WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-5113/19**
Appellant	**Secretary, Department of Education**
Respondent:	**Anne Marie Jacobs**
Date of Decision:	**5 March 2020**
Citation:	**[2020] NSWWCCMA 39**

Appeal Panel:	
Arbitrator:	**Mr John Harris**
Approved Medical Specialist:	**Dr Roger Pillemer**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**

BACKGROUND TO THE APPLICATION TO APPEAL

1. Ms Anne Jacobs (the respondent) suffered injury in the course of employment with Department of Education (the appellant) deemed to have occurred on 6 May 2019.

2. A claim for compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) was made by letter dated 27 March 2019.[1] The s 66 claim was based on the report of Dr James Bodel dated 19 November 2018.

3. Dr Bodel assessed the respondent as having 17% whole person impairment (WPI) for the lumbar spine and associated scar. This assessment was made after the doctor assessed a one-tenth deduction pursuant to s 323 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

4. The appellant qualified Dr Raymond Wallace who examined the respondent on a number of occasions. In the final examination in February 2019, Dr Wallace opined that the respondent had no permanent impairment as a result of injuries sustained on 22 February 1999, 23 May 2001 and by reason of the nature and conditions of her employment.[2]

5. The respondent then commenced proceedings in the Commission seeking permanent impairment compensation. The matter was listed before a Commission Arbitrator who issued consent orders disposing of any liability issues[3] and remitting the matter to the Registrar for referral to an Approved Medical Specialist (AMS).

6. The assessment of WPI was then referred to Dr Philippa Harvey-Sutton, an AMS, who examined the respondent and provided the Medical Assessment Certificate dated 19 December 2019 (MAC). The relevant findings made by the AMS pertinent to the various grounds of appeal are set out later in these Reasons.

[1] Application, p 52
[2] Application, p 116
[3] See *Jaffarie v Quality Castings Pty Ltd* [2018] NSWCA 88 at [75]-[76] and [80] per White JA (Macfarlan and Leeming JJA agreeing on this point).

7. The assessment of WPI is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[4] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth guidelines prevail.[5]

8. The respondent was assessed by the AMS as 17% WPI for the lumbar spine and 1% for the scar which produced a combined assessment of 18% WPI. A critical issue in this appeal is the correct analysis of the surgical procedure undertaken on the respondent on 9 October 2017. This is because Table 4.2 of the fourth edition guidelines allows for an extra 1% WPI for each additional surgical level.

THE APPEAL

9. On 16 January 2020, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).

10. The WorkCover Medical Assessment Guidelines (the Guidelines) set out the practice and procedure in relation to appeals to Medical Appeal Panels under s 327 of the 1998 Act.

11. The appellant claims that the medical assessment should be reviewed on the ground that the MAC contains a demonstrable error and/or the assessment was made on the basis of incorrect criteria within the meaning of s 327(3) of the 1998 Act.

12. The Appeal was filed within 28 days of the date of the MAC. The submissions in support of the grounds of appeal are referred to later in these Reasons. The respondent filed submissions opposing the appeal.

PRELIMINARY REVIEW

13. The Appeal Panel (AP) conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Guidelines. As a result of that preliminary review, the AP determined, for the reasons provided subsequently, that a ground of appeal had been established.

14. The appellant did not request a re-examination by an AMS who is a member of the AP.

EVIDENCE

15. The AP has before it all the documents that were sent to the AMS for the original assessment and has referred to portions of the evidence and taken them into account in making this determination.

GROUND OF APPEAL 1 and 2 – The assessment of additional surgical levels and calculation error

Submissions

Appellant's submissions

16. The appellant submitted that the AMS erred in the assessment of the additional surgical levels pursuant to Table 4.2 of the fourth edition guidelines.

[4] The 4th edition guidelines are issued pursuant to s 376 of the 1998 Act.
[5] Clause 1.1 of the fourth edition guidelines.

17. The appellant referred to page 2 of the MAC where the AMS noted the respondent underwent a three-level laminectomy at L2/3, L3/4 and L4/5. This was contrasted with the conclusion reached by the AMS at page 6 of the MAC that the surgical procedure involved an additional four levels.

18. The appellant referred to the operative report dated 9 October 2017 which showed that the surgical procedure was a three-level laminectomy.[6]

19. It was submitted that this was an application of incorrect criteria as discussed in *Campbelltown City Council v Vegan*[7] as the AMS had failed to correctly apply the fourth edition guidelines.

20. The appellant submitted that there was a demonstrable error as discussed by the Court of Appeal in *Vannini v Worldwide Demolitions Pty Ltd*[8] (*Vannini*) by the assessment of a further four levels.

21. The appellant also submitted, as a second ground of appeal, that the MAC contained a mathematical error when the 10% deduction was made. It was submitted that the final calculation should be made after the correction identified in the first ground of appeal.

Respondent's submissions

22. The respondent submitted that the appellant had confused the issue of "disc" and "level" and submitted that both the AMS and Dr Bodel considered the respondent had undergone surgery at four additional levels.

23. The respondent otherwise submitted that the AMS had understated the final assessment as the amount of 2% assessed for the activities of daily living (ADL), the 3% for ongoing radiculopathy and the 4% for the additional levels in the surgical procedure resulted in an assessment of 19% WPI for the lumbar spine before any s 323 deduction.

24. The respondent also submitted that "there has been no uplift of 5% in respect of the fact that the Respondent Worker suffers a lumbar condition".[9]

Reasons

25. The AMS stated that the respondent underwent a three-level laminectomy procedure at L2/3, L3/4 and L4/5.[10] Later the AMS refers to a "laminectomy at three levels".[11] The AMS then, when assessing the modifiers under Table 4.2, refers to "a single surgical procedure" as involving "four additional levels".[12] It is unclear how the AMS opined that the surgical procedure was at "four additional levels".

26. The operation report dated 9 October 2017 and the clinical notes from Royal North Shore Private Hospital for the admission from 9 to 15 October 2017 establishes that the respondent underwent laminectomies at L2/3, L3/4 and L4/5.[13]

---

[6] Application, p 286
[7] [2004] NSWSC 1129
[8] [2018] NSWCA 324 at [77]-[80].
[9] Respondent's submissions, paragraph 10
[10] MAC, p 2
[11] MAC, p 6
[12] MAC, p 6
[13] Application, pp 219 and 286

27. The Neurosurgeon, Dr Yanni Sergides, in a report dated 21 November 2017 stated that he performed a "3 level decompression 3 weeks ago".[14]

28. The respondent stated that she underwent a three-level surgical procedure at L2/3, L3/4 and L4/5.[15] This history is probably hearsay based on what she was told at hospital or by the Neurosurgeon. In any event, the history provided by the respondent is consistent with the contemporaneous documentation.

29. Dr Bodel opined that the respondent underwent laminectomies from L1/2 to L5/S1.[16] It is unclear how the doctor reached that opinion.

30. The MAC contains two versions as to the number of levels surgically addressed.

31. The AP is of the clear view that the respondent underwent a three-level laminectomy in the surgical procedure. We rely on the contemporaneous operative report, the hospital clinical notes and the report of the treating surgeon, Dr Sergides, written some six weeks after the operation. It is unnecessary to rely on the respondent's statement that the surgical procedure was limited to three levels although her evidence is consistent with the contemporaneous documentation.

32. The AP rejects the opinion of Dr Bodel that the surgical procedure was from L1/2 to L5/S1. The doctor does not provide a proper basis as to how he reached that opinion.

33. In the view of the AP, the AMS initially correctly identified the number of levels where surgery was performed but incorrectly transposed the figure later in the MAC as to the number of levels in the surgical procedure.

34. The conclusion that the respondent underwent surgery at four additional levels is a demonstrable error as discussed in *Vannini.* The conclusion reached by the AMS is inconsistent with the clear contemporaneous evidence that the respondent underwent a three-level laminectomy. The transposition of that error to the additional assessment provided by the modifiers in Table 4.2 of the fourth edition guidelines amounts to an application of incorrect criteria as discussed by the Court of Appeal in *Marina Pitsonis v Registrar of the Workers Compensation Commission of New South Wales*[17] applying Basten JA in *Campbelltown City Council v Vegan*[18].

35. We do not accept the respondent's submissions that the appellant's submission "confuses the issue of 'disc' and the effect of a 'level'".

36. When making an allowance following surgery, Table 4.2 refers to "second and further levels". The meaning of "level" must be viewed in the context of the nature of the surgery.

37. A laminectomy is a procedure carried out to expose the disc and nerve roots between two adjacent vertebral bodies, for example between the L4 vertebral body and L5 vertebral body. That description involves only one level. In the present case the respondent underwent laminectomies at L2/3, L3/4 and L4/5. This is a three-level procedure involving surgery at two "additional" levels.

---

[14] Application, p 189
[15] Application, p 22
[16] Application, p 152
[17] [2008] NSWCA 88 (*Marina Pitsonis*) at [40]-[42], McColl and Bell JJA (as their Honours then were) agreeing
[18] [2006] NSWCA 284 at [94], McColl JA agreeing

38. We agree with the appellant's submissions that there is also an additional calculation error in respect of the quantification of the 10% deduction (ground 2). The calculation of WPI requires reassessment according to law: *Drosd v Nominal Insurer*[19] (*Drosd*).

39. The AP addresses the correct assessment later in these Reasons.

GROUND OF APPEAL 3 – Extent of the section 323 deduction

Submissions

Appellant's submissions

40. The appellant submitted that the MAC contains a demonstrable error and/or the assessment was made on the basis of incorrect criteria in relation to the assessment of a one-tenth deduction pursuant to s 323 of the 1998 Act.

41. The appellant referred to the finding made by the AMS that there was pre-existing spondylosis throughout the lumbar spine and submitted that the AMS should have made a greater than one-tenth deduction because this was at odds with the available evidence.

42. The appellant referred to the previous lump sum compensation claims for injuries sustained on 19 February 1999 and 20 May 2001 based on the MAC of Dr Drew Dixon dated 5 August 2005.[20]

43. The appellant noted that the respondent received further permanent impairment compensation in accordance with the reports of Dr Robin Higgs dated 4 March 2010 and 19 April 2010. Dr Higgs assessed the respondent at 6% WPI and apportioned the impairment as one-third to the 1999 injury, one-third to the 2001 injury and one-third to the nature and conditions of employment.[21]

44. It submitted that a deduction of 6% WPI pursuant to s 323 would be appropriate in "accordance with the assessment of Dr Higgs".

45. Reference was also made to the further compensation paid in 2010 based on Dr Higgs assessment and that it was "reasonable to assume that 6% WPI represents the level of impairment for which the Respondent Worker had previously been compensated".[22] It was further submitted that Dr Higgs assessment "is the best available evidence upon which a Section 323 deduction could be made".

46. The appellant submitted that the AMS had assessed the lumbar spine to include any impairment relating to the injuries on 19 February 1999 and 20 May 2001 and the failure to make a proper deduction in respect of the earlier compensation paid meant that the respondent was effectively compensated twice for the injuries in 1999 and 2001.

47. The appellant submitted that s 68B(3) of the 1987 Act applied with respect to the previous compensation. It submitted:[23]

> "[T]he compensation previously received by the Respondent Worker … is compensation which has previously been paid pursuant to Section 68B(3)(a) of the 1987 Act and therefore must be deducted pursuant to Section 323."

[19] [2016] NSWSC 1053
[20] Application, p 37
[21] Reply, p 34
[22] Appellant's submissions, paragraph 28
[23] Appellant's submissions, paragraph 29

Respondent's submissions

48. The respondent accepted that the appellant is entitled to a credit in respect of amounts paid in previous awards. That allowance of a credit would mean that there is no "double compensation".

49. The respondent otherwise submitted that the s 323 deduction should be assessed at one-tenth in accordance with opinions expressed by the AMS and Dr Bodel.

Reasons

50. Section 68B(3) of the 1987 Act relevantly provides:

> "(3) When determining the compensation payable by an employer in a case in which section 16 applies (an injury that consists in the aggravation, acceleration, exacerbation or deterioration of a disease), section 323 of the 1998 Act applies to that compensation subject to the following:
>
> (a) there is to be no deduction under section 323 of the 1998 Act for any proportion of the impairment that is due to the worker's employment in previous relevant employment (as defined in paragraph (b)) except any such proportion for which compensation under this Division (as in force at any time) or section 16 of the former Act has been paid or is payable,
>
> (b) for the purposes of paragraph (a),
>
> **"previous relevant employment"** is employment that was a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration by a previous employer who is liable under section 16 to contribute in respect of the compensation being determined (or who would be so liable if the requirement to contribute were not limited to employers who employed the worker during a particular period)".

51. The appellant submissions misconstrue s 68B(3) of the 1987 Act.

52. The opening portion of the sub-section allows a s 323 deduction when s 16 applies. However, that deduction does not apply to any proportion of the impairment that is due to "previous relevant employment" unless there has been compensation "paid or is payable" in respect of that previous relevant employment.

53. The appellant did not refer to the definition of "previous relevant employment" in its submissions. Section 68B(3)(b) defines that term to mean employment aggravating etc a disease within the meaning of s 16 "by a previous employer".

54. The appellant referred to the previous compensation which, it submitted, satisfied section 68B(3)(a). However, the previous compensation was paid by the appellant and not by a "previous employer".

55. For these reasons, the AP does not accept the appellant's submissions that pursuant to s 68B(3), s 323 applies to that proportion of the previous permanent impairment compensation paid by the appellant to the respondent.

56. The appellant submitted that the s 323 deduction should be in the order of 6% WPI due to the opinion expressed by Dr Higgs.

57. The fact that the AMS reached a conclusion different to that expressed by other medical opinion does not, of itself, amount to a demonstrable error: *Merza v Registrar of the Workers Compensation Commission*[24].

58. The appellant's submission also fails to appreciate that Dr Higgs' opinion was provided prior to the cessation of employment and could not have addressed the total affect from the nature and conditions of employment to the overall impairment. The doctor's opinion that there was a significant contribution for the 1999 and 2001 injuries is inconsistent with other medical opinion relied upon by the appellant that these injuries produced no assessable impairment. In that respect Dr Wallace opined that the respondent suffered no permanent impairment from the injuries on 22 February 1999 and 23 May 2001.[25]

59. Further, there is no estoppel in a changing situation: *Roche v Australian Prestressing Services Pty Ltd*[26].

60. In *Abou-Haidar v Consolidated Wire Pty Limited*[27] (*Abou-Haidar*) Deputy President Roche stated:[28]

> "The last point to note (though it was not argued by Consolidated, but may be relevant to future claims) is that there is no estoppel in a changing situation (*The Doctrine of Res Judicata* by Spencer Bower, Turner and Handley, 3rd edn, 1996, at page 102; *O'Donel v Commissioner for Road Transport & Tramways* [1938] HCA 15; 59 CLR 744; *Dimovski*; *Hamersley Iron Pty Ltd v The National Competition Council* [2008] FCA 598 at [114] to [116]; *Prisk v Department of Ageing, Disability and Home Care (No 2)* [2009] NSWWCCPD 13 at [55]). A claim for additional lump sum compensation is such a situation."

61. The comments of Deputy President Roche in *Abou-Haidar* were cited and approved by Harrison AsJ in *Railcorp NSW v Registrar of the WCC of NSW.*[29]

62. Whilst not expressed in terms of estoppel, the appellant's submissions were, in part, based on the fact that the deduction should be based on the prior compensation paid pursuant to the complying agreement based on the report of Dr Higgs. That submission is inconsistent with the above authorities that provide that the prior agreement does not create a binding estoppel.

63. For these reasons, the AMS was not bound by Dr Higgs opinion. The AMS is entitled to form an independent view as to the extent of any s 323 deduction.

64. The AP observes that to the extent that the opinion is at "odds with the available evidence", the conclusion reached by the AMS was otherwise consistent with Dr Bodel's opinion.

65. Further, as the respondent correctly submitted, there is no principle of double compensation as the respondent is required to give credit for any previous permanent impairment compensation.

66. The appellant's submissions alleging error in the amount of the s 323 deduction are rejected.

---

[24] [2006] NSWSC 939 at [51]. See also *State of New South Wales v Kaur* [2016] NSWSC 346 at [26]

[25] Application, p 66
[26] [2013] NSWWCCPD 7 at [32]-[35]
[27] [2010] NSWWCCPD 128
[28] At [66]
[29] [2013] NSWSC 231 at [82] – [83]

67. The AP adds an independent reason for rejecting the appellant's submission. In *Vannini* Gleeson JA observed that a finding as to the degree of proportion of permanent impairment due to a previous condition or abnormality "involves matters of degree and impression". His Honour stated:[30]

> "The position may be different in relation to the second question. A finding as to *the* proportion of permanent impairment due to previous injury, pre-existing condition or abnormality involves matters of degree and impression. The applicable standard of the 'proportion' of contributory contribution under s 323 permits some latitude of opinion such as to admit of a range of legally permissible outcomes. That is not to say that such a conclusion is necessarily beyond review by an Appeal Panel on the ground of demonstrable error. However, the resolution of that question should be left to a case by case basis."

68. This ground of appeal is rejected.

REASSESSMENT

69. The AP previously noted that neither party requested that the appellant be re-examined.

70. For the reasons set out herein, the AP accepts that it can reassess in the absence of a re-examination.

71. The AP accepts that it can rely on the detailed findings made by the AMS subject to the express finding made by the AP as to the number of additional surgical levels. In that respect we refer to our reasons that the respondent underwent a three-level laminectomy involving surgery at two further levels.

72. There were no submissions contesting the findings made by the AMS on radiculopathy, the assessment related to the scarring and the assessment for ADL. The AP adopts these findings.

73. In *Robbie v Strasburger Enterprises Pty Ltd*[31] (*Strasburger*) the Court confirmed the procedure adopted by the AMS that the WPI and ADL figures should be added together and then combined (using the combined values chart) with the assessment for modifiers under Table 4.2. The assessment for modifiers in Table 4.2 are internally added together.[32] Her Honour stated:[33]

> "The difficulty with this argument is that it requires each of the modifiers in Table 4.2 to be viewed as a separate "impairment". The plaintiff's entitlement to have her WPI assessment increased under paragraph 4.37 is based upon the fact that she has one additional impairment, being persisting radiculopathy. The value attributed to that impairment is increased as the worker undergoes more surgeries, but it is still the same single impairment. I am not persuaded that the separate ratings in Table 4.2 equate to separate impairments."

74. The respondent's submissions failed to address the correct method adopted for assessment involving modifiers under Table 4.2 and otherwise assume surgery at four additional levels.

---

[30] At [92]
[31] [2017] NSWSC 363
[32] The method adopted by the AMS in *Strasburger* is set out at [34] of her Honours reasons.
[33] *Strasburger* at [70]

75. The respondent was correctly identified as being assessed as DRE category III with an additional allowance of 2% for ADL. This produces an assessment of 12% WPI.

76. Under Table 4.2, the respondent is entitled to 3% for ongoing radiculopathy and a further 2% for the surgical procedure at two additional levels. The assessments under Table 4.2 are added together and equate to 5% WPI.

77. The 5% from Table 4.2 is combined with the assessment of 12% pursuant to the Combined Tables in AMA 5. This produces a combined assessment of 16%.

78. The AP has earlier set out its reasons for rejecting the ground of appeal concerning the extent of the s 323 deduction and adopts the finding of a one-tenth deduction.

79. The appellant did not suggest that the one-tenth deduction pursuant to s 323 should apply to the assessment of the skin. Given that the scar arises from the surgical procedure, it was clearly arguable that there should have been a similar one-tenth deduction to that body part. However, that matter was not the subject of submission by the appellant and, in any event, would have not affected the assessment of the skin and the final combined assessment.

80. Given there is an absence of any subsequent injury and the continuity of symptoms, the AP is satisfied that the assessment of WPI results from the pleaded injury. The duration of symptoms and the fact that the respondent has undergone surgical procedures means that the impairment is permanent.

81. The respondent otherwise submitted that there has been “no uplift of 5%” for the lumbar spine.

82. It is assumed that the respondent is referring to s 66(2A) of the 1987 Act which provides that in respect of the permanent impairment of the back, the amount of permanent impairment compensation calculated in accordance with subsection (2) is to be increased by 5%”.

83. The reference of an increase of 5% is to the amount of compensation awarded and not a reference to the assessment of WPI. The wording of the subsection is clear. The subsection otherwise refers to subsection (2) which sets out the calculation of any quantum.

84. The examples provided under the subsection make the meaning of subsection (2A) otherwise beyond question.

85. The respondent is not entitled to an increase of 5% of the impairment of the lumbar spine although she would be entitled to such an increase in the amount of permanent impairment compensation.

86. The parties otherwise made submissions concerning the issue of “double compensation”. The appellant’s submissions, insofar as they were directed to the issue of the s 323 deduction, were rejected.

87. Whilst it is unnecessary for the AP to determine, we observe that the appellant is entitled to credit for previous s 66 payments previously made in respect of this injury. That issue of the monetary quantification, following the provision of the MAC, is a matter for the Commission.

DECISION

88. For these reasons, the MAC is revoked and a new Medical Assessment Certificate is issued. The new Medical Assessment 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 MEDICAL APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL

MEDICAL ASSESSMENT CERTIFICATE
Injuries received after 1 January 2002

Matter No: **5113/19**
Applicant: **Anne Marie Jacobs (now known as Martin)**
Respondent: **Secretary, Department of Education**

This Certificate is issued pursuant to section 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998.*

The Appeal Panel revokes the combined Medical Assessment Certificate of Dr Harvey-Sutton and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in fourth edition guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA5**	**% 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)**
Lumbar Spine	6 May 2019 (deemed)	Chapter	Chapter	16%	1/10th	14%
Skin	6 May 2019 (deemed)	Chapter	Chapter	1%	N/A	1%
Total % WPI (the Combined Table values of all sub-totals)					**15%**	

John Harris
Arbitrator

Dr Roger Pillemer
Approved Medical Specialist

Dr Tommasino Mastroianni
Approved Medical Specialist

5 March 2020

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE MEDICAL APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar