WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-2307/19**
Appellant:	**State of NSW**
Respondent:	**Phillip George Brown**
Date of Decision:	**28 November 2019**
Citation:	**[2019] NSWWCCMA 176**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr Margaret Gibson**
Approved Medical Specialist:	**Dr J Brian Stephenson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 September 2019 State of NSW lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Jonathan Negus, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 5 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). This matter was also assessed under the Table of Disabilities.

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 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 evidence before us to enable us to determine this appeal.

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.

SUBMISSIONS

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

10. In summary, the appellant submits that the AMS erred in failing to make a deduction pursuant to s 323 of the 1998 Act and failed to provide any reasons for not doing so, given the nature of the referral to him.

11. In reply, the respondent concedes that the AMS "has failed to make a Section 323 deduction with respect to the deemed date of injury and appears not to have provided reasons in relation to the issue" but takes issue with the substance of some of the appellant's submissions.

FINDINGS AND REASONS

12. 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.

13. 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.

14. The terms of the referral to the AMS were as follows:

Date of 1st Injury:	September 1990
Body part/s referred:	Left Leg at or above the knee
Method of assessment:	Table of Disabilities
Date of 2nd Injury:	19 November 2018 (deemed)
Body part/s referred:	Left Lower Extremity (Left Knee)
	Right Lower Extremity (Right Knee)
Method of assessment:	Whole Person Impairment

15. The worker suffered an accepted injury to his left knee in September 1990. His condition deteriorated over the years. He subsequently underwent three arthroscopies of the left knee in 1990, 1997 and 2003, and eventually underwent a left total knee replacement on 12 October 2015.

16. As the AMS noted, “There was no specific injury to his right knee but he was carrying his other knee and he noticed a gradual increase in pain which started about 13 years ago.” He underwent arthroscopy and a right total knee replacement on 26 March 2018.

17. As regards ADL’s, the AMS said:

> “He lives in Cooma and is married with 2 boys aged 27 and 30. He finds it is not as easy as it used to be to get dressed and he can do most things around the house but less easily. He used to garden a little bit but no more. He can drive an automatic but needs to get out and stretch after 90-120 minutes.
>
> He used to enjoy playing rugby league and union in his 20s and is a runner and a snow skier as well as field hockey. Most of these have now finished.”

18. After noting his findings on physical examination, the AMS then documented the radiological material he had before him as follows:

> “8 February 2007 - x-ray left knee - there is osteophytic change with marginal osteophyte formation and narrowing of the medial joint compartment. No effusion or loose bodies seen.
>
> 8 July 2011 - Right knee x-ray - mild medial joint space narrowing. Patellofemoral articulation within normal limits.
>
> 15 November 2012 x-ray bilateral knees - bilateral medial joint space narrowing more pronounced on the left. Minor patellofemoral osteoarthritis.
>
> 27th February 2015- x-ray bilateral knees - bilateral medial joint space narrowing more pronounced on the left. Minor patellofemoral osteoarthritis.
>
> 12 January 2018 Right knee x-ray - severe medial compartment osteoarthritis.
>
> 3 May 2018 bilateral knee x-ray - bilateral total knee replacement prosthesis in situ. Patellae resurfaced.”

19. The AMS assessed 30% loss of use of the left leg at or above the knee resulting from the injury in September 1990, and 16% WPI in respect of both the left and right lower extremities resulting from the deemed date of injury of 19 November 2018.

20. When asked the question: “Is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality?” the AMS replied “No.”

21. In summary, the appellant submits that a deduction of 80% should be made under s 323 with respect to the WPI assessment of the left knee from the deemed injury date of 19 November 2018 and that a “significant” deduction should also be made with respect to the right knee “in the absence of specific work injury to the right knee, and in light of the evidence as to the impact of non-work related recreational / sporting activities.”

22. In support of this submission, the appellant makes the following observations:

> “a. The AMS has ‘double counted’ impairment of the left knee in allowing 30% permanent loss of use of the left leg at or above the knee in addition to an assessment of 16% WPI of the Left Lower Extremity (knee). The AMS should have made a deduction under Section 323 from the 16% WPI assessment to take into account the ‘previous injury’ in 1990:

b. Dr Oates for the worker had obviously made a one-tenth deduction under Section 323 with respect to his assessment of the left knee under AMA5 and the SIRA Guidelines, to take into account the frank injury in September 1990, which he assessed at 15% permanent loss of use of the left leg at or above the knee.

c. Dr Panjratan for the employer also assessed a 30% permanent loss of use of the left leg at or above the knee under the Table of Disabilities, of which he attributed 80% to the frank injury in September 1990, 10% to the nature of the worker's duties as a Paramedic thereafter and the remaining 10% to the worker's recreational activities of field hockey, snow skiing and mountain bike riding. In assessing the left knee under AMA5 and the SIRA Guidelines at 15% WPI, Dr Panjratan made an 80% deduction for the previous injury in September 1990:

d. In his report of 15/09/2015 Dr Aubin commented on whether there was any relationship between the left knee and the right knee symptoms and stated ‘I did explain that arthritis is multifactorial in nature and I do not feel that his left knee has caused his right knee arthritis. He likely had some underlying genetic predisposition. There is a possibility however that by favouring his left knee he has put more stress on the right, and has thus accelerated any arthritis present, leading to him requiring surgery at a younger age:’

e. There is reference to the worker having undergone an arthroscopic procedure to the right knee in 2005. In his report dated 14/02/2007 Dr Donald Kuah noted the history that ‘ a right knee arthroscope around 2000 which was a non-compensable injury':

f. In a report dated 22/10/2004 Dr Gareth Long, Orthopaedic Surgeon, stated ‘Thank you for referring Phillip with symptomatic osteoarthritis of his right knee. We had a good chat about options and I have discussed with him what a high tibial osteotomy involves…’

g. In his forensic medical report dated 26/03/2019 Dr Panjratan, Orthopaedic Surgeon, opined that: ‘The left knee problems were triggered with work and continued to get worse… The right knee osteoarthritis is idiopathic..:’

h. With respect to the right knee, Dr Panjratan also assessed a 15% WPI, however, he only attributed 10% of that assessment to the nature of the worker's duties as a Paramedic; 10% to the worker's sporting activities of field hockey, snow skiing and mountain bike riding; and 80% to pre-existing abnormality/ constitutional/ congenital conditions:

i. Dr Panjratan noted the history that ‘He agreed that he has been playing field hockey, snow skiing and mountain bike riding over the years. Around 16-17 years ago he had to give field hockey away because of the pain. He stopped snow skiing about 5 years ago. He slowed down because the knee was painful. He still goes mountain bike riding but a lot less’. He noted that Dr Oates had noted that after a game of hockey and the drive home ‘he could barely step out of the car and walk. When he played hockey, he was obviously running around on a hard surface:’

j. It was Dr Oates who also noted the history that ‘He did snow-skiing up until 2014. He also rides a mountain bicycle on local tracks. He played field hockey until his mid-40s, at which time he could barely get out of a car and walk when he had driven one-hour home from Canberra after a game because of knee pain.’”

23. As we said previously, the respondent concedes that a deduction is appropriate, but makes the following comments;

> "a. The Appellant's submission that an 80% deduction should be made from the assessment as to the left knee in so far as the 19 November 2018 deemed injury is concerned is excessive. Such a deduction fails to take adequate consideration in relation to the length of time that transpired between the 1990 frank injury and the left knee replacement in October 2015, together with the particular stresses and strains associated with the Respondent Worker's arduous duties as a Paramedic during these intervening years. In particular, in his Statement he describes the duties carried out on a daily basis, including the lifting and carrying of heavy equipment and the lifting of patients on stretchers and other manual assistance, being duties often carried out in tight and confined spaces:
>
> b. It was not inevitable the Respondent Worker would have undergone left knee and subsequently right knee replacement procedures in 2015 and 2016 respectively solely on the basis of the original frank injury in September 1990 and it is submitted that it is more likely that the nature and conditions of employment would have played a greater role in the development of the pathology than the frank incident in September 1990. This is particularly the case in so far as the right knee injury is concerned in circumstances where logically it is the further aggravation of the pre-existing effects of the September 1990 injury which must have played the dominant role in the development of the altered gait and the consequential injury to the right knee:
>
> c. For these reasons, it is submitted the application of the Section 323 deductibles should be far more limited than that proposed by the Respondent and, in particular, a 25% deduction in so far as the left knee is concerned with respect to the deemed date of injury on 19 November 2018, and a 10% deduction in so far as the right knee injury is concerned for the deemed date of injury of 19 November 2018:
>
> d. In so far as the right knee is concerned, it is felt that the statutory 10% deduction should be applied in circumstances where there is no evidence of any pre-existing pathology in so far as the right knee is concerned and where it will be otherwise too time consuming or expensive to determine."

24. In essence, given the nature of the dispute, our task is simply to determine the appropriate deduction in respect of the WPI assessments.

25. However, to begin with, consistent with the decision in Drosd v Workers Compensation Nominal Insurer [2016] NSWSC 1053 (*Drosd*), we have identified an error not referred to by the parties.

26. Clause 3.30 of the Guidelines states: "Note that Table 17-35 (P549, AMA-5) is incorrect. The correct table is shown below." That table is headed "Table 17-35: Rating Knee Replacement Results". It allocates a number of points to be added together with respect to pain, range of motion and stability. The Guides direct that the points allocated in accordance with Table 17-35 are to be converted into a whole person impairment percentage by reference to Table 17-33 of AMA-5. That Table is not amended by the Guides. The table provides for the following conversions to whole person impairment:

Total Knee Replacement	**Whole Person (lower extremity) Impairment (%)**
Good Result 85-100 points	15%
Fair Result 50-84 points	20%
Poor Result, less than 50 points	30%

27. The AMS assessed 16% WPI in respect of both the left and right lower extremities resulting from the deemed date of injury of 19 November 2018.

28. That is not an assessment available in accordance with the Table, and as a matter of law, it must be corrected.

29. In the Panel's view, the assessment in respect of each limb should be 20% WPI.

30. Turning now to the substantive submissions regarding any deduction, we have carefully considered both parties' submissions in light of all the available evidence.

31. The appellant does not challenge the primary assessment by the AMS of 30% loss of use of the left leg at or above the knee resulting from the injury in September 1990, and that assessment is confirmed by the Panel.

32. The appellant makes some valid points as regards the amount of the deduction. It is clear to us that in circumstances where the respondent underwent three arthroscopies of the left knee and eventually underwent a left total knee replacement, a significant deduction is appropriate.

33. However, we also accept the respondent's submission that there was a considerable period of time between the 1990 frank injury and the left knee replacement in October 2015, during which time the respondent continued to work in what we accept were on occasions fairly arduous duties.

34. *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 (*Cole*) is the perennially cited authority on the construction and application of s 323. In summary, Schmidt J said that the section "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…contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the *actual consequences* (our emphasis) of the earlier injury…"

35. Conversely, *Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254 (*Vitaz*) is cited as authority for the principle that "if a pre-existing condition is *a contributing factor causing permanent impairment*, (our emphasis) a deduction is required, even though the pre-existing condition had been asymptomatic prior to the injury."

36. Having regard to these principles, and for the reasons stated, we consider that the appropriate deduction in respect of the left lower extremity should be 60%.

37. As regards the right lower extremity, we are mindful of the evidence that the appellant had problems with his right knee going back to the year 2000, as reported by Dr Kuah.

38. Although there is no specific evidence of any pre-existing pathology in so far as the right knee is concerned, the comments by Dr Kuah and Dr Gareth Long in 2004 regarding "symptomatic osteoarthritis of his right knee" suggest to us that a moderately significant deduction should be applied.

39. In addition, the respondent's sporting activities remained fairly intense up until 2014 as reported by Dr Oates, if not longer as Dr Panjratan noted. His difficulties getting out of a car after playing hockey which he apparently did "until his mid-40s" fits in with the reported symptoms he had back in 2000.

40. Those activities we believe were certainly a contributing factor causing permanent impairment.

41. Again, however, we are mindful of the duties he performed over the years as a paramedic in a rural area, which we also accept contributed to his impairment.

42. Accordingly, we are of the view that a 30% deduction is appropriate.

43. For these reasons, the Appeal Panel has determined that the MAC issued on 5 July 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*.

A Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **2307/19**
Applicant: **Phillip George Brown**
Respondent: **State of NSW**

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 Jonathan Negus 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 the Guidelines**	**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)**
1. Right lower extremity	19 Nov 2018	Chapter 3, page 21	Table 17-35	20	3/10ths	14
2. Left lower extremity	19 Nov 2018	Chapter 3, page 21	Table 17-35	20	6/10ths	8
3.						
4.						
5.						
6.						
Total % WPI (the Combined Table values of all sub-totals)					**21**	

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

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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.)
Left Leg at or above the knee	September 1990	**30**	**0**	**30**

Deborah Moore
Arbitrator

Dr Margaret Gibson
Approved Medical Specialist

Dr J Brian Stephenson
Approved Medical Specialist

28 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 Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar