

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-1180/19
Appellant:	Michael Leslie Mavin
Respondent:	Tomago Aluminium Co Pty Ltd
Date of Decision:	7 August 2019
Citation:	[2019] NSWCCMA 107

Appeal Panel:	
Arbitrator:	Mr William Dalley
Approved Medical Specialist:	Dr Phillipa Harvey-Sutton
Approved Medical Specialist:	Dr Drew Dixon

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 13 June 2019, Michael Leslie Mavin (Mr Mavin/the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tim Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 21 May 2019.
2. The appellant relies on the ground of appeal under s 327(3)(d) 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, the ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground 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. Mr Mavin injured his left shoulder on 12 March 2014 when he fell in the course of his employment with the respondent, Tomago Aluminium Co Pty Ltd (the subject injury). He was initially diagnosed as having adhesive capsulitis. Conservative treatment did not assist and Mr Mavin underwent arthroscopic repair of the left shoulder in October 2014. Further surgery was undertaken in July 2015 but Mr Mavin continued to experience symptoms in the left shoulder.

7. By September 2014, Mr Mavin was reporting painful symptoms in the right shoulder. He was examined by Professor Ghabrial, orthopaedic surgeon, at the request of Mr Mavin's solicitors on 3 October 2018 in order to assess impairment for the purposes of a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act).. Professor Ghabrial assessed 8% whole person impairment (WPI) in respect of the cervical spine, 12% WPI in respect of the left shoulder, 11% WPI in respect of the right shoulder and 1% TEMSKI in respect of scarring on the left shoulder. Professor Ghabrial had examined and assessed Mr Mavin on two earlier occasions.
8. Mr Mavin's solicitors made a claim in accordance with Professor Ghabrial's assessment alleging "injury to the left shoulder and consequential injury to the right shoulder". That claim was subsequently amended to add an allegation of injury to the cervical spine and to specify the inclusion of scarring.
9. Mr Mavin was examined by Dr Paul Robinson, orthopaedic surgeon, in March 2019 at the request of the insurer for assessment of impairment. With respect to the symptoms in the right shoulder Dr Robinson reported;

"I believe that there was no initial injury to account for this pain in his right shoulder and pathology, which is now present. This would thus appear to be a constitutional problem, perhaps exacerbated by the usage because of the problems of his left shoulder but not actually caused by the injury."
10. Dr Robinson assessed 9% WPI in respect of the left shoulder injury. He assessed 16% upper extremity impairment in respect of the right shoulder but noted that, in his opinion, "any impairment related to the right shoulder is not a result of his workplace injury in March 2014." In a subsequent report he confirmed that "the right shoulder is as mentioned not related to the workplace injury."
11. The insurer disputed that Mr Mavin had suffered impairment of more than 10% WPI as a result of the subject injury. An Application to Resolve a Dispute was filed in the Commission by Mr Mavin's solicitors, seeking an award pursuant to s 66 of the 1987 Act in accordance with Professor Ghabrial's assessment. The respondent filed a Reply noting that the respondent disputed that the applicant suffered a consequential injury to the right upper extremity as well as disputing the extent of impairment.
12. The dispute was referred to an AMS, Dr Tim Anderson, who examined Mr Mavin on 11 April 2019. The respondent alerted the Commission to the dispute relating to the consequential condition in the right arm and the AMS was requested to withhold the MAC pending resolution of the dispute as to whether Mr Mavin suffered a consequential condition in the left shoulder as a result of the subject injury to the left shoulder.
13. The dispute was heard by a Commission Arbitrator who delivered an oral decision on 20 May 2019. The Arbitrator determined:
 1. Leave granted to the respondent pursuant to section 289A (4) of the *Workplace Injury Management and Workers Compensation Act 1998* to put in issue the previously notified issue that the applicant does not suffer with a consequential condition of his right upper extremity (shoulder) resulting from injury to his left upper extremity (shoulder) and cervical spine arising out of or in the course of employment on 12 March 2014.

2. The applicant suffers with a consequential condition of his right upper extremity (shoulder) resulting from injury to his left upper extremity (shoulder) and cervical spine as a result of injury arising out of or in the course of employment with the respondent on 12 March 2014.
 3. Matter remitted to the Registrar for the purpose of issuing or publishing the Medical Assessment Certificate of the Approved Medical Specialist who assessed permanent impairment of the applicant's left upper extremity (shoulder), cervical spine and right upper extremity (shoulder) as a result of injury on 12 March 2014."
14. The Commission informed the AMS of that determination and the AMS issued the MAC which is the subject of this appeal on 21 May 2019.

PRELIMINARY REVIEW

15. 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.
16. 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 is sufficient information available to permit the Panel to assess the appellant.

EVIDENCE

Documentary evidence

17. 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

18. 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

19. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.
20. In summary, the appellant submits that the AMS fell into error in concluding that he could not be satisfied that; "the dysfunction of the right arm can reasonably be attributed as an overuse condition as a consequence of injury to the left shoulder" and, consequently, attributing no impairment with respect to the consequential condition resulting from the subject injury.
21. The appellant further submitted that the AMS had fallen into error in not having provided reasons for assessing scarring as 0% WPI rather than 1% WPI.
22. In reply, the respondent submits that the matter was one to be decided by the Panel (it being understood that this would be based on review of the MAC and the material in evidence).

FINDINGS AND REASONS

23. 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.
24. 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.
25. The appellant in his submissions drew attention to the reasoning of the Arbitrator in arriving at the conclusion that Mr Mavin suffered a consequential condition in the right shoulder as a result of injury to the left shoulder. Those reasons were delivered orally and do not appear to have formed part of the material supplied to the AMS. A submission based upon material that was not in evidence before the AMS cannot support a finding of demonstrable error.
26. In *Merza v Registrar of the Workers Compensation Commission and Another*¹, Hoeben J said:
 - “39. I do not propose to, nor is it necessary, that I define what is ‘demonstrable error’ for the purposes of s327 of the Act in an exhaustive way. It is sufficient for the purposes of this matter that I conclude that ‘demonstrable error’ is an error which is readily apparent from an examination of the medical assessment certificate and the document referring the matter to the AMS for assessment.”
27. That statement was approved by the Court of Appeal (Mason P, McCall JA and Bell J) in *Pitsonis v Registrar of the Workers Compensation Commission and Another*².
28. The determination of the Arbitrator with respect to the right shoulder was communicated to the AMS and formed part of the material to be considered in assessing impairment resulting from the subject injury, but the reasons for that determination did not.
29. The Panel accepts that the AMS fell into demonstrable error having regard to the determination of the Commission that Mr Mavin “suffers with a consequential condition in his right upper extremity (shoulder) resulting from his injury to his left upper extremity (shoulder) and cervical spine” as a result of the subject injury.
30. The AMS noted the history of injury to the left shoulder and neck, subsequent treatment and reports of radiological and ultrasound imaging. The AMS performed an appropriate physical examination of the neck and both shoulders noting restricted range of motion bilaterally. He reported “there was a small, well healed surgical scar over his left shoulder”.
31. Based appropriately on the range of motion assessed on examination, the AMS assessed 8% WPI in respect of the right shoulder and 7% WPI in respect of the left shoulder.

¹ [2006] NSWWS 939 at [39]

² [2008] NSWCA 88 at [49]

32. The AMS said with respect to the right shoulder:

“With the right shoulder, all of the evidence which I can find indicates that the development of this condition came on very much later. The radiological picture also demonstrates a tear of the supraspinatus. There is no history of Mr Mavin excessively using the right arm and therefore, I am not persuaded that the dysfunction of the right arm can reasonably be attributed as an overuse condition as a consequence of injury to the left shoulder. I am therefore persuaded that a deduction of 10 tenths of the condition of the right upper extremity is appropriate.”

33. That conclusion was contrary to the determination of the Commission. The role of the Arbitrator is to decide causation and the role of the AMS is to assess the level of impairment resulting from the pathology which results from injury (*Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd*³). The reasoning behind that conclusion is similar to that discussed by the Medical Appeal Panel in *Jednak v Parkview Constructions Pty Ltd*⁴. The Panel said:

“31. In the course of his Reasons, the AMS stated:⁵

‘I have been unable to identify any specific focal injury in the cervical, thoracic or lumbar spine.’

32. Issues of liability are a matter for a Commission Arbitrator and not an AMS: s 321(4) of the 1998 Act.

33. The question of the respective roles of the Commission and an AMS have been 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*⁶ (*Hine*) and *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd*⁷ (*Bindah*).

34. In *Inghams Enterprises Pty Ltd v Belokoski*⁸ Deputy President Snell referred to the reasoning of Roche DP in *Jaffarie v Quality Castings Pty Ltd (Jaffarie No 1)*⁹ and stated that “the Commission (in the bifurcated system) has jurisdiction to determine whether a worker suffered injury, and the nature of the injury.”¹⁰

35. More recently in *Jaffarie v Quality Castings Pty Ltd (Jaffarie No 2)* White J stated:¹¹

‘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

³ [2014] NSWCA 264

⁴ [2019] NSWCCMA 49 (Mr John Harris, Dr Brian Stephenson and Dr Philippa Harvey-Sutton at [31] to [42])

⁵ MAC, paragraph 10(a)

⁶ [2016] NSWCA 213

⁷ [2014] NSWCA 264

⁸ [2017] NSWCCPD 15

⁹ [2014] NSWCCPD 79 at [259] – [261]

¹⁰ at [222]

¹¹ [2018] NSWCA 88, Macfarlan and Leeming JJA agreeing on this point

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.'

36. His Honour endorsed the proposition that the jurisdiction of the Commission, as opposed to that of the AMS, is to determine "the nature of the injury sustained"¹² and noted that this was consistent with the orders of the earlier decision of the Court of Appeal in *Jaffarie v Quality Castings*¹³ remitting the matter for re-determination in accordance with the reasons of the Deputy President in *Jaffarie No 1*.
37. This reasoning is otherwise consistent with the approach taken by the Court of Appeal in *State of New South Wales v Bishop (Bishop)*¹⁴ where it was held that the determination of a consequential condition was a matter for a Commission Arbitrator.
38. These conclusions are also consistent with the decision of the Supreme Court in *Favetti Bricklaying Pty Limited v Benedek*¹⁵ (*Favetti*), that it is a matter for the Commission to determine the issue of injury to a specific body part.
39. The AMS has purportedly made a finding on injury by not accepting that there was injury to the cervical, thoracic and lumbar spines. The MAC contains a demonstrable error in circumstances where the issue of injury was both accepted by the respondent and otherwise was not a matter for determination by the AMS.
40. The statement by the AMS that the appellant 'claims to have hurt his neck, mid-back and lower back' casts some doubt on whether the AMS accepted that the appellant had suffered injury. The latter statement that the AMS was 'unable to identify and specific focal injury in the cervical, thoracic or lumbar spine' is a clear rebuttal of an acceptance that the appellant suffered injury.

¹² at [80]

¹³ [2015] NSWCA 335

¹⁴ [2014] NSWCA 354 (Basten JA at [20]), (Emmett JA at [84]-[85], Gleeson JA agreeing at [93])

¹⁵ [2017] NSWSC 417

41. Whilst it is possible that the first of those two comments could be construed in the light of inconsistent presentation, the AP does not accept that the second statement falls into that category.
42. The statement by the AMS querying injury is a demonstrable error. This ground is made out.”
34. The Panel accepts and adopts that reasoning. The assessment of the extent of impairment arising from injury is one that is within the province of the AMS but, in the present case, the AMS has based his reasoning upon his view that causation by way of overuse of the right arm not been established. In assessing the extent of impairment arising from the subject injury, the AMS has commenced his reasoning with respect to the right shoulder upon an assumption that the condition was unrelated to the subject injury. That assumption was not available in the light of the determination by the Arbitrator and demonstrable error has been made out.
35. Error has been established and the Panel is required to review the evidence for the purpose of assessing the extent of impairment arising from the subject injury.
36. No submissions have been addressed to the conclusions drawn by the AMS from his physical examination of Mr Mavin, the radiological and ultrasound imaging and the history and medical reports available with respect to the right and left upper extremities and the cervical spine. The Panel accepts the assessment of upper extremity impairment with respect to the right and left shoulders as soundly based on the evidence, that is that Mr Mavin is appropriately assessed as 12% upper extremity impairment in respect of the left shoulder and 14% upper extremity impairment in respect of the right shoulder. Those assessments convert to 7% WPI on the left and 8% WPI on the right.
37. No submissions were addressed to the assessment by the AMS of the cervical spine.
38. With respect to the cervical spine and left upper extremity there is no dispute that the impairment assessed results from the subject injury. The evidence however with respect to the right shoulder suggested that the pathology which constitutes the condition in the right shoulder and which results in impairment is not solely attributable to the subject injury. It appears that other concurrent causes have contributed to the degree of impairment assessed in the right shoulder.
39. There is no evidence in the medical reports or in Mr Mavin’s history supplied to treating practitioners of any injury to the right shoulder after 12 March 2014. Nevertheless, the reports in respect of imaging of the shoulder demonstrate a strong probability that there has been contribution to the level of impairment from one or more traumatic incidents as well as from the normal wear and tear of daily life.
40. The report in respect of the right shoulder x-ray and ultrasound carried out on 26 April 2016 notes the history “Painful right shoulder after compensating for left shoulder injury.” The x-ray was reported: “the glenohumeral joint is enlocated. There is no subacromial spur or osteophyte. No fracture is demonstrated.”
41. The ultrasound was reported: “The biceps tendon is normal with no tear. The supraspinatus has a partial thickness tear involving the mid-fibres. There is thickening of the subacromial/subdeltoid bursa with bunching of the bursa on abduction.”

42. The report in respect of the MRI scan of the right shoulder performed on 3 May 2016 notes: “Clinical History: History of left shoulder injury. Now right shoulder pain due to overcompensating usage.” The report concluded that there was evidence of:
- “1. Lateral arch impingement.
 2. Subacromial bursitis.
 3. AC joint arthropathy.
 4. High-grade partial-thickness articular surface supraspinatus tear with a possible full thickness perforation.
 5. Focal slap lesion extending into the biceps anchor.”
43. The findings reported in respect of the MRI scan strongly suggest that there has been both pathology resulting from use of the shoulder and from trauma. It is the opinion of the AMS members of the Panel that the pathology reported is consistent with equal contribution from overuse of the right arm resulting from the subject injury and the normal use of the arm including trauma which may well have gone unnoticed at the time.
44. The Panel considers, as a matter of clinical judgement based upon the imaging reports and the totality of the rest of the evidence, that it is appropriate to assess one half of the whole person impairment of the right upper extremity as resulting from the subject injury.
45. The Panel accordingly determines that Mr Mavin suffered whole person impairment of 4% in the right upper extremity (shoulder) as a result of the subject injury.
46. There is no evidence to suggest the existence of any injury prior to 12 March 2014 to any of the body parts assessed and there is no evidence of any pre-existing condition or abnormality contributing to the respective degrees of impairment assessed. There is accordingly no deduction to be made pursuant to s 323 of the 1998 Act.
47. The appellant also addressed submissions as to the assessment of scarring by the AMS. The appellant submitted:
- “When utilising a discretionary principle, such as the ‘best fit’ principle applied in TEMSKI assessments, the assessor is required to provide identifiable reasons for the decision. On the facts of this case, Mr Mavin’s scarring would fit in either 0% column or the 1%: table 14.1. Dr Anderson does not provide any reasons as to why he chose the 0% column over the 1% column.
- The worker’s injury best fits a finding of 1% whole person impairment. It satisfies three of the criteria listed under that column and only two of the criteria listed under the 0% column.”
48. The appellant’s reference to the “discretion principle” is a reference to paragraph 14.8 of the Guidelines which provides:
- “The TEMSKI is to be used in accordance with the principle of ‘best fit’. The assessor must be satisfied that the criteria within the chosen category of impairment best reflect the skin disorder being assessed. If the skin disorder does not meet all of the criteria within the impairment category, the assessor must provide detailed reasons as to why this category has been chosen over other categories.”

49. The AMS reported:

“The scarring is minimal and has healed well. It is visible while wearing a singlet, although does not cause any specific irritation. In the TEMSKI Table, 14.1 on page 74 of the SIRA Guidelines this would best fit with 0% whole person impairment.”

50. The AMS noted on physical examination “there was a small well healed surgical scar over his left shoulder.”
51. Professor Ghabrial in his report dated 3 October 2018 noted “there was a 6-cm scar and an arthroscopic scar on the left shoulder.” Professor Ghabrial assessed scarring at 1% WPI.
52. The appellant acknowledges that Mr Mavin does not meet all of the criteria for assessment as 1% WPI for scarring, asserting that Mr Mavin meets three of the criteria listed to warrant assessment of 1%. The appellant does not identify which three criteria are said to be satisfied.
53. That submission acknowledges that Mr Mavin does not meet the criteria listed in respect of 1% WPI. The Guidelines only call for detailed reasons as to why the category has been chosen if that category has been selected despite the worker not meeting all of the criteria.
54. It is clear in the present case that the AMS appropriately considered Table 14.1 and came to the conclusion that Mr Mavin did not meet the criteria for 1% WPI. The AMS upon physical examination was satisfied that Mr Mavin did not fall within any of the categories which would warrant an assessment of 1% WPI or greater and accordingly assessed 0%.
55. The Panel can identify no error in that assessment.
56. The appellant has established error with respect to assessment of the right upper extremity and the Appeal Panel has determined that the MAC issued on 21 May 2019 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*.

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 1180/19
Applicant: Michael Leslie Mavin
Respondent: Tomago Aluminium Co 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 Tim Anderson 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 AMA 5 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. Left upper extremity	12/03/14	Chapter 2 Page 10	Chapter 16 Figure 16-40 Figure 16-43 Figure 16-46 Table 16-03	7%	Nil	7%
2. Right upper extremity	12/03/14	Chapter 2 Page 10	Chapter 16 Figure 16-40 Figure 16-43 Figure 16-46 Table 16-03	4%	Nil	4%
3. Cervical spine	12/03/14	Chapter 4, Page 24 ff	Chapter 15 Table 15-5 P. 392	7%	Nil	7%
4. Scarring	12/03/14	Chapter 14.7, 8 – P. 73 Table 14.1 P. 74	N/A	0%		0%
Total % WPI (the Combined Table values of all sub-totals)						17%

Mr William Dalley

Arbitrator

Dr Philippa Harvey-Sutton

Approved Medical Specialist

Dr Drew Dixon

Approved Medical Specialist

7 August 2019

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*.

A Shaw

Andrew Shaw

Dispute Services Officer

As delegate of the Registrar

