WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION OF THE APPEAL PANEL IN RELATION TO REQUEST FOR REVIEW OF DECISION

Matter Number:	**M1-4866/18**
Appellant:	**Bojan Vasilic**
Respondent:	**Boral Transport Limited**
Date of Decision:	**4 September 2019**
Citation:	**[2019] NSWWCCMA 129**

Appeal Panel:	
Arbitrator:	**Carolyn Rimmer**
Approved Medical Specialist:	**Dr John Ashwell**
Approved Medical Specialist:	**Dr Margaret Gibson**

BACKGROUND TO THE APPLICATION FOR REVIEW

1. On 14 March 2019, Bojan Vasilic (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Neil Berry, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 1 March 2019.

2. The respondent to the Appeal is Boral Transport Limited (the respondent).

3. The appellant relied on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - availability of additional relevant information (being additional information that was not available to, and that could not reasonably have been obtained by, the appellant before the medical assessment appealed against),
    - the assessment was made on the basis of incorrect criteria, and
    - the MAC contains a demonstrable error.

4. The Registrar was 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 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).

6. Mr Vasilic, while working as a truck driver, sustained an injury to left knee, hip, left ankle and lower back on 7 July 2016. It was alleged that he suffered a consequential injury to the neck, an aggravation of the back, left shoulder and aggravation of the right knee.

7. Proceedings were commenced in the Commission on 18 September 2018. Mr Vasilic made a claim for lump sum compensation and assessment for threshold for work injury damages.

8. The matter proceeded to arbitration before Arbitrator Beilby on 30 October 2018. In a Certificate of Determination dated11 January 2019, Arbitrator Beilby made the following orders:

> "1. Award for the respondent in respect of a frank injury to the lumbar spine on 7 July 2016.
>
> 2. Award for the applicant in respect of a consequential injury to the right knee (Date of injury 7 July 2016 ('the second incident')).
>
> 3. Award for the applicant in respect of a consequential injury to the cervical spine, left shoulder and lumbar spine (Date of injury 7 July 2016- 'the third incident').
>
> 4. The claim in respect of injury to the left ankle, right knee, cervical spine, left shoulder and the lumbar spine (lumbar- being third incident only) are remitted to the Registrar to be referred to an Approved Medical Specialist for Whole Person Impairment Assessment. The date of injury is 7 July 2016."

9. The matter was referred to the AMS, Dr Berry, in the Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 15 January 2019 for assessment of whole person impairment (WPI) of the left lower extremity (ankle), the right lower extremity (right knee), cervical spine, left upper extremity (left shoulder) and lumbar spine (being third incident only) as a result of the injury on 7 July 2016.

10. The AMS examined Mr Vasilic on 19 February 2019. He assessed 3% WPI in respect of the left lower extremity (ankle), 0% of the right lower extremity (right knee), 0% of the cervical spine, 2% of the left upper extremity (left shoulder) and 7% of the lumbar spine (being third incident only) as a result of the injury on 7 July 2016. These assessments resulted in combined total of 12% WPI as a result of the injury on 7 July 2016.

11. As noted above, on 14 March 2019 Mr Vasilic lodged an Application to Appeal Against the Decision of Approved Medical Specialist.

12. The appellant's submissions made in the Appeal against the Decision of the AMS related only to the assessment of the cervical spine by the AMS. The appellant's submissions essentially stated that the AMS failed to undertake a full and proper assessment of the cervical spine in order to put himself in a position to be able to determine which DRE Category Mr Vasilic was to be placed given the specific criteria in DRE Category I through to Category IV.

13. 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.

14. The appellant requested that he be re-examined by an AMS, who is a member of the Appeal Panel. The appellant submitted that he should be re-examined because the AMS omitted to obtain a proper history concerning pain and symptomatology which is relevant to the assessment of diagnosis-related estimates in order to categorize the injury properly into the appropriate DRE Category.

15. The appellant requested an oral hearing in this matter. The appellant submitted that he should be given an opportunity to present all submissions to the Appeal Panel as there are matters of procedural fairness by which the medical assessor is bound and which he has failed to discharge including providing details to the appellant concerning any inconsistency, abnormal illness behaviour in the examination or exaggeration. The appellant argued that the matter cannot be determined on the papers because the history taken and medical examination undertaken by the AMS is incomplete and to adopt it would result in similar findings and errors being committed by a Medical Appeal Panel.

16. The respondent submitted that there was no need for an oral hearing, and that the matter may be disposed of on the papers. The respondent submitted that the errors asserted by the worker have been articulated in his submissions, and the respondent's opposition to those grounds is articulated fully in the submissions. The respondent argued that there was no explanation as to why an oral hearing would be required to further the submissions advanced and the respondent submits that having regard to the nature of the errors asserted, there was no basis for an oral hearing to be held.

17. The Panel decided that there was no need for an oral hearing in order to determine the appeal; however, the Panel gave the appellant an opportunity to file any supplementary submissions. The appellant's solicitor contacted the Commission and stated that in order to file supplementary submissions, the appellant's solicitor required the Commission to advise as to the reasons why the Panel declined the request for an oral hearing. The appellant's solicitor maintained that without those reasons being provided, the appellant was unable to provide the Commission with supplementary written submissions in response. The appellant's solicitor was referred to the Registrar's Guideline "Appeal Against Medical Assessment" and the SIRA Workers Compensation Medical Dispute Assessment Guidelines Cls 5.14 and following.

18. The Commission advised the appellant:

> "The Medical Appeal Panel was responsible for determining whether or not an 'on the papers review' is to be adopted. In this case the Medical Appeal Panel has determined that this appeal is capable of determination on the papers. This is not a decision as to whether or not the appeal is successful; rather it is a decision as to the procedure to be adopted in determining the appeal."

19. The appellant's solicitor in an email to the Commission dated 27 May 2019 declined the opportunity to file further submissions.

20. As a result of that preliminary review and taking into account the totality of the submissions made by both parties on this procedural aspect, the Appeal Panel determined that it was not necessary for Mr Vasilic to undergo a further medical examination because there was sufficient evidence by way of medical reports and clinical investigations in relation to assessment of the cervical spine on which to make a determination.

21. On 31 May 2019, the Appeal Panel issued its determination in respect of matters the subject of that appeal. The Panel determined that the MAC issued on 1 March 2019 should be confirmed.

22. On 5 June 2019, the appellant requested a reconsideration of the Appeal Panel's determination. A copy of the request for reconsideration was served on the respondent.

23. On 8 July 2019, the respondent lodged submissions concerning the appellant's request for reconsideration.

24. The Appeal Panel proceeded to consider the submissions of the appellant dated 5 June 2019 and 13 June 2019 and the submissions of the respondent dated 8 July 2019.

SUBMISSIONS

25. The appellant submitted that the discretion to reconsider made pursuant to s 329 of the 1998 Act should be exercised for the following reasons:

- The Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 11 March 2015.

- The appeal was accepted by the delegate of the Registrar by way of decision dated 29 April 2019 on the basis that "A ground of appeal as specified In section 327(3)(c) is made out in relation to the AMS Assessment of the cervical spine", s 327(3)(c) of the 1998 Act refers specifically to an appeal on the basis that the assessment was made on the basis of incorrect criteria.

- The Appeal Panel is requested to please reconsider the matter and either rescind, alter or amend the decision previously made.

- The Appeal Panel incorrectly determined that the Registrar was satisfied that at least one of the grounds of appeal under s 327(3)(d) was made out in relation to the assessment of the cervical spine by the AMS. In fact, the Registrar was satisfied that the ground of appeal relied on by the applicant pursuant to s 327(3)(c) was made out on the face of the application and the assessment of the AMS was made on the basis of incorrect criteria and not demonstrable error, as was suggested by the Appeal Panel.

- The Appeal Panel referred to the assessment of the cervical spine by the AMS on page 8, paragraph 43 of its Statement of Reasons as follows:

  "Cervical spine ·.
  There was no tenderness to palpation. There was a full range of movement with no paraspinal muscle spasm and no alteration of spinal contour".

- On page 8, paragraph 45, the Appeal Panel further quoted the assessment of the cervical spine by the AMS as follows:

  "Cervical Spine

  This should be assessed under the DRE methods for the cervical spine and I refer you to Chapter 15, Table 15.5 on page 392 of AMA 5 and the claimant is noted to have a normal range of movement with minimal tenderness and I would therefore assess him as DRE Category I which is a zero whole person impairment ".

- The Appeal Panel's specific reasons for accepting the decision of the AMS are contained on page 9, paragraphs 48, 49 and 50 and are repeated as follows:

  "48. The Appeal Panel was satisfied that the AMS had obtained a valid history of symptoms, which enabled him to determine whether there were non-verifiable radicular complaints. The AMS took an adequate history and carried out an examination of the cervical spine and both upper extremities. Examination of the shoulders by the AMS demonstrated normal range of movement in the right shoulder, a reduced range of movement in the injured left shoulder, intact reflexes, normal sensation, and no muscle wasting, all of which were relevant in considering whether there was non-verifiable radiculopathy in the cervical spine.

49. The AMS stated that he found on examination a full range of movement in the cervical spine and the Appeal Panel inferred from that finding that the AMS measured all planes of motion. There is a presumption of regularity which attends administrative action (*Bojko v ICM Property Service Pty Ltd* [2009] NSWCA 175 at [36]).

50. The Appeal Panel noted that the AMS found that there was a normal range of movement, no muscle spasm and no neurological deficit. The Panel concluded that there were insufficient findings on examination to place the appellant into DRE Category II."

- There are numerous errors with respect to the Panel's reasoning and decision-making process. At Table 15-5 (page 392) of the AMA 5 Guides states the following with respect to DRE Cervical Category II:

  "Clinical history and examination findings are compatible with a specific injury; findings may include;

  - muscle guarding, or
  - spasm, or
  - asymmetric loss of range of motion, or
  - non-verifiable radicular complaints, or
  - clinically significant radiculopathy."

- The assessment of the AMS to which the Appeal Panel referred to verbatim was plainly lacking in material respects as it and the Appeal Panel simply failed to address all of the relevant criteria. The examination of the cervical spine by the AMS plainly omitted to consider the presence or non-presence of at least two criteria namely muscle guarding and non-verifiable radicular complaints.

- In *Crnobmja v Motor Accidents Authority of NSW* (2010) *55* MVR 579 (Hulme J), the Supreme Court of NSW held that in the motor accident's scheme medical assessors must give reasons for each element of DRE categories chosen for determination and assessment. The SIRA decision was set aside.

- If the AMS, in his assessment of the appellant here, excluded tenderness to palpation and excluded alteration of spinal contour, then he should have similarly excluded muscle guarding and non-verifiable radicular complaint. However, he did not. This results in a plain error with respect to the application and/or interpretation of criteria.

- The appellant also submits that the reference to "full range of movement" cannot discharge the obligations of the AMS or Appeal Panel to ensure that a full and proper assessment of the cervical spine has in fact been undertaken and that the three principle planes of motion of the cervical spine were in fact assessed for the presence or non-presence of asymmetric loss of range of motion.

- The Appeal Panel "inferred" from the finding of the AMS that he measured all planes of motion but it is respectfully submitted that such an inference can only be drawn if the AMS stated that "on examination, there was a full range of all movements of the cervical spine." The use of the word 'all' indicates that a thorough and complete examination has been undertaken which would cover the three principle planes of motion. However, the mere use of the words "full range of movement" does not discharge that obligation. This was not a matter appropriate for the Panel to apply the principle of the presumption of regularity which attends administrative action - see *Lee v Napier* (2013) 301 ALR 663 (Katzmann J).

- The AMS must undertake his assessment and report on his findings in such a fashion that the applicant is able to respond if an adverse finding is made. The use of the words "full range of movement" by the AMS puts the applicant in a position where he cannot respond as the language utilised was far too general.

- The Appeal Panel should not infer that the AMS in fact measured all planes of motion when that fact is not evident from the report of the AMS by use of his terminology and in circumstances where this very fact is challenged by the applicant. In circumstances where there is a sufficient or significant doubt as to whether a full examination of the cervical spine was carried out in order to determine the presence or absence of DRE cervical criteria, the applicant should be given the benefit of the doubt and the Appeal Panel should have undertaken a further examination for itself as to remove that doubt.

- The definition of non-verifiable radicular root pain appears in Box 15-1, page 382 of the AMA 5 Guides which states the following:

  > "Non-verifiable pain is pain that is in the distribution of a nerve root but has no Identifiable origin; ie, there are no objective physical imaging, or electrographic findings".

- Non-verifiable radiculopathy is yet another essential criteria which appears in DRE Category II (the criteria are not mutually inclusive but exclusive).

- The Appeal Panel quoted verbatim the present symptoms recorded by the AMS at page 8, paragraph 42. The only relevant part of this report concerning present symptoms are the two sentences:

  > "He has a variable degree of pain in the neck which comes and goes. He has pain in the left shoulder".

- The Appeal Panel has fallen into error when it stated that it was satisfied that the AMS had obtained a valid history of symptoms which enabled him to determine whether there was non-verifiable radicular complaints.

- This is so because there is a complete absence of history in terms of referred pain, non-verifiable radicular pain or verifiable radicular complaint.

- The failure of the AMS to comment concerning any of these three matters does not mean that they were not present but, rather, that the AMS failed to elicit a proper history.

- In order to undertake a full and proper history and examination, an AMS Assessor is required to elicit information by direct questioning. It is inappropriate to rely upon information that is volunteered by an injured worker. An injured worker will not volunteer information as there is an impression that the AMS is equipped with all documents, imaging and statements which enable them to understand the injured worker's symptoms. Unless the AMS expressly includes or excludes symptoms and complaints, then the examination process will not be full and proper and this will necessarily lead to an error with respect to the interpretation and application of criteria of Table 15-5 of AMA 5 Guides.

- The history taken here by the AMS was inadequate and the examination itself was also inadequate. In other words, in the same way that the AMS stated that there was no tenderness to palpation and no alteration of spinal contour (DRE criteria), he should also have stated that there were no symptoms of non-verifiable radiculopathy and no muscle guarding. Instead these remarks were wholly absent.

- In these circumstances, the applicant respectfully submits that the Appeal Panel cannot be reasonably satisfied that the AMS obtained both a valid history and undertook an appropriate examination.

- It is noted that the Appeal Panel referred to the assessment of the left and right shoulders by the AMS and a reference to intact reflexes, normal sensation and no muscle wasting, all of which were relevant in considering whether there was non-verifiable radiculopathy in the cervical spine. This is not correct as a neurological examination is only relevant in determining whether radiculopathy exists in the true sense, that is, verifiable radiculopathy which is a standalone criteria in DRE Category II. However, another separate criterion in DRE Category II is non-verifiable radicular complaint. Non-verifiable radicular root pain need only conform with a known anatomical dermatome and it does not result in any effect on reflexes, sensation or muscle mass. In other words, there are no neurological after affects to non-verifiable radiculopathy.

- DRE Category II refers to non-verifiable radicular complaints rather than non-verifiable radicular symptoms. There was a complete absence of any attempt to elicit information from the appellant by the AMS in order to ascertain or determine the correct criteria applicable to the appellant's cervical injury.

- There are so many errors contained in the assessment of the cervical spine conducted by the AMS, that the Appeal Panel is warranted in revoking the certificate and having Mr Vasilic re-examined. The errors highlighted here are material in nature.

- The Appeal Panel decided that a medical examination was not warranted because there was sufficient evidence by way of medical reports and clinical investigations in relation to the assessment of the cervical spine by which to make a determination. However, although there might have been a significant number of medical reports and other information which might have assisted the Appeal Panel in reaching a determination, it is the clinical examination of the AMS which is of most importance.

- The injured worker and the respondent are in dispute and the evidence of each party is in dispute and the sole purpose of the AMS is to resolve that dispute under statute and according to law. The AMS is obliged to undertake an independent assessment of the injured worker as he appears on the day of assessment. If it is the examination, findings and assessment of the AMS which are in dispute, then it is reasonable for the applicant to seek further medical examination.

26. The respondent made the submissions in response to the request for a reconsideration including the following:

- The respondent opposes the application for reconsideration pursuant to s 378 of the 1998 Act.

- The basis for the application made by the worker, is the same basis on which the initial appeal was lodged - being that it is asserted the AMS failed to undertake a necessary examination of the worker's cervical spine.

- The respondent submits that the submissions advanced by the appellant under this application are simply a restatement (in slightly more detailed form) of the same errors that were previously asserted in the initial appeal.

- The Appeal Panel has already considered and, correctly, rejected, the assertions of error advanced by the worker. There is no error with the conclusions reached by the Appeal Panel.

- The respondent has previously submitted that the Appeal Panel was correct to conclude that the examination findings of the AMS, outlined in the MAC, were sufficient to warrant a DRE I rating for the cervical spine. No error in the MAC was established, and the respondent respectfully submits that the Appeal Panel was correct to conclude that no error was apparent on the face of the MAC.

- The respondent maintains that there was no error with the initial MAC, because, as found by the Appeal Panel:

    1. The AMS' examination findings, which were outlined in the MAC, called for DRE I;

    2. No error with those findings of the AMS is alleged;

    3. The AMS cited the correct guides, referred to his examination findings and history, and placed the worker into the category warranted by his examination;

    4. No further reasons by the AMS were required

- The respondent submits that an expert AMS must be accepted as having undertaken the examinations required to reach a conclusion as to the correct DRE category.

- There is no error in the Appeal Panel concluding that the AMS undertook all examinations necessary to each the above assessment and no basis for the Panel to reconsider the matter has been established.

- The appellant is simply dissatisfied with the result, and is seeking to reagitate matters already considered and rejected.

- Any reconsideration application must take into account the requirement for the finality of litigation *(Railcorp NSW v Registrar of the WCC of* NSW [2013] NSWSC 231 at 56). There is no 'clear cut injustice' suffered by the appellant that warrants or requires reconsideration of the matter.

- In *Altos v Registrar of the Workers Compensation Commission of NSW* [2008] NSWSC 148 at [33], it was held that s 378 should be approached on the basis that finality of decisions was intended.

- The respondent submits that the Appeal Panel was correct to conclude that no error was apparent. The appellant has pointed to no basis to warrant any other decision being reached, nor any injustice requiring reconsideration.

- The respondent submits that the application for reconsideration should be dismissed and the Appeal Panel's decision confirmed.

EXERCISE OF THE DISCRETION TO RECONSIDER

27. Section 378 of the 1998 Act provides:

> "*Reconsideration of decisions*
>
> (1) The Registrar, an approved medical specialist or an Appeal Panel may reconsider any matter that has been dealt with by the Registrar, the approved medical specialist or the Appeal Panel, respectively, and rescind, alter or amend any decision previously made or given.
>
> (2) Without limiting subsection (1), if the Registrar, an approved medical specialist or an Appeal Panel is satisfied there is an obvious error in the text of a decision, the Registrar, approved medical specialist or Appeal Panel may alter the text of the decision to correct the error.
>
> (3) The Registrar, an approved medical specialist or an Appeal Panel must reconsider any matter referred to it for reconsideration not later than 2 months after the referral is made.
>
> (4) An altered or amended decision is taken to be the decision of the Registrar, approved medical specialist or Appeal Panel.
>
> (5) Nothing in this section affects any other power under this Act or the 1987 Act to review or amend a decision.
>
> (6) In this section, 'decision' includes an assessment or further assessment by an approved medical specialist or an Appeal Panel."

28. The power contained in s 378 is discretionary. It will be exercised in order to achieve the Commission's statutory objective of providing a fair dispute resolution system (s 367(1)(a)) and in a way that is consistent with accepted authority. The Registrar's Guideline contains some guidance as to the matters that may be relevant to the exercise of the discretion. Such factors include:

> (1) The sections confer a wide discretion to reconsider previous decisions;
>
> (2) Whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration;
>
> (3) One of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely;
>
> (4) Reconsideration may be allowed if new evidence, that could not have reasonably been obtained prior to the decision, is later obtained and that new evidence, if it had been put before the decision maker in the first instance, would have been likely to lead to a different result;
>
> (5) Depending on the facts of the particular case, a party may be prevented from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings;
>
> (6) A mistake or oversight by a legal representative or agent will not give rise to a ground for reconsideration; and

(7) The Commission has a duty to do justice between the parties according to the substantial merits of the case.

29. In *Samuel v Sebel Furniture Limited* [2006] NSWWCCPD 141(*Samuels*), Roche A-DP stated that it was relevant to bear in mind the flexible nature of proceedings before the Commission and the Commission should exercise its discretion in a beneficial manner without undue emphasis on technicalities, and consistent with s 354 of the 1998 Act. Roche A-DP listed nine principles relevant to the reconsideration power in s 350(3) at [58]:

"(1) The section gives the Commission a wide discretion to reconsider its previous decisions (*Hardaker v. Wright & Bruce Pty Ltd* (1962) 62 SR (NSW) 244);

(2) While the word 'decision' is not defined in s 350, it is defined for the purposes of s352 to include 'an award, order, determination, ruling and direction'. In Roche A-DP's view 'decision' in s 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission;

(3) While the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration (*Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413);

(4) One of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely (*Hilliger v. Hilliger* (1952) 52 SR (NSW) 105);

(5) Reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained during the first proceeding is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result (*Maksoudian v J Robins & Sons Pty Ltd* [1993] NSWCC 36; (1993) 9 NSWCCR 642); 129

(6) Given the broad power of 'review' in s 352 (which was not universally available in the Compensation Court of New South Wales) the reconsideration provision in s 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;

(7) Depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45*;* (1981) 147 CLR 589 may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings;

(8) A mistake or oversight by a legal adviser will not give rise to a ground for reconsideration (*Hurst v Goodyear Tyre & Rubber Co (Australia) Ltd* [1953] WCR 29); and

(9) The Commission has a duty to do justice between the parties according to the substantial merits of the case (*Hilliger v Hilliger* (1952) 52 SR (NSW) 105 and s 354(3) of the 1998 Act)."

30. The appellant in the application for reconsideration made no reference to the principles set out in *Samuels* and did not state how the principles set out in *Samuels* are satisfied in his case.

31. The appellant submitted firstly that the Appeal Panel incorrectly determined that the Registrar was satisfied that at least one of the grounds of appeal under s 327(3)(d) was made out in relation to the assessment of the cervical spine by the AMS. The Panel accepts that the Registrar was satisfied that the ground of appeal relied on by the applicant pursuant to s 327(3)(c) was made out on the face of the application and the assessment of the AMS was made on the basis of incorrect criteria and not demonstrable error. The Appeal Panel accepted that the decision of the Appeal Panel dated 31 May 2019 should be amended to correct paragraph 39 and read "In this matter, the Registrar has determined that he is satisfied that at least one of the grounds of appeal under s 327(3)(c) is made out, in relation to the AMS's assessment of the cervical spine."

32. The appellant's main argument related to whether the Appeal Panel could be reasonably satisfied that the AMS obtained both a valid history and undertook an appropriate examination. The appellant submitted that the Appeal Panel has fallen into error when it stated that it was satisfied that the AMS had obtained a valid history of symptoms which enabled him to determine whether there was non-verifiable radicular complaints. The appellant noted that there was a complete absence of history in terms of referred pain, non-verifiable radicular pain or verifiable radicular complaint and argued that the failure of the AMS to comment concerning any of these three matters does not mean that they were not present but, rather, that the AMS failed to elicit a proper history.

33. This argument and the other arguments set out in the submissions in support of the application for reconsideration are essentially the same arguments raised by the appellant in the appeal. The Appeal Panel accepts that the appellant provided more detail in respect of some of the arguments, however, there is no new evidence to support the application for reconsideration.

34. In the submissions filed in respect of the appeal determined on 31 May 2019, the appellant argued that the AMS's assessment did not permit him to properly categorize or assess the cervical spine in terms of the diagnosis-related estimates because he had omitted to obtain a valid history of symptoms which would enable him to determine whether there is non-verifiable radicular complaints and he had not indicated what planes of movement were full but simply stated that there was a full range of movement. Further, the appellant noted that the AMS omitted to comment whether there was muscle guarding or spasm.

35. These are the same matters that are identified in the the submissions in support of the application for reconsideration and are set out above at paragraph 24.

36. The appellant, in both the submissions filed with the appeal and with the request for reconsideration, referred to the decision of *Crnobrnja v Motor Accidents Authority* [2010] NSW SC 633 (*Crnobrnja)*.In that case, Hulme J stated by way of reference to the DRE descriptors in the 4th Edition AMA Guides that "when allocating the injured person to a DRE Category the assessor must reference the relevant differentiators and/or structural inclusions". However, the MAA's Permanent Impairment Guidelines for the Assessment of the degree of permanent impairment (MAA Guidelines) provide at 4.20 that: "When allocating the injured person to a DRE category the assessor must reference the relevant differentiators and/or structural inclusions." It is significant that there is no such or similar provision in the WCC Guidelines Fourth edition chapter 4. In short, while it may be desirable to do so, there is no requirement in the Guidelines that an AMS must reference the relevant differentiators and/or structural inclusions when allocating a worker to a DRE Category.

37. In terms of the obligation to provide reasons, the appellant argued that the obligation must extend to reasons or explaining or justifying the decision and those reasons cannot be given if the report lacks transparency or there is doubt as to whether the assessor actually assessed all planes of motion in order to determine whether asymmetry exists.

38. The Panel noted that in *Crnobrnja,* Hume J considered a similar argument and held that asymmetry would be quite inconsistent with normal movement to which the assessor had adverted. The Panel does not accept that a reference to a full range of movement cannot be a reference to a full range of movement on all planes of motion unless those planes are specifically referred to by the AMS.

39. The request for reconsideration in this matter was based on allegations of error of law and denial of natural justice. The appellant submitted that the Appeal Panel has fallen into error when it stated that it was satisfied that the AMS had obtained a valid history of symptoms which enabled him to determine whether there was non-verifiable radicular complaints. The appellant also argued that a failure to disclose with some certainty that an examination has been conducted fully and properly resulted in a breach of procedural fairness towards the appellant. There is a failure by the doctor to reveal what his examination involved and as such, a reasonable person simply cannot respond to any adverse determination and this constituted a breach of procedural fairness towards the appellant.

40. An allegation of error of law or denial of natural justice against a determination of an Arbitrator should be dealt with by way of appeal, not reconsideration (*Woodbury v Peter Miles and Annie Miles (No 2)* [2008] NSWWCCPD 97.

41. The Appeal Panel has reviewed all the evidence in the case. In particular, the Appeal Panel noted that there was no evidence of non-verifiable radicular complaint (thumb symptoms) reported by other doctors.

42. Dr Mastroianni, in report dated 22 June 2017, assessed Mr Vasilic as falling into “DRE Cervical and Lumbar Category II. He found tenderness and asymmetry in the cervical spine but no muscle guarding, or radiculopathy. (AMA 5, page 384-392, table 15.3 and table 15.5)”. Dr Mastroianni did not refer to any pain referral to left upper limb i.e. non-verifiable radicular complaint.

43. The Medical Certificate of the general practitioner, Dr Tomasevic, dated 24 March 2017 did not refer to any non-verifiable radicular complaint and there was no shading of the left arm or hand in the pictogram, and only “pains in neck, lower back, left hip, left and right knees and left and right ankles” detailed in the diagnosis or description of injuries.

44. In a report dated 16 June 2018, Dr Tomasevic made a diagnosis of soft tissue musculo-ligamentous injuries and facet joint strains to the neck. Dr Tomasevic made no reference to any non-verifiable radicular complaints.

45. In the MRI Scan report dated 25 August 2017, Dr Ganashan noted: “Clinical Indication - neck pain both shoulders.”

46. The Appeal Panel considered the nine principles outlined above in *Samuel*. The respondent referred to principle 4 which draws attention to the public interest that litigation should not proceed indefinitely. The Appeal Panel accepts that this is an important consideration.

47. As noted above, there is nothing new in this application which would cause the Appeal Panel to exercise the wide discretion that the Commission has in terms of reconsideration applications. The Appeal Panel considered all the issues raised in the Application for Reconsideration in its decision of 31 May 2019 and sees no basis upon which it should exercise its discretion to reconsider these particular matters.

48. There is no fresh evidence so that aspect of *Samuel* does not arise. Given the lack of submissions by the appellant on the *Samuel* principles and the need to exercise the discretion fairly, the Appeal Panel declines to exercise the discretion in the appellant’s favour. Fairness also encompasses fairness to the respondent, who should not have to contest the same matter on another occasion.

49. The Appeal Panel has identified nothing on review to change its original assessment apart from the error in the subsection referred to in paragraph 39 of the Appeal Panel's decision dated 31 May 2019. The decision of the Appeal Panel dated 31 May 2019 should be amended to correct the obvious error in paragraph 39 and read "In this matter, the Registrar has determined that he is satisfied that at least one of the grounds of appeal under s 327(3)(c) is made out, in relation to the AMS's assessment of the cervical spine."

50. The Appeal Panel has declined to change its original determination, being satisfied on the basis of all the evidence that its determination was correct and was made according to law. The Appeal Panel is satisfied there is no basis to rescind, alter or amend its previously made decision apart from the correction in paragraph 39. Accordingly, the Appeal Panel confirms its original determination.

DECISION

51. For the reasons above, the Appeal Panel confirms its decision dated 31 May 2019.

4 September 2019

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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar