WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1544/19**
Appellant:	**Muskoka Farm Pty Ltd**
Respondent:	**Amanda Smith**
Date of Decision:	**13 February 2020**
Citation:	**[2020] NSWWCCMA 22**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr James Bodel**
Approved Medical Specialist:	**Dr Gregory McGroder**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 14 November 2019 Muskoka Farm Pty Ltd lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Jonathon Negus, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 21 October 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 assessment was made on the basis of incorrect criteria,
   - 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* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

6. **PRELIMINARY REVIEW**

7. 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.

8. 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.

9. In addition, we note the appellant’s request that “The Appellant is of the view that this matter should have an oral hearing before the Appeal Panel to address both the analysis required in respect of deduction for pre-existing abnormality and also for a proper calculation for activities of daily living.”

10. We do not consider that such a hearing is necessary. The matters raised by the appellant are those the subject of the appeal. As an Appeal Panel, we are expert at addressing these matters, irrespective of the appellant’s “view.”

11. The appellant’s request is declined.

EVIDENCE

Documentary evidence

12. 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.

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

14. In summary, the appellant submits that the AMS erred in two respects, firstly, as regards his assessment in respect of ADL’s and secondly, in respect of the “failure by the Approved Medical Specialist to make any deduction for pre-existing abnormality…”

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

16. In addition, the Respondent submits that a re-examination is not necessary to enable the proper assessment of the worker’s degree of permanent impairment and does not seek to make any oral submissions in respect of the Appeal. The Respondent submits that no oral hearing is requires as suggested by the Appellant.

17. We agree.

FINDINGS AND REASONS

18. 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.

19. 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.

20. The respondent was referred to the AMS for assessment of the Lumbar Spine and Scarring (TEMSKI) resulting from an injury on 23 May 2014.

21. The AMS obtained the following history:

> "On 23/05/2014, Amanda Smith was working at the general stables complex working on swimming the horses. At the end of a horse swimming session, she was returning the ropes to a hanger when she slipped on the wet rubber matting, landing hard on the sandstone retaining wall initially contacting her tail bone with the ground and then hitting her right forearm on that wall.
>
> She managed to get up and continue working for the rest of the day and socialised that evening. She describes being used to having falls, having ridden horses all her life and worked next to them.
>
> However, the next day she was very stiff and painful mainly in the right upper leg and hip as well as her right arm. The pain became severe throughout the pelvis and then she developed leg weakness and spasm over the next day or so culminating in her being unable to walk. She did not have any lower back pain at that point.
>
> She was taken to Gosford Hospital to be investigated where they treated her with significant amounts of pain killers and muscle relaxants before discharging her home. She was discharged on 25/05/2014 and given a week off work. She felt better at the end of the week and returned to work on restricted duties, however as she was working with a horse and after a sudden movement she lost feeling in her legs and fell to the ground in severe pain.
>
> She was sent to a GP who recommended a physiotherapist. The physio felt that she had a significant lumbar spine disc injury and recommended MRI scan which was performed and she was then referred to Dr Charles New who recommended urgent surgery. She was also sent for a second opinion with Dr Brian Hsu who also recommended surgery. She did have one injection into the lumbar spine prior to the surgery which just made things worse leaving her unable to walk and in a wheelchair for 3 weeks.
>
> Her surgery was scheduled for 22/11/2014 and she underwent an L4/5 laminectomy, disc excision and neurolysis. She spent 10 days post-op in rehab and then had extensive physio.
>
> After the surgery, she felt an initial improvement as the constant pain had gone but she did still have an irritable back. She was unable to work in her previous duties due to pain as she was regularly knocked by horses which made her back pain worse…
>
> She also underwent a right L4 and L5 nerve sleeve block as well as a right hip injection on 19/07/2016 which helped for 4-5 months but was so painful she is reluctant to go back and have it again."

22. Present symptoms were described as follows:

> "Most days now, Ms Smith has no back pain. She managed to ride her horse for the first time in three years recently and did get some aching afterwards. However, she is much better since she has lost 22kg following her gastric sleeve procedure. She is now sleeping better. She does get pain in both sides of the groin, which comes and goes but is not in either side simultaneously. She has no radiating pain from her back since the surgery and no distal neurology in her legs."

23. The AMS continued:

> "There are details in the reports of her fall from a horse in Queensland 3-4 years prior to this injury. She had imaging taken and was investigated following that fall and no significant injury was found. She worked for 3-4 years from that injury in this farm without any back pain or issue. She also describes having lots of minor falls down her stairs since the injury where she will often twist her ankle but has not needed hospital attention."

24. As regards ADL's, the AMS said:

> "She now describes no issues with personal care. She can manage inside household chores but she is unable to mow the lawn, whipper ship [sic] or chain saw. She is active in the Fire Brigade and therefore is unable to help with these tasks. She has no restrictions when driving."

25. Findings on physical examination were reported as follows:

> "She had a 5cm x 0.2cm linear white scar consistent with a spinal operation at the L4/4 level. There was no ulceration or attachment to underlying structures. It would be less visible with normal clothing. She had some mild tenderness in the lower lumbar spine with no guarding or spasm. There was no evidence of muscle atrophy in the calves and she was able to straight leg raise to beyond 50° on both sides with no radicular pain. She had good lumbar spine flexion and extension, as well as lateral bends. She had 5/5 strength from L2 to S1 and was able to heel toe walk. She had reduced sensation in L2 over the anterior thigh with some reduced light touch over L5 on the right."

26. After noting the radiological material, the AMS summarised the injuries as follows:

> "Amanda Smith is a 30 years old lady who suffered an injury 5 years ago on 23/05/2014 while working at Muskoka Farm when she slipped on wet matting, landing on her tailbone. The injury led to sequestration of the L4/5 disc leading to significant pain and radicular symptoms. She had a laminotomy, decompression, neurolysis and disc excision at L4/5 on 21/11/2014 which relieved her pain but did leave her at the time with some radicular symptoms. An MRI did confirm some residual disc in the area.
>
> However, over the last 5 months since I last assessed her, she has lost significant weight and continued with her strengthening exercises and this has led her to be symptom free from a radicular point of view and greatly relieved her lower back pain."

27. The AMS assessed 15% WPI.

28. As regards the lumbar spine, he assessed DRE III – surgery for radiculopathy – at 10%. He added: "Modifiers for DRE categories following surgery - Residual loss of L5 sensation and consistent imaging – Lumbar – 3%"

29. As regards ADL's, the AMS said: "Restricted with usual household tasks restricted. Unable to manage her garden as she used to – 2%."

30. The AMS also said that "There is no deductible proportion."

31. The appellant submits that the assessment of 2% WPI for ADL's is excessive since the AMS only noted that "the only restriction on activities relate to garden activities being the ability to 'mow the lawn, whipper Ship [sic] or chain saw.'"

32. The appellant added:

> "[The] guidelines clearly state that the allowance for activities of daily living should be 1% in circumstances relevantly where the Claimant is "... able to cope with the above, but unable to get back to previous sporting or recreational activities, such as gardening, running and active hobbies etc.". The Appellant notes that as the only restrictions relate to those gardening activities (and in particular do not relate to any of the other activities identified in the guidelines) the appropriate allowance for activities of daily living is 1% Whole Person Impairment.".

33. We accept the appellant's summary of the Guidelines relevant to a 1% WPI allowance, but it is useful to note the activities relevant to a 2% allowance, namely "if the worker can manage personal care, but is restricted with usual household tasks, such as cooking, vacuuming and making beds, or tasks of equal magnitude, such as shopping, climbing stairs or walking reasonable distances."

34. We agree that the AMS' summary of ADL's was perhaps a little brief, but there is ample evidence to show that the assessment of 2% WPI was not inconsistent with that evidence.

35. As the respondent points out, the AMS assessed her in May 2019 at which time he determined that she had not reached maximum medical improvement. In that MAC, the AMS said:

> "The main change to her lifestyle has been that she is no longer able to ride her horses. She used to ride horses competitively and has 4 well-bred horses that are currently in a paddock that she is unable to look after. She used to also enjoy cross country horse riding as well as cattle work. She can still perform her archery at light levels but she used to be a good horseback archer. She is still in the Fire Brigade but she is now in communications and liaison rather than out in the truck as she feels she is a liability, unable for example to use the hoses. She used to enjoy swimming and mountain bike and trail tracking as well as rock climbing and obstacle course which she now struggles with."

36. In her statement dated 30 January 2019, the respondent said:

> "I have been unable to return to my previous duties due to the constant pain, movement and lifting restrictions which prevented me from performing my hours and duties…
>
> Prior to my incident, I used to compete in competitive horse riding I cross country and cattle work. I also participated in Archery, Diving, both free and scuba. I was in the fire brigade. I used to swim and go mountain and trail trekking as well as rock climbing and obstacle courses.
>
> As a result of my injury most of these hobbies and sports are non-existent. It is possible to plan in advance time off of work if I wish to participate in a physical activity as I know I will not be able to move for a few days following.
>
> The biggest loss is my inability to ride horses. This is my passion, my career and my life and is now extremely difficult. In the instances where I am capable of riding, the risk is usually too great in case I fall."

37. Now it is clear that the respondent had improved somewhat between January 2019 and October 2019, but that improvement in symptomatology did not in our view diminish the restrictions the respondent described.

38. Her ability to drive had improved but her inability to fully engage in the numerous sporting and recreational activities she enjoyed prior to her injury had not substantially improved.

39. For these reasons, we do not consider that the AMS erred in his assessment with regards to ADL's.

40. Turning now to the issue of the deduction pursuant to section 323 of the 1998 Act, the appellant submits as follows:

> "The back injury to which the impairment assessment related occurred on 23 May 2014 and there is specific evidence adduced of pre-existing abnormality in the lumbar spine both as to pathological abnormality and clinical complaints of prior pain. Indeed, the records of Gosford Hospital in respect of the admission on 25 May 2014 specifically records "fall from horse six years ago? fracture hip/pelvis and disc bulge and further make reference to radiological investigations of the lumbar spine following a motor vehicle accident in December 2013 (only six months prior to the alleged injury). The Appellant notes that this history was omitted from the history given to Dr Hopcroft and also appears to have been omitted from the history given to Dr New."

41. The respondent's submissions lack detail and generally focus on the numerous decisions dealing with the correct interpretation of section 323.

42. The notes from Gosford Hospital record the following:

> "Fit & well. Fall from horse 6 yrs ago, back pain related to same, since resolved.
> MVA December 2013: MRI/X-ray of hips & lumbar spine NAD."

43. In a report dated 18 September 2014, Dr New said: "She states that she has had a minor soft tissue injury to her back at the age of 19…"

44. He added:

> "Radiographic investigation available for review confirms a very large sequestration of disc at the L4/S level which is asymmetrically placed to the right hand side rather than the left, although I note that her symptoms are now bilateral, the right side being worse than the left."

45. It is true that Dr Hopcroft does not appear to have obtained a history of the fall from a horse some years prior to the work injury. Neither did Dr Hsu.

46. Dr New certainly referred to an incident in the past where she injured her back but without specifics, but read in context with other reports, it seems to us that he was clearly referring to the same incident.

47. The appellant's submissions are thus not entirely accurate.

48. It should also be noted that in the work injury, the respondent sustained a significant and discreet injury to her lumbar spine.

49. As Dr Hsu noted in his report of 7 November 2014:

> "Miss Smith does demonstrate significant disc herniation. At this stage disc herniations tend to calcify rather than reabsorb and therefore she is likely to be left with persistent spinal stenosis. Considering she does experience some degree of weakness in the right leg and her symptoms have been ongoing for quite a number of months, I feel that she has now exhausted non-operative treatment. I would recommend surgical intervention."

50. An AMS is required to make an assessment at the time of the examination, taking into account all the available evidence.

51. In this case, we are not persuaded that the AMS erred in failing to make any deduction pursuant to s323 for reasons that follow.

52. To begin with, 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 (our emphasis) of the earlier injury, pre-existing condition or abnormality.”

53. Equally however, *Vitaz v Westform Pty Ltd* [2011] NSWCA 254 is authority for the proposition 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.”

54. We have been unable to locate what the appellant rather vaguely describes as “specific evidence adduced of pre-existing abnormality in the lumbar spine both as to pathological abnormality and clinical complaints of prior pain.”

55. In the present case, as the AMS noted, the respondent continued to work full time after the incident when she was about 19, some six years prior to the work injury. In addition, as she said in her statement and as noted by the AMS, she continued to engage in significant physical activity such as horse riding and cattle work.

56. The radiological material confirms a significant disc injury: there is no evidence of any similar significant injury or condition prior to the work injury.

57. In summary, in our view there is no evidence that the “actual consequences” of the earlier injury contributed to the impairment assessed by the AMS, nor any evidence that any consequences were “a contributing factor causing permanent impairment” in line with the authorities noted above.

58. For these reasons, the Appeal Panel has determined that the MAC issued on 21 October 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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar