WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-2942/19**
Appellant:	**Mark Coates**
Respondent:	**Murrum Valley Pty Ltd**
Date of Decision:	**4 November 2019**
Citation:	**[2019] NSWWCCMA 159**

Appeal Panel:	
Arbitrator:	**Jane Peacock**
Approved Medical Specialist:	**Dr Drew Dixon**
Approved Medical Specialist:	**Dr Mark Burns**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 18 September 2019 Mr Mark Coates lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Donald Faithfull, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 23 August 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, and
   - 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).

PRELIMINARY REVIEW

6. 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.

7. As a result of its preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination.

EVIDENCE

Documentary evidence

8. 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

9. 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

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

FINDINGS AND REASONS

11. 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.

12. 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.

13. The matter was referred by the Registrar to the AMS as follows:

> "The following matters have been referred for assessment (s 319 of the 1998 Act):
>
> - **Date of injury:** **15/06/2002**
> - **Body parts/systems referred:** **Lumbar spine**
> - **Method of assessment:** **Whole Person Impairment"**

14. The AMS issued a MAC certifying as follows:

Body Part or system	Date of Injury	Chapter, page and paragraph number in NSW workers compensation guidelines	Chapter, page, paragraph, figure and table numbers in AMA5 Guides	% WPI	WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
1. **LUMBAR SPINE**	**15/06/2002**	**Chapter 4**	**Chapter 15**	**13%**	0%	**13%**
Total % WPI (the Combined Table values of all sub-totals)					**13%**	

15. The worker appealed.

16. The AMS placed the appellant in DRE Category III for his lumbar spine about which there was no complaint on appeal. This equated to 10% whole person impairment (WPI). The AMS made no allowance for radiculopathy. This was complained about on appeal. The AMS added an additional 3% for Activities of Daily Living (ADLs) about which there was no complaint on appeal. The AMS made no deduction under s 323 about which there was no complaint on appeal.

17. The AMS took a history which he recorded as follows:

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment: Mr Coates told me that on 15/06/2002, he was working on his tractor. He jumped off the steps, landing on the ground which jarred his lower back. The pain was severe enough that he required to spend 2 weeks in bed.
>
> Mr Coates was treated conservatively initially. He was seen by a Neurosurgeon. On 23/05/2003 a laminectomy with discectomy was performed at the L5/S1 level.
>
> The pain in Mr Coates' back was becoming worse and he would develop tingling down both legs.
>
> The operation improved the leg pain but he still had back pain. Mr Coates' family farm was sold in 2008 and Mr Coates has not worked since.
>
> Present treatment: Mr Coates said he is mainly resting and taking analgesics.
>
> Present symptoms: Mr Coates said he has constant low back pain which can go into his legs particularly if he tries to be too active. Mr. Coates said the low back pain is aggravated by flexing or twisting. His sleep is regularly disturbed because of back pain.
>
> Details of any previous or subsequent accidents, injuries or condition: Mr Coates said that he worked as a paramedic and that in 1985, he was lifting a patient from a stretcher to a bed with a partner when he felt sudden low back pain. He finished work that day but the next morning he had difficulty getting out of bed. He did spend more time in bed in hospital for 2 weeks.
>
> Mr Coates said that he has had no further injuries.
>
> General health: Mr Coates had an operation for oesophageal stenosis called a Heller myotomy. He has also been treated for gout.
>
> Work history including previous work history if relevant: Mr Coates was a paramedic with the New south Wales Ambulance Service from 1977-1983 and then with the Victorian Ambulance Service from 1983-1985. He had a family farm from 1987-2008 when it was sold. He has not worked since 2008.
>
> Social activities/ADL: Mr Coates said that he has difficulty dressing particularly cutting his toe nails and putting his shoes and socks on. He is morbidly obese which would interfere with his ability to flex down to his feet but he said he also suffered back pain when attempting this manoeuvre. He has difficulty sleeping as this causes back pain and he takes tablets for sleeping. Mr Coates said that he cannot help with the housework now. He used to vacuum the floor but he is unable to do anything, particularly anything that requires him to flex his back. He cannot walk up a hill because of back pain and this also causes pain in his legs, the right more than the left. His recreational activities have been affected in that he can no longer play golf or bowls."

18. He undertook a physical examination and there is no complaint about the examination on appeal. The AMS recorded his examination findings as follows:

> "Mr Coates measured 154cm tall and weighed 140kg or more. My office scales only show up to 140kgs.
>
> Lumbar Spine
> There was a very well-healed, longitudinal, surgical scar, 6cm in length. Forward flexion brought his fingertips to the upper pole of the patella. Extension was virtually zero, possibly 10°. Flexion to the left was significantly less than flexion to the right and this precipitated back pain. It is my clinical opinion this is consistent with dysmetria.
>
> Mr Coates had difficulty getting up onto my couch. Straight leg raising in the right leg was 45° and in the left leg 90°. There was no alteration of sensation. Both Knee and left ankle reflexes were present. Right ankle reflex was absent. There was no weakness or wasting in the muscles of his lower limbs."

19. The AMS said that there were no special investigations available. The panel notes that whilst the appellant did not bring with him any original film, there were various radiological reports available in the evidence that was before the AMS.

20. The AMS summarised the injury and diagnosis as follows:

> "summary of injuries and diagnoses:
>
> Mr. Coates herniated an L5/S1 disc as a result of a compression injury to his lumbar spine while at work on his family farm 15/06/2002. This required spinal surgery in 2003."

21. The AMS noted that the appellant was consistent in his presentation as follows:

> "Mr. Coates presented in a straight forward fashion without exaggeration, and was co-operative during the physical examination."

22. The AMS explained his impairment assessment as follows:

> "The above history and physical examination places him in a DRE Lumbar category III That is he had an operation in 2003 for low back pain with radiculopathy. He now has back pain but no radiculopathy, this places him in a DRE LUMBAR category III which equals 10% WPI. He has difficulty dressing especially shoes and socks and cutting his toenails as well as performing any activities such as housework. It has also affected him socially. I have added a further 3% for ADLs."

23. The AMS made brief comment on the other medical opinion and other evidence that was before him as follows:

> "Dr. Graeme Doig - 6/03/2019. Noted a history of an injury to his lower back 15 06 2002 while working on his family farm. On examination Dr. Doig noted Mr. Coates was significantly overweight. Dr. Doig found weakness in the L5 myotome and reduced sensation in the L5 dermatome. The report stated Mr. Coates did have a Whole Person Permanent Impairment. He discussed a report by Dr Stening and Dr. Doig was of the opinion that Dr. Stening should have deducted 1/10th from the full amount i.e. 16% which would have come to 14%
>
> It is my opinion no deduction should be made because he made such a good recovery following the operation that he was able to work on his family farm.

Dr. Peter Isbister - 9/06/2012 described the back injury in 1985 which in his opinion sounded like a disc injury. I cannot find a further assessment.

10/02/2012
Examined Mr. Coates on that date. Mr. Coates complained of painful back muscle cramps and pain down both legs. He noted Mr. Coates was treated with discectomy. He assessed the 1985 injury as a WPI coming to 10% for DRE III plus 3% for persisting Symptoms and a further 3% for ADL. It would appear from my examination there was no radiculopathy and Mr. Coates has improved over the years.

Dr. Saeed Kohan - 19/01/2016
Noted the long history of back pain with a further injury requiring surgery in 2003
Dr. Kohan found significant restriction in spinal movements due to pain but no radicular symptoms or signs.

3/04/2018
Reported worsening symptoms in the lower lumbar region with bilateral gluteal pain. He ordered MRI and SPECT scan.

3/05/2018
Dr. Kohan found increasing back pain going into right leg. Dr. Kohan felt there were numerous reasons for Mr. Coates symptoms and that surgery was likely to fail.

Dr. Pentin 25/05/18 noted gradually increasing back pain over the years from November 2008 to May 2018"

24. The AMS did not make an allowance for radiculopathy. This is the subject of the complaint on appeal. The appellant submitted that such an allowance should have been made. The respondent submitted the MAC should be confirmed.

25. The Guides provide the criteria for assessment of radiculopathy at paragraph 4.27 as follows:

"Radiculopathy is the impairment caused by malfunction of a spinal nerve root or nerve roots. In general, in order to conclude that radiculopathy is present, two or more of the following criteria should be found, one of which must be major (major criteria in bold):

i. **loss or asymmetry of reflexes**
ii. **muscle weakness that is anatomically localised to an appropriate spinal nerve root distribution**
iii. **reproducible impairment of sensation that is anatomically localised to an appropriate spinal nerve root distribution**
iv. positive nerve root tension (AMA5 Box 15-1, p 382)
v. muscle wasting – atrophy (AMA5 Box 15-1, p 382)
vi. findings on an imaging study consistent with the clinical signs (AMA5, p 382)."

26. Based on the AMS' examination findings of an absent ankle reflex, a major criteria (loss or asymmetry of reflexes) was satisfied.

27. The AMS said that no special investigations were available. However, there were a number of radiological reports in evidence before him.

28. An MRI report of Dr Howard Galloway (consultant radiologist) dated 4 August 2016 concludes as follows:

"Post-operative changes of right hemilaminectomy at L5/S1. Narrowing of the neural foramen on the right at L5/S1 secondary to disc and fact joint degenerative change with

impingement on the inferior aspect of the existing right l5 nerve root. The fact joint hypertrophy also is in contact with the right lateral aspect of the thecal sac and the S1 nerve root as it exits the thecal sac. Based on the report of the previous examination performed in 2010, there does not appear to have been significant change."

29. This satisfies the minor criteria of "finding on an imaging study consistent with the clinical signs."

30. Accordingly, there two criteria satisfied (one major criteria) and one minor criteria. The AMS has erred and an allowance should have been made for radiculopathy.

31. Table 4.2 of the Guides provides the modifiers for DRE categories following surgery. For spinal surgery with residual symptoms and radiculopathy (where 4.27 is satisfied) an allowance of 3% WPI is to be made for the lumbar spine.

32. The Guides provide at 4.37 for how the WPI is to be calculated as follows:

> "In summary, to calculate whole person impairment (WPI) for persisting radiculopathy (as per definition) following surgery:
>
> - Select the appropriate DRE category from Table 15-3, 15-4, or 15-5;
> - Determine a WPI value within the allowed range in Table 15-3, 15-4 or 15-5 according to the impact on the worker's ADL
> - Combine this value with the appropriate additional amount from Table 4.2 to determine the final WPI."

33. The correct assessment is therefore DRE III at 10% WPI plus 3% Allowance for ADLs gives 13% WPI to be combined with 3% WPI (modifier for persistent radiculopathy under Table 4,2) giving an overall impairment of 16% WPI of the lumbar spine as a result of injury on 15 June 2002.

34. The AMS made no deduction under s 323 and this was not complained about on appeal.

35. For these reasons, the Appeal Panel has determined that the MAC issued on 23 August 2019 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*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **2942/19**
Appellant: **Mark Coates**
Respondent: **Murrum Valley Pty Ltd**

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 Donald Faithfull 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 NSW workers compensation guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality** (expressed as a fraction)	**Sub-total/s % WPI** (after any deductions in column 6)
1. **LUMBAR SPINE**	**15/06/2002**	**Chapter 4**	**Chapter 15**	**16%**	0%	**16%**
Total % WPI (the Combined Table values of all sub-totals)					**16%**	

Jane Peacock
Arbitrator

Dr Drew Dixon
Approved Medical Specialist

Dr Mark Burns
Approved Medical Specialist

4 November 2019

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*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar