

RECENT DECISIONS

To assume or not to assume – WCC says do neither

Naylor v A Noble & Son Limited [2019] NSWWCMA 144 (11 October 2019)

[Link to decision](#)

Summary

The respondent worker injured both of his knees while undertaking employment with the appellant, which resulted in a number of surgical procedures.

The respondent had also previously injured his left knee as a teenager and had required surgery at that time. Furthermore, the respondent had a pre-existing degenerative condition in both knees.

The Approved Medical Specialist (“AMS”) assessed the respondent for whole person impairment (“WPI”) but failed to make a deduction for the prior injury or pre-existing condition.

The Medical Assessment Certificate (“MAC”) was appealed and the Medical Appeal Panel (“MAP”) determined that the assessment of a deductible must be based on the available evidence.

The MAP noted that it was incorrect to assume that a deductible portion applied on the basis that a prior injury or pre-existing condition was present. Similarly, it was incorrect to assume that a prior injury or pre-existing condition that was asymptomatic did not give rise to a deductible portion.

Background

The respondent suffered an injury to both knees on 19 October 2012 when he tripped over a pallet while working for the respondent. As a result, he underwent a number of surgical procedures:

- 2013 to 2014 – three arthroscopies
- 2016 – right total knee replacement
- 2017 – revision surgery to right knee
- 2018 – left knee replacement

The respondent served a claim for lump sum compensation as there was a dispute regarding the extent of any WPI. The Workers Compensation Commission (“WCC”) subsequently referred the matter to an AMS for determination.

A MAC was issued, dated 25 June 2019, which noted:

Mr Naylor states that just prior to a fall at work on 19.10.2012 he was not experiencing any discomfort in either the right or left knee. . . During each surgery it was revealed there were arthroscopic findings of Grade II degenerative changes on the medial joint with small tears involving menisci. Further arthroscopic surgery to the right knee showed evidence of a loose body in the intercondylar notch and extensive Grade II and Grade III changes in the trochlear notch...

The AMS also noted that the respondent had injured his left knee as a teenager and had undergone two arthroscopies at that time.

Importantly, the AMS assessed the respondent with a total of 44% WPI in relation to both knees and made no deduction for any previous injury or pre-existing condition.

The appellant subsequently appealed the MAC and the matter was referred to a MAP. It was submitted that the MAC contained a demonstrable error as the AMS had erred by not concluding that a portion of the respondent's permanent impairment was due to a previous injury or pre-existing condition. Specifically, the appellant stated that the AMS had failed to provide a reason as to why he did not consider that there was any deductible and noted that both Independent Medical Examiners had previously assessed deductible portions.

The respondent worker's submissions outlined that the AMS was not required to accept other specialists' assessments and that his assessment was based on a correct medical history.

Decision

The MAP firstly considered section 323(1) of the *Workplace Injury Management and Workers Compensation Act 1998* and the requirements surrounding the assessment of a deductible portion. They outlined the following process as determined in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 and *Ryder v Sundance Bakehouse* [2015] NSWSC526:

1. The level of the worker's permanent impairment must first be determined at the time of the assessment;
2. A prior injury or pre-existing condition must be identified;
3. It must be determined whether a proportion of the worker's post-injury impairment is due to the prior injury or pre-existing condition;
4. The extent to which the worker's post-injury impairment is due to the prior injury or pre-existing condition must be determined.

Importantly, the MAP indicated that steps three and four cannot be determined on the basis of assumption or hypothesis. They stated that:

...it cannot be assumed from the fact that a worker has a pre-existing condition or has had a previous injury that a proportion of the worker's impairment is due to that pre-existing condition or prior injury. Similarly, a pre-existing condition that is asymptomatic at the time a worker suffers injury may still contribute to an impairment a worker has from an injury, and so it cannot be assumed from the fact that the pre-existing condition is asymptomatic that it does not contribute to the worker's impairment from the injury.

It was held that the key element to the determination of a deductible portion was whether the worker's prior injury or pre-existing condition made a difference to the worker's present impairment. If it did make a difference, then a deduction must be made.

Based on the evidence in this matter, the MAP found that the respondent's pre-existing degenerative condition in his knees contributed to the impairment that the respondent had. Accordingly, the MAC was revoked and the MAP determined a new assessment of 34% WPI.

Implications

This determination reiterates that the presence of a prior injury or pre-existing condition does not necessarily give rise to a deductible portion for the purposes of a permanent impairment assessment.

Similarly, just because a prior injury or pre-existing condition is asymptomatic, does not mean that a deductible portion should not apply.

The WCC has confirmed that the assessment of a deductible portion must be based on the available evidence as to whether the prior injury or pre-existing condition contributes to the present day permanent impairment. If it does, then a deductible must apply.

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