

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-1047/19
Appellant: The Australia Jockey Club t/as The Australian Turf club Limited
Respondent: Craig Anthony Agnew
Date of Decision: 15 August 2019
Citation: [2019] NSWCCMA 113

Appeal Panel:
Arbitrator: Ross Bell
Approved Medical Specialist: Dr Tommasino Mastroianni
Approved Medical Specialist: Dr Roger Pillemer

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 22 May 2019 The Australian Jockey Club lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Robert Ivers, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 30 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).

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 Agnew told me that in July 2005, whilst he was track riding, at Warwick Farm, the horse that he was riding collided with a riderless horse, which was on the track. Mr Agnew was thrown off his horse and was reviewed at Liverpool Hospital and underwent some x-rays which demonstrated a crush fracture of L1 vertebral body, principally involving the anterior aspect. He was reviewed by a neurosurgeon. He was placed in a body brace for about six months and attended rehabilitation and physiotherapy, along with hydrotherapy. He was also reviewed by Dr Ian Farey, orthopaedic surgeon, at Royal North Shore Hospital. Surgery was not offered. He also started a gym program.

He was able to return to track work, on and off for the next four years, and was able to ride and race. He was conscious of episodic "flareup" of his back discomfort, despite a physiotherapy gym program.

There was a subsequent fall from a horse on 21 November 2009 whilst racing at Kembla Grange. He was transported by ambulance to Wollongong Hospital and x-rays demonstrated an injury to the right knee with pain in the region of his neck and back. Further treatment was not required apart from physiotherapy and gym rehabilitation exercises.

(I also note reference in the brief to a fall in June 2008 in which Mr Agnew sustained a fracture of the right clavicle and exacerbation of his back pain. This was not specifically mentioned by Mr Agnew, though he did mention other falls including several clavicular fractures.)

He ceased riding in 2010. He states that he had episodic back pain for the next six months, along with bilateral sciatica, and he eventually underwent surgery in the form of a spinal fusion in September 2011. (I note that the bilateral sciatica has not been featured in the reports from the treating orthopaedic surgeon, or in the reports of other experts.) He has not been able to return to work since that time."

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 because the errors found could be corrected from the materials before the Panel, as explained in the reasons below.
9. The appellant requests an oral hearing but the Panel determined it is able to consider the grounds of appeal without an oral hearing.

EVIDENCE

Documentary 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 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

Appellant

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 has erred in failing to take account of an agreement between the parties as to the level of impairment due to injury on 21 November 2009 which is “final and binding as between the parties”. The agreement was based on an assessment by Dr Bodel of 11% whole person impairment (WPI) for injury to the lumbar spine in November 2009.
14. The AMS also erred in failing to apply a deduction pursuant to s 323 of the 1998 Act based on imaging taken in 2005 showing pre-existing degenerative changes.
15. The AMS has erred in attributing the scarring to September 2011. Any impairment due to injury in 2011 cannot be combined with the injury referred from 2005.
16. The MAC should be revoked, and the assessment of the thoracic spine should be reduced by 11% WPI from the injury in 2009, leaving 10% WPI, which should be reduced by between 10% and 25% for pre-existing abnormality under s 323 of the 1998 Act.

Respondent

17. The respondent submits that the obvious error relating to the scarring should be corrected.
18. The MAC should be confirmed.
19. The appeal should be otherwise be dismissed.

FINDINGS AND REASONS

20. 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.
21. 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.

Deduction to assessment of spine due to subsequent injury on 21 November 2009

22. The injury referred for assessment occurred on 21 July 2005. The appellant submits that there should be a deduction to the assessment of the thoracic spine to the extent of a previous agreement between the parties about the degree of impairment for injury on 21 November 2009.
23. The first task of an AMS is to assess the body part referred, and then to address whether s 323 applies (MAC Part 8.e.) or if there is an element of the impairment due to subsequent injury (MAC Part 8.g.).¹

¹ *Greater Western Area Health Service v Austin* [2014] NSWSC 604

24. The method described by the appellant (excluding the impairment due to a subsequent injury based on a previous agreement between the parties) does not fit the above authority, and is clearly not an appropriate method to be applied by the AMS, who is required to exercise their own clinical judgement.
25. The ground raised by the appellant essentially relates to Part 8.g. of the MAC. The AMS did consider the subsequent injury in terms of the correct criteria regarding Part 8.g, which sets out the following,
 - “g. Indicate whether there has been any further injury subsequent to the subject work injury. If this injury has caused any additional impairment this should not be included with the assessment of impairment due to the subject work injury.”
26. The AMS’s response was,
 - “Mr Agnew did not volunteer information regarding a subsequent work injury, though I note from the brief that there was a further injury in 2009 following a fall from a horse whilst riding. There was an exacerbation of the back and neck pain and also pain in the region of the knee, with possible undisplaced fracture.”
27. The AMS calls the 2009 fall “an exacerbation of the back and neck pain”, and at Part 10.c. he notes Dr Bodel’s view to the same effect in his report of 7 February 2013. Dr Bodel said, “Apportionment was not required”, and also used the expression “exacerbation” in relation to the subsequent fall in November 2009.
28. Dr Farey as treating specialist was consulted about recurring problems due to the thoracic injury in the 2005 fall over the years, and it clearly never resolved. Mr Agnew says in his statement, “I virtually continued working pre-injury duties and hours despite experiencing occasional exacerbation of my thoraco-lumbar spine until 21 November 2009.”
29. The issue is whether the injury on 21 November 2009 has caused any additional impairment to the thoracic spine which should be excluded from the assessment for the 21 July 2005 injury.
30. The evidence establishes that the 21 November 2009 injury was not just an exacerbation of pain without a change in pathology. From the time of the 2009 fall Mr Agnew has been unable to ride. He says in his statement that following the November 2009 fall and hospitalisation that while conservative treatment was tried for a considerable time, the pain persisted, and in 2011 the decision was made to proceed to a laminectomy.
31. Dr Farey says in his report of 13 June 2011 that he saw Mr Agnew on 14 September 2010, reporting,
 - “He was unable to work as a race rider since the time of his race fall in November 2009. He also reported difficulty getting out of bed, performing home duties such as mowing lawns and there was an overall reduction in his activity level.”
32. It is apparent on the evidence that there was a significant deterioration in the pathology in the thoraco-lumbar junction caused by the fall in 2009, which resulted in the greater restrictions reported by Dr Farey and the medical certificates.

33. When the pain persisted from the time of that fall up to 2011 Dr Farey said in the same report,

“There is no doubt that Mr Agnew has significant disability as a result of his compression fracture and subsequent development of degenerative disc disease and kyphosis formation. In my opinion, he would benefit from stabilisation at T12-L1 and the performance of a Ponte osteotomy to realign the spine and correct the kyphosis. This is likely to produce significant relief from his current symptoms.”

34. It is the Panel’s view that the significant increase in symptoms and restrictions resulting from the fall in November 2009 which continued to the point of requiring the T12-L1 laminectomy in September 2011 means the impairment was greater than it would otherwise have been and that there should be a reduction in the impairment assessed to exclude this later element. That the AMS did not address the evidence in greater detail on this in relation to Part 8.g. of the MAC is a demonstrable error on the face of the Certificate.

Section 323 of the 1998 Act

35. There is no evidence from the period before the fall in June 2005 of any pre-existing element that would allow a deduction under s 323. For a deduction to be properly made under s 323 there must be evidence that a pre-existing abnormality; condition; or previous injury contributes to the impairment.², and “assumption will not suffice”.³

36. The AMS states at Part 11,

“I do not have any evidence of a pre-existing condition affecting the thoracolumbar spine. Consequently, there is no deductible proportion.”

37. The appellant refers to imaging after the subject fall reporting “pre-existing abnormalities” but does not make any submission as to how the mild issues reported contribute to the current impairment, as required by the relevant authorities.

38. There is no evidence that any pre-existing element contributes to the assessment of the thoraco-lumbar spine. The Panel discerns no error in the consideration of s 323 of the 1998 Act by the AMS. The ground of appeal is not made out.

Scarring

39. The Panel notes that scarring (TEMSKI) was referred to the AMS for assessment. The parties agree in submissions that the AMS erred in giving a date of injury to the scarring of “September 2011”, which is when the laminectomy was performed. It is readily apparent that scarring is due to the 2005 injury referred. It is a simple slip that the Panel will correct in its new Certificate below.

Findings

40. 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 subsequent injury and the scarring without recourse to further examination of Mr Agnew.

² *Cole v Wenaline Pty Ltd* (2010) NSWSC 78; *Ryder v Sundance Bakehouse* [2015] NSWSC 526

³ *Fire & Rescue NSW v Clinen* [2013] NSWSC 629

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

41. The Panel is satisfied that the impairment is permanent, and the injury has reached maximum medical improvement.
42. As discussed above, the Panel is of the opinion that there was a permanent aggravation of the pathology in the thoracic spine on 21 November 2009 which contributes to the current WPI due to the injury on 21 July 2005, falling under Part 8.g. of the MAC template.
43. This element of the impairment is to be excluded. The Panel considers that 2% WPI is the additional impairment due to the permanent aggravation in the subsequent injury on 21 November 2009.
44. The scarring as assessed is due to the surgery in 2011 but that surgery is attributable to the injury referred. The Panel has determined that the best fit on the evidence is 1% on TEMSKI as shown in the Panel's Certificate below.
45. As noted above there is no evidence to support a deduction under s 323 of the 1998 Act for a pre-existing injury, abnormality or condition which contributes to the current impairment of the thoraco-lumbar spine.
46. Adopting the overall assessment by the AMS of the thoracic spine, which is not subject to appeal, of 21% WPI, including 1% WPI for impact on the activities of daily living, but excluding 2% WPI for the subsequent injury, gives 19% WPI, plus 1% WPI for the scarring, giving a total of 20% WPI as shown in the Panel's Certificate.
47. For these reasons, the Appeal Panel has determined that the MAC issued on 30 April 2019 should be revoked, and a new MAC 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Matter Number: 1047/19
Appellant: The Australia Jockey Club t/as The Australian Turf club Limited
Respondent: Craig Anthony Agnew

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 Robert Ivers 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)
Thoracic spine	21/07/2005	Chapter 4 pp.24-29	Chapter 15 Page 389; Table 15-4	19	0	19
Lumbar spine	21/07/2005	Chapter 4 pp.24-29	Chapter 15 Page 384; Table 15-03	0	n/a	0
Scarring	21/07/2005	Chapter 14 pp.73-74		1	0	1
Total % WPI (the Combined Table values of all sub-totals)					20%	

Ross Bell
Arbitrator

Dr Tommasino Mastroianni
Approved Medical Specialist

Dr Roger Pillemer
Approved Medical Specialist

12 August 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar

