasty', 'in the **presence** of decreased motion, motion impairments are derived separately and **combined** with the arthroplasty impairment'. This includes those arthroplasties in AMA 5 Table 16-27 designated as (isolated)."

55. Accordingly, if the 10% upper extremity impairment is included in the calculation of the total upper extremity impairment found by the AMS at 21%, a combined table would result in a figure of 29% upper extremity impairment which equates with 17% WPI. A ¼ deduction in fact then would leave a 13% entitlement.

56. Although the Panel does not have jurisdiction to correct this demonstrable error as we have confirmed the MAC, we are able to refer the matter back to the registrar for consideration of the parties which we now do.

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[15] Appeal Papers 35
[16] Appeal Papers 22
[17] At 506
[18] Guides 12

57. For these reasons, the Appeal Panel has determined that the MAC issued on 9 May 2019 should be confirmed.

58. We refer this matter to the Registrar for consideration of our reasons herein.

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