WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-4460/20**
Appellant:	**Kevin Skinner-Smith**
Respondent:	**Smoke Alarms Australia Pty Ltd**
Date of Decision:	**25 February 2021**
Citation No:	**[2021] NSWWCCMA 43**

Appeal Panel:	
Arbitrator:	**Mr John Harris**
Approved Medical Specialist:	**Dr Margaret Gibson**
Approved Medical Specialist:	**Dr Brian Noll**

BACKGROUND TO THE APPLICATION TO APPEAL

1. Mr Kevin Skinner-Smith (the appellant) suffered injury to the left hip and groin and the lumbar spine on 31 August 2018, in the course of his employment with Smoke Alarms Australia Pty Ltd (the respondent).

2. The appellant served a letter of claim dated 10 March 2020 seeking permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act). The claim was based on the opinion expressed by Dr Neil Berry for 18% whole person impairment (WPI) comprising 7% WPI for the lumbar spine and 12% for the left hip.

3. By letter dated 3 July 2020 the respondent disputed the extent of the claim based on the opinion expressed by Dr Frank Machart in reports dated 6 May 2020 and 22 June 2020. Dr Machart assessed the appellant at 5% WPI attributable to the lumbar spine and 4% in respect of the left hip. The doctor opined that the totality of the assessment was unrelated to injury. He appears to have made a 100% deduction pursuant to s 323 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) and/or that the impairment did not result from the injury.

4. The appellant then commenced proceedings claiming permanent impairment compensation pursuant to s 66 of the 1987 Act for the lumbar spine and left lower extremity.

5. The respondent filed a Reply to the Application (Reply) which limited the issues to the assessment of the degree of WPI as a result of injury.

6. On 9 September 2020, the matter was listed before a Commission Arbitrator who remitted the claim for permanent impairment compensation to the Registrar. The assessment of whole person impairment (WPI) was then referred by the Registrar to Dr Timothy Anderson, an Approved Medical Specialist (AMS), who examined the appellant and provided the Medical Assessment Certificate dated 19 November 2020 (MAC). The relevant findings made by the AMS pertinent to the various grounds of appeal are set out later in these Reasons.

7. The AMS assessed the lumbar spine at 7% WPI and the left lower extremity at 2% WPI. A one-tenth deduction was made pursuant to s 323 resulting in an overall assessment of 8%.

8. The assessment of WPI is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[1] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth guidelines prevail.[2]

THE APPEAL

9. On 17 December 2020, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).

10. On 13 January 2021, the respondent filed an Opposition to the Appeal.

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

12. The appellant claims that the medical assessment by the AMS should be reviewed on the grounds of additional relevant information, that there has been a deterioration of the appellant's condition, that the MAC contains a demonstrable error and/or the assessment was made on incorrect criteria.

13. 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

14. 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.

15. In its appeal submissions the appellant relied on further material that indicated that he intended undergoing a left total hip replacement on 1 February 2021.

16. As a result of that preliminary review, the AP determined, for the reasons provided, that a ground of appeal had been established.

17. As the matter was listed before the AP after the date when the hip replacement was scheduled to take place, the following Direction was issued:

> "The appellant's solicitor has asserted in his submissions that a proposed left total hip replacement was scheduled for 1 February 2021.
>
> The appellant is to file and serve any evidence by close of business, 17 February 2021, advising whether the left total hip replacement was undertaken.
>
> The respondent will have an opportunity to respond once the further evidence is received by the Appeal Panel. A further direction will be issued by the Appeal Panel upon receipt of the further material."

[1] The fourth edition guidelines are issued pursuant to s 376 of the 1998 Act.
[2] Clause 1.1 of the fourth edition guidelines.

18. The AP has the power, pursuant to s 324 of the 1998 Act, to call for further information for the purposes of assessing a medical dispute.

19. Following the receipt of the report of Dr Salaria dated 1 February 2021, the AP issued a further Direction. That Direction provided:

> "The respondent is to address whether the left total hip replacement is a deterioration as defined in s 327(3)(a) of the 1998 Act and as discussed by the Court of Appeal in *Riverina Wines v Registrar of the Workers Compensation Commission* [2007] NSWCA 149 at [94] and/or any other authority.
>
> Given that the appellant has recently undergone the surgery, the parties are also directed to address whether the appellant's degree of permanent impairment is stablised and whether maximum medical improvement (MMI) has been attained at this time.
>
> The appellant is to file and serve a short submission in relation to the issue of MMI by close of business, 19 February 2021.
>
> The respondent is to file and serve written submissions on either issue by close of business, 22 February 2021."

20. The parties filed submissions in accordance with this Direction. These submissions are discussed subsequently.

APPLICATION TO ADDUCE FRESH EVIDENCE

21. The appellant sought to rely on further evidence, specifically a physiotherapist report dated 25 November 2020, a request for admission to hospital dated 27 November 2020 for a total left hip replacement to be undertaken on 1 February 2021, a statement from the appellant dated 26 November 2020 and a report from Dr Hardeep Salaria dated 27 November 2020.

22. In response to the Direction, the appellant filed a report from Dr Salaria dated 1 February 2021. The report established that the appellant had undergone a left total hip replacement on 1 February 2021.

23. The appellant submitted that there has been a deterioration in the appellant's left hip pain and was undertaking a total left hip replacement regardless of whether it was approved by the insurer. A total hip replacement is assessed at between 15% and 30% depending upon the outcome in accordance with Table 17-33 of AMA 5.

24. The appellant also submitted that his statement should be admitted based on his assertion that the range of movement of his left leg, as opposed to his right leg, was not assessed.

25. The respondent submitted that the appellant has not provided reasons why the further evidence should be admitted. It submitted that "on this basis", all the fresh evidence should be rejected. It also submitted that the medical reports of Mitchell Integrated therapy and Dr Salaria "could have been obtained prior to the assessment by the AMS".[3]

26. The respondent referred to the decision of *Petrovic v BC Serv No 14 Pty Ltd*[4] (*Petrovic*) where the Court held that the "additional relevant information … does not include matters going to the process whereby the AMS makes his or her assessment." It was submitted that the statement was not "additional relevant information" for the purposes of s 327(3)(b) of the

[3] Respondent's submissions, paragraph 14.
[4] [2007] NSWSC 1156 at [31]-[34].

1998 Act. It also referred to the observations of Hodgson JA in *Lukacevic v Coates Hire Operations Ltd*[5] (*Lukacevic*).

27. The respondent submitted that the appellant's statement offers no substantial prima facie probative value and is contradicted by the terms of the MAC which outlines the various hip movements of both the right and left hip. Accordingly, it submitted that the statement should be rejected.

28. The respondent was given leave to file further submissions following the provision of the report of Dr Salaria dated 1 February 2021.

29. In reply the respondent maintained reliance on its prior submissions, conceded that there had been a deterioration in the appellant's condition, and that he had not achieved maximum medical improvement.

Reasons

30. The AMS does not respond to any complaints or suggestions that he was wrong or in how the examination was conducted.[6]

31. Section 327(3)(b) of the 1998 Act provides that the material must be "additional relevant information" which was not available to and could not have been obtained prior to the examination.

32. Section 328(3) of the 1998 Act provides that the Appeal Panel is not to receive evidence that is fresh evidence, or evidence in addition to, or in substitution for, the evidence received in relation to the medical assessment appealed against, unless the evidence was not available to the appellant before the medical assessment and could not reasonably have been obtained by the appellant before the medical assessment.

33. In *Lukacevic* Hodgson JA stated:[7]

> "Having regard to the matters I have set out, in my opinion it would be reasonable for an AP not to admit evidence raising such a dispute unless that evidence had substantial *prima facie* probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, simply by raising such a dispute, going to a matter relevant to the correctness of the certificate, a worker could put the AP in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of the WIM Act."

34. In *Lukacevic* Handley AJA considered evidence pertaining to the examination process as "fresh evidence" within the meaning of s 328(3).[8] His Honour also considered that the Panel could exercise its discretion in deciding whether to admit the evidence.[9]

35. The appellant failed to articulate whether the application was made under s 327(3)(b) and/or s 328(3) of the 1998 Act.

36. As the respondent correctly submitted, the decision of *Petrovic* does not support the appellant's submission that the statement is admissible pursuant to s 327(3)(b). This is because his Honour held that the provision "does not include matters goings to the process whereby the AMS makes his or her assessment".

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[5] [2011] NSWCA 1123 at [98]-[99].
[6] See the discussion by Hodgson JA in *Lukacevic* at [78].
[7] At [76].
[8] *Lukacevic* at [100].
[9] *Lukacevic* at [103].

37. The appellant failed to address why the statement is admissible which essentially criticises the process of the examination. Based on the decision of *Petrovic*, we do not accept that the report is admissible pursuant to s 327(3)(b) of the 1998 Act.

38. Given that the Court of Appeal held in *Lukacevic* that the AP has a discretion to accept or reject the statement pursuant to s 328(3), we are of the view that it should be rejected.

39. The appellant's statement contradicts the express findings in the MAC of measurements taken of the six range of motions in both hips. The appellant's statement is directly contradicted by the MAC, does not contain probative information, and is rejected.

40. The appellant's submissions are vague as to the admissibility of the other evidence. However, the appellant referred to a ground of appeal based on deterioration that results in an increase of the degree of permanent information.

41. The MAC examination occurred on 19 October 2020 and was issued on 19 November 2020. Within days of the provision of the MAC, the appellant was complaining of a deterioration in his condition, had seen an orthopaedic surgeon and arranged for total hip replacement surgery to be undertaken on 1 February 2021.

42. Despite the unusual speed in obtaining treatment and being scheduled for serious surgery within a week following the issuing of a MAC, the AP accepts that on a probable basis, albeit coincidentally, the appellant suffered a deterioration in left hip symptomatology. That conclusion is based on the reports of Dr Hardeep Salaria and the physiotherapist. In those circumstances we are prepared to accept that the additional evidence was not available to and could not reasonably have been obtained prior to the medical assessment.

43. The further report of Dr Salaria dated 1 February 2021 establishes that the appellant underwent a left total hip replacement on that date.

44. The AP admits the further evidence. The material was not available at the time of the assessment and arose after the provision of the MAC in circumstances where there has been a deterioration in the appellant's symptoms. The material is otherwise clearly relevant to the issue of whether there has been a deterioration within the meaning of s 327(3)(a) of the 1998 Act. This latter point is addressed subsequently.

EVIDENCE

45. The AP has before it all the documents that were sent to the AMS for the original assessment together with the further evidence admitted on appeal. We have referred to portions of the evidence and taken them into account in making this determination.

GROUND OF APPEAL – DETERIORATION OF THE LEFT HIP CONDITION

Appellant's submissions

46. The appellant referred to Table 17-33 of AMA 5 where an assessment of WPI following a total hip replacement is either 15% for a good result, 20% for a fair result and 30% for a poor result. He submitted, in light of the further material, that there had been a deterioration since the MAC.

Respondent's submissions

47. The respondent initially submitted that the surgery had not taken place and could not be assessed as it was a future contingency and "not yet sustained".[10]
48. The respondent also submitted that it was "possible" that the proposed surgery was not reasonably necessary or not as a result of injury. In those circumstances any impairment resulting from the surgery "would not be compensable".[11]

49. In its further submissions the respondent otherwise conceded that there had been a deterioration in the appellant's condition.

Reasons

50. The issue of "deterioration" in s 327(3)(a) was considered in *Riverina Wines v Registrar of the Workers Compensation Commission*[12] when Campbell JA stated:[13]

> "94. Considering that submission involves, first, construing section 327(3)(a). 'Deterioration" of a person's condition is an inherently relational concept. It involves the condition in question having become worse than it previously was, at some particular point in time. In my view, the 'deterioration' that section 327(3)(a) talks of is a deterioration from the degree of impairment that has been certified by the MAC, over the time since the examination or examinations on the basis of which the MAC was issued took place. That conclusion follows from the fact that the appeal in question is, as section 327(2) requires, against a matter as to which the assessment of an AMS certified in a MAC is conclusively presumed to be correct."

51. The further evidence established that the appellant has undergone a total left hip replacement. As the appellant correctly submitted, depending upon the outcome of that surgery, the WPI following a total hip replacement is either 15%, 20% or 30%. Those assessments are set out in Table 17-33 of AMA 5 and based upon the ratings in Table 17-34 and dependent upon whether the condition is ultimately described as "good", "fair" or "poor".

52. The respondent otherwise submitted that the surgical procedure may not be "reasonably necessary" and/or may not be "as a result injury".

53. In relation to the former we observe that the surgery was undertaken following recommendation by the surgeon in circumstances where there is gross osteoarthritis in the hip joint. That portion of the respondent's submission does not appear to have significant merit.

54. Furthermore, the issue of whether the surgery is "reasonably necessary" is relevant to a determination under s 60 of the 1987 Act and is not directly relevant to the assessment of impairment under s 66.

55. The relevant test in s 66 is whether the injury "results in permanent impairment". That involves an assessment of common law principles of causation: *Secretary, New South Wales Department of Education v Johnson*.[14]

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[10] Respondent's submissions, [26].
[11] Respondent's submissions, [25].
[12] [2007] NSWCA 149 (*Riverina Wines*)
[13] At [94], Hodgson JA and Handley AJA agreeing at [1] and [115].
[14] [2019] NSWCA 321 at [124]-[125].

56. It is correct that on further assessment, the appellant's impairment must be assessed by an AMS in circumstances where injury is admitted. The AMS is required to assess the degree of permanent impairment "as a result of injury" (s 325) and whether any proportion of the impairment is due to any pre-existing condition or abnormality.

57. Having undergone a total left hip replacement, we are satisfied that there has been a deterioration in the appellant's condition that results in an increase in the degree of permanent impairment. For the subsequent reasons, it is presently inappropriate to assess that degree of permanent impairment.

58. This ground of appeal is upheld.

GROUND OF APPEAL – LEFT LOWER EXTREMITY

59. The parties agreed that the AMS had assessed the left lower extremity at 2% WPI instead of 4% WPI.

60. The appellant also submitted that the AMS erred in making a one-tenth deduction.

61. Considering the finding that there has been a deterioration in the appellant's condition, the AP has set aside the assessment of left lower extremity including the s 323 deduction. As this matter will be subsequently reassessed when the appellant has attained maximum medical improvement, all findings made by the AMS including the extent of any s 323 deduction are set aside.

62. In these circumstances it is unnecessary to address this ground of appeal.

63. However, we add that shortly after the injury the pelvic CT scan showed advanced bilateral hip joint osteoarthritis with prominent marginal osteophytic lipping. That scan was taken within two weeks of the injury and showed extensive pre-existing osteoarthritis which pre-existed the injury. As the WPI of the left lower extremity will change, a further issue will be how the pre-existing condition contributed to that impairment. In these circumstances it will subsequently be necessary to assess whether and to what extent the pre-existing changes contributed to the need for hip replacement and the resulting impairment.

GROUND OF APPEAL - SECTION 323 DEDUCTION – LUMBAR SPINE

Appellant's submissions

64. The appellant referred to the principles discussed in *Cole v Wenaline*[15] (*Cole*) and submitted that the pre-existing condition or injury must contribute to the assessed whole person impairment.

65. The appellant also referred to *Vitaz v Westform (NSW) Pty Ltd* [16] (*Vitaz*) which held that a pre-existing condition can be a contributing factor causing permanent impairment even though the worker was asymptomatic prior to injury.

66. The appellant submitted that there was "no evidence of a contribution by a pre-existing condition to the current impairment."[17] He also submitted that the AMS is required to articulate how the previous condition contributed to the current impairment and "made it different in terms of the degree of impairment resulting from the work injury and … a difference in outcome due to the pre-existing condition".

[15] [2010] NSWSC 78.
[16] [2011] NSWCA 254.
[17]

67. The appellant submitted that there was "no reasoning" provided by the AMS as to why a deduction is necessary other than "some degenerative changes demonstrated on the radiology".

68. The appellant submitted that there was a failure to apply s 323 "in accordance with law" and a failure to "give adequate reasons".

Respondent's submissions

69. The respondent referred to the radiological investigations which demonstrated extensive degenerative changes.

70. The respondent submitted that the application on s 323 was based on the medical evidence available to him and that the reasoning for the deduction was articulated throughout the MAC.

Reasons

71. The AMS noted a history that on 31 August 2018 the appellant injured himself when he fell and experienced a tearing sensation in the left hip. The fall was said to be "minimised by a ladder he was carrying".

72. A CT scan on 20 September 2018 and the MRI Scan dated 24 September 2018 was reported by the AMS as showing "extensive degenerative changes, particularly in the lower segments" and "foraminal stenosis and facet joint degenerative changes throughout".

73. The AMS stated that there was "ample evidence of significant pre-existing degenerative change in the lower back and both hips, which long predated this event". He also noted that the injury involved a "wrenching" of the lower back which was "quite badly aggravated" by the incident. The AMS concluded:[18]

> *"*To a limited extent, the aggravation continues."

74. Section 323(1) of the 1998 Act provides:

> "(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."

75. 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*.[19]

76. A deduction can be made even though the worker is asymptomatic prior to injury. In *Vitaz* Basten JA stated:[20]

> "42. The appeal to the Appeal Panel did not expressly identify an erroneous failure to give reasons. Rather, the submissions on the appeal, which appear to set out the grounds of challenge, complained that there can be no deduction under s 323, as a matter of law, in the absence of a pre-existing physical impairment. It was further submitted, by reference to the opinion of three medical commentators in a local publication:

[18] MAC, paragraph 7.
[19] [2011] NSWCA 254.
[20] At [42]-[43], McColl JA and Handley AJA agreeing.

> ‘If a worker develops permanent pain and symptoms due to work consistent with spondylosis in the neck region, that condition might be assessed at DRE II. Although the spondylosis is likely to have been degenerative, if there were no symptoms in the period prior to the work-related complaint, then there was no rateable impairment at that time. So nothing would be subtracted from the current impairment.’
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> 43. That opinion contained a legal assumption which is inconsistent with the approach adopted by this Court in, for example, D'Aleo v Ambulance Service of New South Wales (NSWCA, 12 December 1996, unrep) (quoted by Giles JA, Mason P and Powell JA agreeing, in Matthew Hall Pty Ltd v Smart [2000] NSWCA 284; 21 NSWCCR 34 at [30]-[32] and, more recently, by Schmidt J in Cole v Wenaline Pty Ltd [2010] NSWSC 78 at [13]). 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.”

77. Basten JA referred to the reasoning of other Court of Appeal decisions including the decision in *Matthew Hall Pty Ltd v Smart*[21] (*Smart*). In *Smart* Giles JA stated:

> “The same, in my view, must be said as to the current s 68A(1). It does not matter that the pre-existing condition was asymptomatic, and if the loss is to some extent due to the pre-existing condition there must be deduction of the deductible proportion for that loss. But it is necessary that the pre-existing condition was a contributing factor causing the loss. And, of course, it is necessary that there was a pre-existing condition.”

78. In *Vannini v Worldwide Demolitions Pty Ltd*[22] (*Vannini*) Gleeson JA stated 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”.[23] In relation to the answer to this question, his Honour stated:[24]

> “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.”

79. 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”.

80. The appellant correctly submitted that the pre-existing condition must contribute to the impairment. We do not agree that there was “no evidence” that the pre-existing impairment contributed to the impairment.

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[21] [2000] NSWCA 284 at [32], Mason P and Powell JA agreeing.
[22] [2018] NSWCA 324 (*Vannini*) at [90].
[23] At [90].
[24] At [91].

81. The appellant did not refer to opinion expressed by Dr Machart that the appellant had underlying spinal canal stenosis that would "be expected to be symptomatic given the radiological features".

82. Dr Berry was qualified on behalf of the appellant and did not address this issue.

83. The appellant otherwise downplayed the extent of the pre-existing condition when he described these as "some degenerative changes demonstrated on the radiology". The AMS described the pre-existing degenerative changes as "extensive". The changes are not only extensive in their degree but extend over multiple levels. We agree with the opinion provided by the AMS on the extensive degenerative changes and reject the description adopted in the appellant's submissions.

84. The reason provided by the AMS must be read as a whole. In concluding that the pre-existing condition contributed to impairment the reasoning process included:[25]

    (a) the pre-existing condition was extensive;

    (b) the injury was by way of aggravation to these changes;

    (c) the injury by way of aggravation continues "to a limited extent".

85. We are satisfied that when the reasons are read as a whole, the AMS has explained why he was satisfied that the pre-existing condition contributed to the impairment particularly considering his conclusion that the effects of the injury only continued to a limited extent. That conclusion necessarily means that the pre-existing condition in mainly responsible for the present impairment. In these circumstances we are not required to reassess the lumbar spine.

86. We do not accept that the AMS has failed to provide adequate reasons as the reasons are sufficient to explain how the conclusion that a s 323 deduction was required: see *El Masri v Woolworths Ltd*.[26] The AMS, upon being satisfied that a deduction was required, then applied the statutory deduction under s 323(2) of the 1998 Act.

87. However, if we were required to reassess, the AP observes that it considers the minimal discount made by the AMS to be generous and favourable to the appellant. The finding by the AMS that the aggravation is ongoing to a "limited extent" suggests that a greater deduction was required. We would also add that the nature of the injury sustained by the appellant would not have caused any aggravation to the underlying pathology and that Dr Berry, who was qualified by the appellant, did not address this issue. The extensive multi-level lumbar spondylosis and canal stenosis at L4/5 provides the basis for a significant proportion of the appellant's ongoing symptoms and resultant impairment.

88. We finally observe that the observations in *Ryder* relied upon by the appellant appear to be inconsistent with the legal test enunciated by the Court of Appeal in *Vannini*.

89. The concept of "demonstrable error" was discussed by the Court of Appeal in *Vannini* where Gleeson JA observed that, consistent with the observations of Basten JA in *Mahenthirarasa v State Rail Authority of New South Wales*[27] a "demonstrable error must be apparent in findings of fact or reasoning contained in the medical assessment certificate, although the error may be established in part by reference to materials that were before the approved medical specialist".[28] We are not satisfied that a demonstrable error has been shown.

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[25] MAC, paragraph 7.
[26] [2014] NSWSC 1344.
[27] [2008] NSWCA 101.
[28] *Vannini* at [86].

90. For these reasons, the AP is satisfied that no demonstrable error or application of incorrect criteria is established. In those circumstances we are not required to reassess the appropriate s 323 deduction of the lumbar spine.

REASSESSMENT

91. Having found error, the AP is required to reassess according to law: *Drosd v Nominal Insurer.*[29]

92. The ground of appeal in relation to the lumbar spine is rejected. We confirm that aspect of the assessment.

93. The appellant's condition of the left lower extremity has deteriorated within the meaning of s 327(3)(a) as he has undergone a total left hip replacement.

94. The parties were asked to address the issue of whether maximum medical improvement has now been attained given the recency of the surgical procedure. In a supplementary submission the appellant submitted that he would not attain maximum medical improvement until "three to six months" following the surgery. The respondent accepted that MMI had not been attained at this time.

95. Normally the effects of this type of surgical procedure would stabilise over a nine to twelve-month period.

96. In these circumstances it is necessary to revoke that part of the MAC concerning the left lower extremity and state that the body part has not attained maximum medical improvement.

DECISION

97. The MAC is revoked in part, and a new Medical Assessment Certificate is issued. The new Medical Assessment Certificate is attached to the statement of reasons.

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

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar

[29] [2016] NSWSC 1053.

WORKERS COMPENSATION COMMISSION
APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter No: **4460/20**
Applicant: **Kevin Skinner-Smith**
Respondent: **Smoke Alarms Australia Pty Ltd**

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 Timothy Anderson dated 19 November 2020 and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in fourth edition guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA5**	**% WPI**	**WPI deductions pursuant to s 323 for pre-existing injury, condition or abnormality (expressed as a fraction)**	**Sub-total/s % WPI (after any deductions in column 6)**
Lumbar Spine	31.8.18	Paragraphs 4.27 and 4.36	Chapter 15, pages 384, Table 15-3	7%	1/10th	6%
Left lower extremity	31.8.18	Paragraph 1.15	Chapter 17, Table 17-33	Not MMI	N/A	Not MMI
Total % WPI (the Combined Table values of all sub-totals)					Not finalised	

John Harris
Arbitrator

Dr Margaret Gibson
Approved Medical Specialist

Dr Brian Noll
Approved Medical Specialist

25 February 2021

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

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar