WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-859/19**
Appellant:	**Lismore City Council**
Respondent:	**William Graeme Elliott**
Date of Decision:	**25 September 2019**
Citation:	**[2019] NSWWCCMA 137**

Appeal Panel:	
Arbitrator:	**Mr John Harris**
Approved Medical Specialist:	**Dr Drew Dixon**
Approved Medical Specialist:	**Dr Brian Noll**

BACKGROUND TO THE APPLICATION TO APPEAL

1. Mr Elliott (the respondent) suffered injuries to various body parts on 19 May 2003 and 29 November 2005 in the course of his employment with Lismore City Council (the appellant).

2. The appellant served a notice denying liability pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) although the notice accepted injury to some body parts in respect of the incidents at work on 19 May 2003 and 29 November 2005[1].

3. The respondent then commended proceedings claiming permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act). As liability was in dispute, the matter was referred to a Commission Arbitrator.

4. The liability issues were resolved by consent on 24 April 2019 when the Arbitrator made the following consent orders (Consent Orders):

   > "The following elements of the Application to Resolve a Dispute (the Application) are discontinued:
   >
   > a. The allegations of injury to the left and right lower extremities and the left shoulder relating to dates of injury 19 May 2003 and 29 November 2005;
   >
   > b. The allegation of injury dated 13 December 2005 and 1 January 2006 to 1 February 2008;
   >
   > c. The claim for section 60 of the *Workers Compensation Act* 1987 (the 1987 Act) medical expenses

---

[1] Application, pg 70

The section 66 of the 1987 Act lump sum compensation claim is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment of the degree of whole person impairment (if any) as follows:

a. Date of injury 19 May 2003 - cervical spine, lumbar spine, and right upper extremity (shoulder);

b. Date of injury 29 November 2005 - cervical spine, lumbar spine, and right upper extremity (shoulder)."

5. The Registrar then issued a Referral for assessment of permanent impairment in accordance with the Consent Orders. Dr Hugh English was appointed as the Approved Medical Specialist (AMS).

6. The AMS examined the appellant and provided a Medical Assessment Certificate dated 17 June 2019 (MAC). The relevant findings by the AMS pertinent to the various grounds of appeal are set out later in these Reasons. The AMS assessed the respondent as having a 32% whole person impairment (WPI) for the injury on 29 November 2005 and a 0% WPI for the injury on 19 May 2003.

7. The assessment of whole person impairment is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[2] 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 edition guidelines prevail.[3]

THE APPEAL

8. On 11 July 2019, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).

9. The Workers compensation medical dispute assessment guidelines (the 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 Guidelines.

10. The appellant claims, in summary, that the medical assessment by the AMS with respect to the assessment of the various body parts 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.

11. 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.

PRELIMINARY REVIEW

12. 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.

---

[2] The 4th edition guidelines are issued pursuant to s 376 of the *Workplace Injury Management and Workers Compensation Act 1998*

[3] Clause 1.1 of the fourth edition guidelines

13. The appellant submitted that a re-examination was required although no relevant submissions were provided to support this part of the application.[4] The respondent filed submissions generally opposing the relief sought without directly addressing this aspect of the application.

PRIOR PROCEEDINGS/SETTLEMENTS

14. A complying agreement entered between the parties on 18 March 2008 (the complying agreement) specified the following impairments[5]:

    (a) 19 May 2003 – 2% WPI of the right upper extremity; 5% WPI for the cervical spine and 1.5% WPI for the lumbar spine;

    (b) 29 November 2005 – 1.5% WPI for the lumbar spine and 2% WPI for the right upper extremity.

15. The respondent also brought proceedings in the Commission seeking weekly compensation from 1 February 2008 to date and continuing. In a determination dated 9 September 2008,[6] the Commission made an award in favour of the appellant in respect of the allegation of injury to the lumbar spine as a result of the nature and conditions of employment from 31 December 2001 to 31 December 2005.

16. The Commission ordered the appellant to pay weekly compensation at the rate of $275 per week from 1 February 2008 to date and continuing in respect of the accepted injuries on 19 May 2003 and 29 November 2005.

EVIDENCE

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

REASONS PROVIDED BY THE AMS

18. The relevant portions of the MAC are set out in the respective grounds of appeal.

GROUND OF APPEAL 1 – PRIOR AWARDS

Submissions

Appellant's submissions

19. The appellant referred to the complying agreement and submitted that the MAC contains a demonstrable error and/or the AMS applied incorrect criteria by "failing to accept the previous assessments signed by the parties and recorded in the complying agreement dated 11 March 2008".[7]

20. The appellant referred to the findings made by the AMS that were inconsistent with the terms of the complying agreement. The appellant relevantly submitted[8]:

---

[4] Appellant's submissions under "Relief Sought", paragraph (e)
[5] Application, p 159
[6] Elliot v Lismore City Council, 3702/08
[7] Appellant's submissions, paragraph 4(a)
[8] Appellant's submissions, paragraph 4(h) – (i)

> "This impairment is 'permanent' and the complying agreement and payment of compensation constitutes an estoppel by agreement: *Roche v Australian Prestressing Services Pty Ltd* [2013] NSWWCCPD 7. Further, the section 66A agreement finally and for all time determined the worker's lump-sum compensation entitlement for permanent cervical spine, lumbar spine and right upper extremity (shoulder) impairment resulting from the 19 May 2003 injury: *Di Paolo v Constructions (NSW) Pty Ltd* [2013] NSWWCCPD 8.
>
> The AMS cannot deny the previous impairment from the subject injuries. The AMS was obliged to accept the worker suffered 2% WPI to the right upper extremity (shoulder), 5% to the cervical spine and 1.5% WPI to the lumbar spine as a result of the injury on 19 May 2003. The prior assessments cannot be ignored, as the AMS has done in the MAC. To do so, constitutes a demonstrable error."

Respondent's submissions

21. The Respondent submitted that the Appellant had ignored critical portions of the decision in *Roche v Australian Prestressing Services Pty Ltd* [2013] NSWWCCPD 7 (*Roche*) where the Deputy President held that the doctrine of estoppel does not apply to a changing position. He submitted that the agreement in 2008 cannot apply noting that the AMS made the determination in 2019.

Reasons

22. The AMS stated:[9]

> "The cervical region is assessed with reference to DRE Cervical Category 1. There is no attributable permanent impairment to the neck in relation to the date of injury 19 May 2003. This sounded like a minor event as described.
>
> In relation to 29 November 2005, this is assessed under DRE Cervical Category 2 with a base of 5% whole permanent impairment. No uplift is applied.
>
> In terms of the right upper extremity, again date of injury 19 May 2003, whilst an event appeared to have occurred, there appeared to be minimal dysfunction until 2005 and all impairment for the right upper extremity, in my opinion, is assessed in relation to the 2005 date. Impairment is assessed based upon range of motion. With reference to AMA5, there is an 8% upper extremity impairment calculated which equates to a 5% whole person permanent impairment.
>
> The lumbar spine is the most complex to assess. Again, my feeling from the description above and verbal history, is that the 2003 injury represented minimal persistent problems in relation to the lumbar spine and all impairment in relation to the lumbar spine is assessed in relation to the second injury. I realize this disagrees with the previous awards or settlements that have been documented. A 0% whole person permanent impairment is found in my belief in relation to the 2003 injury. The 2005 injury, which is difficult to separate from the 2003 injury in terms of attribution, with a much more serious event as described has eventually led to 3-level fusion with 2 operations and persistent non-verifiable radicular complaints."

23. The appellant's legal submissions are rejected.

[9] MAC, paragraph 10(b)

24. As the respondent correctly submitted, portions of the decision in *Roche* directly contradict the appellant's submission where the Deputy President clearly stated that there was no estoppel in a changing situation.[10]

25. In *Abou-Haidar v Consolidated Wire Pty Limited*[11] (*Abou-Haidar*) Deputy President Roche stated:[12]

> "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."

26. 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.*[13]

27. The appellant's submissions that the complying agreement was "final" is inconsistent with the decision of the High Court in *O'Donel v Commissioner for Road Transport & Tramways*[14] and the decision of the Court of Appeal in *Rail Services Australia v Dimovski*.[15] The AP finds it unnecessary to analyse these decisions in rejecting the appellant's submission.

28. The AP accepts that the prior agreements "cannot be ignored". That does not mean that the AMS is obliged to determine the impairment in accordance with the prior awards or is otherwise bound by them. That submission is otherwise contrary to the express statutory power of the AMS to assess the degree of permanent impairment as a result of an injury in accordance with s 326 of the 1998 Act.

29. The AMS correctly noted the prior awards and gave reasons why his opinion differed. There was no error solely because the AMS formed a conclusion different with that contained in the complying agreement.

30. Those reasons dispose of the appellant's submissions on the first ground of appeal which were limited to an argument based on estoppel and which otherwise did not seek to challenge the decision.

31. The AP adds further reasons for rejecting the appellant's submission that the s 66A agreement "finally and for all time determined the worker's lump-sum compensation entitlement for permanent cervical spine, lumbar spine and right upper extremity resulting from the 19 May 2003 injury". The decision of *Di Paolo v Cazac Constructions Pty Ltd*[16] was cited in support of this submission.

32. An Appeal Panel is not bound by this decision. The nature of the estoppel from that decision is unclear and is not entirely consistent with other Presidential decisions.[17]

---

[10] See *Roche* at [32]-[35]
[11] [2010] NSWWCCPD 128
[12] At [66]
[13] [2013] NSWSC 231 at [82] – [83]
[14] [1938] HCA 15; 59 CLR 744
[15] [2004] NSWCA 267.
[16] [2013] NSWWCCPD 8 (*Di Paolo*).
[17] *Abou-Haidar v Consolidated Wire Pty Ltd* [2010] NSWWCCPD 128; *Caulfield v Whelan Kartaway Pty Ltd* [2014] NSWWCCPD 34; *Avni v Visy Industrial Plastics Pty Ltd* [2016] NSWWCCPD 46.

33. We otherwise observe that the introduction of the one claim restriction under s 66, by s 66(1A) and subsequent amendments, such as clause 11 to Schedule 8 of the Workers Compensation Regulation 2016, are inconsistent with the private rights purportedly created by the asserted estoppel.

34. The respondent is entitled to bring one further claim for permanent impairment compensation due to the operation of clause 11 to Schedule 8 of the Workers Compensation Regulation 2016. That right was acknowledged by the appellant when it agreed to the Consent Orders and the body parts to be referred for assessment. We do not agree that the statutory entitlement to be assessed is somehow curtailed by an estoppel which otherwise limits his entitlement to be assessed in accordance with the provisions of Part 7 of the 1998 Act and the entitlement to bring a further claim for impairment pursuant to cl 11 Sch 8 of the Workers Compensation Regulation 2016.

35. For those reasons, there is no error by the AMS in assessing permanent impairment in a manner inconsistent with the terms of the complying agreement.

GROUND OF APPEAL 2 – Incorrect assessment of the lumbar spine

Submissions

Appellant's submissions

36. The Appellant referred to the findings made by the AMS that the appellant was DRE lumbar category 4 attracting 20% WPI with a 1% uplift for ADLs, a further 2% WPI for surgery to the second and third levels and 2% for the second operation.

37. The AMS assessed 21% WPI and used the combined values chart to combine the figure with 2% WPI for surgery to two levels and a further 2% WPI for the second surgery.

38. The appellant submitted:[18]

> "This is incorrect and inconsistent with the approach in *Robbie v Strasburger Enterprises Pty Ltd* [2017] NSWSC 363. This case stands for the proposition that the WPI and ADL figures should be first added together, and then combined (using the combined values chart) with the entire assessment for modifiers."

39. The appellant submitted that correct calculation was 21% WPI (base line and ADL's) combined with the entire modifiers of 4% to result in a final assessment of 24% WPI.

40. The appellant also submitted that the combined assessment for the three body parts was 31% and not 32%. With the correction for the lumbar spine, the combined assessment was 30%.

Respondent's Submissions

41. The Respondent stated that it made no submissions in reply to paragraphs 5(a) to (j) but obliquely submitted that the ground of appeal should be rejected.

---

[18] Appellant's submissions, paragraph 5(e)

Reasons

42. The AMS described his calculation at paragraph 10(b) of the MAC where he stated:

> "Referring to the New South Wales Guidelines and AMA5, spinal fusion is categorized under DRE Lumbar Category 4. This gives a base 20% whole person permanent impairment. A 1% uplift is applied for restriction in terms of gardening activities. Modifiers are applied as per Table 4.2. Radicular symptoms are present but no definite radiculopathy. The first modifier is therefore not applied. The second and third further levels modifier is applied twice with a 1% and 1% combination. The second operation also receives a 2% modifier. 21% is therefore combined with 2% combined with 1% and combined with 1% to give a 25% whole person permanent impairment in regard to his lumbar spine."

43. The ground of appeal clearly raises an issue of application of incorrect criteria. Paragraph 4.37 of the fourth edition guidelines includes Table 4.2 which provides various modifiers following surgery. The modifiers include 1% for each additional level of surgery to the spine and 2% for the second operation.

44. The respondent underwent a spinal fusion at the L3 and L4 levels in June 2014 and a second operation in November 2016 involving fusion to the L5 to S1 levels.

45. In *Robbie v Strasburger Enterprises Pty Ltd* her Honour stated:[19]

> "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."

46. Having found error, the AP is required to reassess according to law: *Drosd v Nominal Insurer.*[20] Noting the Respondent made no contrary submission, the AP accepts the Appellant's submission that the appropriate method of calculation is to combine the 21% with the 4% allowed under Table 4.2. Using the combined tables, the overall whole person impairment of the lumbar spine is 24%, not 25% as assessed by the AMS, prior to any s 323 deduction.

47. The AP accepts that the assessment of the lumbar spine was made on the basis of incorrect criteria. We accept the appellant's submission that the correct combined assessment is 30% WPI.

GROUND OF APPEAL 3 – SECTION 323 DEDUCTION

Submissions

Appellant's submissions

48. The appellant submitted that the MAC contains a demonstrable error and/or the AMS failed to apply the correct criteria by failing to apply a greater than one-tenth deduction under s 323 for the lumbar spine.

[19] At [70]
[20] [2016] NSWSC 1053

49. The appellant referred to the principles set out by the Court of Appeal in *Vitaz v Westform (NSW) Pty Ltd*[21] and the statutory basis to make a one-tenth deduction pursuant to s 323(2) of the 1998 Act. It referred to the reason provided by the AMS that it was "hard" to calculate the deduction.

50. The appellant referred to the "medical evidence [that] indicates the worker complained of back pain form the late 1970s until the late 1980s" and that this history was not referred to or recorded in the MAC. It was noted that the AMS acknowledged that there were "other dates of injury" but did not detail these or what body parts were involved.

51. The appellant referred to "the evidence" which indicates that the respondent injured his lower back in 1976 whilst changing the suspension on a truck, was off work for a week and saw a chiropractor.[22]

52. The appellant referred to an injury in the 1980s when the respondent was injured in the workshop, admitted to St Vincent's Hospital for several days and had 2 weeks off work before returning to light duties.[23]

53. The appellant referred to a further back complaint in the late 1980s when the respondent was "moved out of the workshop on account of ongoing back pain" and that the respondent "believed he suffered an aggravation of his lower back condition at this time."[24]

54. The appellant submitted that the record of these injuries is recorded by Dr Powell[25] and Dr Ashwell.[26] It was submitted that Dr Ashwell accepted that the main injury to the lower back was in the late 1980's and the condition had been exacerbated by work between 1987 and 2005.

55. The appellant submitted that the "earliest scan of the lumbar spine is dated 9 December 2005", one week after the injury which revealed L5/S1 facet joint osteoarthritis.[27]

56. It was submitted that the AMS did not specifically refer to the prior injuries in 1976 and the 1980s and only "the brief contained reference to 'other injuries' but he does not discuss this in any other detail."[28]

57. It was submitted that there is ample evidence to support a substantial deduction greater than one-tenth and the statutory assumption should not be made if at odds with the evidence.

Respondent's submissions

58. The Respondent referred to the terms of s 323 of the 1998 Act and submitted that the assessment must have regard to the evidence as to the actual consequences of the pre-existing condition or abnormality.

59. It was submitted that the respondent "had a number of minor complaints concerning back pain over a number of years whilst employed by the appellant".[29] These complaints were limited to back pain and there was no complaint of radicular type symptoms or other complaints which might be indicative of more significant pathology.

---

[21] [2011] NSWCA 254
[22] Appellant's submissions, paragraph 6(g)
[23] Appellant's submissions, paragraph 6(h)
[24] Appellant's submissions, paragraph 6(i)
[25] Application, page 196
[26] Application, page 131
[27] Appellant's submissions, paragraph 6(l)
[28] Appellant's submissions, paragraph 6(m)
[29] Respondent's submissions, paragraph 21

60. The AMS found that the 2005 injury cause a significant aggravation leading to two operations and a three-level fusion.

61. The respondent referred to the observations of Handley JA in *Bojko v ICM Property Service Pty Ltd*[30] that a court should not be concerned with looseness in language nor with unhappy phrasing.

62. The Respondent submitted that the AMS has given proper consideration to the necessary deductible proportion pursuant to s 323 and considered the available evidence and, in the circumstances, relied upon the default provision provided by s 323(2) of the 1998 Act.[31]

Reasons

63. The AMS noted that there were "other dates of injury … given with the brief" but none "were specifically recalled by Mr Elliott."[32]

64. The AMS referred to the opinion expressed by Dr Hopcroft and Dr Powell. He noted that Dr Powell's impairment assessment involved "multiple other dates."[33]

65. The AMS stated:

> "Deduction I feel should be made in relation to the cervical and lumbar region. The deduction is hard to calculate and a one-tenth deduction is used for the underlying degenerative process which is at least partially responsible for later surgical events that were required for the lumbar region. A one-tenth deduction to 25% and a one-tenth deduction to 5% in regard to the neck are calculated in the table."

66. The AP notes the decision of Arbitrator Nicholl dated 9 September 2008 which determined that there was an award for the respondent in respect of the allegation of injury from the nature and conditions of employment from 31 December 2001 to 31 December 2005.[34]

67. Dr Ashwell provided a report dated 7 March 2006.[35] The history obtained by Dr Ashwell was that the back symptoms "settled completely" following the work injury in the mid 1970's and that the respondent was off work for approximately two weeks with low back pain following an injury in the early 1980's.[36]

68. Following the injury on 19 May 2003, Dr Ashwell recorded a history that the respondent was off work for two weeks "and then returned to full work duties."[37] Dr Ashwell noted that the respondent was taken off street sweeping in December 2005 and has been on light duties.

69. Dr Ashwell opined that the respondent recovered completely from the injury in the 1970's and suffered an exacerbation of degenerative changes in the lumbo sacral spine in the work injury in the mid 1980's.[38] It is reasonable to assume that the effects of this injury had no ongoing consequences.

---

[30] [2009] NSWCA 175 at [36]
[31] Respondent's submissions, paragraph 25
[32] MAC, pg 4
[33] MAC, paragraph 10
[34] Application, pg 14
[35] Application, pg 131
[36] Application, pg 133
[37] Application, pg 134
[38] Application, pg 135

70. In a report dated 25 September 2007, Dr Ashwell apportioned some impairment to the injury in the 1980's, and to the subsequent injuries on 19 May 2003 and 29 November 2005.[39]

71. In statements dated 6 July 2007[40] and 12 September 2007[41], the respondent stated the November 2005 injury made his condition "worse". In a statement dated 11 June 2008 the respondent noted that he had been on restricted duties since January 2006.[42]

72. Dr Bodel examined the respondent and provided a report dated 26 April 2006.[43] He opined that the injury on 29 November 2005 "aggravated long-standing pathology" and caused a significant injury to the right shoulder. He opined that impairment was due to the injury in the early 1990's, in 2003 and in 2005.[44]

73. Dr Richard Powell examined the respondent and provided a report dated 20 November 2018.[45] He concluded that the respondent suffered injury to the lumbar and cervical spine by reason of the "nature and conditions of employment" over the period of employment. He then apportioned 1/5th of the lumbar spine impairment to the incident in 1976, the incident in the 1980's, the incident on 13 May 2003, the injury on 29 November 2005 and to the nature and conditions of employment prior to 2001.[46]

74. The appellant referred to the history contained in reports, such as Dr Powell and Dr Ashwell, of previous problems. It is clear that the AMS was aware of the history as he specifically referred Dr Powell's assessment and apportionment through multiple dates.

75. The AMS formed a view different from these doctors. However, the AMS was clearly aware of the history of prior back pain as he expressly referred to the apportionment provided by Dr Powell.

76. The appellant has submitted that the 2003 work injury should have been apportioned greater liability on the basis argued in ground 1 of this appeal. That ground has been rejected for the reasons we have given.

77. We do not accept that the injury in the mid 1970's was significant. The history taken by Dr Ashwell would tend to indicate that the injury had no consequence. In these circumstances there is a clear difference of opinion between the AMS and the medical opinion expressed by others as to the relevant s 323 deduction as the respondent is only relying on the work injuries in 2003 and 2005.

78. A deduction pursuant to s 323 of the 1998 Act is required if a proportion of the permanent impairment is due to previous injury or due to pre-existing condition or abnormality: *Vitaz v Westform (NSW) Pty Ltd (Vitaz)*[47]; Ryder *v Sundance Bakehouse* (*Ryder*)[48]*; Cole v Wenaline Pty Ltd* (*Cole*)[49].

---

[39] Application, pg 148
[40] Application, pg 97
[41] Application, pg 98
[42] Application, pg 101
[43] Application, pg 110
[44] Application, pg 114
[45] Application, pg 196
[46] Application, pg 207
[47] [2011] NSWCA 254
[48] [2015] NSWSC 526 (*Ryder*) at [54]
[49] [2010] NSWSC 78 at [29] - [30]

79. The AMS is not obliged to accept the medical opinion and must form his or her own opinion: *State of New South Wales v Kaur*[50]. In Kaur Campbell J stated:[51]

> "In particular it is obvious that approved medical specialists are required to decide disputes referred to them by the process of medical assessment. Even so, it is not necessary that approved medical specialists should sit as decision makers choosing between the competing medical opinions put forward by the parties. Essentially, the function is the same as that described by the High Court in *Wingfoot Australia*. That is to say, their function is in every case to form and give his or her own opinion on the medical question referred by applying his or her own medical experience and his or her own medical expertise."

80. The AMS determined that the 2005 injury was significant given the time off work and the fact that the respondent never returned to full duties. He undoubtedly used his clinical judgment in assessing the relevant deduction.

81. The appellant referred to the statement by the AMS that the determination of the issue was "hard" to calculate was error in the terms used by the AMS. The AP does not agree with this submission. The use of the word "hard" by the AMS is consistent with the terms of s 323(2) that the deduction is "difficult to determine".

82. In these circumstances the nature of the appellant's submissions raises the need for caution in the terms expressed by Mason P in *Marina Pitsonis v Registrar of the Workers Compensation Commission* when his Honour stated:[52]

> "The reasons of an administrative decision-maker (especially one who is not a judge) are not to be *'construed minutely and finely with an eye keenly attuned to the perception of error'* (see *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at 271-2, approving *Collector of Customs v Pozzolanic* (1993) FCR 280 at 287). A court should exercise restraint lest it mistakes looseness in language for errors of substance."

83. Similar observations were made by Handley AJA in *Lukacevic v Coates Hire Operations Pty Limited*[53] and recently by the Court of Appeal in *Vannini*.[54]

84. It is clear that there is difference of opinion as to the effects of the various injuries on the overall impairment.

85. In *Vannini v Worldwide Demolitions Pty Ltd*[55] Gleeson JA suggested that an Appeal Panel, when considering the reasoning of an Approved Medical Specialist on the question of causation under s 323, was required to determine "whether any proportion of the impairment was due to any previous injury, or pre-existing condition or abnormality" and if so, "what was that proportion".[56]

---

[50] (*Kaur*) [2016] NSWCA 346
[51] At [26]
[52] [2008] NSWCA 88; McColl JA and Bell JA (as their Honours then were) agreeing at [31]
[53] [2011] NSWCA 112 at [107], Hodgson JA agreeing
[54] [2018 NSWCA 324 at [1], [94] and [113]
[55] [2018] NSWCA 324 (*Vannini*) at [90]
[56] At [90]

86. In relation to the answer to the first question set out above, his Honour stated:[57]

> "The first question involved an assessment by the Panel, substantially of fact by reference to the evidence, although in part informed by the exercise of a clinical judgment. Such an assessment may be characterised as an evaluative judgment or conclusion based on findings of fact. Nonetheless, the legal criterion applied to reach that conclusion on causation demands a unique outcome, rather than tolerates a range of outcomes. Accordingly, the reasoning and finding of the medical specialist attracts the correctness standard of review by a Panel."

87. However, in respect of the extent of the deduction, 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:[58]

> "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 where it is dispositive."

88. The AMS concluded that a portion of the impairment was due to a pre-existing condition or abnormality and by inference, the other work injuries not relied upon. Accordingly, there can be no suggestion of error that the AMS failed to conclude that there should be a deduction pursuant to s 323 of the 1998 Act.

89. In these circumstances the error is said to be the extent of the appropriate deduction made pursuant to s 323.

90. The AP does not accept that the opinion is "at odds" with the evidence. The AMS explained why he reached that conclusion. The evidence does not only consist of medical opinion but on other facts such as, as the respondent noted, the onset of radiculopathy and the fact that the respondent did not return to full duties following the 2005 injury.

91. Although it could be argued that the extent of the deduction may have warranted one greater than 10%, the AP defers to the AMS clinical judgment. As we observed, we reject the suggestion that the AMS was unaware of the prior injures. In our view we are not satisfied that the finding by the AMS that the statutory deduction applies amount to a demonstrable error or an application of incorrect criteria by the AMS. This ground is rejected.

REASSESSMENT

92. The only successful ground of appeal related to the combination of the modifiers provided in Table 4-2 of the fourth edition guidelines. The correct calculations are set out in the reasons provided under the second ground of appeal.

93. The AP otherwise rejects the other grounds of appeal and confirms the findings and assessments made by the AMS.

[57] At [91]
[58] At [92]

DECISION

94. For these reasons, the Medical Assessment Certificate given in this matter is revoked. A further medical assessment certificate is attached to these 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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL

MEDICAL ASSESSMENT CERTIFICATE

Matter No: **859/19**
Applicant: **William Graeme Elliott**
Respondent: **Lismore City Council**

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

The Appeal Panel revokes the Medical Assessment Certificate of Dr Hugh English 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 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)
Cervical spine	19.5.03	Chapter 4	Chapter 15	0%	0%	0%
Lumbar spine	19.5.03	Chapter 4	Chapter 15	0%	0%	0%
Right upper extremity	19.5.03	Chapter 2	Chapter 16	0%	0%	0%
Cervical spine	29.11.05	Chapter 4	Chapter 15, Table 15-5	5%	One-tenth	5%
Lumbar spine	29.11.05	Chap 4, para 4.33 – 4.37	Chapter 15, Table 15-3	24%	One-tenth	22%
Right Upper Extremity	29.11.05	Chapter 2	Chapter 16	5%	0%	5%
Total % WPI (the Combined Table values of all sub-totals)					**30%**	

John Harris
Arbitrator

Dr Drew Dixon
Approved Medical Specialist

Dr Brian Noll
Approved Medical Specialist

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*.