# WORKERS COMPENSATION COMMISSION

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

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| **Matter Number:** | **M1-2055/18** |
| **Appellant:** | **2HD Broadcasters Pty Ltd** |
| **Respondent:** | **Christina Wright** |
| **Date of Decision:** | **22 August 2018** |
| **Citation:** | **[2018] NSWWCCMA 90** |

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| **Appeal Panel:** | |
| **Arbitrator:** | **Carolyn Rimmer** |
| **Approved Medical Specialist:** | **Dr Philippa Harvey-Sutton** |
| **Approved Medical Specialist:** | **Dr Sophia Lahz** |

### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 15 June 2018 2HD Broadcasters Pty Ltd lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by David Lewington, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 1 June 2018.

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 WorkCover Medical 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 WorkCover Medical 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).

### RELEVANT FACTUAL BACKGROUND

6. Ms Wright sustained an injury to her left shoulder, right shoulder, right hip and right knee in the course of her employment on 7 April 2016 when she fell on an incline.

7. As a result, she sustained injury to her left shoulder, her right shoulder, her right hip and her right knee.

8. Ms Wright commenced proceedings in this matter on 23 April 2018. She applied for assessment of the degree of permanent impairment (section 66, *Workers Compensation Act 1987*).

9. The matter was referred to the AMS, Dr Lewington, for assessment of whole person impairment (WPI) of the right upper extremity, left upper extremity and right lower extremity.

10. The AMS examined Ms Wright on 28 May 2018 and made an assessment of 4% WPI of the right upper extremity, 8% WPI of the left upper extremity and 11% WPI of the right lower extremity. This resulted in a total assessment of 21% WPI as a result of the injury on 7 April 2016.

**PRELIMINARY REVIEW**

11. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.

12. Neither party sought an opportunity to make oral submissions to the Panel. The Panel does not consider it would benefit by hearing oral submissions from the parties. The Panel shall therefore determine the Appeal without an Assessment Hearing.

13. The appellant did not request that the respondent worker be re-examined by an AMS, who is a member of the Panel.

14. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because there was sufficient evidence on which to make a determination.

**EVIDENCE**

**Documentary** evidence

15. 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.

**Medical Assessment Certificate**

16. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

**SUBMISSIONS**

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

18. The appellant's submissions include the following:

    - The assessment of the right foot was outside the scope of the claim for injury and was not a body part which was alleged to have been injured in these proceedings. The assessment of impairment of the right foot was a demonstrable error.

    - The Application to Resolve a Dispute (ARD) at Part 4 pleads the injury as "Right shoulder, left shoulder, right hip and right knee." There was no claim for impairment of the right foot, capable of assessment by the AMS.

    - The ARD did not contain any allegation of injury to the right foot.

- Although the referral identified “right lower extremity” without further parameters, the parameters of the referral must be limited to body parts which are the subject of a claim and identified in the initiating process (i.e. the ARD) before the Commission. The AMS has exceeded his jurisdiction by making a finding on a matter which was not before him for assessment. A determination on causation for a consequential condition must be made prior to the issue of impairment being referred to an AMS for determination.

- The AMS by assessing the impairment for the right foot determined causation for injury, not impairment, which is a matter beyond the exercise of his jurisdiction (*Bindah v Carter Holt Harvey Wood products Australia Pty* Ltd [2014] NSWCA 264).

- The appellant was denied the opportunity to respond to a claim for impairment of the right foot, or to address the issue of causation of such an injury, by the manner in which the assessment has been provided without any reference to the right foot in the claim or these proceedings until the MAC being issued. The appellant was denied procedural fairness by the failure of the right foot to be claimed and pleaded prior to the AMS findings on the matter.

- The assessment of impairment for the right foot should be deleted from the MAC, and the overall assessment of impairment adjusted accordingly.

- The failure by the AMS to make a deduction for pre-existing abnormality or condition in respect of the right knee was a demonstrable error.

- There was evidence of pre-existing right knee complains and abnormality due to surgical interventions. The AMS did not specifically identify the surgical history of procedures to the right knee by Dr Mitchell, although this history was set out in the documents before him and illustrated a history of right knee medial and lateral meniscus partial meniscectomy. The failure by the AMS to identify the prior surgical history was a demonstrable error, which has led to an error on the face of the MAC due to a deduction under section 323 of the 1998 Act not being given.

- At Part 4 under “Previous or subsequent accident’s injuries or condition” the AMS recorded Ms Wright as having an arthroscopy of the right knee in 2011 ‘with no further symptoms thereafter’. The AMS did not record the nature of the arthroscopy, or the pathology identified by the surgeon. Further, the history accepted of “no further symptoms thereafter” was inconsistent with the clinical notes of Dr Khan. The AMS failed to provide proper reasons, address relevant documents before him, and take an adequate history of the worker’s multiple right knee surgical interventions. The failure to address the evidence of pre-existing right knee pathology and surgery was a demonstrable error.

- Taking into account the reports of Dr Mitchell concerning the prior surgery partial, excision of the medial and lateral meniscus, the appropriate deduction is not “difficult or costly to determine” and should not attract a 1/10$^{th}$ deduction. The deduction can be calculated with specific reference to the evidence.

- The pre-existing impairment of the right knee can be assessed in accordance with Table 17-33 at page 546 of AMA 5 Guides, and results in 4% WPI (medial and lateral meniscectomy – partial). The cause of the 4% WPI is the previous surgery to the right knee, and it may be deducted from the overall assessment of impairment pursuant to section 323 of the 1998 Act. The injury on 7 April 2016 did not cause any increase in the assessable pre-existing pathology. There is no objective evidence that the compensable injury on 7 April 2016 has caused any increase to the degree of permanent impairment; per *Ryder v Sundance*

*Bakehouse* [2015] NSWSC 526. The appellant submits that following a deduction pursuant to section 323 of the 1998 Act of 4% WPI, the right knee should therefore be assessed for 0% WPI in relation to the incident on 7 April 2016.

- The failure by the AMS to make a deduction for pre-existing abnormality or condition in respect of the right shoulder was a demonstrable error.

- There is evidence of pre-existing degenerative changes and abnormality of the right shoulder.

- The AMS did not refer to the evidence above which was in the documents before him and which illustrated a history of right shoulder symptoms and pathology. At Part 4 of the MAC under 'Previous or subsequent accident's injuries or condition', the AMS did not refer to right shoulder complaints being present from 2011, and acute flare ups of right shoulder impingement which were noted by Dr Posel.

- The AMS failed to provide proper reasons, address relevant documents before him, and take an adequate history of the worker's pre-existing right shoulder condition. This failure to address the evidence of pre-existing right shoulder condition and abnormality was a demonstrable error on the face of the MAC.

- The amount of the deductible proportion is difficult to calculate for the right shoulder, as there is no definitive evidence of range of motion in the shoulder prior to the injury on 7 April 2016. However, a deduction of 1/10$^{th}$ would be at odds with the available evidence, which confirms acute chronic right shoulder pain and a full rotator cuff tear prior to the incident of injury. An appropriate deductible proportion for the right shoulder is 75% of the assessment of 4% WPI, which equates a deduction of 3% WPI, and a compensable impairment of 1% WPI for the right shoulder.

- The following amendments should be made to the assessments of impairment, based on the appeal submissions;

  Right lower extremity (knee) – 0% WPI
  Right lower extremity (foot) – deleted from MAC
  Right lower extremity (hip) – 6% WPI
  Left upper extremity (shoulder) – 8% WPI
  Right upper extremity (shoulder) – 1% WPI

- The the MAC should be revoked, and a new MAC be issued based on the calculations above (8%, 6%, 1% - combined for 15%) for 15% WPI.

19. In reply, the respondent's submissions include the following:

- The parties were notified on 15 May 2018 that the medical dispute was referred for assessment of the right foot pursuant section 319 of the 1998 Act.

- In the ARD at Part 5.6 the respondent worker pleaded an impairment affecting the "right upper extremity, left upper extremity, right lower extremity".

- The Referral from the Commission did not limit the body parts referred which were described in Whole Person Impairment terminology as the "right upper extremity, left upper extremity and right lower extremity".

- Parties were given the opportunity to object to the Referral and no objection was raised by the appellant to the particulars of that Referral. Specifically, no request

was made that the assessment of the "right lower extremity" be confined to an assessment of the right knee only.

- The AMS was not confined to assessment of only the right knee and was entitled to assess any Body Part / System Claimed, which were included in the referral.
- It was open to the AMS pursuant to s 319 of the 1998 Act to determine questions of causation "as a result of an injury". Injury means the injurious incident dated 7 April 2016, as pleaded in Part 4 of the ARD.

- Dr Machart, whose report was attached to the claim made on 9 November 2007 referred to symptoms radiating from the hip to the peroneal region of the right leg, below the knee, and described generally the respondent walking with a distinct limp.

- In respect of the right knee, Dr Machart, in a report dated 28 August 2017, considered the past history of knee injury or abnormality. He inferred from the pathology (although he acknowledges that it has been asymptomatic for five years) that it has nevertheless contributed to the current impairment and accordingly provides a 1/10$^{th}$ deduction pursuant to s 323 (2), on the basis that the condition was too difficult or costly to determine.

- Dr Powell, in his report dated 1 August 2016 specifically referred to Ms Wright's medical history as including "bilateral knee arthroscopies" but in the light of this history, provided no opinion concerning impairment affecting the right knee.

- In the absence of specific complaints of impairment caused by any right knee problem before the relevant injury in 2016, some five years after the last treatment to the right knee it is not appropriate to attempt an impairment calculation in the manner suggested by the appellant. The reference made by the respondent to the Table in AMA5 at page 546 describes "medial and lateral" partial meniscectomy, whereas the only evidence available describes debridement of the relevant parts.

- If it is determined that the prior knee condition contributed to impairment at all, before the injury under consideration here, that assessment should reflect the difficulty in clarifying the precise pathology and impairment of function (if any) by implementing the assumption provided for in s 323(2).

- The AMS specifically referred to a history of right knee problems that culminated in 2011 with a "painful catching" and he acknowledged (contrary to the appellant's submission at paragraph 13 of the Appeal Submissions) that Ms Wright had been treated arthroscopically with "no further problems thereafter". The AMS considered at p 12 of the MAC the opinions of both Dr Machart and Dr Powell and provided the following reasons for his own assessment:

> "There is history right knee pain that predated the subject injury with painful catching in 2011. This was of spontaneous onset ... was treated and investigated with arthroscopy and with no further symptoms thereafter making a full recovery. There is no evidence on imaging investigation to confirm a pre-existing condition prior to the subject injury and no subsequent imaging of the right knee since the subject injury. There is no available information on the findings of the arthroscopy to establish exactly what went on. The evidence is therefore lacking to establish a pre-existing condition and the history suggests that the episode in 2011 was of no consequence or contribution to the current impairment."

- The AMS correctly understood what was required on assessment in this case and has not fallen into error.

- In relation to the right shoulder the AMS in his MAC at p 11 commented that Dr Powell has not offered an impairment rating for the shoulder (or the knee). The appellant's independent medical examiner had not considered whether a deductible proportion should be assessed for this body part. The appellant bears the onus of establishing that MAC contains a demonstrable error.

- There was no evidence that the examination by the AMS was in any way materially defective and the respondent submits that the AMS's examination amounts to a proper medical examination revealing no pre-existing contribution to impairment at the right shoulder. There was no evidence to the contrary and an Appeal Panel would be satisfied that the AMS's examination revealed no error.

- The MAC of the AMS should be confirmed.

**FINDINGS AND REASONS**

20. 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.

21. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 (*Siddik*). The Court held that while prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gateway, it can consider other grounds capable of coming within one or other of the s 327(3) heads, if it gives the parties an opportunity to be heard. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation.

22. Section 327(2) was amended with the effect that while the appeal was to be by way of review, all appeals as at 1 February 2011 were limited to the ground(s) upon which the appeal was made. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 Davies J considered that the form of the words used in s 328(2) of the 1998 Act being, 'the grounds of appeal on which the appeal is made' was intended to mean that the appeal is confined to those particular demonstrable errors identified by a party in its submissions.

23. 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.

24. In this matter, the Registrar has determined that he is satisfied that at least one of the grounds of appeal under s 327(3)(d) is made out, in relation to the assessment made by the AMS of Ms Wright's right lower extremity.

25. The Panel reviewed the history recorded by the AMS, his findings on examination, and the reasons for his conclusions as well as the evidence referred to above.

**Assessment of the right foot**

26. The appellant submitted that the assessment of the right foot was outside the scope of the claim for injury and was not a body part that was alleged to have been injured in these

proceedings. The appellant argued that the assessment of impairment of the right foot was a demonstrable error.

27. Under "Present symptoms", the AMS noted: "There is discomfort to the right foot sole or heel region which she stated was originally very painful then qualified as being 'fixed up fairly well' but with residual discomfort." On examination, the AMS noted: "Ankle and foot movements were normal. There was tenderness over the right heel plantar spur."

28. Under "Reasons for assessment" the AMS wrote:

> "In the right foot, there is tenderness over the heel associated with a calcaneal spur on x-ray consistent with plantar fasciitis. According to the W.C.C Guides 4th Edition, Paragraph 3.28 and Page 20, Plantar Fasciitis attracts 2% L.E.I and 1% W.P.I.
>
> It is noted that neither Dr Machart nor Dr Powell offers impairment for the right foot. However, the A.M.S brief is for assessment of impairment of the whole right lower limb (joints not specified). It would appear Dr Machart and Dr Powell did not have access to X-Rays of the right foot 15 June 2016. The condition is not pre-existing, coming on since the subject injury in relation to limping, and therefore has no deductible proportion."

29. It is clear that the AMS determined that the plantar fasciitis was a consequential condition as a result of the accepted right hip and knee injury. However, this injury to the right foot was not an injury that was pleaded in the ARD nor an injury that was part of the WPI claim made by Ms Wright based on the assessment of Dr Machart. Issues of liability are a matter for a Commission Arbitrator and not an AMS: s 321(4) of the 1998 Act.

30. The question of the respective roles of the Commission and an AMS were discussed in a number of recent decisions of the Court of Appeal including *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine* [2016] NSWCA 213 (*Hine*) and *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd* [2014] NSWCA 264 (*Bindah*). In *Jaffarie v Quality Castings Pty* Ltd [2018] NSWCA 88 *(Jaffarie No 2),* White J stated*:*

> "What was said by Emmett JA at [109], quoted above at [70], must be understood in the context of the issues before the court in *Bindah*. I do not understand his Honour to mean that anything which falls within the definition of 'medical dispute' in s 319 will necessarily be outside the jurisdiction of an arbitrator.
>
> Under s 105(1) of the WIM Act the Commission has exclusive jurisdiction to examine, hear and determine all matters arising under the WIM Act and the *Workers Compensation Act*. This is subject to specific exclusions contained in both the WIM Act and the *Workers Compensation Act*. The specific exclusion in s 65(3) of the *Workers Compensation Act* does not extend to any medical dispute within the meaning of s 319 of the WIM Act, but only to a subset of such disputes, being a dispute about the degree of permanent impairment of an injured worker. Even a medical dispute concerning permanent impairment of an injured worker cannot be referred for assessment under Pt 7 of Ch 7, except by the Registrar and then where liability is not in issue, or, if in issue, liability has been determined by the Commission (ss 293(3)(a) and 321(4)(a)). The medical assessment is conclusive only in respect of the matters referred to in s 326 which are not as extensive as the matters falling within the definition of medical dispute in s 319."

31. His Honour confirmed the proposition that the jurisdiction of the Commission, as opposed to that of the AMS, is to determine "the nature of the injury sustained" and noted that this was consistent with the orders of the earlier decision of the Court of Appeal in *Jaffarie v Quality Casting Pty Ltd* [2015] NSWCA 335. This reasoning is otherwise consistent with the approach taken by the Court of Appeal in *State of New South Wales v Bishop* [2014]

NSWCA 354 where it was held that the determination of a consequential condition was a matter for a Commission Arbitrator.

32. In *Tomislav & Ranka Divliak (trading as DTR Ceilings) v Workers Compensation Commission & Ors* [2018] NSWSC 760, Latham J quashed the decision of the Appeal Panel. The proceedings concerned a discrete point regarding the assessment of the lower digestive system. The worker claimed impairment of the upper and lower digestive systems as a consequence of a physical injury to his spine. The matter was referred to an AMS, who assessed 2% for the upper digestive system and nil for colorectal disorder under tables 6.3 and 6.4 of AMA 5. The AMS included an assessment of the anus (haemorrhoids) of 1% WPI under Table 6.5. The appellant employer appealed against that assessment, essentially on the basis that no claim had been made, nor was there a dispute, relating to the assessment of the anus (see [13] for a full outline). The Panel rejected the appeal. The Court held that the dispute that was referred to the AMS was the assessment of the colon and rectum under Table 6.4, not the anus under Table 6.5 and that the employer would be subject to a "practical injustice" on the basis of an assessment on which it had no notice, no opportunity to address and no opportunity to provide medical evidence (at [28]).

33. In this matter, the AMS did not have power to determine the issue raised by the appellant, that is, whether the right foot condition was consequential to the right hip and right knee injury. This is a liability issue which must be determined by an Arbitrator or otherwise accepted by the employer and then referred to the AMS to assess permanent impairment as a result of injury.

34. Therefore, for the reasons stated above, the AMS erred in his assessment of the right foot.

**Section 323 Deduction – right knee**

35. The AMS in the MAC under "previous or subsequent accidents, injury or conditions" noted that "Right knee painful catching 2011 and apparently changes on x-ray. This was treated or investigated with arthroscopy and with no further symptoms thereafter".

36. The AMS under "Deduction (if any) for the proportion of the impairment that is due to previous injury or pre-existing condition or abnormality" wrote:

> "There is no evidence of a pre-existing condition that contributes to the current impairment or as a consequence to the current impairment. In this regard, I agree with Dr Powell.
>
> I note Dr Machart has applied 1/10th deduction for the right knee. There is a history of right knee pain that predated the subject injury with painful catching in 2011. This was of spontaneous onset. This was treated or investigated with arthroscopy and with no further symptoms thereafter making a full recovery. There is no evidence on imaging investigation to confirm a pre-existing condition prior to the subject injury and no subsequent imaging of the right knee since the subject injury. There is no available information on the findings of the arthroscopy to establish exactly what went on. The evidence is therefore lacking to establish a pre-existing condition and the clinical history suggests that the episode in 2011 was of no consequence or contribution to the current impairment."

37. The appellant submitted that the failure by the AMS to make a deduction for pre-existing abnormality or condition in respect of the right knee was a demonstrable error. The appellant referred to evidence of pre-existing right knee complaints and abnormality due to surgical interventions including various reports of the treating orthopaedic surgeon, Dr Mitchell.

38. The Panel noted that the AMS did not refer to any of the reports of Dr Mitchell.

39. The Panel reviewed the evidence in this matter.

40. Dr Mitchell, in his report dated 21 August 2007, noted that Ms Wright had injured her right knee seven weeks ago and had quite a significant valgus strain to the knee. He expressed the view that she had a large bucket handle tear of the medial meniscus.

41. In his report dated 21 September 2007, Dr Mitchell stated that he had performed an arthroscopy of both knees that same day and wrote: "On the right side we again found an intact patella-femoral articulation again with a defect in the articular cartilage and the medial femoral condyle which was debrided. The medial meniscus showed the tear that was noted on the MRI and this was debrided."

42. Dr Mitchell in a report dated 23 April 2010, stated in relation to arthroscopy to both knees performed on the same day: "In the right knee there were Grade II changes in all compartments. The medial meniscus was intact but the lateral meniscus was significantly torn and again debrided."

43. In the clinical notes of Dr Khan, general practitioner, reference was made to imaging of the right knee on 9 July 2007 and an ultrasound of the right knee on 25 August 2007.

44. On 2 November 2010 Dr Lyford referred to an injury to the knee as a junior athlete and a previous injury in 2008 when Ms Wright slipped on the farm. He noted that both knees were operated on in 2008 and there was recurrent pain in both knees and instability despite the arthroscopies.

45. On 18 February 2011, Dr Thompson referred to a right knee injury and noted that Ms Wright was in and out of her car all day at work and had stood and the right knee collapsed and became extremely painful. He reported that she had pre-existing osteoarthritis in both knees.

46. There was no doubt that Ms Wright had a pre-existing condition, namely, osteoarthritis, in her right knee and had undergone arthroscopies on that knee on 21 September 2007 and then on 23 April 2010.

47. The AMS was incorrect in recording that Ms Wright had only undergone one arthroscopic procedure. The AMS failed to refer to the reports of Dr Mitchell written in 2007 and 2010 and, in particular, his findings on performing the arthroscopies on 21 September 2007 and then on 23 April 2010. The Panel considered that such a failure to look at the reports concerning the prior right knee history and take a history in sufficient detail was a demonstrable error.

48. In *Cole v Wenaline Pty Ltd* [2010] NSW SC 78 (*Cole*), Schmidt J said:

> "29. …The section is directed to a situation where there is a pre-existing injury, pre-existing condition or abnormality. For a deduction to be made from what has been assessed to have been the level of impairment which resulted from the later injury in question, a conclusion is required, on the evidence, that the pre- existing injury, pre-existing condition or abnormality caused or contributed to that impairment.
>
> 30. 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. The extent that the later impairment was due to the earlier injury, pre-existing condition or abnormality must be determined. The only exception is that provided for in s 323(2), where the required deduction 'will be difficult or costly to determine (because, for example, of the absence of medical evidence)'. In that case, an assumption is provided for, namely that the deduction 'is 10% of the impairment'. Even then, that assumption is displaced, if it is at odds with the available evidence.

31. … That is a matter of fact to be assessed on the evidence led in each case".

49. The assessor must point to the actual consequences of the pre-existing condition or abnormality on the assessed impairment, and how it contributes to that assessment. In *Vitaz v Westform (NSW) Pty Limited and Ors* [2010] NSWSC 667, Johnson J said at [48]: "...it is insufficient to assume that the existence of a pre-existing injury or condition will always contribute to the impairment flowing from any subsequent injury: *Cole v Wenaline Pty Limited* at [30]."

50. The Panel accepted that s 323 of the 1998 Act requires that a deduction be made "for any proportion of the impairment that is due to any previous injury or that is due to any pre-existing condition or abnormality."

51. The Panel was satisfied after considering the reports of Dr Mitchel and the clinical notes of Dr Khan, Dr Lyford and Dr Thompson that Ms Wright had prior injuries and a pre-existing condition in the right knee. The reports by Dr Mitchell following the arthroscopies in September 2007 and April 2010 demonstrated that Ms Wright had osteoarthritis in all compartments of the knee. Osteoarthritis is a progressive condition. The Panel was satisfied that the osteoarthritic condition was present for a significant period before the injury on 7 April 2016 and that the condition contributed to the impairment being assessed. Taking into account the reports of Dr Mitchell and the extent of the degenerative change, the Panel considered that a 50% deduction should be made pursuant to s 323 of the 1998 Act. The Panel was of the view that a deduction of 10% would be at odds with the evidence.

52. The Panel noted that the Guidelines at paragraph 3.6 provide:

> "When the Combined Values Chart is used, the assessor must ensure that all values combined are in the same category of impairment rating (ie percentage of WPI, percentage of lower extremity impairment, foot impairment percentage, and so on). Regional impairments of the same limb (eg several lower extremity impairments) should be combined before converting to a percentage of whole person impairment (WPI)."

53. The AMS assessed 10 % LEI and after applying a deduction of 50% this resulted in 5% LEI for the right knee. The assessment in respect of the right knee, namely 5% LEI was then combined with the assessment of 15% LEI for the right hip and this produced 19% LEI which equalled 8% WPI.

**Section 323 Deduction – right shoulder**

54. The AMS in the MAC under "previous or subsequent accidents, injury or conditions" made no reference to the right shoulder.

55. The appellant submitted that the failure by the AMS to make a deduction for pre-existing abnormality or condition in respect of the right shoulder was a demonstrable error. The appellant referred to evidence of pre-existing degenerative changes and abnormality of the right shoulder, in particular, the reports of Dr Posel, treating orthopaedic surgeon

56. The Panel noted that the AMS did not refer to any of the reports of Dr Posel, apart from his report of 28 June 2016.

57. The Panel reviewed the evidence in this matter.

58. Dr Posel, in a report dated 30 August 2011, noted that he had provided a steroid injection to the right shoulder on the same day and wrote:

> "Christina has acute right shoulder supraspinatus tendonitis and impingement syndrome … An ultrasound of her right shoulder performed on 22 August 2011, identified extensive calcification of the rotator cuff. A rotator cuff tear was thought to be present...."

59. In a report dated 11 October 2011, Dr Posel noted good resolution of shoulder discomfort following the steroid injection to the right shoulder, but that:

> "... given the presence of calcification within the rotator cuff, it is highly likely she will develop a further acute flare up... I have counselled her to consider such surgery [arthroscopic acromioplasty and curettage of calcium from the rotator cuff] in the not too distant future."

60. An x-ray and ultrasound of the worker's right shoulder dated 19 November 2014, revealed the following right shoulder pathology: "moderate full-thickness tear of the anterior/ supraspinatus tendon, increased in size from a previous study of 10/9/2013".

61. The clinical notes of Dr Thompson dated 24 August 2011 referred to a right supraspinatus full thickness tear. On 7 September 2011, Dr Thompson noted that Ms Wright had been seen by Dr Posel and had a spur which had worn through the tendon and would need surgery.

62. The AMS did not refer to the evidence above concerning a history of right shoulder symptoms and pathology. The Panel was of the view that the failure to take a full history and to consider and refer to the reports and clinical notes concerning the right shoulder condition and predating the injury on 7 April 2016 was a demonstrable error.

63. The Panel considered the evidence in this matter. The Panel was satisfied after considering the reports of Dr Posel and the clinical notes of Dr Thompson that Ms Wright had a pre-existing condition in the right shoulder. The reports of Dr Posel and imaging studies of 19 November 2014 demonstrated that Ms Wright had moderate full-thickness tear of the anterior/ supraspinatus tendon and osteophyte or calcification within the rotator cuff. The Panel was satisfied that the full-thickness tear of the anterior/supraspinatus tendon and calcification within the rotator cuff contributed to the impairment being assessed. Taking into account the reports of Dr Posel and the extent of the full-thickness tear of the anterior/ supraspinatus tendon, the Panel considered that a 25% deduction should be made pursuant to s 323 of the 1998 Act. The Panel was of the view that a deduction of 10% would be at odds with the evidence.

64. The AMS assessed 4% WPI in respect of the right shoulder and after applying a deduction of 25% this resulted in 3% WPI for the right shoulder.

65. The total WPI was therefore 8% in respect of the right lower extremity, 8% in respect of the left upper extremity and 3% in respect of the right upper extremity. Combining those figures resulted in a total of 18% WPI

66. For these reasons, the Appeal Panel has determined that the MAC issued on 1 June 2018 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

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*.

**Glicerio de Paz**
**Dispute Services Officer**
**As Delegate of the Registrar**

# WORKERS COMPENSATION COMMISSION

## APPEAL PANEL
## MEDICAL ASSESSMENT CERTIFICATE

**Injuries received after 1 January 2002**

**Matter Number:** **M1-2055/2018**
**Applicant:** **Christina Wright**
**Respondent:** **2HD Broadcasters Pty Ltd**

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

The Appeal Panel revokes the Medical Assessment Certificate of Dr Lewington and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

**Table - Whole Person Impairment (WPI)**

| Body Part or system | Date of Injury | Chapter, page and paragraph number in WorkCover Guides | Chapter, page, paragraph, figure and table numbers in AMA5 Guides | % WPI | Proportion of permanent impairment due to pre-existing injury, abnormality or condition | Sub-total/s % WPI (after any deductions in column 6) |
|---|---|---|---|---|---|---|
| **1. Right Upper Extremity** | 07/04/16 | Conditions Affecting Shoulder: Chapter 2, Page 11, Paragraphs 2.14-2.16.<br><br>Motion Impairment: Page 12, Paragraph 2.20 and Page 10, Paragraph 2.5. | Shoulder Motion Impairment– Chapter 16:<br><br>Flex-Ext - Page 476, Figure 16-40.<br><br>Abd-Add - Page 477, Figure 16-43.<br><br>I-E Rot – Page 479, Figure 16-46. | 4% | 25% | **3%** |

| | | | | | | |
|---|---|---|---|---|---|---|
| **2. Left Upper Extremity** | 07/04/16 | Conditions Affecting shoulder: Chapter 2, Page 11, Paragraphs 2.14-2.16.<br><br>Motion Impairment: Page 12, Paragraph 2.20 and Page 10, Paragraph 2.5. | Shoulder Motion Impairment- Chapter 16:<br><br>Flex-Ext - Page 476, Figure 16-40.<br><br>Abd-Add - Page 477, Figure 16-43.<br><br>I-E Rot – Page 479, Figure 16-46. | 8% | 0% | **8%** |
| **3. Right Lower Extremity** | 07/04/16 | Knee Motion Impairment: Chapter 3, Page 15, Paragraphs 3.16 and 3.17. | Knee Motion Impairment: Chapter 17, Page 537, Table 17–10.<br><br>Chronic Trochanteric Bursitis: Chapter 17, Page 546, Table 17–33.<br><br>Hip Motion Impairment: Chapter 17, Page 537, Table 17 – 9. | 11% | 50% in respect of the right knee only<br><br>0% for the right hip | **8%** |
| **Total % WPI (the Combined Table values of all sub-totals)** | | | | | **18%** | |

The above assessment is made in accordance with the *Guidelines for the Evaluation of Permanent Impairment* for injuries received after 1 January 2002

**Carolyn Rimmer**
Arbitrator

**Dr Philippa Harvey-Sutton**
Approved Medical Specialist

**Dr Sophia Lahz**
Approved Medical Specialist

22 August 2018

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

**Glicerio de Paz**
**Dispute Services Officer**
**As Delegate of the Registrar8**