WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-6657/19**
Appellant:	**Con Argeetes**
Respondent:	**Bayside Council**
Date of Decision:	**11 May 2020**
Citation:	**[2020] NSWWCCMA 87**

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

BACKGROUND TO THE APPEAL

1. The appellant worker, Mr Argeetes, appeals from the Medical Assessment Certificate of Approved Medical Specialist Dr Weisz dated 9 February 2020.

2. On 10 April 2014, Mr Argeetes slipped and fell at work, injuring his right ankle. On 31 July 2015, he came to surgery of the right ankle and heel at the hands of orthopaedic surgeon, Dr Lam. When recovering from this surgery, he favoured the right lower limb by putting pressure on the left. On 16 October 2017, he came to total left knee replacement surgery.

3. In these proceedings, he claimed compensation for impairment of the whole person as a result of injury on 10 April 2014, relying on Dr Patrick's assessment of 19% whole person impairment (5% right ankle/hindfoot; 15% left knee, 0% scarring).

4. The Registrar referred the right and left lower extremities for assessment by Approved Medical Specialist Dr Weisz. On 9 February 2020, Dr Weisz assessed a 14% whole person impairment (4% right lower extremity; 10% left lower extremity) as a result of injury on 10 April 2014. In assessing the left lower extremity, he assessed a 20% whole person impairment, from which he deducted one half to account for severe pre-existing osteoarthritis evident on scans. Dr Patrick had similarly deducted one-half from his assessment of the left lower extremity.

5. The appellant alleges error in respect of the assessment of the left knee only. The grounds are summarised below.

6. On 17 April 2020, the Registrar by his delegate was satisfied that the ground of demonstrable error was made out in respect of the assessment of the left knee, and referred the matter to this Appeal Panel for determination.

7. On 6 May 2020, the Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the *NSW workers compensation guidelines for the evaluation of permanent impairment* (*Guidelines*).

Submissions

8. 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.

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

   (a) The Approved Medical Specialist failed to provide a grading or points for left knee flexion contracture, extension lag and tibio-femoral alignment in accordance with Table 17-35 of AMA5, causing him erroneously to record ‘no deductions’ at par [10b] of the Medical Assessment Certificate: submissions pars [8] to [9].

   (b) In deducting one half for pre-existing osteoarthritis, the Approved Medical Specialist erred, because the left knee was asymptomatic prior to injury, allowing the worker to engage in heavy manual labour without restrictions: submissions pars [13] to [14].

   (c) In failing to warn the worker of his belief that, contrary to the worker’s evidence, the left knee must have been symptomatic prior to injury, the Approved Medical Specialist denied him procedural fairness: submissions pars [15] to [17].

10. The respondent submits in summary as follows.

   (a) The Approved Medical Specialist conducted a detailed examination of the left lower extremity, and concluded expressly that no deductions of the kind now suggested by the worker ought be made. He gave reasons for his conclusion. He was not required to disclose the exact points assessed.

   (b) On the radiological evidence before him of severe pre-existing osteoarthritis, it was open to the Approved Medical Specialist to conclude that the pre-existing condition was contributing to current impairment, and in the exercise of his clinical judgment to assess that contribution at one half.

Reasoning of the Approved Medical Specialist

11. Dr Weisz examined the worker on 6 February 2020. He took a history of injury on 10 April 2014, its surgical and other sequelae, and of the onset of symptoms in the left knee during recovery from surgery to the right ankle.

12. Under the hearing ‘present symptoms’, he recorded:

> “The left knee is with minor symptomatology; he is restricted somewhat on stairs or long walks. He experiences "cramps at night time". His right ankle is almost symptom free, with only occasional discomfort on long walks or kneeling.”

13. In respect of the history of surgery to the left knee, he recorded at [4]:

> “I understood that he was operated on his **left knee** in 1982, when early stages of arthritis were radiologically documented. Ligament repairs were performed on three occasions, leading to a symptom free condition, allowing return to full and unrestricted work, despite progressive and severe osteoarthritis developing along the years to come. His right knee was also operated after an injury in 2007, when ligaments were repaired. He remained symptom free ever since, stating that "the knee is very good".”

14. In respect of investigations of the left knee, he recorded at [6]:

> "Mr Argeetes was exposed to a large number of radiological investigations: I perused a total of 26 bags of x-ray films, quite a significant irradiation, except the ultrasound and MRI tests being non-irradiating. The essentials of those films are the following: In 1982-3 period, plain film detected early signs of arthritic changes in the left knee. These have been progressive in subsequent tests and in 2015, there was a severely arthritic joint detected in all three compartments, literary bone on bone."

15. He concluded at [8f]:

> "The left knee condition is well documented years before the aggravation he sustained in 2014-15."

16. He summarised his opinion as to injury and diagnosis at [7]:

> "The right ankle injury dated 2014 was surgically treated and in the post-operative period, the strain to the contra-lateral limb aggravated or exacerbated an advanced degenerative left knee joint. He was also operated in the left knee. Both surgeries are with good conclusion, apart from dermatitis and some restriction in certain activities."

17. This, in view of the fact that his assessment of whole person impairment included an assessment of the left knee, necessarily implied a finding that the condition of the left knee resulted from injury to the right ankle on 10 April 2014. That finding on causation favoured the appellant.

18. Dr Weisz explained his assessment of left knee permanent impairment at [10b] in the following way:

> "The left lower extremity (knee) is assessed based on Diagnosis Based Estimate, equivalent to 75 points (i.e. chapter 17.2j on pg 545, and Table 17-35 (pg. 21) in WorkCover Guides.
>
> a. Pain = 30; b. ROM = 25; c. Stability in AP line = 10 and 15 in medio-lateral line; with no deductions offering 75 points, equal to 20% WPI, with 1/2 deduction = 10%".

19. This indicates that he used Table 17-35 from AMA5, in the corrected form published at page 21 of the *Guidelines*. That Table provides a method of scoring knee replacement results. Points are scored for pain, range of motion and stability. A total score of 85-100 points is described as a 'good result', yielding 15% whole person impairment. 50-84 points is described as 'fair results', yielding 20% whole person impairment. Less than 50 points is described as 'poor results', yielding 30% whole person impairment: AMA5, page 547. Deductions are made for flexion contracture, extension lag and tibio-femoral alignment.

20. In the passage above, Dr Weisz indicates that he added 30, 25, 10 and 15 points to yield a total of 75 points. By our calculations, the sum of those points equals 80, but it makes no difference to the result. A score of 75 points falls within the same category as does a score of 80 – that is, the 'fair results' category, which attracts a 20% whole person impairment, as assessed by Dr Weisz.

21. Dr Weisz indicated that he made 'no deductions' – that is, no deductions for flexion contracture, extension lag and tibio-femoral alignment. This is the subject of the first ground of appeal considered below.

22. Dr Weisz specifically considered Dr Patrick's assessment of 19% whole person impairment, noting as follows at [10c]:

> "In the knee assessment, condition during the year since the doctor's report have [sic] improved, as ranges of movements [sic] usually do, hence the slightly reduced impairment."

23. As indicated, Dr Weisz made the same deduction of one half for pre-existing osteoarthritis as had Dr Patrick.

24. Dr Weisz also considered the assessment of Dr Machart at [10c], noting that Dr Machart assessed "a full deduction from the left knee condition, with which I respectfully disagree."

Ground 1: gradings and points for deductions

25. The Approved Medical Specialist recorded at [10b] that he made 'no deductions' under Table 17-35 for left knee flexion contracture, extension lag and tibio-femoral alignment. It would have been preferable to record his measurements of flexion contracture (if any), extension leg (if any) and tibio-femoral alignment, but the omission to do so does not of itself constitute error, provided his findings can be ascertained from the result itself. In our, view, they can.

26. A flexion contracture of less than 5 degrees attracts zero deductions. It can be readily inferred that he measured a flexion contracture, if any, of less than 5 degrees. If present, an extension lag merits a deduction of between 5 and 15 points, depending on degree. We infer that Dr Weisz found none was present. A tibio-femoral alignment of between 5 and 10 degrees valgus attracts a deduction of 0 points. It can be readily inferred that he measured an alignment within those parameters.

27. We can identify no error. The first ground fails.

Ground 2: Deduction for pre-existing osteoarthritis

28. As indicated, the left knee was assessed by Dr Weisz on the basis that the worker had come to total left knee replacement surgery on 16 October 2017.

29. To make a deduction pursuant to section 323, an Approved Medical Specialist must find that there was a pathological condition which existed prior to injury, and that the condition is contributing to current impairment. It may contribute to impairment even if it was asymptomatic prior to injury: *Cole v Wenaline Pty Limited* [2010] NSWSC 78.

30. The scans commented on by the Approved Medical Specialist demonstrated that the worker was afflicted by left knee arthritis well before injury on 10 April 2014, whether the arthritis was symptomatic or not. It was well open to him to conclude that advanced osteoarthritis of the knee existed prior to injury. The only other finding that the Approved Medical Specialist needed to make in order to justify a deduction was that pre-existing arthritis contributed to current impairment.

31. The knee joint having been replaced; the pre-existing osteoarthritis had been eliminated by surgery. The only available basis for concluding that pre-existing arthritis was contributing to current impairment was that the arthritis contributed to the need for knee replacement surgery, which in turn formed the basis for assessing impairment. Dr Weisz did not make that finding expressly, possibly because he considered it self-evident. That he made such a finding is necessarily implied by the fact that he made the deduction itself, and we infer that he did make such a finding. That finding was well open to him on the evidence which indicated the presence of long-standing significant pre-existing osteoarthritic degenerative change.

32. Given the severity of the pre-existing arthritis, it was well open to Dr Weisz to conclude, as he must have, that it contributed one half to the need for surgery, notwithstanding that it had been asymptomatic prior to injury. Dr Patrick appears to have reached the same conclusion. We would make a similar finding.

33. We can identify no error. The second ground fails.

Ground 3 – alleged lack of procedural fairness

34. Under the heading, 'consistency of presentation', the Approved Medical Specialist recorded:

> "there were only minor inconsistencies recorded. It would be difficult to accept that the extensive left knee degeneration was asymptomatic before 2014."

35. The appellant essentially submits that Dr Weisz rejected the appellant's assertion that the knee was asymptomatic prior to injury, and denied him procedural fairness by failing to warn him of this finding.

36. The meaning of the quoted passage is not entirely clear, save that Dr Weisz considered any inconsistency to be 'minor'. In saying that it 'would be difficult to accept' that the left knee was asymptomatic prior to injury, he did not go so far as to say that he rejected the appellant's evidence to that effect, and we are not satisfied that he did.

37. Nothing turns on it in any event, because it was unnecessary for him to conclude, as the appellant submits he did, that the left knee was symptomatic prior to injury. It was well open to him to conclude that pre-existing arthritis had contributed one half to the need for knee replacement surgery, whether or not the left knee had been symptomatic prior to injury. His finding that arthritis had contributed one half to the need for surgery was not dependent on a finding that the left knee was symptomatic prior to injury, and we are not satisfied that the latter finding was made.

38. For these reasons, the issue of procedural fairness does not arise. We can identify no error.

Conclusion

39. For the reasons given, the appeal is dismissed, and the Medical Assessment Certificate of Dr Weisz is 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar