WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-2974/18**
Appellant:	**Eduardo Arquero**
Respondent:	**Shannons Anti Corrosion Engineers Pty Ltd**
Date of Decision:	**2 July 2019**
Citation:	**[2019] NSWWCCMA 88**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr Brian Noll**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 30 April 2019 Eduardo Arquero lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tim Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 3 April 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, 4th* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). This matter was assessed under the table of disabilities.

RELEVANT FACTUAL BACKGROUND

6. The appellant suffered injury on 18 December 2000 when he slipped on the step of a crane cab injuring his right knee. The appellant was then found to have suffered a consequential injury to the left knee following the right knee injury.

7. In 2011, the appellant brought a claim for lump sum compensation in respect of his right knee. In those previous proceedings (6496/11), he was assessed by AMS Dr Rosenthal, who provided his MAC dated 12 October 2011.

8. Dr Rosenthal provided an assessment of 40% permanent loss of efficient use of the right leg at or above the knee.

PRELIMINARY REVIEW

9. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.

10. 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 no request was made, and we consider that we have sufficient information before us to enable us to determine the appeal.

EVIDENCE

Documentary evidence

11. 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.

SUBMISSIONS

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

13. In summary, the appellant submits that the AMS erred in respect of a deduction pursuant to s 323 of the 1998 Act.

14. In reply, the respondent submits that no errors were made.

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.

17. The appellant was referred to the AMS for assessment of permanent loss of efficient use of the right leg at or above the knee (including below the knee) and permanent loss of efficient use of the left leg at or above the knee (including below the knee) pursuant to the Table of Disabilities.

18. It is not necessary to set out in detail the nature and extent of the injuries. They were set out in some detail in both MAC's.

19. Relevant to the issue in dispute, the AMS obtained the following history:

> "When he was a teenager, he had been playing soccer and had injured his right knee. This was managed by two separate arthroscopic procedures. The treatment protocol included a reconstruction of the anterior cruciate ligament and also excision of a tear of the medial meniscus."

20. In summarising the injuries, the AMS said:

> "Mr Arquero sustained an impact injury to his right knee in late 2000. The knee had previously been injured many years beforehand and there had been quite extensive reconstructive surgery. Although he was asymptomatic at the time of the fall in December 2000, there would have been accelerated degenerative change to the knee complex which would have made it more susceptible to further damage. As the years went by, the accelerated degenerative change developed and has only just been managed at a level where he has been able to remain reasonably functionally effective. This has included a high tibial osteotomy. Further clinical management is likely to include a total knee joint replacement although all attempts are being made to hold this off for as long as possible.
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> In caring for the right knee, this has naturally been favoured and there has been deterioration of the left knee complex. Much of this has been overshadowed by the condition of the right knee although in the last 3 years or so, the condition of the left knee has developed further. It has already been determined that this is consequential to the right knee condition."

21. When asked "Is any proportion of loss of efficient use or impairment or whole person impairment, due to a pre-existing injury, abnormality or condition?" the AMS said:

> "Yes. There has been a previous quite extensive surgery to the right knee when he was a teenager. This would have resulted in accelerated degenerative change."

22. When asked for his comments about other medical opinions, the AMS said:

> "Most assessing specialists advise that one tenth of the condition of the right knee is due to pre-existing features. I would agree with this. Dr William Patrick assesses the right leg at 55%. My own assessment is a little less than this at 50%. Dr Patrick is the only Specialist who has assessed the left leg and arrives at a figure of 9%. My assessment is 10%."

23. The thrust of the appellant's submissions is that in the MAC dated 12 October 2011, Dr Rosenthal stated: "I am not aware of any pre-existing condition prior to 2000." He declined to make any deduction under s 323, unlike the AMS in the current claim.

24. The appellant adds that Dr Rosenthal was clearly aware of the earlier injury because he said: "He had a torn cartilage at age 17 and had surgery on the knee but he then played soccer to the age of 30 without any problems."

25. The appellant continues:

> "It is evident... reading the 2011 MAC as a whole, that Dr Rosenthal had carefully considered the history of the right knee injury before deciding whether any impairment was due to pre-existing injury. The AMS determined that the evidence before him did not indicate that the Appellant worker's pre-injury condition resulted in any impairment.

> The deductible proportion due to any previous injury or due to any pre-existing condition or abnormality is undertaken in the exercise of medical judgement and knowledge, considering all available evidence to calculate the degree of permanent impairment that pre-existed the injury, if any. It follows that the AMS would adopt the same deduction for any further assessment of the same body part, which is consistent, reasonable and logical.
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> However, contrary to Dr Rosenthal's opinion, the AMS answers 'yes', to the question 'is any proportion of loss of efficient use or impairment or whole person impairment, due to a pre-existing injury, abnormality or condition?'
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> The AMS did not consider whether the appellant's pre-existing pathology contributed to his overall impairment. As opposed to the assessment of Dr Rosenthal which was well reasoned and carefully considered, the AMS essentially speculated without proper reference to the facts of the prior surgery.
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> The Appellant submits that the deduction is at odds with the evidence before the AMS. The Appellant's statement confirms that he underwent two arthroscopies to the right knee at age 17, subsequently returning to play graded soccer for a further 13 years until the work incident in 2000 when the Appellant was 30 years of age.
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> Furthermore, a 10% deduction is at odds with the previous MAC…the current MAC is inconsistent with an earlier MAC.
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> The AMS has not taken into account, nor explained why his assessment differs from Dr Rosenthal's previous finding in respect to any deduction."

26. An AMS is not bound by the opinion contained in an earlier MAC: only the *assessment* is conclusively presumed to be correct (s 326). In addition, an AMS is required to make an assessment at the time of the examination, taking into account all the available evidence.

27. In this case, we are not persuaded that the AMS erred in the deduction he applied pursuant to s 323 for reasons that follow.

28. To begin with, it is true that, as Schmidt J said in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78:

> "Section 323 does not permit that assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will always, 'irrespective of outcome', contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality."

29. Equally however, *Vitaz v Westform Pty Ltd* [2011] NSWCA 254 is authority for the proposition that "if a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury."

30. In this case, it is clear from all the evidence that the appellant had a significant injury to his right knee in his teens. He had two arthroscopies to the right knee at age 17. Some reports suggest he in fact had two injuries, at age 17 and 19, both requiring surgery. He had a reconstruction of the anterior cruciate ligament and also excision of a tear of the medial meniscus.

31. Regrettably there is very little information about the state of Mr Arquero's right knee just prior to his work injury, but we have been able to locate some references to imaging studies close to the time of the injury. We have also looked at some earlier medical reports for information.

32. We agree that some of the wording used by the AMS might suggest that he may have "hypothesised" about the impact of the earlier right knee injury. For example, he said "there *would* have been accelerated degenerative change to the knee complex which *would* have made it more susceptible to further damage." (our emphasis)

33. Nevertheless, there is ample evidence to support his opinion.

34. Dr Patrick, the IME relied upon by the appellant, did not have access to any earlier imaging studies. The first recorded one is dated 31 January 2005.

35. When he assessed impairment, Dr Patrick simply stated:

> "These are net assessments, with no component of these assessments related to any pre-existing constitutional, developmental or degenerative condition which might be contributing to his impairment assessments now."

36. No reasons for this statement were provided.

37. Dr Selby-Brown saw the appellant on 1 July 2003. He said:

> "Mr. Arquero did bring to this examination ultrasound films of his right knee dated 22.12.00. There was no report on these films and on my own inspection of these films I was not able to identify any abnormality…Mr. Arquero did bring to this examination plain x-rays and MRI Scan films of his right knee both of which were dated 16.1.01. These films were not accompanied by any report. On my own viewing of the plain x-rays I was not able to identify any abnormality."

38. However, he then added that a bone scan dated 27 April 2001, some four months after the work injury, showed "degenerative changes in the medial and patello-femoral compartment."

39. It is also unclear whether the plain x-rays to which he referred were done with weight bearing or not.

40. Dr Mills saw the appellant for the insurer in August 2003. He also referred to the same bone scan. He also noted that the appellant had returned to playing soccer at a high level following the injury in his teens. He assessed 30% loss of use adding "Ninety percent attributable to the injury of I8 December 2000 and Ten percent attributable to his knee injury at the age of 17."

41. Dr Maniam saw the appellant on 21 February 2011. He said:

> "My impression is that he may have developed some amount of degenerative changes in the medial compartment following the two arthroscopic surgical onslaughts at the ages of seventeen and nineteen. In the Initial radiograph that was examined which included two MRI scans dated 16/1/01 and 23/5/01 there were signs of previous meniscectomies, osteochondral damage to the medial compartment and osteochondral fracture of the lateral femoral condyle.
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> In the radiographs obtained on 6/1/01 and 23/5/01 and in the immediate period post injury, it appears that the injury related to the osteochondral damage in the medial and lateral femoral condyles.
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> It would be suffice to indicate that the degenerative changes had gradually deteriorated consequential upon the early arthroscopy at ages 17 and 19 and the subsequent osteochondral injury that was sustained In December 2000."

42. Dr Breit saw the appellant on 5 September 2016. He said, referring to the MRI of 9 August 2010, "There is evidence of pre-existing disease however there is a lack of information regarding its extent."

43. Dr Pitsis saw the appellant in July 2013. He said:

> "Mr Arquero enjoyed playing soccer from the age of 12. At the age of 17 and 21 he underwent right knee arthroscopies for medial meniscal tears with Dr Michael Johnson. He was able to return to playing sport one week after each of the surgeries performed…
>
> Mr Arquero presents with clinical and radiological features of Grade IV medial compartment osteoarthritis against the background of Grade II osteoarthritis of the other compartments."

44. Having regard to all of the evidence, we are satisfied that the AMS did not err in the deduction he applied. He explained his reasons, noting that "Most assessing specialists advise that one tenth of the condition of the right knee is due to pre-existing features" with which he agreed.

45. As pointed out earlier, his manner of expression was perhaps confusing, but his conclusion that "There is evidence of a pre-existing condition of the right knee with quite an extensive associated surgical reconstruction" was consistent with the evidence, and in our view was equally consistent with the one-tenth deduction he made.

46. For these reasons, the Appeal Panel has determined that the MAC issued on 3 April 2019 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar