WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1057/19**
Appellant:	**Brian Howard**
Respondent:	**Skilled Engineering Limited**
Date of Decision:	**14 November 2019**
Citation:	**[2019] NSWWCCMA 166**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr Greg McGroder**
Approved Medical Specialist:	**Dr James Bodel**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 6 August 2019 Brian Howard lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr David Lewington, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 11 July 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).

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 Howard was not a detailed historian.
>
> Mr Howard describes that when working for Skilled Engineering between 1997 and 2000 he experienced aggravation of existing bilateral knee pain as an upholsterer for train seats. This work involved lifting heavy seats and in awkward postures, prolonged standing and climbing on and off trains.

> On 15 April 2000, there was also a frank incident when a section of seat struck him across the anterior aspect of both knees. This occurred when the object slid down some stairs striking him on the knees. He was off work for approximately 1 week at that time. Some months later (he cannot recall exactly) he underwent a right knee arthroscopy performed by Dr Tarrant [November 2001].
>
> He was attended by Dr Verheul, orthopaedic surgeon and proceeded to an arthroscopy of the left knee 25 February 2010. Bilateral knee replacements were discussed. These proceeded in 2014."

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 for the reasons given 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 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 making a deduction greater than 1/10 pursuant to s 323 of the 1998 Act applied to the assessments for the back and both legs.

13. There is no evidence of investigations or treatment to the back prior to the employment to support the deduction of 8/10 for the back, which should not be more than 1/10.

14. There is no evidence to support the deduction of 4/10 applied to the assessment of the right and left legs, which should be no more than 1/10.

15. The worker should be re-examined by the Panel.

Respondent

16. The respondent submits, in summary, that the AMS had before him previous agreements for impairment of the back and loss of efficient use of both legs in 2003 and 2004. The AMS also had before him Dr Tarrant's and Dr Ostinga's diagnosis of gout.

17. The AMS also had before him the history of injury to the appellant's back in 1975 and 1981. The AMS refers to the medical evidence he considered for the assessment at Part 10.c. of the MAC.

18. The appellant has failed to establish any error.

FINDINGS AND REASONS

19. 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.

20. 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.

Section 323 of the 1998 Act deductions

21. For a deduction to be properly made under s 323 there must be evidence that there is a pre-existing injury; condition; or abnormality and that this element contributes to the impairment[1] and "assumption will not suffice".[2]

22. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526 Campbell J explained the requirement (emphasis in original),

> "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."

23. A pre-existing condition can be asymptomatic before the injury providing the evidence establishes that it existed before the injury and that it forms part of the impairment.[3]

24. The date of injury in this matter is clearly a deemed date, as the claim is based on the history of heavy work in the period of employment with the respondent from 1997 to 2000. What is required in these circumstances is evidence of a previous injury, condition or abnormality present before the employment with the respondent. If this is established the AMS then considers whether that element contributes to the impairment. In *Fire & Rescue NSW v Clinen* [2013] NSWSC 629 Campbell J said,

> "As Schmidt J pointed out in *Cole* and *Elcheikh*, it is necessary to find a pre-existing abnormality or condition, here the latter, actually contributing to the impairment before s. 323 *WIM* is engaged. This conclusion has to be supported by evidence to that effect. Assumption will not suffice."

25. Campbell J also noted that it is '… necessary for the evidence acceptable to the appeal panel to actually support the connection between a previous injury (here, pre-existing abnormality or condition) and the overall degree of impairment in the instant case.'

26. The AMS notes at Part 4 the earlier elements referred to by the respondent,

> "Mr Howard developed gout/gouty arthritis in the 1990s and was placed on Progout medication which he has remained on since that time. He experiences occasional episodes of acute gout typically affecting his big toes but at times has also affected his right knee and his wrist. Evidence of gout was noted at arthroscopy in 2001.

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[1] *Cole v Wenaline Pty Ltd* (2010) NSWSC 78;
[2] *Fire & Rescue NSW v Clinen* [2013] NSWSC 629
[3] *Vitaz v Westform (NSW) Pty Limited* [2011] NSWCA 25

> Mr Howard described developing bilateral knee pain in the course of his work duties between 1988 and 1997 working as a crane chaser/driver which involved climbing ladders, climbing on to and under train carriages, and repetitive kneeling and crouching.
>
> Mr Howard was employed by the water board from 1973 to 1989 as a labourer and injured his back 4 February 1975 and 16 October 1981 with both times lifting heavy cast-iron pipes. Digging and shovelling was also required. He was off work for approximately 2 weeks after the 1975 injury and some days after the 1981 injury, requiring physiotherapy. After the 1975 episode there was a day admission into Nelson Bay Hospital for a manipulation of the back under anaesthetic. He was able to return to normal duties after each of these episodes of back pain. There has been increasing back pain since that time. There was a worker's compensation claim in relation to these injuries. He does not recall if there were any investigations performed on his back at that time."

27. It is apparent from this history that Mr Howard suffers from gout in both knees, and that there were episodes of knee pain before the employment with Skilled Engineering. There is also a history of incidents involving the back in 1975 and 1981 requiring physiotherapy, and manipulation under anaesthetic, respectively.

28. This is enough in the circumstances of this matter to establish that there was a pre-existing condition in the knees and previous injuries to the back. The Panel notes that the previous consent agreements as to impairment/loss of efficient use are not evidence of the degree to which these elements contribute to the current impairment. The imaging before the AMS was conducted in 2013. The main finding at arthroscopy of the right knee on 21 November 2001 was gout, as reported by Dr Tarrant in his report of 23 November 2001.

29. The imaging of the knees and spine following the deemed date of injury discussed by Dr Ostinga and Dr Tarrant does not provide enough evidence to allow a precise measure of the degree to which the pre-existing elements contribute to the impairment.

30. The Panel is satisfied that the evidence subsequent to the injury, including that discussed in the reports of Dr Tarrant and Dr Ostinga, is sufficient to conclude that there is a proportion of the impairment attributable to the previous issues for all three body parts, but in the absence of any medical evidence before the employment the degree of this proportion is difficult to ascertain.

31. The AMS says at Part 11.c.,

> "Whilst the extent of the deduction is difficult or costly to determine the available evidence is that the deductible proportion is large and a deduction of one tenth is at odds with the available evidence."

32. The Panel does not agree that 1/10 deduction under s 323(2) is at odds with the evidence. It is difficult to assess the degree to which the gout contributes to the knee impairments, and the lack of evidence such as imaging before the injury similarly makes it speculative to attribute greater than 1/10 to any of the three body parts.

33. The Panel therefore finds the proportions deducted by the AMS are demonstrable errors on the face of the Certificate.

34. The Panel notes that at Part 4 of the MAC the AMS explains that he identified a subsequent injury in employment following that with the respondent,

> "Between 2000 and 2004 he worked as a traffic controller involving prolonged standing and for different employers and by the end of that employment, he again experienced substantial worsening of his knee conditions. He was able to take some breaks and sit. He applied for a disability pension in approximately July 2004. I have assessed the 1/10th deductible proportion for this subsequent condition. This takes into consideration the nature of the work conditions and length of time employed. Noting 1/10th deduction of the 40% assessed impairment, leaves 36% carried through to the Medical Assessment Certificate."

35. The AMS records "Not applicable" at Part 8.g. of the MAC, but the above explanation contradicts this. The Panel finds that the comment at Part 8.g is a simple slip of no consequence. It is also noted that this deduction is not appealed.

Findings

36. If a ground of appeal is successfully made out and an error identified, the Panel must correct the error or errors found "applying the WorkCover Guides fully" (see *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499).[4] The Panel is able to make the assessment and correct the errors in regard to the s 323 deductions without recourse to further examination of Mr Howard.

37. The Panel is satisfied that the impairment is permanent, and the injury has reached maximum medical improvement, as found by the AMS.

38. As explained above, the Panel finds that the pre-existing elements in the assessed body parts do contribute to the impairment, but that the proportions are difficult to ascertain. Section 323(2) is therefore applicable, with a deduction of 1/10. This is not at odds with the evidence.

39. Applying the 1/10 deduction to the assessments of the AMS after the deduction under Part 8.g. of the MAC, which were not appealed, results in 32.4% loss of efficient use of each leg at or above the knee, and 27% permanent impairment of the back.

40. For these reasons, the Appeal Panel has determined that the MAC issued on 11 July 2019 is revoked. A new Certificate is provided below.

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

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

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received before 1 January 2002

Matter Number: **1057/19**
Appellant: **Brian Howard**
Respondent: **Skilled Engineering Limited**

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 David Lewington and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Assessment in accordance with the Table of Disabilities for injuries received before 1 January 2002

Body Part (describe the body part as per Table of Disabilities) e.g. right leg at or above the knee	**Date of injury**	**Total amount of permanent % loss of efficient use or impairment**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Total permanent % loss of efficient use or impairment attributable to this injury** (after deduction of any pre-existing impairment in column 4.)
Back	**15.04.2000**	**30**	**1/10**	**27%**
Right leg at or above the knee	**15.04.2000**	**36**	**1/10**	**32.4%**
Left leg at or above the knee	**15.04.2000**	**36**	**1/10**	**32.4%**

Ross Bell
Arbitrator

Dr Gregory McGroder
Approved Medical Specialist

Dr James Bodel
Approved Medical Specialist

14 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*.

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar