

# WORKERS COMPENSATION COMMISSION

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

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**Matter Number:** M1-6699/19  
**Appellant:** Christopher O'Reilly  
**Respondent:** Paul Anthony Howlett  
**Date of Decision:** 9 February 2021  
**Citation No:** [2021] NSWCCMA 26

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**Appeal Panel:**  
**Arbitrator:** R J Perrignon  
**Approved Medical Specialist:** Dr James Bodel  
**Approved Medical Specialist:** Dr Tommasino Mastroianni

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### GROUND OF APPEAL

1. The appellant employer, Mr O'Reilly, appeals from the Medical Assessment Certificate of Approved Medical Specialist Dr Anderson dated 11 October 2020.
2. The respondent worker, Mr Howlett, was injured on 22 April 2017 in the course of his employment as a jockey, when he fell off a horse which had bolted, wrenched his left shoulder, and hurt his right thigh.
3. By a Certificate of Determination dated 2 April 2020, Arbitrator Bell, with the consent of the parties, ordered:
  - (a) that the matter be remitted the matter to the Registrar for referral to an approved medical specialist to assess the 'left upper extremity and right lower extremity (thigh injury)', and
  - (b) that 'Surveillance film media is excluded from the evidence before the AMS.'
4. On 30 July 2020, the Registrar referred him to approved medical specialist Dr Anderson for assessment of whole person impairment with respect to the 'Left Upper Extremity, Right Lower Extremity (thigh)'.
5. Dr Anderson assessed a 15% whole person impairment (5% left upper extremity, 11% right lower extremity) as a result of injury on 22 April 2017.
6. The employer appeals from this assessment on the basis that it demonstrates error, essentially because:
  - (a) the medical assessment certificate bears the wrong date,
  - (b) Dr Anderson exceeded the terms of the Registrar's referral by including assessments of the right hip, right knee and scarring, and
  - (c) he failed to have regard to surveillance evidence which contradicted his findings on examination and dismissed Dr Robinson's assessment of 4% whole person impairment which was consistent with the surveillance.

7. No error is alleged in the calculation of whole person impairment with respect to the left upper extremity.
8. The appellant seeks an oral hearing before, and examination by, the Panel.
9. On 15 January 2021, the Registrar by his delegate was satisfied that ground of demonstrable error was made out, and referred the matter to this Appeal Panel for determination.
10. On 5 February 2021, the Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (4th edition) (the Guidelines). There was no need for an oral hearing, as the issues were capable of determination on the basis of the parties' helpful written submissions.

## **Submissions**

11. Both parties have filed written submissions which have been taken into account. It is not necessary to repeat them in full, but they may be summarised briefly as follows.
12. The appellant employer submits that error is demonstrated for the following reasons.
  - (a) The date of the medical assessment certificate is in error. The examination did not occur until 14 October 2020, some three days later. This is evidence that the assessment was made prior to examination.
  - (b) Dr Anderson exceeded the terms of the Registrar's referral by assessing scarring.
  - (c) Dr Anderson exceeded the terms of the Registrar's referral by including assessments of the right hip and right knee. 'The specific reason for this referral was to ensure that it excluded any calculation of impairment in respect of the alleged injury to the knee or hip.'
  - (d) He failed to have regard to, or comment on, the surveillance evidence which contradicted his observations of a limp.
  - (e) That evidence was taken into account by Dr Robinson, who assessed a 4% whole person impairment.
13. The respondent worker submits as follows.
  - (a) The date of the Medical assessment certificate is a clerical error. It is not evidence that the assessment was made before examination.
  - (b) Dr Anderson did not assess scarring. He merely expressed an opinion as to what his assessment would be, if it were referred for assessment.
  - (c) Dr Anderson was required to assess impairment resulting from injury to the right thigh only. He found that restricted range of motion in the hip and knee resulted from that injury and assessed accordingly, as he was entitled to do.
  - (d) He did not have regard to surveillance video footage, because it was not provided to him. It was not provided because the parties agreed that it should not be, in consenting to the orders made by Arbitrator Bell on 2 April 2020, which included: 'Surveillance film media is excluded from the evidence before the AMS.'
  - (e) The mere fact that Dr Anderson has assessed the worker differently from Dr Robinson does not demonstrate error.

### **Reasoning of the approved medical specialist**

14. Dr Anderson records in his medical assessment certificate that he examined the worker on 14 October 2020.
15. Dr Andersons took a history of injury on 22 April 2017, consistent with the summary above. He noted the terms of the referral and examined the worker's left shoulder and right thigh.
16. He noted at [4], 'Swelling and bruising over the lateral part of the right thigh which keeps recurring every three months or so'. He noted also that the right hip and knee were stiff and painful.
17. On physical examination he noted at [5] that the worker 'walked with a left sided limp'. He also noted 'an extensive soft tissue mass over the lateral part of the right thigh. This whole area was excessively tender'.
18. With respect to the right thigh, he diagnosed at [7] 'gross deformity of the right thigh complex with an area of increased sensitivity over the affected part.' He added:

'This injury has also reduced his functional movement capacity with the right hip and the right knee.'
19. He assessed the left upper extremity by reference to range of motion at [10b]. As indicated, no error is alleged in respect of this part of the assessment.
20. He assessed the right lower extremity also by reference to range of motion at [10b], in the knee and hip joints, which range he considered had been affected by injury to the thigh.
21. Noting that scarring had not been referred for assessment, he assessed it at 4% but excluded it from his final assessment in the Table.

### **Ground 1: Date of Medical assessment certificate**

22. As the examination occurred on 14 October 2020, the date of the medical assessment certificate - 11 October 2020 - must be in error. This is not necessarily evidence that the certificate was written, in whole or in part, prior to examination as the appellant suggests. It is consistent with clerical error, which we consider likely, having regard to the fact that the Medical Assessment Certificate was issued to the parties on 11 November 2020, which is likely to be the correct date of the Certificate. Contrary to the submissions of the appellant, we are not satisfied that the certificate was written before examination.
23. A clerical error as to the date of the Certificate is not an error of assessment, and the appropriate course is to request correction by the Registrar pursuant to section 325 of the *Workplace Injury Management and Workers Compensation Act 1998*. The parties may make such a request if they wish. The Registrar may also correct an obvious error of his own motion. To assist the parties, we will request the Registrar to consider such a course.

### **Ground 2: Assessment of scarring**

24. As indicated, Dr Anderson expressed the view that scarring was assessable at 4% whole person impairment, but noting that it had not been referred to him for assessment, omitted it from the Table, and from his calculations of the final 15% whole person impairment.
25. Contrary to the appellant's submissions, scarring was not included in the final assessment. In effect, Dr Anderson has merely expressed an opinion as to what his assessment of scarring would have been if it had been referred.
26. We can identify no error. This ground fails.

### **Ground 3: Assessment of right lower extremity (hip)**

27. The Registrar's notice of referral differed in one respect from the consent orders of 2 April 2020. Whereas the consent orders remitted the matter for referral for assessment of the 'right lower extremity (thigh injury)', the Registrar referred the 'right lower extremity (thigh)' for assessment.
28. The power of assessment is confined to the body parts referred for assessment by the Registrar. However, where the meaning of the Registrar's referral is properly construed by reference to the consent orders to which it gave effect. It is those orders which reflected the agreement of the parties to the referral. The words in brackets, 'thigh injury', describe not only a body part but the injury which was the subject of the claim for whole person impairment compensation. That is, they refer to the pathology which resulted from high-speed contact between the worker's right thigh and the racing track fence.
29. Doing our best to interpret the phrase, 'right lower extremity (thigh injury)', it seems to be a reference to the impairment of the right lower extremity which results from injury to the thigh. That is how Dr Robinson assessed impairment of the right lower extremity, at the insurer's request, in his report of 25 October 2019 on which the insurer relied. He had examined the worker on 9 October 2019 at the insurer's request and assessed a 4% whole person impairment. Noting pain and swelling in the right thigh, he reported:

'There is no impairment of thigh function, but he does have a mild decrease in his range of movement of his right hip which he relates to the problems associated with the thigh'.
30. On that basis, he assessed impairment by measuring reduced range of motion in the right hip.
31. Similarly, Dr Miller, on whose opinion the worker relied, found that 'the swelling and associated pain has decreased the function of his right lower extremity in regard to his hip and right knee'. In his report of 12 March 2019, he assessed whole person impairment as a result of injury to the thigh on the basis of its effects on the range of motion of the right hip and knee.
32. Having regard to the assessments of Dr Robinson and Dr Miller and the parties' reliance on one or the other, we are comfortably satisfied that, when they agreed to the orders of 2 April 2020, the parties both intended that the right lower extremity be assessed by reference to range of motion of the joint or joints affected by injury to the thigh, just as Dr Robinson and Dr Miller did. The orders to which they agreed were intended to authorise assessment of impairment of the right lower extremity as a result of injury to the thigh. That included the possibility of assessment by reference to restrictions in range of motion restriction of the hip or knee joints, at least to the extent that the restrictions resulted from injury to the thigh.
33. This is distinct, of course, from assessing impairment of the right lower extremity resulting from injury to the hip or knee. The referral was confined to impairment of the right lower extremity resulting from injury to the thigh.
34. The Registrar's referral was intended to give effect to the orders of 2 April 2020. We construe it in the same way.
35. It follows that, in assessing the right lower extremity by reference to the range of motion in the joints above and below the thigh, Dr Anderson proceeded in accordance with the terms of the referral.
36. We can identify no error.

#### **Ground 4: Surveillance evidence**

37. It is common ground that the approved medical specialist did not consider surveillance video footage of the worker. It had not been provided to him, because it had been excluded by the consent orders made on 2 April 2020. An omission to consider video footage which was not provided cannot constitute error.
38. However, the employer alleges error in the failure to consider any surveillance evidence at all. Attached to the Reply was an investigation report dated 2 October 2019 by Asia Pacific Security Group Pty Limited. It included observations made on each day from 20 to 24 September 2019, with photographs. This material must have been before the approved medical specialist, but no comment was made on it in the medical assessment certificate.
39. Also attached to the Reply were two reports from orthopaedic surgeon Dr Robinson, both dated 25 October 2019. The first, containing his assessment, is summarised above.
40. In his supplementary report (the date of which, it seems to us, may also be in error), he noted that the insurer had provided him with a surveillance report to consider. We infer that this is the surveillance report of Asia Pacific Security Group Pty Limited dated 2 April 2020. It might also have included video footage.
41. He notes that the surveillance indicates that the worker is able to lift and bend very satisfactorily and is 'seen to be lifting material without difficulty and apparently throughout the video had no apparent discomfort.'
42. He concludes that the worker is capable of some employment, contrary to his earlier understanding, but does not offer a revised assessment of whole person impairment.
43. It follows that Dr Robinson did not rely on the surveillance evidence in making his assessment of 4% whole person impairment.
44. As indicated, the appellant alleges that Dr Anderson's omission to consider the surveillance report before him demonstrates error.
45. An approved medical specialist must consider all relevant evidence provided to him or her. The mere failure to mention it is not proof that it was not considered. The surveillance report was attached to the Reply, which was before the approved medical specialist. The natural inference to be drawn is that it was considered.
46. As the appellant rightly points out, the surveillance report was specifically considered in Dr Robinson's supplementary report. Both Dr Robinson's reports were also attached to the Reply. The approved medical specialist specifically referred to Dr Robinson's assessment and report of 25 October 2019 at par [10c] of his reasons. We are comfortably satisfied that Dr Anderson read and understood both reports of Dr Robinson, including his discussion of the surveillance evidence. We are also satisfied that the approved medical specialist considered the surveillance report itself, which was before him.
47. We can identify no error. This ground fails.

#### **Ground 5: Difference from assessment of Dr Robinson**

48. The task of the approved medical specialist was to assess the worker by reference to his presentation on the day of assessment. The mere fact that Dr Robinson made a different assessment from that of Dr Anderson on a different date does not demonstrate error.
49. This ground fails.

## Conclusion

50. For the reasons given, the appeal is dismissed. The Medical Assessment Certificate of Dr Anderson is confirmed.
51. The Registrar is requested to consider whether the date of the Medical Assessment Certificate represents an obvious error and, if so, to correct it.

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*.

R Gray

Robert Gray  
Dispute Services Officer  
**As delegate of the Registrar**

