WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3561/19**
Appellant:	**Mitchl John French**
Respondent:	**Wentworth Golf Club Limited**
Date of Decision:	**17 December 2019**
Citation:	**[2019] NSWWCCMA 188**

Appeal Panel:	
Arbitrator:	**Marshal Douglas**
Approved Medical Specialist:	**Dr James Bodel**
Approved Medical Specialist:	**Dr Philippa Harvey-Sutton**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 27 September 2019, Mitchl John French (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Greggory Burrow, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 3 September 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 WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of *Workplace Injury Management and Workers Compensation Act 1998* (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).

RELEVANT FACTUAL BACKGROUND

6. On 12 July 2013, the appellant was working for Wentworth Golf Club Limited (the respondent) moving kegs in one of its cellars. He injured his lumbar spine while undertaking this task.

7. The appellant claimed compensation from the respondent under s 66 of *the Workers Compensation Act 1987* (the 1987 Act) for permanent impairment resulting from his injury. A medical dispute arose between the parties regarding the degree of the appellant's permanent impairment. The appellant registered an Application to Resolve a Dispute with the Commission seeking determination of his claim for compensation. The Registrar deferred determination by the Commission of the appellant's claim and, through his delegate, referred the medical dispute to an AMS to assess. The referral was in these terms:

> **"MEDICAL DISPUTE REFERRED FOR ASSESSMENT** (s319 1998 Act)
>
> - the degree of permanent impairment of the worker as a result of an injury (s319(c))
>
> - whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion (s319(d))
>
> - whether impairment is permanent (s319(f))
>
> - whether the degree of permanent impairment of the injured worker is fully
> - ascertainable (s319(g))
>
> **Date of Injury:** 12 July 2013
> **Body part/s referred:** Lumbar spine
> Scarring - TEMSKI
> **Method of assessment:** Whole person impairment".
>
> (Bold as per original)

PRELIMINARY REVIEW

8. 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.

9. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the appellant to undergo a further medical examination. This is because the material before the Appeal Panel is sufficient to enable the Appeal Panel to reassess the medical dispute that was referred to the AMS for assessment.

EVIDENCE

10. 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

11. The AMS examined the appellant on 23 August 2019. The history the AMS obtained included the circumstances in which the appellant suffered injury on 12 July 2013. The history the AMS obtained also included that the appellant had previously suffered an acute episode of low back pain in 2011 that resulted in the appellant being unable to work for around two weeks. The AMS noted that a CT scan following that earlier injury in 2011 recorded a protruded L5/S1 disc. The AMS noted that the appellant received treated in the form of an epidural injection for his earlier injury.

12. The history the AMS obtained also included that the appellant, following his injury on 12 July 2013, was stiff for two days but able to work. He then suffered "exquisite back pain and leg pain" when bending over in a shower. The AMS noted the appellant was referred for a CT scan that his treating neurosurgeon, Dr van Gelder, described as showing "an L5/S1 herniated disc compressing the S1 nerve root". The history the AMS obtained included the appellant initially having conservative treatment for his injury but then undergoing surgery on 19 February 2015 when Dr McMaster performed an L5/S1 discectomy.

13. The AMS noted that the appellant at the time of examination reported his symptoms to be back pain and leg pain and occasional pins and needles and numbness in the dorsal and lateral aspect of the leg.

14. The AMS recorded in the MAC making the following findings from his examination of the appellant:

> "Mr French stands 184cm tall, weighs 90kg and was of average build. He sat comfortably, rose cautiously and was protective when dressing and undressing. Inspection of the lower extremities showed no evidence of Complex Regional Pain Syndrome.
>
> Examination of his gait showed no limp. He did not use a brace or a stick.
>
> Examination of his lumbar spine showed a 3.5cm surgical scar in the midline consistent with the known discectomy surgery, which was fine, not cross hatched, not adherent and non-puckered.
>
> There were no dystrophic features.
>
> Examination of the lumbar spine showed normal coronal and sagittal alignment with no paraspinal guarding or spasm. Lumbar motion was reduced by approximately one half but was symmetrical.
>
> Straight leg raise was 80° bilaterally and produced no sciatica. Examination of the lower extremities did not allow for quad or calf measurement in that he has had a total knee replacement and multiple operations on the right knee. In any case, there was no motor weakness in a radicular pattern on examination. He did report altered sensation to light touch over the L5/S1 area of the right lower extremity, but reflexes were present at the knee and ankle and symmetrical."

15. The AMS provided the following summary of the appellant's injury and this diagnosis:

> "Mr French suffered a first time injury to his lumbar spine area which was documented by CT scan confirming a partly extruded L5/S1 disc in 2011. He required a steroid injection. He says that he made an excellent recovery after this condition and was only off work for several weeks.
>
> There was a further injury on 12/07/2013, this time working for the Wentworth Golf Club, while manipulating kegs. He had exquisite low back pain and leg pain which 3 days later was aggravated by bending over in his shower at home.
>
> There was a further aggravation when he returned to restricted duties after about 6 weeks when he tripped on linen walking through the foyer area of the Golf Club. He essentially did not work after that and his position was subsequently terminated. MR scan at this stage showed herniated L5/S1 disc with pressure on the right S1 nerve root and with persisting symptoms he underwent L5/S1 discectomy surgery with Dr McMaster in February 2015.

He has since returned to full time work in retail-forklift driving, working for Bunnings in the timber yard section."

16. The AMS assessed the appellant's permanent impairment to be 12% WPI relating to his lumbar spine and 0% WPI relating to his scarring. The AMS provided the following reasons and calculations by way of explaining his assessment of the appellant's permanent impairment:

> "The history of discectomy with no evidence of radiculopathy as per SIRA paragraph 4.27 on today's examination. The persisting surgical scar is fine, minimally discoloured, small, nonpuckered and non-adherent and is not seen with normal clothes. There is a significant history of pre-existing disease with disc protrusion at L5/S1 in 2011 pre-dating the work incident which
> required significant medical intervention by way of peri-neural injection and time off work.
> …
>
> **Lumbar Spine**
>
> AMA-5, Chapter 15, Table 15-3: DRE Lumbar Category II (sic: III) as there has been surgery for a herniated disc but there is no evidence of ongoing radiculopathy as per SIRA paragraph 4.27: 10% WPI.
>
> Impact of ADLs: SIRA paragraphs 4.33, 4.34 and 4.35: 2% WPI as he has ongoing difficulties with yard, garden, sport, recreation and home care but is independent of self -care.
>
> Total lumbar impairment: 12% WPI.
>
> **Scarring**
>
> SIRA Table 14.1: 0% WPI as Mr French is barely conscious of the scar, there is a good colour match with surrounding skin, there are no trophic changes, there are no suture or staple marks visible, the anatomic location is not visible with usual clothing (that is shirt and trousers), there is no contour defect, no effect on ADLs, no treatment is required and there is no adherence."
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> (Bold as per original)

17. The AMS was of the view that a proportion of the appellant's permanent impairment was due to the previous injury the appellant suffered in 2011, and that that proportion was two fifths. As required by s 323(1) of the 1998 Act, the AMS deducted that proportion from the appellant's permanent impairment when assessing the degree of the appellant's permanent impairment resulting from the injury on 12 July 2013. The AMS accordingly assessed the appellant's degree of permanent impairment resulting from his injury to be 7% WPI.

SUBMISSIONS

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

19. In summary, the appellant submits that the deduction the AMS made under s 323 was based on assumption and hypothesis and was conjecture and illogical and not supported by evidence. The appellant submits that the AMS did not have regard to the fact that the appellant was not suffering symptoms from his 2011 injury at the time he suffered his injury on 12 July 2013. The appellant submits that no proportion of his present permanent impairment is due to his previous injury. In the alternative, the appellant submits that the deduction of two-fifths that the AMS made under s 323 for the proportion of his injury that was due to the prior injury was arbitrary and not explained by the AMS. The appellant submits that if a proportion of his permanent impairment is due to his previous injury, that proportion should be assumed to be 10%.

20. In reply, the respondent submits that the AMS took account of the fact that the appellant's pre-existing lumbar spinal disease was asymptomatic at the time the appellant suffered injury on 12 July 2013. The respondent submits that the AMS found that the spinal pathology revealed by the CT scan done of the appellant's lumbar spine on 22 November 2011 remained unchanged and that the appellant's symptoms from the 2011 injury were only temporarily alleviated in the intervening period to 12 July 2013. The respondent submits that the AMS found that the previous injury was a very significant contribution to the impairment the appellant presently suffers. According to the respondent, the AMS explained the basis for the deduction he made on account of the appellant's previous injury when assessing the appellant's permanent impairment from his injury on 12 July 2013. The respondent submits that the deduction the AMS made was based on the AMS's clinical judgment. The respondent submits that the appellant "merely cavils" with the judgment of the AMS and that the clinical judgment of the AMS should not be disturbed. The respondent says that the MAC does not contain a demonstrable error.

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.

23. The issues the appellant raises in his appeal against the MAC are in substance whether there was evidence to support the AMS's finding that a proportion of his permanent impairment was due to his previous injury in 2011 or whether the AMS just proceeded on an assumption that was the case. Beyond that, and in the alternative, the issues the appellant raises are whether the AMS has sufficiently explained his finding that a proportion of the appellant's permanent impairment is due to the appellant's previous injury and sufficiently explained why that proportion is two-fifths.

24. With respect to the deduction that an Approved Medical Specialist (an AMS) is to make under s 323(1), the authorities are consistent and clear as to the approach an AMS must adopt. That is, the level of a worker's post-injury impairment, as at the time of assessment, must firstly be determined. Secondly, a worker's prior injury or pre-existing condition or abnormality must be identified. Thirdly, it must be determined whether a proportion of a worker's post-injury impairment is due to that prior injury or pre-existing condition. Lastly, the extent to which a worker's post-injury impairment is due to the prior injury or pre-existing condition or abnormality must be determined.[1]

[1] See *Cole v Wenaline Pty Ltd* [2010] NSWSC78; *Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254 (*Vitaz's case*) and *Ryder v Sundance Bakehouse* [2015] NSWSC526 (*Ryder's case*).

25. The Court of Appeal held in Ryder's case that the pre-existing condition that a worker has or the prior injury the worker has suffered must make a difference to the outcome in order that a worker's impairment can be found to be due to it.[2] The extent to which it does make a difference, there must be a deduction.

26. The third and fourth stages of this process cannot be done based on assumption or hypothesis. The evidence must be able to demonstrate that a proportion of a worker's impairment is due to the pre-existing condition or previous injury and what that proportion is. It is an error for an AMS to assign an arbitrary figure for the extent to which a pre-existing condition or previous injury contributes to the worker's permanent impairment.[3] In accordance with s 323(2) of the 1987 Act, if the extent to which a deduction is to be made under s 323(1) would be too difficult or costly to determine because of the absence of medical evidence or some other reason, the deduction must be assumed to be 10% so long as that assumption is not at odds with the evidence.

27. Section 325(2)(c) of the 1998 Act requires an AMS to set out within the MAC his or her reasons for the assessment of the matters that were referred for assessment. The reasons must be sufficient to reveal the actual path by which an AMS arrives at his or her assessment.[4] The reasons do not need to be comprehensible to a person with no medical expertise, such that if a conclusion of an AMS is self-evident in a medical sense, then the reasons need not be extensive. If, however, a conclusion may be medically contestable, based on the evidence, then an AMS will need to address the evidence so as to expose the path of his or her reasoning in order to explain the conclusion to which he or she came.[5]

28. In the case to hand, the AMS was required therefore to set out his reasons for the deduction he made under s 323(1) for the proportion of the appellant's permanent impairment that was due to the 2011 injury the appellant suffered, given that was one of the matters referred to the AMS for assessment.

29. The Appeal Panel considers that when the MAC is considered as a whole, the AMS has clearly and cogently exposed his reasoning for his conclusion that a proportion of the appellant's impairment was due to the injury the appellant suffered in 2011. Further, the Appeal Panel considers that the AMS's conclusion on this matter is correct. The AMS explained that the appellant had suffered an injury in 2011. The AMS identified the consequence of that injury, as revealed by the CT scan done on 22 November 2011. The AMS identified that the condition caused by the 2011 injury was a disc protrusion at L5/S1. The AMS explained that the MRI the appellant had following his work injury on 12 July 2013 showed a herniated L5/S1 disc with pressure on the right S1 nerve root. The AMS explained that the pre-existing disease from the 2011 injury, being a protruding L5/S1 disc, contributed to the WPI the appellant had at the time the AMS assessed the appellant.

30. In the Appeal Panel's view therefore, there is no demonstrable error in the MAC as a consequence of the AMS's finding that a proportion of the appellant's permanent impairment is due to the previous injury.

31. In terms of the extent to which the appellant's previous injury contributes to his permanent impairment, the Appeal Panel is of the view that the AMS has not sufficiently exposed his reasoning as to why the proportion is of the order of 2/5ths. In the Appeal Panel's view, based on the evidence the parties presented, the issue of the extent to which the appellant's previous injury contributes to his permanent impairment is a medically contestable issue. It is not self-evident, in medical sense, that it is of the order of 2/5ths. Consistent with what was held in *Vitaz's* case, the AMS needed to explain by reference to medical evidence why the appellant's previous injury contributed to his permanent impairment to the extent of 2/5ths.

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[2] Ibid

[3] See *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC 1053 at [86]

[4] See *Wingfoot Aust Partners Pty Ltd v Kocak* [2013] HCA43 at [55] and *Broadspectrum (Aust) Pty Ltd v Fiona Louise Wills* [2018] NSWSC1320 at [73] – [79]

[5] See *Vitaz* at [34]

The key parts of the evidence that related to that issue were the CT scan done on 22 November 2011; the treatment of the appellant's 2011 injury and the subsequent abatement of symptoms; the MRI scans done after the appellant's injury on 12 July 2013; and the appellant's description of his symptoms following both the 2011 injury and the 2013 injury.

32. The AMS's reasons for making a 2/5th deduction for the 2011 injury were in substance limited to the appellant having "very significant pre-existing disease". In circumstances where the scanning methodologies used to investigate the appellant's 2011 and 2013 injuries were different, and where the appellant was without symptom for the most part between his suffering injury in 2011 and his suffering injury on 12 July 2013, it is the Appeal Panel's view that the AMS's limited reasons for his assessment that the proportion of the appellant's impairment due to the earlier injury is 2/5ths, amounted to the AMS assigning an arbitrary figure. It did not amount to the AMS exposing his reasons on a medically contestable issue by reference to the evidence.

33. The Appeal Panel considers that with respect to the particular matter that of "the extent of that proportion", that had been referred to the AMS to assess, the AMS's explanation for why it was 2/5ths did not meet the requirement of s 325(2)(c). The Appeal Panel therefore finds that on that issue, the MAC contains a demonstrable error.

34. That being the case, the Appeal Panel must reassess the medical dispute.

35. The Appeal Panel notes that neither party took issue with the AMS's assessment that the appellant has 12% whole person impairment relating to his lumbar spine and 0% whole person impairment relating to scarring.

36. In the Appeal Panel's view, the AMS's assessment of the appellant's total permanent impairment was correct, and the Appeal Panel makes the same assessment. With respect to the appellant's lumbar spine the Appeal Panel notes that the appellant has had surgery in the form of a discectomy but has no signs of persisting radiculopathy. Accordingly, the appellant's impairment relating to his lumbar spine must be assessed by reference to Table 15-3 of AMA 5 as being within DRE Lumbar Category 3, which attracts a 10% WPI rating. Further, the appellant experiences ongoing difficulties in the yard and garden and with home care. The appellant however is independent in his self-care. Accordingly, 2% WPI is to be added to the 10% WPI, resulting in the appellant having a total 12% WPI relating to his lumbar spine.

37. The Appeal Panel notes that the AMS found from his examination of the appellant that the appellant had a 3.5 centimetre surgical scar in the midline that was fine, non-adherent, non-puckered, with no dystrophic features, no trophic changes, with a good colour match with surrounding skin and no suture or staple marks visible. The AMS noted that the anatomic location of the scar was not visible with usual clothing. The AMS noted that the appellant was barely conscious of the scar. The Appeal Panel adopts those findings. Based on those findings, the Appeal Panel rates the appellant's WPI from scarring as 0% in accordance with Table 14.1 of the Guidelines.

38. For reasons explained above, the Appeal Panel is of the view that the appellant's previous injury in 2011 does contribute to his permanent impairment. The injury the appellant then suffered was a protruding disc at the L5/S1 level on the right side. That is the same area in which he suffered injury on 12 July 2013. It is apparent to the Appeal Panel that the pathology in the appellant's L5/S1 spine that was initiated by his 2011 injury was made significantly worse by the appellant's subsequent injury on 12 July 2013. For those reasons, the Appeal Panel considers, the same as the AMS did, that the 2011 injury does contribute to the appellant's current impairment.

39. The Appeal Panel's view is that it is too difficult to determine the extent to which the appellant's previous injury contributes to his current impairment. A CT scan was done to investigate his 2011 injury. MRI scans were done to investigate his injury on 12 July 2013. The scans involve different methodologies and are not comparable. The appellant was without symptom for most of the period between injuries, and was asymptomatic at the time of his injury on 12 July 2013. The fact that the appellant was not suffering symptoms for most of the intervening period and was without symptom at the time of injury means that it is uncertain that immediately before he suffered injury on 12 July 2013 his disc was compressing the right S1 nerve root. In all likelihood, there had been some recovery subsequent to the appellant suffering the 2011 injury.

40. It is too difficult to determine by reference to the present evidence the extent to which the appellant's previous injury contributes to his present impairment. There is simply no evidence, in the Appeal Panel's view, that would enable precise or even approximate quantification of the proportion of the appellant's current impairment that is due to the previous injury. Given that evidence does not exist, it is the Appeal Panel's view that the evidence is not at odds with the assumption that is required to be made under s 323(1) that the proportion to which the appellant's previous injury contributes to the appellant's present impairment is 10%. The Appeal Panel must therefore, in accordance with s 323(2), assume that the deduction to be made under s 323(1) is to be 10%.

41. For these reasons, the Appeal Panel has determined that the MAC issued on 3 September 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.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **3561/19**
Applicant: **Mitchl John French**
Respondent: **Wentworth Golf Club 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 Greggory Burrow 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 AMA5 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.Lumbar spine	12/7/2013	Paragraphs 4.27, 4.33, 4.34 and 4.35	Chapt 15 Table 15-3	12%	1/10	11%
2.Scarring (TEMSKI)	12/7/2013	Table 14.1		0	-	0
Total % WPI (the Combined Table values of all sub-totals)					**11%**	

Marshal Douglas
Arbitrator

Dr James Bodel
Approved Medical Specialist

Dr Philippa Harvey-Sutton
Approved Medical Specialist

17 December 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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar