

# WORKERS COMPENSATION COMMISSION

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

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<b>Matter Number:</b>	<b>M1-1248/19</b>
<b>Appellant:</b>	<b>State of New South Wales (HealthShare NSW)</b>
<b>Respondent:</b>	<b>Kevin John Martine</b>
<b>Date of Decision:</b>	<b>20 December 2019</b>
<b>Citation:</b>	<b>[2019] NSWCCMA 199</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Mr William Dalley</b>
<b>Approved Medical Specialist:</b>	<b>Dr Brian Noll</b>
<b>Approved Medical Specialist:</b>	<b>Dr Mark Burns</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 October 2019 Healthshare NSW (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr James Bodel, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 4 September 2019.
2. The appellant relies on the following grounds of appeal under section 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 grounds 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 section 328 of the 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, 4<sup>th</sup> ed* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> ed* (AMA 5).

### RELEVANT FACTUAL BACKGROUND

6. Kevin John Martine (the respondent/Mr Martine) commenced employment with the appellant in July 2016. On 20 October 2016, Mr Martine underwent a right total hip replacement. The requirement for the hip replacement was not related to his employment. He returned to his work as a Patient Transport Officer with the appellant.

7. On 12 December 2016, in the course of his employment, Mr Martine suffered a periprosthetic fracture around the femoral stem of the total hip replacement (the subject injury). He underwent revision surgery and was off work for six months before returning to his previous employment. His employment was later terminated for reasons not disclosed by the evidence.
8. Mr Martine was examined by A/professor Kleinman on 24 October 2017 at the request of Mr Martine's solicitors. A/professor Kleinman assessed Mr Martine as having achieved a "good" result from his revision surgery and assessed 15% whole person impairment. A/professor Kleinman deducted one tenth due to the pre-existing condition in the right hip pursuant to section 323 of the 1998 Act.
9. Mr Martine's solicitors made a claim for lump-sum compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of 14% whole person impairment for the right lower extremity as result of injury on 12 December 2016.
10. Mr Martine was examined by Dr Pillemer at the request of the appellant's solicitors on 9 October 2018. Dr Pillemer assessed Mr Martine as having a fair result from the revision surgery. Leaving to one side the issue of liability, Dr Pillemer assessed 20% whole person impairment and deducted three quarters as attributable to the pre-existing condition constituted by the earlier hip replacement.
11. The issue of liability was established in favour of the respondent in proceedings in the Commission and the claim was referred to an AMS, Dr Bodel, who assessed Mr Martine as having achieved a fair outcome from the revision surgery with 20% whole person impairment. Dr Bodel considered the provisions of section 323 and concluded that a deduction of one tenth was appropriate resulting in an assessment of 18% whole person impairment arising from injury to the right lower extremity as result of injury on 12 December 2016.

## **PRELIMINARY REVIEW**

12. 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.
13. 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 there was sufficient information before the Panel to allow resolution of the appeal. Further examination would not assist in determination of the issue in dispute.

## **EVIDENCE**

### **Documentary evidence**

14. 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**

15. The AMS noted the earlier right hip replacement and the subject injury resulting in a requirement for revision surgery for the periprosthetic fracture. The AMS recorded that Mr Martine had been off work for six months on restricted duties and had returned to his pre-injury duties after one year.
16. On examination the AMS noted reduced range of movement in both hips with the injured right hip showing a slightly greater range of movement than the left.

17. The AMS noted x-rays of the pelvis in both hips. The later x-ray performed on 13 February 2017 showed “the total hip replacement on the right-hand side is in satisfactory position with four cerclage bands securing the fracture on the right-hand side.” The AMS diagnosed “a periprosthetic fracture around the femoral stem of a total hip replacement on the right-hand side”.
18. The AMS assessed the hip replacement in accordance with Table 17-34 of AMA 5 and applied Table 17-33 to reach a whole person impairment figure of 20%.
19. The AMS noted the pre-existing condition. The AMS observed that Dr Pillemer had assessed a “fair” outcome for a total hip replacement following the revision surgery, having had an “excellent” result from his earlier right hip replacement. He observed that Dr Pillemer had assessed Mr Martine as having 20% whole person impairment in accordance with Table 17-33 of AMA 5 reduced pursuant to section 323 of the 1998 Act by three quarters representing the contribution to impairment resulting from the pre-existing condition.
20. The AMS also noted the report of A/professor Kleinman who had assessed Mr Martine as having a “good” result following the revision surgery and has accordingly assigned whole person impairment of 15% which A/professor Kleinman had then reduced by one tenth for pre-existing impairment.
21. The AMS discussed the application of section 323 of the 1998 Act noting the existence of the prior hip replacement. The AMS said:

“I agree with the 1/10 deduction principle for the following reason:

This gentleman had total hip replacement in place. Had the fall not occurred, his hip would have continued to functioned (sic) well. The fact that he had a hip prosthesis in place is the only reason that a periprosthetic fracture occurred and therefore this is predisposed him to the fracture which occurred in the circumstances described above.

In my view however, it is difficult to determine the exact level of contribution from that existence of the total hip replacement to determine the exact level of deduction that should be made in the circumstances.

In my view, the deduction of three quarters is excessive as the hip was functioning very well the time of this injury and he was back at work doing his normal role.

The presence of the hip replacement did leave him vulnerable to the periprosthetic fracture but not everyone who has a hip replacement and has a fall develops a fracture as a consequence of that fall.

The specific circumstances of the fall, and the way in which he landed on the edge of the curb and guttering has led to the periprosthetic fracture in the circumstances.

A 1/10 deduction exercised by A/Professor Kleinman is appropriated (sic).

It is too difficult to determine the exact level of the pre-existing abnormality or condition as it contributes to the overall level of impairment and I have also made a 1/10 deduction in this circumstance.”

22. In accordance with that reasoning the AMS deducted one tenth of his assessment of 20% whole person impairment to arrive at an assessment of 18% whole person impairment due to the subject injury.

## SUBMISSIONS

23. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
24. In summary, the appellant submits that the AMS had not considered the available evidence and the guidelines when concluding that it was too difficult to determine the exact level of the pre-existing abnormality or condition as it contributes to the overall level of impairment. The appellant submitted that the AMS had failed to note that the Guidelines would have dictated an assessment of 15% whole person impairment arising from the earlier hip replacement. The assessment of one tenth deduction was contrary to the evidence.
25. The appellant submitted that the Panel should accept the assessment of Dr Pillemer.
26. In reply, the respondent submits that the AMS had performed his function in accordance with section 323. While it was possible to arrive at a conclusion as to the fact of the earlier hip replacement, it was too difficult to assess the contribution which that condition had made to the overall level of impairment assessed by the AMS. The respondent referred to the decision of Schmidt J in *Cole v Wenaline Pty Ltd*<sup>1</sup> (*Cole*) and that of the Court of Appeal in *Vannini v Worldwide Demolitions Pty Ltd*<sup>2</sup> (*Vannini*).
27. The respondent submitted that the AMS had considered the medical evidence and given detailed reasons for his findings. The respondent noted that it was not open to conclude that Mr Martine would have had a pre-existing impairment of 15% as the subject injury had occurred only two months after the right total hip replacement and Mr Martine would not have been considered to have reached maximum medical improvement at that time.

## FINDINGS AND REASONS

28. 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.
29. 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.
30. The parties do not allege error or application of incorrect criteria with respect to the assessment by the AMS of 20% whole person impairment arising from injury to the right lower extremity. The error asserted is in the application of section 323 of the 1998 Act in the circumstances of the case.
31. The Panel is satisfied that the ground of demonstrable error has been made out with respect to the AMS's deduction of one tenth.
32. The evidence establishes that Mr Martine had a pre-existing condition at the time of the subject injury because he had undergone a right total hip replacement.
33. The AMS accepted that there had been a good result from that procedure but, following the subject injury, Mr Martine was properly described as having only a fair result following the subject injury. That conclusion was appropriate on the evidence.

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<sup>1</sup> NSWSC [2010] NSWSC 78

<sup>2</sup> [2018] NSWCA 324

34. The AMS accepted the history provided by Mr Martine at the time of examination and referred to in the respective reports of A/professor Kleinman and Dr Pillemer as to the outcome of the earlier hip replacement prior to the subject injury.
35. The AMS noted the opinion of Dr Pillemer that, on a theoretical assessment of Mr Martine following the original hip replacement and prior to the subject injury, Mr Martine could be assessed as having a 15% whole person impairment of the right lower extremity based upon Table 17-34 and Table 17-33 of AMA 5.
36. The Panel accepts that the AMS was correct to reject that approach. In *Cole*, Schmidt J said:

“[30] Section 323 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, ‘irrespective of outcome’, contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality. The extent that the later impairment was due to the earlier injury, pre-existing condition or abnormality must be determined. The only exception is that provided for in s 323(2), where the required deduction ‘will be difficult or costly to determine (because, for example, of the absence of medical evidence)’. In that case, an assumption is provided for, namely that the deduction ‘is 10% of the impairment’. Even then, that assumption is displaced, if it is at odds with the available evidence.”<sup>3</sup>
37. The AMS correctly recognised that a deduction pursuant to section 323 was appropriate. Neither party disputed that conclusion. The respondent correctly points to the difficulty involved in assessing the extent of that contribution but does not address the issue raised by the appellant as to whether that assessment “is at odds with the available evidence”<sup>4</sup>.
38. The opinion of the Panel is that a good result following total hip replacement nevertheless results in a significant degree of impairment. This is reflected in the Guidelines and the assessment to be carried out in accordance with Table 17-33 and 17-34 in AMA 5.
39. The submissions of the appellant highlight that the deduction of one tenth pursuant to section 323(2), where it is difficult or costly to assess the extent of the appropriate deduction, is subject to the requirement that this assumption is not at odds with the available evidence.
40. The facts accepted by the AMS were that, following a right total hip replacement, a revision of that hip replacement was required to be carried out with the substitution of an appropriate prosthesis. The assessment of impairment resulting from substitution of one device for another required consideration of whether, and to what extent, the degree of impairment assessed following the revision surgery was contributed to by the earlier hip replacement.
41. The Panel is satisfied that the AMS fell into error in failing to consider whether a deduction of one tenth was at odds with the available evidence and the ground of demonstrable error is established.
42. While the provisions of the Guidelines and Chapter 17 of AMA 5 are not determinative of the issue, the Tables 17-33 and 17-34 in AMA 5 provide a respected body of expert opinion that assign a significant degree of impairment to a “good” outcome following hip replacement.

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<sup>3</sup> Although the respondent submitted that *Cole* had been applied in *Vannini*, the latter case was decided upon other grounds.

<sup>4</sup> Section 323(2).

43. The Panel accepts that the AMS failed to weigh the extent of impairment resulting from the pre-existing condition against the impairment assessed upon examination but instead assigned a one tenth deduction on the basis that it was too difficult to determine the extent of the deduction, without considering whether this assumption was at odds with the available evidence.
44. The Panel, upon review of the evidence, is satisfied that the evidence that there was a previous condition by way of a total right hip replacement, although with a “good” outcome, was at odds with a deduction of one tenth not only based upon the clinical experience of the expert members of the Panel but also having regard to the expert opinions which underlie the criteria set out in chapter 17 of AMA 5.
45. Upon review of the evidence the Panel accepts that, following the total hip replacement surgery on 20 October 2016 Mr Martine had a good outcome and was able to return to work as a transport officer. He was relatively asymptomatic following the hip replacement though he had suffered symptoms of osteoarthritis prior to the replacement.
46. As a result of the subject injury it was necessary for Mr Martine to undergo revision surgery with a “fair” result. Mr Martine now has ongoing discomfort in the right buttock extending halfway down the lateral aspect of the right thigh and pain which he assesses as 8/10. His symptoms are aggravated by exercising or excessive walking or bending and lifting or twisting or getting in and out of vehicles. The symptoms are relieved by rest and by use of a heat pack.<sup>5</sup>
47. The Panel accepts that, notwithstanding a “good” result from the original hip replacement Mr Martine would nevertheless have had a significant degree of right lower extremity impairment following insertion of the prosthesis. That is consistent with the methods of assessment contained in chapter 17 of AMA 5 and Tables 17-34 and 17-33 in particular.
48. The Panel does not accept the opinion of Dr Pillemer that the appropriate deduction is three quarters. The Panel accepts that there was a “good” result from the initial hip replacement which has been reduced to a “fair” result as a result of the subject injury as assessed pursuant to the Guidelines and Chapter 17 of AMA 5. The submissions of the parties do not dispute this.
49. In the opinion of the Panel, acknowledging the difficulty in assigning a precise measure of contribution to the impairment, a deduction of one tenth is at odds with the evidence and an appropriate assessment, reflecting the change from a “good” result to a “fair” result would be to assess the contribution of the pre-existing condition at one half.
50. For these reasons, the Appeal Panel has determined that the MAC issued on 4 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**



<sup>5</sup> report of Dr Pillemer dated 18 October 2018

# WORKERS COMPENSATION COMMISSION

## APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

**Matter Number:** 1248/19  
**Applicant:** Kevin John Martine  
**Respondent:** State of New South Wales (HealthShare 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 James Bodel 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 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	12/12/16	Chapter 3	Chapter 17 Table 17-34, page 548 Table 17-33 page 546	20%	1/2	10%
<b>Total % WPI (the Combined Table values of all sub-totals)</b>					<b>10%</b>	

**Mr William Dalley**  
Arbitrator

**Dr Brian Noll**  
Approved Medical Specialist

**Dr Mark Burns**  
Approved Medical Specialist

20 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**

