

# WORKERS COMPENSATION COMMISSION

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

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**Matter Number:** M1-6512/18  
**Appellant:** Mark Murphy  
**Respondent:** Summertime Chicken Pty Limited

**Matter Number:** M2-6512/18  
**Appellant:** Summertime Chicken Pty Limited  
**Respondent:** Mark Murphy

**Date of Decision:** 30 August 2019  
**Citation:** [2019] NSWCCMA 126

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**Appeal Panel:**  
**Arbitrator:** Ross Bell  
**Approved Medical Specialist:** Dr James Bodel  
**Approved Medical Specialist:** Dr Brian Noll

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 14 May 2019 Mark Murphy lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr George Weisz, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 17 April 2019.
2. On 15 May 2019 Summertime Chicken Pty Ltd lodged an Application to Appeal Against the Decision of Approved Medical Specialist as above.
3. The appellants rely on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):
  - the assessment was made on the basis of incorrect criteria
  - the MAC contains a demonstrable error.
4. 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.
5. The Workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.
6. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4<sup>th</sup> ed* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> ed* (AMA 5).

## **RELEVANT FACTUAL BACKGROUND**

7. The report of Panel member Dr James Bodel contains the background below.

## **PRELIMINARY REVIEW**

8. 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.
9. As a result of that preliminary review, the Appeal Panel determined that it was necessary for the worker to undergo a further medical examination because the errors found regarding the assessment of the lumbar spine could not be corrected from the materials before the Panel, as explained in the reasons below.

## **EVIDENCE**

### **Documentary evidence**

10. 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.

### **Further medical examination**

11. Dr James Bodel of the Appeal Panel conducted an examination of the worker on 6 August 2019 and reported as shown below.

### **Medical Assessment Certificate**

12. 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 in M1-6512/18 (Mr Murphy's appeal)**

13. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel. The appeals relate to the assessment of the lumbar spine and the additional impairment for the impact on the activities of daily living (ADLs). The assessments for the cervical spine and left upper extremity (shoulder) are not appealed.

### **Appellant**

14. In summary, the appellant submits that the AMS has erred in finding an additional 1% whole person impairment (WPI) for the impact of the injury on the ADLs. The AMS has not taken proper account of the histories recorded in the medical reports before him; the statement of Mr Murphy; or the history he took himself.
15. Given the evidence there should have been an explanation as to why a higher assessment for ADLs was not given.
16. The AMS also erred in attaching the additional WPI for ADLs to the cervical spine assessment rather than the lumbar spine which is primarily responsible for the impairment.
17. The MAC should be revoked and the additional WPI for ADLs applied should be 3%.

### **Respondent**

18. The respondent submits that the finding of the AMS of 1% WPI for the ADLs is consistent with his findings on examination. The Guidelines at paragraph 1.25 require that the ADLs element should be based on objective assessments where possible.

19. An AMS is required to base an assessment on their own clinical judgement rather than to rely on the opinions of other practitioners.
20. It is up to the AMS to determine to which body part the ADLs element should be attached according to what is most responsible for the impact on ADLs.
21. The grounds of appeal are not made out. The MAC should be confirmed.

### **SUBMISSIONS in M2-6512/18 (Summertime Chicken Pty Ltd appeal)**

#### **Appellant**

22. The AMS has not provided any explanation as to how he assessed 10% WPI for the lumbar spine. The findings on examination do not satisfy the requirements for DRE Lumbar Category III in Table 15-3 from AMA 5, used by the AMS. The findings on examination of the AMS would place Mr Murphy in DRE Lumbar Category I.
23. The reference by the AMS to a conference of the College of Surgeons at the end of 2018 in Melbourne and some agreed instructions at that meeting in the context of his assessment is not appropriate. The detail of this has not been disclosed to the parties.
24. Given the lack of reasoning provided by the AMS, there should be re-examination by the Panel to assess the lumbar spine.

#### **Respondent**

25. The assessment of the lumbar spine by the AMS was not based on incorrect criteria and contains no demonstrable error.
26. If it is found that there is an error due to the reasoning for the assessment of the lumbar spine, Mr Murphy should be re-examined by the Panel for an assessment of impairment.

### **FINDINGS AND REASONS**

27. 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.
28. In *Campbelltown City Council v Vagan* [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.

#### **Appeal by Mr Murphy – assessment of effect of injury on ADLs**

29. The Panel notes that the appeal on the impact on ADLs is subsumed by the finding of error in relation to the assessment of the lumbar spine. The impact on ADLs and the body part to which it should be associated has been determined by the Panel as part of the assessment of the lumbar spine in accordance with the Guidelines due to the error found in the lumbar spine assessment.<sup>1</sup> This is explained further below.

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<sup>1</sup> See *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499; *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792 cited in paragraph 35 below.

## Appeal by Summertime Chicken Pty Ltd – assessment of 10% WPI for the lumbar spine

30. The AMS reports his findings on examination of the lumbar spine at Part 5,

“He walked with a slight limp, helped by a stick in his right hand, claiming weakness in his left leg. However, he could also walk freely without the stick; he was not able as stated to stand on tip toes, or heels or on either leg. He sat during a long interview with no obvious discomfort. He undressed without difficulty and climbed up to the examination couch with no assistance.

...

The lumbar spine was restricted in all directions, no spasm or localised pain was recorded in the entire spine. The lower extremities indicated leg raising of 90 degrees, no sensory or muscle power diminution was recorded; reflexes (cremaster, medial hamstring, patellar and Achilles) were all positive. Measurements of thigh and calves indicated no obvious muscular wastage, being 52-52 and 43-43cm respectively.”

31. The AMS notes the investigations at Part 6, and at Part 7 summarises,

“Mr Murphy has a constitutional spinal condition that lead to excessive calcification of longitudinal ligament along the spine. The effect is rigidity known as Ankylosing Hyperostosis (Forrestier's disease), or more recently renamed as DISH. The diagnosis in this case is essentially radiological.

The mechanism of fall as described would have produced and aggravated the existing spinal condition, and also lead possibly to disc pathology. The mechanism is however not the one that would produce left shoulder injury.

Interestingly, such a case was presented by me for discussion at WorkCover Medical meeting in Sydney in September 2018 and at the Medico Legal Section of the College of Surgeons, at the end of 2018 in Melbourne. I apply the instructions agreed at these meetings in assessing the impairment of this condition.”

32. At Part 10.b. the AMS explains his calculations:

“Cervical spine 5%WPI+1%WPI for ADL.  
Lumbar spine 10%WPI; totalling 14%WPI. The left shoulder has no documented pathology and no clinical findings at present to attract any impairment.”

33. The Panel considers there is no logical sequence of reasoning given for the assessment of 10% WPI for the lumbar spine. Table 15.3 of AMA 5 is noted in the Certificate, but how the findings on examination relate to the relevant criteria is not apparent. As the appellant submits, 10% WPI requires a finding of DRE Lumbar Category III, and the AMS has not discussed how the findings he records satisfy the criteria for this Category. On the face of it the AMS's findings on examination do not satisfy the requirements for DRE Category III.
34. Additionally, the reference by the AMS to the application of “instructions” from a medical conference to the assessment adds further confusion as to the process of assessment. This constitutes a demonstrable error on the face of the Certificate.
35. If a ground of appeal is successfully made out and an error identified, the Panel must correct the error or errors found “applying the WorkCover Guides fully” (see *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499).<sup>2</sup>

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<sup>2</sup> See also *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792

36. The Panel is unable to address the error from the MAC and other materials in the circumstances of this matter given the nature of the error without re-examination of Mr Murphy.
37. The re-examination report of Panel member, Dr James Bodel, follows:

**“REPORT OF THE EXAMINATION BY APPROVED MEDICAL SPECIALIST  
MEMBER OF THE APPEAL PANEL**

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**Matter No:** M1-6512/18 & M2-6512/18  
**Appellant:** Mark MURPHY  
**Respondent:** Summertime Chicken Pty Limited

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**Examination Conducted By:** Dr James G Bodel  
**Date of Examination:** 6 August 2019

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**1. The workers medical history, where it differs from previous records**

I have carefully been through the history as recorded by Dr Weisz in the Medical Assessment Certificate of the 17 April 2019.

This confirms that the date of injury under review is 17 December 2015.

The injuries involved are the cervical spine, left upper extremity (shoulder) and the lumbar spine.

I confirm that at the time of Mr Murphy’s injury he worked 50-60 hours as a truck driver for Summertime Chicken Pty Limited.

I have reviewed the history; Dr Weisz has recorded that Mr Murphy confirms he first had pain in a fall at work in 2013 which is prior to the date of injury under review.

This injury occurred while working at Summertime Chickens. This workplace is an abattoir in Galston. He also worked at another facility at Cordina Chickens at Seven Hills, which is a part of Summertime Chickens.

He had middle back pain in 2013 and that settled with conservative care.

The injury under review occurred on 17 December 2015 at the Cordina Chickens facility at Seven Hills.

He was at Cordina Chickens to ‘pick up products and return to Galston’. He slipped off the back of the truck and landed heavily on his buttocks injuring the interscapular region of the thoracic spine, the lower part of the back and the buttocks. He also jarred his head and neck area. He was knocked unconscious.

He recalls other workers coming to assist him. He was shaken up and reported the matter to the office. Other workers completed the loading process and he then drove back to Galston.

About half-way there he stopped at a McDonalds store to eat and he called Summertime Chickens. Eventually he arrived at his destination at Galston. He went inside the office to sit and rest.

At that point, he had approximately one hour till the end of his shift and then was driven home.

He saw his doctor, Dr Hadgis at the Balmoral Street Medical Centre as he was 'sore all over'. The areas of pain were the neck, middle back, lower back and shoulders.

He was off work for one week and treated with medication and physiotherapy but there was no improvement.

He was cleared to return to work although he was still in pain.

On his first day back at work, he was required to 'shrink wrap a pallet' and within an hour he was in pain and 'could not do it'.

He attended a different doctor nearer to his home and was put off work. He was given medication, physiotherapy and hydrotherapy and was referred to a Pain Specialist.

He has seen Dr Aggarawal in Hornsby and has been put on the following medication:

- Gabapentin, 1800mg (600mg) three times a day which he found helpful.
- Palexia 200mg twice a day.
- Amitriptyline.

He has never been referred to a Spinal Surgeon and surgery has never been recommended.

There have been three attempts to return him to work on light duties but all have failed. One attempt lasted for two days and another for four days. He has been unable to return to work.

Mr Murphy indicates to me that over the three and a half years since his injury, there has been about a '10% improvement in my pain'.

## **2. Additional history since the original Medical Assessment Certificate was performed**

There has been no further accident or injury and no additional history provided.

## **3. Findings on clinical examination**

As part of this re-examination, the Appeal Panel have determined that I am to examine only the lumbar spine.

He has tenderness on palpation at the lumbosacral junction and guarding on the right side. He reaches forward and flexes with his hands to the knees. There is backache at this point and also on extension and there is a reduced range of lateral bending to the left.

Straight leg raising is 70 degrees on both sides and limited by hamstring tightness. There is no definite evidence of nerve root irritability that I can detect clinically and there is no significant wasting in either thigh or calf and no reflex abnormality or sensory impairment in the lower limbs. The reflexes are present and equal and there is no objective evidence of radiculopathy on clinical testing here today.

There is no weakness of knee flexion or extension or ankle dorsiflexion and plantar flexion.

There is asymmetry of back movement and guarding and some non-verifiable radicular complaints in the right leg but no clinical sign of radiculopathy.

#### **4. Results of any additional investigations since the original Medical Assessment Certificate**

This gentleman has had no new x-rays since the previous medical assessments.

##### CT scan:

I have had the opportunity to view his x-rays of the lumbar spine including a CT scan on 15 February 2016 which has mildly level degenerative disc disease at many levels but particularly at L2/3 and at the right side at L5/S1. There is foraminal stenosis on both sides at that level.

##### MRI scan:

The MRI scan of the cervical, thoracic and lumbar spines on 22 March 2016 also show degenerative disc disease at C5/6 with a large central left sided disc prolapse at that level and minor degenerative change in the mid thoracic region and, again the L2/3-disc pathology in the lumbar spine and, the right sided disc pathology at the L5/S1 level.

There is, however, no definite clinical sign of nerve root compression that I can identify in any of these films.

##### **Comment:**

I have assessed the lumbar spine.

##### **Lumbar spine:**

He has a DRE Lumbar Category II level of assessable impairment in accordance with the description in Table 15-3 on page 384 of AMA5. He has a base rating of:

- 5% Whole Person Impairment.

##### **Activities of Daily Living:**

His Activities of Daily Living have been moderately compromised in accordance with Item 4.34 and Item 4.35 on page 28 of the 4<sup>th</sup> Edition of the WorkCover Guidelines giving a:

2% loading and a 7% Whole Person Impairment overall.

##### **Pre-existing impairment:**

There is evidence of pre-existing degenerative change which is contributing to the overall level of impairment and therefore it is appropriate to make a one-tenth deduction for pre-existing impairment as there is no indication clinically as to the exact level of the contribution to the impairment in the medical evidence available.

The one-tenth deduction leaves a 6.3% Whole Person Impairment and after rounding, there is a:

- **6% Whole Person Impairment for the lumbar spine.**

**Signed:**



Date: 19 August 2019"

38. The Panel agrees with and adopts the report of Dr Bodel, including the assessment of 6% WPI for the lumbar spine. It is apparent to the Panel that the bulk of the impact on ADLs is due to the impairment of the lumbar spine, and it should therefore be associated with that assessment as found by Dr Bodel.
39. The Panel is satisfied on the history that the impairment is permanent, and the injury has reached maximum medical improvement.
40. The assessment for the lumbar spine is derived from Dr Bodel's finding of DRE Lumbar Category II, giving the base of 5% WPI. To this is added the finding of an additional 2% WPI for the impact on ADLs because most of that impact comes from the impairment of the lumbar spine. To this is applied a deduction of 1/10 under s 323 of the 1998 Act, as explained by Dr Bodel, giving 6.3% rounded to 6% WPI for the lumbar spine.
41. Without the additional WPI for the effect on ADLs the cervical spine reverts to the base assessment by the AMS of 5% WPI with the 1/10 deduction under s 323 of the 1998 Act giving 4.5% rounded to 5% WPI. The combined values chart with 6+5+0 results in 11% WPI as shown in the Panel's Certificate below.
42. For these reasons, the Appeal Panel has determined that the MAC issued on 17 April 2019 should be revoked, and a new MAC 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*.

G De Paz

**Glicerio De Paz**  
**Dispute Services Officer**  
As delegate of the Registrar





# WORKERS COMPENSATION COMMISSION

## APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

**Matter Number:** 6512/18  
**Appellant:** Mark Murphy  
**Respondent:** The Australia Jockey Club t/as The Australian Turf club Limited

**Matter Number:** 6512/18  
**Appellant:** The Australia Jockey Club t/as The Australian Turf club Limited  
**Respondent:** Mark Murphy

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 George Weisz 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 NSW Workers Compensation Guidelines	Chapter, page, paragraph, figure and table numbers in AMA5 Guides	% WPI	WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
Cervical spine	17/12/15	Chapter 4 pp.24-29	Chapter 15.6 Page 392; Table 15-5	5	1/10	5
Lumbar spine	17/12/15	Chapter 4 pp.24-29	Chapter 15.4 Page 384; Table 15-3	7	1/10	6
Left upper extremity (shoulder)	17/12/15	Chapter 2 Pg 10	Chapter 16.4i Pg 474 Fog 16-40, 16-43,16-46	0	0	0
<b>Total % WPI (the Combined Table values of all sub-totals)</b>					<b>11%</b>	

**Ross Bell**  
Arbitrator

**Dr James Bodel**  
Approved Medical Specialist

**Dr Brian Noll**  
Approved Medical Specialist

30 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*.

G De Paz

Glicerio De Paz  
Dispute Services Officer  
**As delegate of the Registrar**

