WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1333/20**
Appellant:	**Lithgow City Council**
Respondent:	**Antony Hajwan**
Date of Decision:	**21 January 2021**
Citation No:	**[2021] NSWWCCMA 14**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Margaret Gibson**
Approved Medical Specialist:	**Dr James Bodel**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 22 October 2020, Lithgow City Council, the appellant employer lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Mohammed Assem, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 28 September 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* (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 Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). "WPI" is reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 21 July 2020, a delegate of the Registrar referred this matter to the AMS for an assessment of WPI. The referral repeated the Orders made by consent by an Arbitrator.[1] With regard to the subject matter of the referral, the injury was described in the following terms:

[1] At appeal papers 30.

"Date of Injury : December 2009 (deemed)

Body part/s referred: Aggravation of pre-existing arthritis due to the nature and conditions of employment."

7. The AMS quite reasonably assumed that the referral was concerned with the aggravation to Mr Hajwan's knees.

8. The referral also contained the following:

> "*NOTE: THIS MATTER IS REFERRED AS A THRESHOLD DISPUTE ONLY – THE AMS IS TO ASSESS AS THE WHOLE PERSON IMPAIRMENT REGARDLESS OF THE DATE OF INJURY"*

9. The AMS again quite reasonably assumed that the relevant date of injury was indeed December 2009 (deemed). These matters will be considered further in these reasons.

10. The referral also contained the following notations and summaries of prior awards, which too were included in the Orders of the Arbitrator:

> **"Notations:**
>
> i. The applicant has sought a referral to to determine whether the degree of permanent impairment resulting from an injury to the left and right lower extremities (knees), with a date of injury of December 2009 (deemed), is more than 20%;
>
> ii. There are six different dates of injury for the left and right lower extremities knees (sic);
>
> iii. The only matter to be assessed is the injury listed in Order 2 above [Order 2 was the injury as described above];
>
> iv. On 22 November 2012, a Medical Assessment Certificate was issued by Dr Assem in which he assessed all injuries the left and right lower extremities;
>
> v. The application is brought on the basis of a report from Dr Peter Giblin, orthopaedic surgeon (pages 42 – 56);
>
> vi. The respondent relies upon a report from Dr Richard Powell, orthopaedic surgeon (page 59 – 69);
>
> vii. The AMS is to consider the apportionment of the whole person impairment between the six different dates of injury and how any deduction should be applied pursuant to section 323 of the *Workplace Injury Management and Workers Compensation Act 1998*.
>
> **PREVIOUS AWARDS OR SETTLEMENTS:**
> 10523/12
> 6% WPI Left Lower Extremity (injury date 24 January 2003)
>
> 6% WPI Left Lower Extremity (injury date 19 February 2007)
>
> 9% WPI Right Lower Extremity (injury date 10 February 2008)
>
> 9% WPI Right Lower Extremity (injury date 11 June 2008)
>
> 14% WPI (Left and Right lower extremities -Nature and conditions of employment (injury date deemed December 2009)."

11. It can be seen from that summary that Mr Hajwan has been compensated for a number of injuries to his "lower extremities" which it is common ground concerned his knees.

12. Each of those injuries were set out in the history taken by the AMS. He recorded that during the currency of Mr Hajwan's knee difficulties Mr Hajwan underwent arthroscopes to the left knee in July 2003, 14 January 2004, and 4 March 2004 until he finally came to a total knee replacement on the left knee on 19 July 2009. In relation to the right knee he came to an arthroscopic patellofemoral arthroplasty on 21 May 2009 and then, on 26 October 2020, he underwent a total knee replacement to his right knee.

13. As can be seen from the face of the referral there were prior proceedings in matter 10523/12 which were determined by Consent Orders on 3 April 2013 following the issue of a Medical Assessment Certificate (MAC) by the same AMS to whom this matter was referred, Dr Mohammed Assem.

14. In his statement of 29 November 2019[2] Mr Hajwan indicated that he moved to Lithgow in 1988 and on an undetermined date, obtained a job with the respondent as a labourer in Queen Elizabeth Park at Lithgow.

15. On 21 January 1997 he became head gardener, and all his injuries occurred whilst he was employed by the respondent. He ceased work on 18 December 2009 due to the condition of his knees.

16. The AMS assessed Mr Hajwan as having a 20% WPI with regard to each knee from which 10% was taken respectively pursuant to s 323 of the 1998 Act, leaving an entitlement of 33%.

PRELIMINARY REVIEW

17. The appellant employer requested that the worker be re-examined but such a re-examination was note called for as no demonstrable error was established.

EVIDENCE

Documentary evidence

18. 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

19. 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

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

FINDINGS AND REASONS

21. 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.

22. 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

[2] Appeal papers page 116.

not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

23. The appellant employer submitted that there were three grounds on which the AMS fell into error.

Wrong injury date given

24. The first ground was that in his table 2 certificate the AMS had certified a Combined Table Value of 33% for injuries to both knees that were said to have occurred on 16 March 2018.

25. The appellant employer submitted that it was unclear where that had come from, as it was not mentioned in any of the evidence.

26. This, it was argued, constituted a demonstrable error and resulted in an assessment that had been made on the basis of incorrect criteria.

27. Mr Hajwan submitted that it was simply a typographical error and, as we understood the submission, was capable of rectification by the Panel.

Discussion

28. This point may be dealt with shortly. It is clear that the AMS has made a typographical error and he has acknowledged at paragraph 1 of the MAC that the date of injury referred to him was "December 2009 (deemed)"[3]. The MAC will accordingly be revoked to correct this error.

Apportionment of WPI

29. The second ground relied on was "that the AMS did not apportion the impairment between the various dates of injury as directed in the referral." The AMS had been "directed" to consider an apportionment between the dates of injury listed in the referral. The failure by the AMS to do so constituted an assessment on the basis of incorrect criteria and, as the assessment was not completed in accordance with the terms of the referral, it was also a demonstrable error.

30. Mr Hajwan did not respond to this ground.

DISCUSSION

31. It is standard practice for referrals to list on their face prior settlements and Orders that are relevant to the subject injury. They are, however, not binding on an AMS, who is charged with the assessment of the actual injury/injuries referred to him/her. They are provided for the purpose of informing an AMS of the prior litigation, and he is entitled to put as much weight on that material as he considers appropriate.

32. Chapter 1.6 of the Guides provides:

> "PART 2 – PRINCIPLES OF ASSESSMENT
>
> 1.6 The following is a basic summary of some key principles of permanent impairment assessments:
>
> a. Assessing permanent impairment involves clinical assessment of the claimant as they present on the day of assessment taking account the claimant's relevant medical history and all available relevant medical information to determine:
>
> •• whether the condition has reached Maximum Medical Improvement (MMI)
> •• whether the claimant's compensable injury/condition has resulted in an impairment
> •• whether the resultant impairment is permanent

[3] Appeal papers page 18.

•• the degree of permanent impairment that results from the injury
•• the proportion of permanent impairment due to any previous injury, pre-existing condition or abnormality, if any, in accordance with diagnostic and other objective criteria as outlined in these Guidelines."

33. Thus, an AMS is tasked to make a clinical assessment of a claimant as he/she presents on the day of the evaluation. The guideline provides also that the AMS is to take into account relevant medical history and all available relevant medical assessment. With those injunctions, the AMS is charged with determining his opinion. The guideline includes the assessment of s 323 related deductions.

34. The operative word in the guideline is "relevant." The referral sought an assessment of whole person impairment caused to Mr Hajwan's knees (as the AMS correctly inferred) by the aggravation of pre-existing arthritis due to his employment. The AMS had to assess a person who had undergone bilateral total knee replacements. The criteria for such an assessment are mandated by Table 17-35 of the Guides,[4] which the AMS has used.

35. The appellant employer contended that in these circumstances the AMS was obliged to apportion the resulting WPI amongst the four dates of injury set out in the referral. The basis of its contention was that the AMS had been directed to do so. We disagree.

36. Firstly, it can be seen that notations (i) – (vi) were self-explanatory. Notation (ii) simply paraphrased what already appeared on the face of the referral. Notation (iii) merely stated what had already been said in notation (i) and "Order 2 above." As indicated, Order 2 was not "above", but had been reproduced in the referral as the "body part/s referred."

37. The identity of the two medico-legal specialists named in notes (iv) and (v) again was information that the AMS would have seen for himself when he conducted his assessment. Similarly, the identity of the AMS (Dr Assem himself) and the content of the MAC he issued on 22 November 2012 was also information that the AMS would have seen for himself when he examined the evidence before him.

38. These notations were thus all superfluous and accordingly unnecessary - and potentially confusing for an AMS.

39. The content of note (vii) was difficult to understand in terms of the appellant employer's submissions. The note was not a "direction," as it contended. The note invited the AMS to "consider" apportionment of the WPI assessed between the six different dates of injury (and to further consider how s 323 of the 1998 Act was to be applied).

40. The AMS may be presumed to have read the material referred to him, including the referral. He would have seen the terms of the prior settlements, and he would have read the notes that appeared in the referral. The appellant employer submitted that the AMS had not considered the question of apportionment, but there is no basis for that contention, beyond mere speculation that because the AMS did not refer to it, it followed that he must not have considered it. It is more probable that the AMS did not comment because he placed no weight on the matters raised therein.

41. Secondly, lump sum claims are assessed by a bifurcated system. There is a dichotomy between the tasks of an AMS and the jurisdiction of the Commission. This was illustrated in *Haroun v Rail Corporation New South Wales & Ors*[5] in which an Arbitrator noted the consent findings by the parties that two falls the worker had sustained at work "continued to contribute to any impairment". The AMS disagreed, and his decision was upheld by the Medical Appeal Panel. Handley AJA with whom McColl JA and McDougall J agreed, said:

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[4] Guides page 21.

5 [2008] NSWCA 192: See also Jaffarie v Quality Castings Pty Ltd [2014] NSWWCCPD 79 per DP Roche at 249

> "16. In my judgment the Panel were not only entitled to treat the finding as irrelevant, they were bound to do so if they independently came to a different conclusion. The scheme for the settlement of compensation disputes established by the 1998 Act read with the Workers' Compensation Act 1987 (the 1987 Act) is to have factual and legal issues resolved by an Arbitrator subject to an appeal to a President or Deputy President, and to have certain medical issues decided by an AMS subject to appeal to a Panel."

42. His Honour later in his judgment said:

> "19 The scheme of the two Acts is to ensure that the degree of permanent impairment that results from an injury, and any contribution to the worker's total impairment that is due to an earlier injury or pre-existing condition are assessed under and in accordance with Part 7 of the 1998 Act and not otherwise.
>
> 21 Since the Arbitrator had no jurisdiction to decide the medical dispute referred, he had no jurisdiction to make findings which were binding on the AMS or the Appeal Panel. The finding of a person without jurisdiction cannot bind the person or persons with jurisdiction and cannot even be persuasive."

43. Notation (vii) offends that dichotomy, and accordingly was not binding on the AMS in any event. Whilst notations (i) – (vi) were self-explanatory (and otiose), the same cannot be said about notation (vii).

44. The Panel had difficulty in discerning the purpose of notation (vii). One interpretation of its purpose – and indeed that pressed by the appellant employer – was that it was directing the AMS to take into account the prior settlements, which as indicated the Commission had no power to do.

45. However, the appellant employer submitted that nonetheless the AMS was obliged to apportion as requested, and had fallen into error in not so doing. This leads to a third problem with these grounds.

46. The referral contained the phrase "to assess as the whole person impairment regardless of the date of injury." This description was itself confusing, but the AMS and the employer have accepted that it meant that his task was in fact to assess Mr Hajwan's WPI, with a deemed date of December 2009, on the basis that it was for threshold purposes. Assessments of WPI caused by the aggravation of a disease condition such as pre-existing arthritis are governed by s 16 of the 1987 Act, which provides for a deemed date, relevantly, at the time of Mr Hajwan's incapacity. That date was referred as "December 2009", and we note that Mr Hajwan ceased work with the employer on 18 December 2009.[6] The purpose of the above phrase remains a mystery. It is not possible to refer a matter for assessment without a date of injury.

47. Notwithstanding these difficulties, the appellant employer assumed that the prior settlements listed in the referral were relevant because they referred to different dates of injury, which, it contended, should have led to the WPI assessed being apportioned amongst them. We were not addressed as to how this might be, and we were not referred to any authority which would compel such a result. The submission is rejected.

[6] Appeal papers page 88, paragraph [19].

Section 323 deduction

48. Ground 3 submitted as its heading:

> "The AMS' 10% deduction for pre-existing conditions in accordance with s 323 of the *Workplace Injury Management and Workers Compensation Act 1998* is not consistent with the available evidence".

49. The appellant employer submitted, notwithstanding its heading, that no deduction had been made by the AMS.

50. The appellant employer kindly reproduced s 323(1) and submitted that the test regarding the application of the subsection was "therefore" whether any pre-existing condition or abnormality contributed to the degree of permanent impairment. It was argued that the language of the subsection was mandatory and that a deduction had to be made even if the relevant pre-existing condition had been asymptomatic prior to the injury. The appellant employer relied on the often cited authority of *Vitaz v Westform (NSW) Pty Ltd*[7]*.*

51. The appellant employer then submitted that the 1/10th deduction was "wholly inadequate and at odds with the available evidence". This was said to be because of the prior assessments that were set out on the face of the referral, and secondly that the investigations as early as 2003 confirmed advanced degeneration in the left knee and that in 2008 investigations showed pre-existing degenerative changes.

52. The summary by the AMS was accurately reproduced:[8]

> *"Right knee*
>
> i. An x-ray dated 19 December 2003 osteoarthritic changes at the patellofemoral joint and the tibial femoral joint with slight lateral displacement of the patella.
>
> *Left knee*
>
> i. An MRI dated 29 March 2003 showed advanced grade 4 articular cartilage degeneration over the lateral surfaces of the patellofemoral joint. There was some minor chondral fissuring in the weight bearing part of the lateral femoral condyle."

53. The appellant employer submitted that accordingly the MAC should be revoked and a higher deductible portion applied.

54. Mr Hajwan did not reply to this ground.

DISCUSSION

55. Section 323 of the 1998 Act provides, relevantly:

> "(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.
>
> (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."

[7] [2011] NSWCA 254 (Vitaz).
[8] Appeal papers page 12.

56. The AMS allocated a one-tenth deduction respectively. He said:

> "The MRI scan of the left knee on 31 March 2003 confirmed the presence of advanced grade 4 articular cartilage degeneration of the lateral surface of the patellofemoral joint. Although he was asymptomatic prior to the work injury, it has no doubt contributed to his current impairment. As it was difficult or costly to determine, a one-tenth deduction was applied.
>
> Similarly, with regards to the right knee, an MRI scan on 28 August 2008 identified grade 2-3 chondromalacia of the lateral femoral condyle with partial to full thickness loss in the mid and posterior weight bearing surface, grade 2 chondromalacia in the medial femoral condyle and grade 2-4 chondromalacia patellae. The widespread tricompartmental pathology would indicate the presence of pre-existing degenerative changes that have contributed to his impairment and the need for a total knee replacement. As it was difficult or costly to determine, a one-tenth deduction was applied."

57. It can be seen that s 323 is concerned with the effect of a previous injury, pre-existing condition or abnormality would have on the degree of impairment assessed. The previous injuries were listed in the referral, but they were all concerned with the assessment at different times of the condition of Mr Hajwan's arthritic knees, as Mr Hajwan's statement illustrated.[9] The fact that there were several prior dates of injury did not affect the bases of the WPI assessments at different times, which was the deteriorating condition of Mr Hajwan's knees because of his pre-existing arthritis. That is what the AMS assessed, and we find no error in his explanation for deducting one tenth for each knee.

58. There was no evidence that Mr Hajwan's arthritis pre-existed the commencement of his employment in 1988, so that, on one view, a deduction may not have been required at all.[10] However, as we are confirming the MAC (apart from correcting the obvious error) there is no need to further consider that issue.[11]

59. The reasons given by the AMS for his assessment were well explained and discussed. The AMS has assessed Mr Hajwan as he presented on 28 September 2020. That is to say, Mr Hajwan was a worker who had been employed by the respondent for well over 20 years and had undergone two total knee replacements as a result of the aggravation of his arthritic condition. This is what the AMS was asked to do and this is what the AMS has done.

60. For these reasons, the Appeal Panel has determined that the MAC issued on 28 September 2020 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

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

[9] Appeal papers pages 86- 89.
[10] See *Cullen v Woodbrae Holdings Pty Ltd* [2015] NSWSC 1416.
[11] See *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC 1053 @ [59 - 61].

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **1333/20**
Applicant: **Lithgow City Council**
Respondent: **Antony Hajwan**

This Certificate is issued pursuant to s 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Appeal Panel revokes the Medical Assessment Certificate of Dr Mohammed Assem and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - Whole Person Impairment (WPI)

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in WorkCover Guides**	**Chapter, page, paragraph, figure and table numbers in AMA 5 Guides**	**% WPI**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Sub-total/s % WPI (after any deductions in column 6)**
Right lower extremity (knee)	December 2009	WorkCover Guides IV Edition, Table 17-35, page 21	AMA5, Table 17-33, p 547	20%	1/10	18%
Left lower extremity (knee)	December 2009	WorkCover Guides IV Edition, Table 17-35, page 21	AMA5, Table 17-33, p 547	20%	1/10	18%
Total % WPI (the Combined Table values of all sub-totals)					**33%**	

John Wynyard
Arbitrator

Dr Margaret Gibson
Approved Medical Specialist

Dr James Bodel
Approved Medical Specialist

21 January 2021

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE 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