WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-687/20**
Appellant:	**Woolworths Limited**
Respondent:	**Upali Weliwita-Kankanamalage**
Date of Decision:	**17 June 2020**
Citation:	**[2020] NSWWCCMA 108**

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

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 23 April 2020, Woolworths Limited (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Philippa Harvey-Sutton, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 27 March 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* (the 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 the1998 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 Upali Weliwita-Kankanamalage (the respondent) suffered an injury to his lumbar spine and right knee on 25 July 2018 while working for the appellant.

7. The respondent made a claim, through his solicitors, on 13 November 2019 against the appellant for compensation under s66 of the *Workers Compensation Act 1987* (the 1987 Act) for 15% whole person impairment he said resulted from his injury. He relied on a report of orthopaedic surgeon Dr John Harrison dated 29 October 2019. The appellant denied liability to pay compensation to the respondent, relying on a report it had obtained from orthopaedic surgeon Dr Steven Rimmer, who had assessed the respondent's degree of permanent impairment resulting from the injury to be 1% whole person impairment only.

8. The respondent then registered an Application to Resolve a Dispute (ARD) with the Commission, by which he sought the Commission to determine his disputed claim for compensation under s 66. He described the circumstances in which his injury occurred in the ARD in this way:

> "On Wednesday, 25 July 2018, the applicant was required to go down to the cool room and as he approached the rather narrow freezer area passage way, he found that a staff member, who had been working there, had stacked quite an amount of goods and materials narrowing access to the place in an inconvenient way. The applicant moved to clear the space a little by restacking what was there. He bent over and picked up a plastic container weighing 9-10 kg and turned to place it down in a less inconvenient spot. As he turned, he inadvertently caught his toe on a produce crate that had been placed there. This blocked the rotation movement of his leg suddenly and he twisted on the right knee further to the left experiencing sudden, severe pain in his back and radicular discomfort radiating from his lumbar spine down to his right foot and great toe at the same time."

9. Because there was a dispute between the parties regarding the degree of permanent impairment of the respondent from his injury, a delegate of the Registrar referred that medical dispute to the AMS to assess.

PRELIMINARY REVIEW

10. 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.

11. As a result of that preliminary review, the Appeal Panel determined that it did not require the respondent to undergo a further medical examination. This is because the Appeal Panel considers, for reasons explained below, firstly, that the MAC does not contain a demonstrable error and secondly, that the AMS based her assessment of the degree of the respondent's permanent impairment on correct criteria. Accordingly, the Appeal Panel does not need to reassess the medical dispute and consequently no point is served by examining the respondent again. Moreover, absent the MAC containing a demonstrable error or the AMS basing her assessment on incorrect criteria the Appeal Panel lacks the power to require the respondent to submit to a further examination.[1]

EVIDENCE

12. 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

13. The appeal the appellant makes against the MAC relates only to the AMS's assessment of the respondent's permanent impairment due to the injury to the respondent's right knee on 25 July 2018, and not to the injury to the respondent's lumbar spine.

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

14. The history that the AMS obtained and recorded in part 4 of the MAC with respect to the circumstances in which the respondent suffered his injury included this:

> "On Wednesday, 25 July 2018, Mr Weliwita-Kankanamalage was required to go down to the cool room and as he approached the rather narrow freezer area passageway, he found that a staff member, who had been working there, had stacked quite an amount of goods and materials, narrowing access to the place in an inconvenient way.
>
> He moved to clear the space a little by restacking what was there. He bent over and picked up a plastic container weighing 9-10kg and turned to place it down in a less inconvenient spot. As he turned, he inadvertently caught his toe on a produce crate that had been placed there. This blocked rotation movement of his leg suddenly and he twisted on the right knee further to the left, experiencing sudden severe pain in his back and radicular discomfort radiating down from his lumbar spine to his right foot and great toe at the same time, and he said that he also felt pain in his right knee."

15. Within part 10 of the MAC the AMS also said, when explaining her assessment of the respondent's permanent impairment relating to his right knee, that the respondent "indicated he had knocked his right knee in the accident".

16. The AMS noted that an MRI investigation of the respondent's right knee done on 30 August 2018 revealed a horizontal/oblique medial meniscal tear extending into the posterior horn. The AMS also noted that this tear was repaired during an arthroscopy done on 23 April 2019.

17. Within part 4 of the MAC, the AMS also noted that the respondent had indicated that his symptoms with respect to his right knee included that his knee felt stiff and tight and that he felt pain when walking down hills, slopes and stairs, and that he had swelling of his right knee at the end of the day.

18. The AMS found that "there was a crepitus palpable in the right knee joint" during her examination of the respondent's right knee.

19. The AMS assessed that the respondent had 3% whole person impairment relating to his right knee as a result of his injury. She provided the following explanation for her assessment within part 10 of the MAC:

> "In relation to the right knee, there is a 2% lower extremity impairment for a partial right medial meniscectomy under Table 17-33, page 546 of the AMA5 Guides. In addition, under Table 17-31, page 544, footnote there is a 5% lower extremity impairment for the patellofemoral pain and crepitations and direct injury to the right knee—he indicated that he knocked his right knee in the accident, and thus there is a 5% lower extremity impairment.
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> 5% and 2% are combined to 7% and under Table 17-3, page 527, 7% lower extremity impairment translates to a 3% Whole Person Impairment."

SUBMISSIONS

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

21. In summary, the appellant submits that the AMS did not properly consider the evidence before her and, had she done so, she would not have concluded that the respondent suffered a direct injury to the front of his knee. The appellant submits that because the respondent did not suffer a direct injury to the front of his knee the AMS erred by adding a

further 2% whole person impairment pursuant to Table 17-31 of AMA 5. The appellant noted that [3.23] of the Guidelines provide that the footnote to Table 17-31 of AMA 5 is only to be used if there is a history of direct injury to the front of the knee or if there is not where there has been patellar translocation/dislocation. The appellant submits that the respondent does not have patella-femoral pain and crepitation as the result of a patellar translocation/dislocation, and because the respondent did not suffer a direct injury to the front of his knee, the AMS consequently erred by applying the footnote to Table 17-31 and adding 2% whole person impairment for patella-femoral crepitation.

22. In reply, the respondent submits that he suffered an injury to the front of his knee. He submits that it was not necessary that that injury be "an impact to the knee", but could be "a direct twisting of the knee". He submits that, irrespective of that, the AMS took a history that he suffered a direct impact to his right knee in the incident on 25 July 2018 and it was open to the AMS to accept that history and base her assessment on that history. He submits that the AMS not required to corroborate that history by other evidence before she could rely on it. The respondent submits that the history the AMS obtained with respect to his suffering a direct impact to the front of his knee was, in any event, corroborated by other evidence, namely Dr Harrison recording that he had caught his knee and Dr Bhisham Singh obtaining a history of his twisting and falling in the incident from which he suffered injury.

23. The Appeal Panel observes that the respondent's submissions were prepared by his counsel and that his counsel in fact referred to "Dr Briggs" taking a history of his falling and twisting, but the report to which the respondent's counsel referred, by reference to page numbers, was in fact a report of Dr Singh. Dr Singh is an orthopaedic surgeon whom the respondent consulted for treatment, as is Dr Biggs.

FINDINGS AND REASONS

24. 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.

25. In *Campbelltown City Council v Vegan* [2006] NSWCA 284, the Court of Appeal held that the Appeal Panel is obliged to give reasons.

26. In the Appeal Panel's view it is clear that the respondent twisted his right knee in the incident on 25 July 2018. The members of the Appeal Panel who are Approved Medical Specialists consider that the force from that twisting motion caused a translocation strain on the patellar-femoral joint; that is, the twisting resulted in significant force being applied to the back of the respondent's knee cap. To state the obvious, the patellar-femoral joint, is at the front of the knee.

27. Within [3.23] of the Guidelines there is the following instruction:

> "Footnote to AMA5 Table 17-31 (p 544) regarding patello-femoral pain and crepitation:
>
> This item is only to be used if there is a history of direct injury to the front of the knee, or in cases of patellar translocation/dislocation without direct anterior trauma. This item cannot be used as an additional impairment when assessing arthritis of the knee joint itself, of which it forms a component. If patello-femoral crepitus occurs in isolation (ie with no other signs of arthritis) following either of the above, then it can be combined with other diagnosis-based estimates (AMA5 Table 17-33, p 546). Signs of crepitus need to be present at least one year post-injury."

28. The relevant footnote to AMA 5 Table 17-31 reads as follows:

> "In an individual with a history of direct trauma, a complaint of patella-femoral pain and crepitation on physical examination, but without joint space narrowing on x-rays, a 2% whole person or 5% lower extremity impairment is given."

29. The Appeal Panel agrees with the respondent's submission that the requirement for "a direct injury to the front of the knee", in order for the footnote to AMA 5 Table 17-31 to apply, does not require that there be a direct impact to the front of the knee. So long as there is an injury to the front of the knee then the footnote is engaged.

30. In the Appeal Panel's view that is what occurred here as a consequence of the respondent twisting his right knee in the incident in which he suffered injury. As the Appeal Panel said, that circumstance caused a direct force on the back of the respondent's kneecap, which is at the front of the knee of course.

31. In any event, the AMS found that the respondent did suffer a direct blow to the front of his knee in the incident. The Appeal Panel agrees with the respondent that it was open to the AMS to rely on that history that she had obtained in the process of assessing the respondent's impairment. Whilst it is not a requirement that the history the AMS obtains be corroborated by other evidence, in this case it was in that Dr Singh obtained a history of the respondent "twisting and falling during a work related injury". Dr Singh had obtained that history from the respondent within two months of the respondent suffering injury and it thereby reliably corroborates the history the AMS obtained from her direct questioning of the respondent as part of her assessment of the respondent's impairment from his injury.

32. The AMS, as mentioned above, also obtained a history of the appellant experiencing pain when walking down hills, slopes and stairs. Bearing in mind that the AMS when explaining within part 10 of the MAC her assessment of the permanent impairment the respondent has with respect to his knee, noted that the footnote to Table 17-31 allows for a 5% lower extremity impairment for patella-femoral pain and crepitation and direct injury to the right knee, the Appeal Panel infers that the pain to which the AMS referred in the history she recorded in part 4 of the MAC was patella-femoral pain. In other words, when the MAC is read as a whole, the history the AMS recorded within Part 4 of the MAC regarding the respondent's symptoms of pain is a reference, in the Appeal Panel's view, to patella-femoral pain.

33. The AMS also found from her examination of the appellant that he had crepitation in the right knee.

34. In the circumstances therefore the AMS was correct to add the 5% lower extremity impairment allowed under the footnote to Table 17-31 of AMA 5.

35. For these reasons, the Appeal Panel has determined that the MAC issued on 27 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.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar