

# 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- 4657/19</b>
<b>Appellant:</b>	<b>Lindsay Transport Pty Ltd</b>
<b>Respondent:</b>	<b>Richard Linn</b>
<b>Date of Decision:</b>	<b>9 March 2020</b>
<b>Citation:</b>	<b>[2020] NSWCCMA 42</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Catherine McDonald</b>
<b>Approved Medical Specialist:</b>	<b>Dr James Bodel</b>
<b>Approved Medical Specialist:</b>	<b>Dr Gregory McGroder</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 30 December 2019, Lindsay Transport Pty Ltd (Lindsay Transport) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tim Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 17 December 2019.
2. Lindsay Transport relies on the ground of appeal under s 327(3)(d) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) – that the MAC contains a demonstrable error.
3. The Registrar is satisfied that, on the face of the application, the 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 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, 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. Mr Linn was employed by Lindsay Transport as a truck driver when he suffered an injury to his lumbar spine, right shoulder and right hip on 21 November 2015. Mr Linn stood on a circular inspection hatch for a water tank at Lindsay Transport's depot which tipped up so that his right leg fell into the tank.
7. Mr Linn underwent a repair of an extensive tear of his supra-spinatus on 13 April 2016 carried out by Prof G Murrell. The tear broke down and it was determined that no further surgery would be undertaken to his shoulder.

8. Mr Linn's right hip was treated by Dr A Jovanovic, who performed a right total hip replacement in December 2017.
9. The AMS assessed 7% whole person impairment (WPI) with respect to Mr Linn's lumbar spine, reduced by one-tenth under s 323 of the 1998 Act. He assessed 10% WPI in respect of Mr Linn's right upper extremity and 20% WPI in respect of his right lower extremity, also reducing the latter assessment by one-tenth under s 323. The combined total assessment was 30% WPI.
10. The only issue on the appeal is the extent of the s 323 deduction in respect of the lumbar spine and right lower extremity.

### **PRELIMINARY REVIEW**

11. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.
12. 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 is no error in the assessment by the AMS.

### **EVIDENCE**

13. 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.
14. 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**

15. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
16. In summary, Lindsay Transport submitted that the AMS was in error to make only a one-tenth deduction from the assessments in respect of Mr Linn's lumbar spine and right lower extremity because he suffered substantial and advanced degenerative changes in those areas. Lindsay Transport stressed that paragraph 1.28 of the Guidelines provides that the deduction should be one-tenth unless that is at odds with the available evidence. It notes that radiological investigations taken soon after the injury showed extensive degenerative changes in Mr Linn's lumbar spine and both hips. It noted the AMS's comment that Mr Linn's weight would have had a substantial contribution to those degenerative changes.
17. Lindsay Transport submitted that the lack of previous symptomatology should have been afforded less weight than the scans taken soon after the injury. It said that the appropriate deduction could be as much as three-quarters.
18. In reply, Mr Linn submitted, through his solicitor, Mr Langler that Lindsay Transport was cavilling with a question of clinical judgement. He noted that s 323 itself rather than the provisions of the Guidelines should be considered. He said it was clear that the AMS had considered all of the evidence, including the radiological evidence and that he reached a decision which was open on the medical evidence.

### **FINDINGS AND REASONS**

19. 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.

20. 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.

### **The MAC**

21. The AMS set out a detailed history of the incident, subsequent treatment and Mr Linn's present symptoms. He noted a history of lower back dysfunction in the early 1990s when Mr Linn was chopping wood, which settled down. He set out his findings on examination, noting that Mr Linn was overweight but had previously weighed much more.
22. The AMS reviewed investigations including the CT scan of the lumbo-sacral spine dated 8 December 2015 which he said showed extensive degenerative changes at L4/5/S1 with gas formation and also in the sacro-iliac joints. He noted that the plain x-ray of the right hip on 4 April 2016 showed extensive degenerative changes and that a CT scan of both hips on 2 August 2016 showed extensive degenerative changes in the right hip and to a lesser extent in the left.

23. The AMS said:

"It has also been identified that he had substantial degenerative changes to both of his hips. Although the right side was more severely affected, radiological investigation of the left hip demonstrates that this has also been at a moderate to severe nature. This is likely to reflect the potential state of his right hip in the absence of the associated injury."

24. When dealing with the s 323 deduction, the AMS said:

"Before this event, there was very little recorded history of dysfunction of Mr Linn's lower back, right shoulder or his right hip. In spite of the fact that there does appear to be significant associated degenerative changes, particularly of the lower back and of the right hip, he was still able to work effectively full-time as a truck driver. It is acknowledged, however that at the time of this injury he was extremely heavy and there is a long history of excessive weight, which would contribute significantly to these degenerative issues. Nevertheless, under these circumstances, I am not persuaded that it is reasonable to deduct anything greater than 1/10<sup>th</sup> for the lumbar spine and the right lower extremity."

### **Other medical evidence**

25. The AMS recorded a complaint of back pain in 1992 while chopping wood. A careful review of the file does not reveal any prior complaint of right hip pain and any other complaint of low back pain besides an injury while bricklaying in about 2000. Though Mr Linn was paid compensation for that injury, he said that he made a good recovery. There is nothing in the file to suggest this was not the case.
26. On 7 December 2015, Dr S Lu, Mr Linn's general practitioner, noted that Mr Linn had acute low back pain, was unable to sit or stand for more than 10 minutes and needed to "change his posture due to his LBP/R hip/thigh pain." He ordered a CT scan.

27. The CT scan of the lumbar spine on 8 December 2015 was reported as showing:
- “There are degenerative changes, particularly in the lower lumbar spine and most marked at L5/S1. There is moderate narrowing of the left L5 neural foramen. There does not appear to be any other significant encroachment on the neural elements.”
28. The MRI of the right hip on 4 April 2016 was reported as showing “osteoarthritic right hip joint changes most evident supero-laterally.” The CT scan of the hips on 2 August 2016 showed “severe osteoarthritis in both hips though more so on the right”.
29. Mr Linn’s solicitors qualified Dr A Hopcroft, general surgeon, who reported on 26 September 2018. Dr Hopcroft said that Mr Linn had severely aggravated cervical and lumbar spondylitic problems. He also had severely aggravated an underlying and relatively asymptomatic pre-existent problem with his right hip joint. Dr Hopcroft said:
- “I agree with Dr Walls that this fall did not cause the patient's osteoarthritis, but the aggravation to the pre-existent osteoarthritis was so severe that he struggled to mobilise and ultimately required right total hip arthroplasty which has gone forward with only a fair result.
- While the patient did relate a pre-existing lumbar spinal injury in 2000, he had no significant ongoing problems with his back and continued to drive right up until the time of the accident, and it was the accident/fall that so severely aggravated his lumbar spinal symptoms. However, he has not developed bilateral lower limb radiculopathy.”
30. Dr Hopcroft prepared an assessment of WPI. He did not make any deduction under s 323 in respect of Mr Linn’s right hip injury. He deducted one-tenth of the lumbar spine impairment due to pre-existing changes.
31. Dr F Machart, orthopaedic surgeon, was qualified for Lindsay Transport. He saw Mr Linn on three occasions. On 25 February 2016, he noted that Mr Linn suffered a lower back strain in 2000 and that the pain dissipated after a few weeks. He said that the pre-existing changes in the lumbar spine were “symptomatic in 2000 when he changed jobs.” He said those changes were “evident and not surprisingly symptomatic given someone with morbid obesity.”
32. Dr Machart’s final report is dated 7 June 2019. He said that the consequences of the injury were:
- Rotator cuff disruption right shoulder — Repaired using a patch. Not functioning all that well. Mechanical features of pain and diminished movement were not confirmed to the same extent in attached medicals and appeared to be complicated by altered illness reaction.
  - Bruising to the right hip and groin — He was treated for osteoarthritis by hip replacement. There was non-structural exacerbation of right hip osteoarthritis, asymptomatic before the injury. The symptoms of injury had largely resolved. Ongoing symptoms leading up to hip replacement represented expected progression of osteoarthritis which incidentally is also present on the opposite left side.
  - Mild non-structural injury to the lumbar spine — Judged as pre-existing severe spondyloarthrosis evident radiologically. Symptomatic in the past. Substantial injury excluded by lack of initial symptoms. Subsequent progress reflects deterioration on the background of obesity rather than through impact of the injury.”

33. Dr Machart considered that the lumbar spine injury was a very mild soft tissue injury. He assessed Mr Linn in DRE Lumbar Category II and allowed 1% for impact on the activities of daily living. He said that there was:

“0% WPI as a result of injury. The impact of the soft tissue injury had long ago healed. The ongoing symptoms represent spondylosis which would be expected to cause the physical changes direct in DRE Category II now.”

34. With respect to the right hip, Dr Machart said:

“Hip replacement was conducted for osteoarthritis. Osteoarthritis was not caused by the injury. Three-quarters deduction for exacerbation of the hip arthritis by the injury.

WPI as a result of hip injury is 15% - 3/4 = 4% rounded.”

35. Dr Machart did not further explain the significant deductions he applied.

### Consideration

36. Section 323 of the 1998 Act provides:

#### **“323 Deduction for previous injury or pre-existing condition or abnormality**

- (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.
- (2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.
- ...
- (3) The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter.
- (4) The Workers Compensation Guidelines may make provision for or with respect to the determination of the deduction required by this section.
- ...”

37. In *Cole v Wenaline Pty Limited*<sup>1</sup> Schmidt J described the operation of s 323:

“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, preexisting condition or abnormality. The extent that the later impairment was due to the earlier injury,

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<sup>1</sup> [2010] NSWSC 78 at [30]-[31].

pre-existing condition or abnormality must be determined. The only exception is that provided for ins 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.

The reason for this statutory approach can readily be seen. It is entirely possible that a person could suffer such a catastrophic injury, that the presence or absence of any previous injury, pre-existing condition or abnormality, would make no difference at all to the impairment which resulted from the later injury. ... That is a matter of fact to be assessed on the evidence led in each case. An assumption of the kind here made, namely that surgery to the lumber spine, irrespective of outcome, must always result in a level of residual impairment which contributes to the level of impairment which follows a later injury, has no role to play in that assessment. What must be determined on the evidence is whether any proportion of the permanent impairment present after the second injury was due to the earlier injury."

38. In *Vitaz v Westform (NSW) Pty Ltd*<sup>2</sup>, Basten JA considered earlier decisions and said:

"The resulting principle is that if a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury."

39. It is clear that the significant degenerative changes in Mr Linn's back and right hip do contribute to the permanent impairment. However, there is no evidence that they were symptomatic. He performed heavy work as a truck driver until the injury, despite his considerable weight. The task for the AMS was to assess the appropriate deduction.

40. Lindsay Transport quoted paragraph 1.28 of the Guidelines which says:

"In assessing the degree of permanent impairment resulting from the compensable injury/condition, the assessor is to indicate the degree of impairment due to any previous injury, pre-existing condition or abnormality. This proportion is known as 'the deductible proportion' and should be deducted from the degree of permanent impairment determined by the assessor. For the injury being assessed, the deduction is 1/10th of the assessed impairment, unless that is at odds with the available evidence."

41. That paragraph paraphrases s 323(2) and places a different emphasis on the task to be undertaken by the AMS. It does not direct the attention of the AMS to consider if the extent of the deduction would be difficult or costly to determine because of the availability of medical evidence or other reasons.

42. In *Kolundzic v Quickflex Constructions Pty Ltd*<sup>3</sup> Campbell J said that the previous edition of the Guidelines were subordinate legislation which "require application in accordance with their terms to the extent to which those terms are not inconsistent with the Act or its purposes."<sup>4</sup>

43. Paragraph 1.28 is inconsistent with the Act. The AMS was required to apply s 323 and he did so. He explained his reasons – that there was little recorded history of dysfunction before the injury and Mr Linn worked full time as a truck driver.

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<sup>2</sup> [2011] NSWCA 254.

<sup>3</sup> [2014] NSWSC 1523.

<sup>4</sup> Citing *McKee v Allianz Australia Insurance Ltd* [2008] NSWCA 163.

44. The AMS was required to obtain and consider a history and to review the radiological evidence. Both of those elements were necessary to form his opinion. The deduction he made was an appropriate exercise of his clinical judgement.
45. For these reasons, the Appeal Panel has determined that the MAC issued on 17 December 2019 should be confirmed.

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

