

# WORKERS COMPENSATION COMMISSION

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

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<b>Matter Number:</b>	<b>M1-6162/18</b>
<b>Appellant:</b>	<b>Norman Bedford</b>
<b>Respondent:</b>	<b>Machin's Sawmill Pty Limited</b>
<b>Date of Decision:</b>	<b>7 August 2019</b>
<b>Citation:</b>	<b>[2019] NSWCCMA 106</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Ross Bell</b>
<b>Approved Medical Specialist:</b>	<b>Dr Mark Burns</b>
<b>Approved Medical Specialist:</b>	<b>Dr James Bodel</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 18 April 2019 Norman Bedford lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Roland Hicks, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 26 March 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 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, 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. It is convenient to extract the history reported by the AMS at Part 4 of the MAC,  
“Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:

Mr Bedford worked as a sawmill worker at Machin’s Sawmill at Wingham, in the planing shed. He gives history that he was adjusting the heads on a planing machine, pulling on the rollers, when his left ring finger was pulled into the machine and almost completely amputated. He sustained injuries also to the adjacent index and middle fingers. He was taken to Taree Hospital where he underwent surgery the same day. The ring finger was not able to be salvaged and was terminalised through the proximal part of the proximal phalanx. There was extensor tendon repair to the middle finger at the level of the metacarpophalangeal joint and defects on the radial border of the index finger at the PIP joint and the middle finger at the metacarpophalangeal joint were skin grafted using some skin from the amputated digit. His wounds healed uneventfully and he subsequently had physiotherapy in Taree. He was off work for perhaps four to five months and then resumed pre-injury duties. He is still employed full time at the same mill.”

## **PRELIMINARY REVIEW**

7. 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.
8. 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 the reasons set out below.

## **EVIDENCE**

### **Documentary evidence**

9. 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**

10. 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**

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

### **Appellant**

12. In summary, the appellant submits that the AMS has erred in applying a 1/13 deduction to the assessment under s 323 of the 1998 Act for a previous injury to the left thumb. There is no evidence that there was any impairment before the injury so on the relevant authorities there was no basis for a deduction.

## Respondent

13. The respondent submits that there are no relevant grounds for appeal against the MAC. The AMS has not based the assessment on incorrect criteria and there is no demonstrable error on the face of the Certificate. The AMS has correctly excluded the proportion of impairment due to the previous injury. Both Dr McGlynn and the AMS identified the restrictions in the range of motion in the left thumb at examination.
14. The MAC should be confirmed.

## FINDINGS AND REASONS

15. 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.
16. 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.

## DISCUSSION

### Deduction of 1/13 pursuant to s 323 of the 1998 Act for previous injury to the left thumb

17. The appeal relates only to the deduction applied to the assessment under s 323 of the 1998 Act.
18. For a deduction to be properly made under s 323 there must be evidence that there is a pre-existing abnormality; condition; or previous injury and that this element contributes to the impairment<sup>1</sup>; “assumption will not suffice”.<sup>2</sup>
19. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526 Campbell J explained the requirement as follows:

“What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if that proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of the *degree* of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the *degree* of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to the pre-existing abnormality.”

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<sup>1</sup> *Cole v Wenaline Pty Ltd* (2010) NSWSC 78;

<sup>2</sup> *Fire & Rescue NSW v Clinen* [2013] NSWSC 629

20. At Part 4 “Details of any previous or subsequent accidents, injuries or condition” the AMS records,

“There is previous injury of fracture involving his left thumb many years previously as a consequence of which he has had restricted flexion at the interphalangeal joint of the left thumb since then. There is no history of previous injury or pain in the fingers of the left hand, or of subsequent accidents, injuries or conditions involving those digits.”

21. The AMS reports the restrictions in the range of motion of the left thumb found on examination at Part 5, and at Part 10.a. he explains,

“Deduction for pre-existing condition left thumb impairment for loss of motion = nett 2%, thumb impairment = 1% [hand] impairment = 1% upper extremity impairment = 1% whole person impairment.”

22. The Panel has corrected a typographical error bracketed above to read “hand”, which is of no significance for the issues.

23. At Part 11 the AMS notes, “The injury to the left thumb has resulted in restricted range of movement of the left thumb interphalangeal joint.”

24. The appellant relies on *Mahenthirarasa v State Rail Authority of New South Wales & Ors* [2007] NSWSC 22 in which the Court said: “A demonstrable error would essentially be an error for which there is no information or material to support the finding made – rather than a difference of opinion.” Contrary to the submissions for Mr Bedford the identification of the proportion of the impairment due to the previous left thumb injury is not difficult, with the precise range of motion deficits at the left thumb being identifiable and measurable and readily excluded from the assessment of the injury referred. The evidence for the deduction comprises the history of previous injury and the findings on examination. The question is not the degree of impairment before the injury, as submitted for Mr Bedford, but the contribution to the impairment found on the day of the assessment.

25. Contrary to the submission for Mr Bedford the s 323 deduction is not calculated by reference to how well he was able to function at work prior to the recent injury, but by the extent of the contribution from the previous injury to the impairment based on the relevant criteria. This is the way the AMS has approached the task.

26. It is submitted for Mr Bedford that the AMS has not explained how the previous injury contributes to the current impairment. However, as shown by the extracts from the MAC above, the AMS sets out the restricted range of motion of the left thumb found on examination, and then goes on to spell out the degree of the impairment due to those unrelated restrictions.

27. As the respondent submits the Guidelines at paragraph 1.27 provide,

“The degree of permanent impairment resulting from pre-existing impairments should not be included in the final calculation of permanent impairment if those impairments are not related to the compensable injury. The assessor needs to take account of all available evidence to calculate the degree of permanent impairment that pre-existed the injury.”

28. The Panel notes that Dr McGlynn finds the same deductible contribution for the left thumb,  
“There is restriction of left thumb IP joint active motion following an unrelated prior injury. This causes 3%DI, 1%HI, 1%UEI and 1%WPI. This is a deductible proportion.”
29. The AMS has explained his findings in relation to the s 323 deduction and has applied the correct criteria. The Panel discerns no demonstrable error on the face of the Certificate.
30. For these reasons, the Appeal Panel has determined that the MAC issued on 26 March 2019 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*.

*A MacLeod*

**Ann MacLeod**  
**Dispute Services Officer**  
As delegate of the Registrar

