# WORKERS COMPENSATION COMMISSION

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

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| **Matter Number:** | **M1-4957/19** |
| **Appellant:** | **Albury City Council** |
| **Respondent:** | **Phillip Patrick Elias** |
| **Date of Decision:** | **7 April 2020** |
| **Citation:** | **[2020] NSWWCCMA 70** |

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| **Appeal Panel:** | |
| **Arbitrator:** | **Ms Deborah Moore** |
| **Approved Medical Specialist:** | **Dr David Crocker** |
| **Approved Medical Specialist:** | **Dr J Brian Stephenson** |

### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 13 January 2020 Albury City Council lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr T Michael Long, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 16 December 2019.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) 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, 4th edition* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

### PRELIMINARY REVIEW

6. 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.

7. 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, notwithstanding the appellant's request, we consider that we have sufficient evidence before us to enable us to determine this appeal.

## EVIDENCE

### Documentary evidence

8. 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.

## SUBMISSIONS

9. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.

10. In summary, the appellant submits that the AMS erred by "ignoring the terms of the referral and substituting his own findings of injury."

11. In reply, the respondent submits that no errors were made.

## FINDINGS AND REASONS

12. 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.

13. 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.

14. The respondent was referred to the AMS for assessment of whole person impairment (WPI) in respect of the lumbar spine, the left upper extremity and skin/scarring resulting from a deemed date of injury of 20 June 2019.

15. Given the nature of the dispute, it is appropriate to set out the terms of the referral following a teleconference with Arbitrator Bell on 25 October 2019 which were as follows:

> "The Application to Resolve a Dispute is amended at Part 4 and Part 5.6 as follows:
>
> 'Type of injury - Aggravation of disease from nature and conditions of employment'
>
> 'Date of injury - 2 May 2016 to 2 August 2016'
>
> 'Deemed date of injury - 20 June 2019'
>
> 'Date of compensation claim – 4 August 2016'
>
> 'Injury description/cause of injury – The nature and conditions of employment from 2 May to 2 August 2016, including lifting concrete fence bases from the back of a work vehicle to the ground and lifting and carrying fence timbers and plastic barriers on or about 2 August 2016, aggravated a degenerative disease in the worker's lumbar spine, pursuant to section 4(b)(ii) of the 1987 Act. Furthermore, the worker sustained some subsequent falls in or about 2016 and in or about 2017 when his right leg gave way which caused a consequential aggravation of a degenerative disease in his left shoulder. Also, the worker used his left arm as a crutch or support to manoeuvre up on

to and around furniture in his house following lumbar spinal surgery of October 2016 and during a recurrence of severe lower back pain and sciatica in or about January 2017 and on occasions thereafter, which caused a consequential aggravation of the degenerative disease in his left shoulder. '"

16. The AMS obtained the following history:

> "At work on 2 August 2016, as he was undertaking heavy lifting, he noted increasing stiffness of his back. In the early hours of the following morning, he developed severe lower back pain, which radiated into the right buttock and right leg. He attempted to return to work, but this was impossible because of pain. Initially, he was managed conservatively and imaging studies performed. He was referred to Dr John McMahon, Neurosurgeon, who on 19 October 2016 performed right L4 and L5 hemilaminectomies; Right L5/S1 microdiscectomy including foraminal microdiscectomy; Rhizolysis of right L5 and right S1 nerve roots.
>
> A large right L5/S1 disc prolapse with sequestrated disc fragment with compression of the right L5 and right S1 nerve roots had been confirmed. Postoperatively, the pain in his right leg was greatly reduced. He returned to work in December 2016, but found this increasingly difficult because of pain in his back and recurrent pain in his right leg. At times he was limping and at home it was frequently necessary for him to crawl or move with support of the furniture about his home. As he did so, he was aware of some discomfort in the left shoulder, but this was suddenly aggravated as he climbed into a truck, at work on 22 June 2017 when he fell because of weakness in his right leg causing him to grab a support with his elevated left arm. His full body weight was supported by this elevated arm and 'something gave in my left shoulder' and he had severe pain in the left shoulder and left elbow. There was also tingling in the fingers of the left hand…
>
> He continued to have pain and painful restriction of movement in the left shoulder and on 24 July 2018 Ms Prue Keith, Orthopaedic Surgeon, undertook left shoulder arthroscopy, bursectomy, subscapularis reconstruction and biceps tenotomy – tenodesis…
>
> Approximately 10 weeks following surgery on the left shoulder, he recommenced light driving duties for the council. Initially he would walk, photographing wheelie bins about the city, but because of difficulty with his back and right leg, he was then provided with an automatic utility in order to perform this work.
>
> His employment was terminated on medical grounds in June 2019."

17. The AMS then documented the respondent's present treatment and symptoms. He set out in considerable detail the effects of the injuries on ADL's.

18. At paragraph five of the MAC, he documented his findings on physical examination.

19. At paragraph six he set out details of the various radiological reports he had. Relevant to the issues in dispute were the following comments:

> "4 August 2016, CT lumbar spine, radiologist not identified, but the films were later correlated with the MRI lumbar spine of 17 August 2016.
>
> Interpretation: 'Significant disc disease at L5/S1 with a background moderate size broad based disc protrusion, partially calcified to the left, leading to impingement on both exiting L5 nerve roots. There was additional significant impingement of the right exiting L5 nerve root by a focal, large right-sided disc extrusion, as described. This explains the weakness in the dorsiflexion the right foot. Impingement also on the right descending S1 nerve root with contact on the left. Moderate canal stenosis.

Background moderate broad-based disc protrusion at L4/5 with foraminal osteophytes leading to compression of the exiting L4 nerve roots within the neural exit foramina. A superimposed central component of disc extrusion leading to impingement of the descending L5 nerve roots within their subarticular recesses.

Moderate canal stenosis…'

August 2016, MRI lumbar spine, reported by Dr N Balendaran:

Interpretation:

'A right central and foraminal disc extrusion at L5/S1 on the background of mild broad-based protrusion leading to compression of the right exiting L5 and descending S1 nerve roots. The L5 compression explains the clinical picture. Compression also of the exiting L5 nerve root on the left with contact on S1. The combination of a mild broad based disc protrusion and a central disc extrusion at L4/5 leading to some compression on the exiting L4 nerve roots bilaterally. Contact on L5 in their recesses…'"

20. The AMS summarised the injuries as follows:

> "As a result of an injury he sustained at work on 2 August 2016, Mr Phillip Elias who is now 46 years of age, sustained an injury to his lumbar back, which caused a large right L5/S1 disc prolapse with compression of right L5 and S1 nerve roots. On 19 October 2016, right L4/5 hemilaminectomies; right L5/S1 microdiscectomy and foraminal microdiscectomy; rhizolysis right L5 and right S1 nerve roots was undertaken. Initially, he had good pain relief, particularly in the right leg and was able to return to lighter duties, however, he again developed ongoing pain in the lumbar back with symptoms and signs of radiculopathy affecting his right leg. He had ongoing weakness in the right leg, which caused him to fall. The weakness in the right leg caused him to fall as he was entering a truck on 24 July 2017. As he fell, he endeavoured to support himself with his outstretched left hand, causing injury to his left shoulder and left elbow. He had ongoing pain and painful restriction of movement of the left shoulder, but symptoms in the left elbow resolved. He did not respond to conservative treatment and on 24 July 2018, left shoulder arthroscopy was performed with repair of a near full thickness tear of the subscapularis tendon, biceps tenotomy and tenodesis, because of subluxation of that tendon. He was able to return to lighter duties. He received ongoing physiotherapy. His employment was terminated on medical grounds on 4 July 2019."

21. The AMS assessed 20% WPI, comprising of 15% WPI in respect of the lumbar spine, 6% WPI for the left upper extremity and 1% for scarring.

22. When asked: "Is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality?" the AMS replied "Yes" and added:

> "Pre-existing, asymptomatic degenerative changes in the lumbar spine. The degenerative changes lumbar spine noted in initial imaging studies following the work injury 2 August 2016 are considered pre-existing, asymptomatic, and not necessarily related to the nature or conditions of his work prior to 2 August 2016. The acute disc prolapse is directly the result of the work injury 2 August 2016…
>
> He sustained an injury to his left shoulder at work on 22 June 2017. This resulted in arthroscopy which was performed on 24 July 2018. It is considered that the injury to the left shoulder and subsequent events is directly related to the original work injury 2 August 2016 which resulted in weakness of the right leg, There was no evidence of previous injury or symptoms in the left shoulder either within or outside the workplace."

23. The AMS concluded by summarising the other medical opinions and findings.

24. At the outset, we accept that this was a complex referral to the AMS, and it is the approach adopted by the AMS to the terms of the referral which form the basis of the appeal.

25. The appellant's submissions may be summarised as follows:

    (a) The AMS erred in finding that the injury to the respondent's lumbar spine "was a personal injury under section 4(a) of the 1987 Act that occurred on 2 August 2016" which was contrary to the referral which was in terms of "an aggravation of disease injury…to the lumbar spine from the nature and conditions of employment from 2 May to 2 August 2016."

    (b) In the alternative, "the AMS erred in finding that the disease, or aggravation of the disease injury was due to the nature and conditions of employment solely on 2 August 2016…"

    (c) The AMS erred in finding that the respondent "suffered a further personal injury or a consequential injury incident at work on 22 June 2017" where he injured his left shoulder "because "this injury or consequential injury incident did not form part of the pleading…"

    (d) The AMS failed to give reasons or adequate reasons for concluding that it would be too difficult or costly to determine the extent of the pre-existing condition and prior work as a bricklayer.

26. In our view, it was incumbent on the AMS to elicit a history of the circumstances surrounding the various "injuries" or consequential or related conditions. It is a fundamental requirement of his task.

27. As far as the lumbar spine is concerned, it is noted that the terms of the referral specifically stated "the nature and conditions of employment from 2 May to 2 August 2016, *including lifting concrete fence bases from the back of a work vehicle to the ground and lifting and carrying fence timbers and plastic barriers on or about 2 August 2016*, (our emphasis) aggravated a degenerative disease in the worker's lumbar spine…"

28. There is no doubt that a specific incident occurred on 2 August 2016.

29. In his statement dated 25 January 2017 Mr Elias said: "Prior to 2 August 2016 I was unaware of any previous problems with my lower back what so ever and I had not had any previous symptoms or medical treatment."

30. There is no suggestion in any of the evidence that this statement was incorrect.

31. In our view, it was open to the AMS to conclude as he did that:

    > "The degenerative changes in the lumbar spine noted in initial imaging studies following the work injury 2 August 2016 are considered pre-existing, asymptomatic, and *not necessarily related* (our emphasis) to the nature or conditions of his work prior to 2 August 2016."

32. Dr Oates described the injury as "an aggravation of pre-existing *asymptomatic* (our emphasis) degenerative changes at L4/5 and L5/S1" adding: "This has resulted in a symptomatic disc lesion at L5/S1 compressing the right L5 nerve root."

33. We agree with the respondent's submission that, in a case such as this, it is indeed a "difficult exercise to characterise the injury as either…an aggravation/exacerbation or acceleration of a disease or frank injury."

34. We also agree that where it is clear that a significant injury occurred on 2 August 2016 that "whether or not the injury is characterised as an aggravation of a disease or personal injury, is of little import and does not alter the legitimacy of the assessment made by the AMS."

35. Accordingly, we are not persuaded that the AMS erred in his primary assessment with respect to the lumbar spine.

36. As regards the deduction pursuant to section 323 of the 1998 Act, the appellant submits that a deduction of more than 10% is warranted, and that the AMS failed to give adequate reasons for this deduction.

37. Both Dr Oates and Dr Quain considered that a 10% deduction was appropriate, consistent with the history by the worker of no prior symptoms or restrictions in his lumbar spine.

38. Dr Bentivoglio stated: "My working diagnosis is significant L4/5 and L5/S1 disc protrusion and with a significant right L5/S1 disc prolapse compressing the right S1 and L5 nerve root in the foramen."

39. He added:

> "I am not aware of any pre-existing back injury but he undoubtedly has significant pre-existing degenerative disc disease in his lumbar spine at the L4/5 and the L5/S1 level….
>
> I do believe that the disc injury at the L5/S1 level was an acute (our emphasis) exacerbation of the pre-existing significant degenerative disease that he has at L4/5 and L5/S1…
>
> The main non-work related factors that have contributed to his significant degenerative disc disease is that he did 14 years as a bricklayer which entailed a lot of heavy lifting and repetitive bending and twisting and he has been working as a plant operator for the last 9 years which also entails heavy lifting and repetitive bending and twisting all producing significant pre-existing degenerative disease of his lumbar spine…
>
> The fact that he undoubtedly had pre-existing degenerative disease in his lumbar spine, I deduct 10%..."

40. Although the AMS said that "The extent of the deduction is difficult or costly to determine so in applying the provisions of s.323(2) I assess the deductible proportion as one tenth…" his final assessment was consistent with the totality of the evidence.

41. Whilst that evidence would suggest that there was nothing particularly "difficult or costly" as regards the deduction, that in itself does not detract from the final assessment.

42. We accept that the AMS did not give detailed reasons for the deduction in paragraph 10 of the MAC, but he clearly explained his reasons in paragraph 8 (f), and his decision was consistent with all other relevant medical opinions.

43. It is true that, as Schmidt J said in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 "Section 323 does not permit that assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will always, 'irrespective of outcome', contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality."

44. In our view, there was insufficient evidence to conclude that the *actual consequences* of the pre-existing condition contributed to the impairment other than as found by the AMS and other doctors.

45. For these reasons, we are not persuaded that the AMS erred in the deduction he made pursuant to section 323.

46. Turning now to the issue of the left shoulder condition.

47. The appellant submits that the AMS erred in finding that the respondent sustained a further personal injury or consequential injury on 22 June 2017 when his leg gave way and he fell from a truck.

48. The appellant submits that the AMS attributed "the entire left shoulder impairment" to that incident, contrary to the terms of the referral.

49. In addition, the appellant adds:

> "This injury or consequential injury incident did not form part of the pleading of the injury or the terms of the referral…[and] was factually disputed under section 4 of the 1987 Act for multiple reasons, including the absence of any reference to it in the clinical notes…the reference to this alleged specific injury on 22 June 2017 was omitted by consent…in the amended pleading of injury and the terms of the referral to the AMS."

50. The terms of the referral read:

> "Furthermore the worker sustained some subsequent falls in or about 2016 and in or about 2017 when his right leg gave way which caused a consequential aggravation of a degenerative disease in his left shoulder."

51. It is true that the AMS referred to an incident on 22 June 2017 in paragraph 4 of the MAC, but he then referred to an incident on 24 July 2017 at paragraph 7, such that it cannot be said that he attributed "the entire left shoulder impairment" to that incident.

52. That may sound a little pedantic, but it must be remembered that the respondent was describing events as he recalled them over three years after they occurred.

53. In any event, the referral was in respect of incidents "in or about" 2016 and 2017, presumably because there was some confusion as to the precise date or dates of such occurrences: even the AMS referred to two different dates.

54. In our view, the assessment by the AMS was generally consistent with the terms of the referral.

55. As the respondent pointed out,

> "it was entirely open to the AMS to make this finding for the reason that the terms of the referral did not limit the AMS in the way contended by the appellant… the most that can be concluded from many discussions was that the date upon which the relevant incident took place was unclear."

56. It is noteworthy that the appellant did not dispute that such incidents occurred such that it was common ground that the respondent suffered a shoulder injury as a consequence of his back condition.

57. Finally, as the respondent points out, the appellant does not appear to challenge the actual impairment assessment of the left shoulder, rather the challenge is simply as regards the date or dates recorded by the AMS.

58. We agree, and again are not persuaded that the AMS erred in his assessment with respect to the left upper extremity (shoulder).

59. For these reasons, the Appeal Panel has determined that the MAC issued on 16 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*.

R Gray

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