WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-590/20**
Appellant:	**Brett Anthony Meyers**
Respondent:	**Andrew Miedecke Motors Pty Ltd**
Date of Decision:	**17 June 2020**
Citation:	**[2020] NSWWCCMA 107**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr Margaret Gibson**
Approved Medical Specialist:	**Dr Brian Stephenson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 9 April 2020, Brett Anthony Meyers (the appellant/Mr Meyers) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Murray Hyde Page, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 19 March 2020.

2. The appellant relies on the following grounds of appeal under section 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 grounds 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 section 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 Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. Mr Meyers suffered an injury to his lumbar spine on 14 November 2017 (the subject injury) while securing a load of timber on a truck in the course of his employment with Andrew Miedecke Motors Pty Ltd (the respondent). He attempted to continue to work but during the following weeks his symptoms worsened and he sought medical assistance. A CT scan showed pathology at the lumbosacral junction.

7. A trial of physiotherapy did not lead to an improvement and in January 2018 Mr Meyers was referred to a neurosurgeon, Dr Michael Edger. An L5/S1 epidural steroid injection was not effective and in March 2018 Dr Edger performed a right sided L5/S1 microdiscectomy with dorsal root rhizolysis. Mr Meyers continued to experience pain and noticed increased neurological symptoms in the legs.

8. A subsequent MRI scan showed continuing compression of the S1 nerve root and in May 2018 Dr Edger performed an L5 lumbar laminectomy and a further L5/S1 microdiscectomy with bilateral rhizolysis.

9. Mr Meyers continued to suffer pain and restriction of movement and was referred for pain management. He was unable to return to work.

10. In June 2019, Mr Meyers was examined by a surgeon, Dr Hopcroft, for the purposes of a claim for lump sum compensation. Dr Hopcroft was of the opinion that further surgery might be of assistance in relieving Mr Meyers's symptoms and accordingly assessed that Mr Meyers had not achieved maximum medical improvement at that time.

11. Mr Meyers consulted another neurosurgeon, Dr Nicholas Little. Dr Little did not support further surgical intervention but recommended referral to a pain clinic. Mr Meyers accepted that opinion and Dr Hopcroft then provided an assessment of whole person impairment (WPI).

12. Dr Hopcroft assessed Mr Meyers as falling within DRE Lumbar Category III warranting 10% WPI. A further 2% was added in respect of the additional surgery and 3% in respect of radiculopathy. Dr Hopcroft assessed restriction in activities of daily living at 3% which he added to assess a total of 18% WPI in respect of the lumbar spine. To this he added 2% WPI in respect of scarring, to make a total of 20% WPI.

13. Dr Hopcroft made no deduction in respect of previous injury or pre-existing condition or abnormality in the lumbar spine, although noting that Mr Meyers had suffered an episode of back pain in 2013 in the course of his employment and that the CT examination at that time demonstrated a small central posterior protrusion at the L5/S1 disc.

14. Mr Meyers's solicitors made a claim for lump-sum compensation pursuant to section 66 of the *Workers Compensation Act 1987*. The insurer then had Mr Meyers examined by an orthopaedic surgeon, Dr Richard Powell. Dr Powell agreed that Mr Meyers was appropriately assessed as within DRE Lumbar Category III. He ascribed 2% to interference with activities of daily living and agreed with Dr Hopcroft in adding 2% WPI for the second surgery and 3% for persisting radiculopathy.

15. Dr Powell assessed scarring as falling within class 1 attracting 0% WPI. Dr Powell's total assessment was 17% WPI. Dr Powell deducted one fifth from this figure due to what he described as "significant pre-existing pathology in the lumbar spine involving the L5/S1 level" resulting in an assessment of 13% WPI after rounding.

16. The dispute as to the extent of impairment to the lumbar spine was referred to an Approved Medical Specialist (AMS) who assessed Mr Meyers as falling within DRE Lumbar Category III warranting 10% WPI with an additional 3% in respect of persisting radiculopathy and 2% in respect of the second surgical procedure. The AMS assessed interference with activities of daily living at 2% WPI to make a total assessment of 16% WPI.

17. The AMS deducted one tenth in respect of the pre-existing condition in the spine pursuant to section 323 of the 1998 Act to yield a total assessment of 14% WPI after rounding.

18. The referral to the AMS did not include "scarring" and no assessment was made by the AMS in this regard.

PRELIMINARY REVIEW

19. 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.

20. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because sufficient material was available to enable determination of the appeal. The Panel notes that neither party has requested re-examination.

EVIDENCE

Documentary evidence

21. 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

22. The grounds of appeal are limited to the deduction made by the AMS pursuant to section 323 of the 1998 ACT and to the assessment of interference with activities of daily living.

23. With respect to the deduction pursuant to section 323, the AMS noted that Mr Meyers had suffered what he described as “an acute back injury” in the course of his employment in 2013. He recorded the circumstances of that injury, noting that Mr Meyers consulted his general practitioner and that a CT scan taken at the time “showed a small L5/S1 disc protrusion.” The AMS noted this had settled down within a matter of weeks and that Mr Meyers had informed him that he had “made a full recovery”. The AMS noted that Mr Meyers had not had any further trouble with his back until the subject injury.

24. In response to the heading in the MAC form at 8(e); “Is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality?” the AMS answered “Yes”. At paragraph 8(f) the AMS identified the body part affected by the previous injury, pre-existing condition or abnormality, as the lumbar spine.

25. The AMS considered the report of the CT scan carried out in December 2013 which he said showed “a small central L5/S1 disc protrusion associated with only minor degenerative changes in the lower lumbar spine.” He contrasted this with the findings of the CT and MRI scans carried out following the subject injury which showed “a large central L5/S1 disc protrusion impinging the adjacent S1 nerve roots, mainly on the right side.”

26. Under the heading “Summary of injuries and diagnoses” the AMS noted: “However, it needs to be noted that he had had an injury at the end of 2013 and a CT scan at that time showed there was already a small L5/S1 disc protrusion, but his symptoms settled completely on that occasion.”

27. In considering his assessment the AMS said: “I also need to take into account the fact that he had a pre-existent lumbar spine condition dating back to the end of 2013 when he had a CT scan done that showed a small central L5/S1 disc protrusion.” The AMS noted the substantially increased pathology following the subject injury. He said: “It is likely that the work injury caused the L5/S1 disc to dramatically increase the amount of protrusion. Taking all this into account, I consider using section 323, that one tenth of his level of WPI is due to this pre-existent injury and condition.”

28. The AMS considered the respective opinions of the independent medical experts, Dr Hopcroft and Dr Powell. He noted that Dr Powell had concluded that two fifths of the impairment that he assessed was due to "clear evidence of significant pre-existent pathology in the lumbar spine involving the L5/S1 level." (The Panel notes that this was a slip by the AMS as Dr Powell in fact deducted only one fifth.[1])

29. The AMS commented:

> "I also have taken into consideration there was a pre-existent *symptomatic* lumbar spine condition and he had an injury in 2013. This was investigated with a CT scan that showed a small central L5/S1 disc protrusion. Using section 323, I consider one- tenth his level of WPI is due to this pre-existent condition" (emphasis added).

30. With respect to the assessment of interference with activities of daily living the AMS recorded the history "He is able to care for himself and that includes showering and dressing without any assistance."

31. The AMS noted:

> "He has difficulty with heavier indoor tasks with cleaning, such as vacuuming and anything involving bending and lifting. He does some lighter tasks such as cooking. He is restricted in outdoor activities and cannot do gardening and lawn mowing. He finds it difficult getting involved with his children's sport."

32. The AMS recorded that his assessment was based "on the history and examination I undertook today, as well as with reference to the investigations."

33. In assessing interference with activities of daily living the AMS said "I consider that he is able to do all his own personal care but has restrictions on indoor and outdoor tasks and activity. He therefore has 2% WPI for affect [sic] on ADL's."

SUBMISSIONS

34. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.

35. The appellant noted the relevant case law relevant to error with respect to assessment of impairment. With respect to the assessment of interference with activities of daily living the appellant submitted:

> "In the circumstances, the Appellant submits that Assessor Hyde Page has failed to provide any, or any proper reasons to support his opinion as to the restriction on the appellant's activities of daily living, and has applied incorrect criteria by simply applying his belief as to the limits on the appellant's activities, rather than giving any consideration as to what the actual restrictions are."

36. In reply, the respondent submits that the assessment of interference with activities of daily living are a matter of appropriate clinical judgement based on the evidence, noting that the reasons had to be considered as a whole.

[1] Report of Dr Powell 24 October 2019 p 8. (p. 19 of Application to Resolve a Dispute)

37. With respect to the deduction of one tenth pursuant to section 323 of the 1998 Act, the appellant submitted that:

> "Other than identifying the pathology which was revealed in the December 2013; there is no evidence that assessor Hyde Page took a history, or considered whether the appellant had any pre-existing symptoms or restrictions from the alleged pre-existing pathology, at the time of the injury which is the subject of the claim."

38. The appellant referred to the evidence and submitted:

> "Assessor Hyde Page did no more than identify and [sic – an] alleged pre-existing pathology and apply a deduction.
>
> In the circumstances, it is submitted that Assessor Hyde Page failed to provide any, or any sufficient reasons to support a deduction pursuant to section 323, or that if such a deduction was warranted, to support the application of section 323(2)."

39. The respondent in reply submitted that both independent medical experts had come to the conclusion that there was a pre-existing condition in the lumbar spine which had been aggravated by the subject injury. That conclusion was therefore open to the AMS who also had evidence of the report of the 2013 CT scan of the lumbar spine which supported the conclusion that the pre-existing condition contributed to the ultimate impairment.

40. The respondent submitted that the issue of whether the pre-existing condition contributed to the overall impairment assessed was a matter of clinical judgement appropriately exercised by the AMS.

FINDINGS AND REASONS

41. 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.

42. 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.

Interference with activities of daily living.

43. The appellant alleged that the AMS had failed to take a history of interference with activities of daily living and had not given any or sufficient weight to the history obtained by Dr Powell which included difficulty with managing shoes and socks and restricted ability to perform domestic tasks so that Mr Meyers avoided shopping and vacuuming.

44. The Panel does not accept that submission. The AMS stated "He is able to care for himself and that includes showering and dressing without any assistance." That statement must be presumed to have come from the history provided to the AMS by Mr Meyers at the time of examination. The appellant has not provided any evidence that this information was not elicited on examination by appropriate questioning.

45. In the absence of evidence to the contrary the AMS is presumed to have carried out an appropriate examination which would include obtaining the relevant history[2]. The AMS provided a comprehensive summary of that history under the heading "Social activities/ADL".

46. The "statement" by Mr Meyers provided in the Application to Resolve a Dispute takes the form of a chronology which did not assist with the assessment of activities of daily living.

47. Dr Hopcroft's reports do not assist in the assessment of activities of daily living beyond noting that Dr Hopcroft had assessed 3% WPI with respect to interference with activities of daily living.

48. Dr Powell assessed 2% WPI based on a history that he obtained of interference with yard and garden activities as well as sporting and recreation activities and interference with ability to perform household tasks.

49. The Guidelines make provision for assessment of interference with activities of daily living. Paragraph 4.34 sets out three areas which cumulatively may give rise to an assessment of up to 3% WPI. Where there is interference with "yard/garden, sport/recreation" an assessment of 1% WPI is to be assessed. If the interference extends to home care then the appropriate assessment is 2% WPI. In the event that the interference includes self-care then the maximum 3% WPI is indicated.

50. Paragraph 4.35 of the Guidelines indicates that 3% WPI for interference with activities of daily living is appropriate "if the worker's capacity to undertake personal care activities such as dressing, washing, toileting and shaving has been affected" as well as the areas of "home care" and "yard/garden" and "sport/recreation" have been affected.

51. The Guidelines provide that 2% WPI is to be added "if the worker can manage personal care, but is restricted with usual household tasks, such as cooking, vacuuming and making beds, or tasks of equal magnitude such as shopping, climbing stairs or walking reasonable distances" in addition to interference with "yard/garden"and "sport/recreation" activities.

52. In assessing interference with activities of daily living the AMS took into account the extent of impairment revealed by the evidence and his examination. After assessing Mr Meyers as falling within DRE III and noting the additional ratings indicated by the Guidelines, the AMS said: "I consider that he is able to do all his own personal care but has restrictions on indoor and outdoor tasks and activity. He therefore has 2% WPI for affect on ADLs."

53. The results of examination, consideration of the imaging and the history recorded by the AMS provided a sound explanation for an assessment of 2% in respect of interference with activities of daily living. The report of Dr Powell containing the reference to "difficult[y] with shoes and socks" was considered by the AMS, but the Panel is satisfied that the AMS was correct in finding that difficulty with shoes and socks was insufficient to warrant a finding that there had been interference with "capacity to undertake personal care activities such as dressing, washing, toileting and shaving".

54. The Panel is satisfied that the AMS did not apply incorrect criteria and no demonstrable error has been shown with respect to assessment of activities of daily living. That ground has not been established.

Section 323 deduction.

55. The AMS made a deduction of one tenth of the assessed level of WPI in respect of a "pre-existent condition". The rationale provided by the AMS for the deduction is noted above.

[2] *Jones v The Registrar of the Workers Compensation Commission* [2010] NSWSC 507 at [35].

56. The appellant referred to the reports of Dr Hopcroft and Dr Powell, noting that Dr Hopcroft had made no deduction pursuant to section 323 and Dr Powell had deducted one fifth from the final assessment although he had provided no reasons other than the pathology disclosed by the CT scan in December 2013.

57. The appellant observed that the report of the CT scan in December 2013 showed "a small central L5/S1 disc protrusion associated with only minor degenerative changes in the lower lumbar spine" (as reported by the AMS). Mr Meyers had reported a complete recovery from the earlier injury.

58. The appellant submitted that the MAC did not disclose that the AMS had taken a history or considered whether the appellant had any pre-existing symptoms or restrictions from the "alleged pre-existing pathology" at the time of the subject injury.

59. The appellant recognised that "if a pre-existing condition is a contributing factor to the permanent impairment a deduction may be made even if the pre-existing condition was asymptomatic" noting the decision of the Court of Appeal in *Vitaz v Wesfarmers (NSW) Pty Ltd*[3] but submitted that the AMS had failed to provide sufficient reasons for applying section 323(2) and deducting one tenth from the overall assessment.

60. With respect to the deduction, the AMS referred to a "pre-existent *symptomatic* lumbar spine condition"[4] (emphasis added). It is possible that the AMS intended to convey that symptoms in the lumbar spine had appeared as a result of the 2013 injury but had subsequently resolved, allowing Mr Meyers to carry on his normal duties until the subject injury. That reading would be consistent with the history noted earlier in the MAC "his symptoms settled completely on that occasion[5]".

61. If the AMS made the deduction on the basis that Mr Meyers was continuing to suffer symptoms in the lumbar spine up until the time of the subject injury, then that conclusion was against the weight of the evidence and not open to be drawn.

62. As noted by the appellant, the absence of symptoms is not determinative if there was a pre-existing condition or abnormality or a previous injury that contributed to the overall level of impairment assessed in the lumbar spine.

63. The adequacy of the reasons for the deduction need to be considered in the light of the whole of the MAC. The AMS noted that the symptoms from the 2013 injury had "settled down within a matter of weeks and he states he made a full recovery"[6] in addition to the report "his symptoms settled completely on that occasion." This suggests that when the AMS subsequently referred to Mr Meyers as "symptomatic" prior to the subject injury, this was either a typographical error or a reference to an earlier, transient state.

64. There is some force in the appellant's submission that the AMS does not explain how it is that the appearance of the pathology reported in the 2013 scan contributed to the overall level of impairment.

65. Accepting that the AMS does not explain his conclusion that the appearance of pathology in the 2013 scan leads to the conclusion that there was a pre-existing condition which contributed to the overall level of impairment, and the appearance that the AMS may have mistakenly accepted that Mr Meyers remained symptomatic up to the subject injury, then error is established and it is necessary for the Panel to perform its own assessment on the evidence.

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[3] [2011] NSWCA 254 at [28]-[30].
[4] MAC p 7 par 10(c).
[5] MAC p 4 par 7 under the heading "summary of injuries and diagnoses".
[6] MAC p 3 par 4 under the heading "Details of any previous or subsequent accidents, injuries or condition".

66. The Panel accepts that there was a previous condition. That condition was recognised by Dr Hopcroft and Dr Powell who both recognised the 2018 injury as an aggravation of a pre-existing degenerative condition. That conclusion is established by the scan in December 2013.

67. The Panel is satisfied that the pre-existing degenerative condition in the lumbar spine at L5/S1 contributed to the WPI assessed by the AMS at examination.

68. The evidence establishes on the balance of probabilities that the 2013 injury aggravated pre-existing degenerative changes in the lumbar spine but it appears that the aggravation caused by that injury then ceased. However, the degenerative condition spine would have remained and would not have resolved, that being the clinically accepted course of such conditions.

69. The level of pain and restriction of movement which led to the failed surgical interventions resulted from the whole of the pathology in the lumbosacral spine which resulted from both the subject injury and the pre-existing degenerative condition. The impairment assessed by the AMS is assessed pursuant to the Guidelines which base the assessment of the lumbar spine as DRE III as a result of the surgery.

70. The extent to which the pre-existing condition contributed to the requirement for surgery and the resulting level of impairment is difficult to quantify precisely. Clearly the subject injury was the major contributor and the contribution of the pre-existing condition would have been relatively minor given that Mr Meyers was asymptomatic prior to the subject injury and the pathology disclosed by the scans following the subject injury. A one tenth deduction is appropriate and is not at odds with the evidence.

71. Accordingly, although the Panel accepts that demonstrable error has been established, upon review the Panel is satisfied that the overall assessment by the AMS was correct and in accordance with the evidence.

72. For these reasons, the Appeal Panel has determined that the MAC issued on 19 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*.

A Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar