WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1633/19**
Appellant:	**State of New South Wales (Albury Wodonga Health)**
Respondent:	**Debbie McLachlan**
Date of Decision:	**30 September 2019**
Citation:	**[2019] NSWWCCMA 138**

Appeal Panel:	
Arbitrator:	**Jane Peacock**
Approved Medical Specialist:	**Dr James Bodel**
Approved Medical Specialist:	**Dr David Crocker**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 1 July 2019 the State of New South Wales 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 5 June 2019.

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

    - the assessment was made on the basis of incorrect criteria,
    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The 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.

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).

PRELIMINARY REVIEW

6. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.

7. 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.

EVIDENCE

Documentary evidence

8. 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.

9. It is noted that one of the complaints on appeal by the appellant is that the AMS did not have adequate regard to the opinion of Dr Marchart, the expert qualified on behalf of the appellant and whose report was attached to the Reply.

10. It transpires that the AMS did not in fact have Dr Marchart's report because whilst it formed part of the Reply it was not sent with the Reply to the AMS.

11. The Commission had already referred the matter to the appeal Panel and the Panel had set a date and time for the preliminary review when this was brought to the Commission's attention.

12. The Commission instructed the Panel to proceed with the preliminary review and the Panel was provided with the opinion of Dr Marchart, which was in evidence as part of the reply but by administrative error had not been forwarded to the AMS.

13. By email dated 16 August 2019, the parties were given the opportunity by the Commission to object to the matter proceeding to a determination by the Panel. By this email the parties were advised to lodge any objection to the panel proceeding by close of business 20 August 2019 and they were further advised that "absent response to this correspondence, the panel will proceed to issue a decision in due course". The worker advised that she consented to the matter being determined by the Panel. The appellant failed to advise the Commission of any objection or consent by the appointed date and time. In these circumstances, the Commission instructed the Panel to proceed to issue a decision in due course.

Medical Assessment Certificate

14. 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

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

FINDINGS AND REASONS

16. 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.

17. 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.

18. The matter was referred by the Registrar to the AMS as follows:

> "The following matters have been referred for assessment (s 319 of the 1998 Act):
>
> **a. Date of injury:** '21 June 2014-(deemed) – due to nature and conditions of employment from 1 January 2002.'
>
> **b. Body part referred:** Cervical spine.
> **c. Method of assessment:** Whole Person Impairment."

19. The AMS issued a MAC certifying as follows:

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)**	
Cervical spine	21/06/14 (Deemed)	Chap 4 P 29		P 392 T 15-5	28%	1/10	
	Total % WPI (the Combined Table values of all sub-totals)						

20. The employer appealed.

21. There was no complaint on appeal by either party about the assessment of the cervical spine as DRE IV.

22. The complaint on appeal relates to the deduction made by the AMS of one-tenth under s 323 to take account of any pre-existing condition, abnormality or injury.

23. The AMS took a detailed history from the respondent worker which was consistent with the other evidence that was before him:

> **"Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:**
>
> (1) Miss McLachlan advised that she had been working for the Health Service for about 26 years. In 1998, she had been working for about 5 or 6 years. She had no particular problem to start with, although over the subsequent years, up until 1998, she started experiencing increasing pain in her neck. At the time, she was assessing claims forms. There was a lot of manual writing and calculations. Towards the end of the week, there would be about 200 cheques to complete and to put into postal envelopes. She described that this component of the job was now managed electronically. There had been a restructure and they were always short of staff although she enjoyed her job.

(2) With the continual bending forward of her head, she experienced increasing neck pain. She saw her Doctor. Anti-inflammatories were tried but these did not help and the condition deteriorated further. She requested that there should be a review of her workplace, but this did not occur at that stage. Unfortunately, her condition deteriorated very rapidly. She saw her Doctor who had her seen at Albury Hospital. Just before this, she had been manoeuvring heavy files. There was a need to look upwards to higher shelves and also to get files out of a bottom drawer. At this stage, she was alarmed because there was pain radiating down her left leg.

(3) There were no MRI facilities in Albury, and she was rapidly sent to Wagga where an MRI scan was conducted. This demonstrated cervical discogenic pathology. She was rapidly transferred by aircraft to the Royal Melbourne Hospital and came under the care of Specialist Neuro-surgeon, Dr Damien Tange. On 17/08/98 he carried out a surgical fusion at the C5/6 level. This gave her a lot of improvement. She was able to get back to work and managed to work for a different Department where there was less physical posturing with her head down and less writing. She continued with this job for the next 8 years or so.

(4) She described that although her neck felt alright, she did experience some pain in her lower back. She had cortisone injections and also epidurals. In 2006, her position was apparently terminated from that part of the Department. Nevertheless, she managed to get a job working in administration and reception in a Mental Health Section. Throughout 2008 and 2009, her work increased markedly. She developed right sided tendonitis and had surgery for Carpal Tunnel Syndrome which gave her quite a good result. She advised that she was moving heavy files to and from a high shelf system and was also putting large files together which would necessitate holding her head in a flexed (downwards-looking) position. She described that her neck started hurting and there was pain radiating down her left arm.

(5) She was seen in Melbourne again. On this occasion, there was further surgery to her neck which was conducted with an anterior approach by Specialist Neuro-surgeon, Dr Christopher Thien. It was identified that there was significant discogenic pathology at the C5/6 level with a large posterior protrusion. This was managed by a disc excision and an artificial disc replacement. This procedure was conducted in June 2014.

(6) She was able to return to work and from then on had better office assistance.

(7) In 2016, she felt very concerned that the situation was happening again. There were modifications to her work-station and she also was using a stand up desk.

(8) She then came under the care of Specialist Pain Management Physician, Dr Brett Todhunter. In November 2016, he organised the insertion of two spinal cord stimulators. This gave her some improvement. Earlier, she had been using Pregabalin, but this resulted in an incapacity to do her job. Although the spinal cord stimulators assisted, there was still a need for further help. As a result, there was an attempt at a Ketamine infusion which did assist. This was repeated but unfortunately had to be ceased since she developed a liver function disorder. The most recent attempt at clinical management was a Lignocaine infusion in September 2018 but unfortunately this did not help.

b. Present treatment:

As advised, she is trying to get by with the use of the spinal cord stimulators. She also takes extensive analgesic medication although tries to minimise this.

c. Present symptoms:

(1) Pain in her neck with radiation down the left arm.

(2) Gross restriction of movement of the neck. If she tries to flex her neck, it is very painful.

(3) Although not included in this assessment, she advised that she was suffering a lot of low back pain.

d. Details of any previous or subsequent accidents, injuries or condition:

Other than the development of neck pain starting in 1998, there does not appear to have been any other significant issue.

e. General health:

This is not all that good. She is on Thyroxine replacement medication and also takes medication for the control of raised blood pressure.

f. Work history:

As advised, just about all of her working life has been with the Health Service in a secretarial capacity. She is continuing with this work although now is reducing it from 5 days a week down to 4 days a week with the Wednesday off in the middle, to try to control her condition.

g. Social activities/ADL:

(1) Miss McLachlan is single without dependents.

(2) She is a smoker although has reduced down to 10 cigarettes a day. She also enjoys a few drinks.

(3) At home, she is keen on collecting antiques and listening to music. She also looks after her elderly cat.

(4) She is able to drive but only for about 15 minutes. For this assessment, she was driven by a friend.

(5) At home, she has a cleaner funded by herself who comes once every two weeks. She does very little shopping. This is mostly home delivered."

24. The AMS conducted a physical examination about which there is no complaint on appeal.

25. The AMS had regard to the following radiological investigation:

DATE	INVESTIGATION	COMMENT
20/06/14	MRI scan	Large central posterior protrusion at C6/7.
24/06/14	Plain x-ray	Fusion at C5/6.
16/06/15	CT scan	C5/6 ankylosis. C6/7 artificial disc. At C4/5 there is inter-foraminal narrowing which is more severe on the right.

26. The AMS summarised the injuries and his diagnosis as follows:

> **"Summary of injuries and diagnoses:**
>
> Miss McLachlan gives a history of severe deterioration of her cervical spine. This initially came to a head in 1998 with the development of discogenic pathology at the C5/6 level. This was managed by cervical fusion. This gave her quite a good result so that she was able to continue with her job. Unfortunately, the condition deteriorated with the development of discogenic pathology at the C6/7 level. This was managed by a disc replacement. Again, this gave her some improvement although the chronic pain of her cervical spine continued. This has more recently been managed by the insertion of spinal cord stimulators and also by a Ketamine infusion. This seems to have given her sufficient improvement so that she is able to continue with her job although still has gross dysfunction of her cervical spine and is now facing the prospect of having to reduce her working hours.
>
> **b. Consistency of presentation**
>
> Miss McLachlan's presentation was very consistent. She came across as a hard-working and decent person. She advised that she was very keen to continue with her job and felt that financially she has no option."

27. The AMS considered that there was pre-existing condition, abnormality or injury as he noted that "there is extensive pre-existing degenerative change throughout her cervical spine. This is particularly demonstrated in the mid to lower segments".

28. The AMS explained his assessment of 28% WPI as follows:

> "There has been a cervical spine disc replacement at the C6/7level. According to the SIRA Guidelines, Page 29, Para 4.38, disc replacement surgery is assessed in the same way as a spinal fusion. This automatically places her into DRE Cervical Category IV in Table 15-5 on Page 392 of AMA-5. This provides a whole person impairment ranging between 25% and 28%, depending on the activities of daily living. For this, she attracts a further 2%, giving her 27%.
>
> This current condition is closely associated with the original development of her condition from 1998 where there was a spinal fusion at the C5/6 level. The disc replacement is therefore a second surgical procedure. This is addressed in the Modification Table 4.2 on Page 29 of the SIRA Guidelines. This provides a further 2% WPI which is combined with the original 27%, giving a final whole person impairment of 28%."

29. The AMS made a deduction of one-tenth reasoning as follows:

> "There is evidence of significant and quite longstanding degenerative change which would have contributed to the discogenic pathology in 1998 and again in 2014. This would reasonably attract a deduction of one tenth. This therefore reduces the whole person impairment from 28% down to 25% which is her final whole person impairment."

30. The AMS was bound by the terms of the referral to him. That referral provided as follows:

> "21 June 2014-(deemed) – due to nature and conditions of employment from 1 January 2002."

31. The referral to the AMS was consistent with how the injury was "pleaded" – at Part 4 of the Application to Resolve a Dispute the respondent worker "pleads":

> "21/06/2014 deemed date (nature and conditions from 1 January 2002".

32. The appellant makes the point in its submissions that this was the basis on which the matter was referred to the AMS.

33. The AMS was correct to assess DRE IV for the cervical spine (25% WPI) and neither party complains about this assessment.

34. This assessment is based upon the surgery performed at C6/7 as a result of the injury deemed to have occurred on 21 June 2014.

35. The appellant said that the AMS did not have adequate regard to the opinion of Dr Marchart.

36. The panel has Dr Marchart's report. It transpires that the AMS did not have that report. Dr Marchart's approach was to assess the impairment as DRE 1V (25% WPI) add 2% for ADLS and then deduct one-half for degenerative changes and the fusion performed after the 1998 injury at C5/C6 which he describes as at a nearby but not adjacent level.

37. The AMS was not bound to follow Dr Marchart's approach but his role was to carry out an independent assessment. He was bound by the terms of the referral to him.

38. The panel considers that the AMS was correct to assess DRE IV. He was correct to assess 2% WPI for ADLs.

39. The injury the subject of the referral was the injury deemed to have occurred on 21 June 2014 due to the nature and conditions of employment from 1 January 2002. This injury resulted in surgery to the cervical spine by way of disc replacement at the C6/7 level. The impairment assessed as a result of the injury on 21 June 2014 (deemed) is based upon the surgery performed at C6/7. This was at a separate level (nearby but not adjacent) to the surgery performed after the 1998 injury namely the spinal fusion at C5/6. The 1998 injury was not part of the referral to the AMS. The panel notes that the worker had a good recovery from the spinal fusion at C5/6 which followed the 1998 injury and that she was able to return to full-time work. After the injury deemed to have occurred on 21 June 2014 (the subject of the referral) the worker came to surgery at a different level - namely cervical spine disc replacement at the C6/7level. The AMS was asked to assess impairment from the injury deemed to have occurred on 21 June 2014, not the 1998 injury. This can be assessed separately and results in an assessment of 27% WPI (25% WPI for DRE IV plus 2% for ADLs). There is no allowance of 2% WPI for operation on a second level because the impairment from the injury deemed to have occurred on 21 June 2014 is based on the surgery performed at the C6/7 level that occurred as a result of that injury and which can be treated as single level surgery.

40. A deduction under s 323 can only be made if the pre-existing condition, injury or abnormality has contributed to the level of permanent impairment assessed.

41. The panel considers that there is such a contribution to the level of permanent impairment assessed from the underlying degenerative changes (which the panel notes were asymptomatic prior to the injury in 1998) and from the surgery previously performed at the C5/C6 level as a result of the 1998 injury. The Panel notes that the impairment assessed as a result of the referred injury of 21 June 2014 (deemed) is based on the surgery performed at C6/7 level, which is not at a level adjacent to the prior surgery. The worker had a good recovery from the surgery in 1998 and was able to return to full time duties. So while the panel considers that there would be some contribution to the level of permanent impairment assessed as a result of injury on 21 June 2014 from the degenerative changes and the 1998 injury resulting in a spinal fusion and thus would require deduction to be made, the extent of that deduction would be difficult to determine and so the deduction will be one-tenth.

42. Whilst the deduction remains at one-tenth as assessed by the AMS, the MAC will be revoked because the overall impairment assessment should have been 27% WPI (25% WPI for DRE IV plus 2% WPI for ADLs) because as set out above the worker is not entitled to the allowance for a second operation because there is one operation that results from the referred injury date. Accordingly, the impairment as a result of injury deemed to have occurred on 21 June 2014 is 27% WPI less one-tenth is 24.3% WPI or 24% WPI after rounding.

43. For these reasons, the Appeal Panel has determined that the MAC issued on 5 June 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 MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **1633/19**
Applicant: **Debbie McLachlan**
Respondent: **State of New South Wales (Albury Wodonga Health)**

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 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	21/06/14 (Deemed)	Chap 4 P 29	P 392 T 15-5	27%	1/10	24%
Total % WPI (the Combined Table values of all sub-totals)					**24%**	

Jane Peacock
Arbitrator

Dr James Bodel
Approved Medical Specialist

Dr David Crocker
Approved Medical Specialist

30 September 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 MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar