WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3226/19**
Appellant:	**Borka Kuzmanovic**
Respondent:	**State of New South Wales**
Date of Decision:	**17 December 2019**
Citation:	**[2019] NSWWCCMA 189**

Appeal Panel:	
Arbitrator:	**R J Perrignon**
Approved Medical Specialist:	**Dr Richard Crane**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**

BACKGROUND TO THE APPLICATION TO APPEAL

1. The appellant worker, Ms Kuzmanovic, suffered injury to her left shoulder and neck on 15 February 2005. On 16 March 2008, she later suffered injury to her right shoulder, back and legs when she fell down stairs at work. She aggravated the condition of her right shoulder on 12 October 2017, when she fell in the bathroom at home, fracturing her right humerus.

2. By a Medical Assessment Certificate dated 11 June 2019, Approved Medical Specialist Dr Wong assessed the following:

   (a) 5% whole person impairment (5% cervical spine, 0% left upper extremity - shoulder and arm) as a result of injury on 15 February 2005.

   (b) 9% whole person impairment (7% lumbar spine, 2% right upper extremity - shoulder, 0% left lower extremity, 0% right lower extremity) as a result of injury on 16 March 2008.

3. The appellant worker appeals from the assessment of left and right upper shoulders only, as a result of injury on 15 February 2005 and 16 March 2008 respectively.

4. On 22 August 2019, the Registrar by his delegate was satisfied that the ground of demonstrable error was made out, and referred the matter to this Appeal Panel for determination.

5. On 4 September 2019, 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*. Having identified error on one or more of the grounds relied on by the appellant, the worker was referred for examination by Dr Crane. His report is set out below.

Submissions

6. The Appeal Panel has had regard to the written submissions filed by both parties. It is unnecessary to set them out here in full, but appropriate to summarise them as follows.

7. Doing our best to understand the submissions made by the worker's solicitor, the appellant worker submits as follows:

   (a) The Approved Medical Specialist measured shoulder movement using a goniometer but declined to assess on the basis of range of movement because the appellant moved her shoulders in a slow fashion, contrary to his normal experience. He failed to explain why this slow movement justified rejection of range of movement as an accurate method of assessment. He should have assessed both shoulders on the basis of the range of movement, measured by goniometer.

   (b) In respect of the left shoulder, the Approved Medical Specialist assessed a 0% whole person impairment on the basis that the left shoulder was found to be normal by Approved Medical Specialist Dr Adler when he examined the worker on 13 May 2011, and by Dr Dias when he examined the worker on 20 February 2015, and that it was not subsequently injured. The reasoning is flawed because Dr Adler and Dr Dias assessed 0% impairment and did not find that there had been no injury.

   (c) In respect of the right shoulder, the Approved Medical Specialist assessed a 2% whole person impairment, adopting the assessment of Dr Adler when he examined the worker 13 May 2011. He did so despite Dr Dias' assessment of the 10% on 20 February 2015, as there had been no further injury or aggravation since Dr Adler's initial assessment. This reasoning is also flawed.

8. The respondent submits in summary as follows.

   (a) Dr Wong explained that he was unable to accept range of movement as an accurate method of assessment because the worker complained of loss of sensation in all four limbs on a non-dermatomal distribution, and because her movements were unusually slow, as indicated above. He considered that this gave rise to inconsistency sufficient to justify rejection of range of movement as an accurate method of assessment. His reasons for doing so were sufficient.

   (b) Contrary to the applicant's submissions, Dr Wong did not find there had been no injury to the left shoulder. He articulated the injury in his reasons. He assessed impairment at 0% notwithstanding restrictions measured in the range of movement, because inconsistencies in presentation rendered range of movement an inappropriate method of assessment.

Reasoning of the Approved Medical Specialist

9. Dr Wong used a goniometer to measure the range of movement of both shoulders. On that basis, he assessed (par 5) the following:

   (a) 13% whole person impairment (left shoulder).
   (b) 18% whole person impairment (right shoulder).

10. He rejected range of movement as an appropriate measure of impairment, for the following reasons (at par 7):

    "There are significant inconsistencies identified at the time of my assessment. When Ms Kuzmanovic walked from the waiting room to the examination I noticed that she carried a walking stick on her left arm and she was walking with a normal gait. Later, I asked her to get up from the seat so that I could perform the lumbar spine examination. I asked her to walk across the examination room and I noticed a prominent limp on the left side. I asked her why she was limping and she told me that she walked with a limp because she had numbness at the sole of the left foot. On neurological examination, Ms Kuzmanovic complained of loss of sensation globally in

all four extremities with the left upper extremity worse than the right and the right lower extremity worse than the left. The loss of sensation at the four extremities was not in a dermatomal distribution. On examination for the range of motion of the shoulders, I noted that Ms Kuzmanovic move her arms exceedingly slowly from the start to finish of every movement. In my experience, the claimants usually move the shoulders through the first part of the range in a reasonable pace until they encounter the painful section at the end of that particular range of movement. I found this lack of enthusiasm to move her shoulder joints to be very unusual. I have no confidence in the goniometric measurements obtained in this examination reflecting the true status of the shoulders."

11. He noted that the fall at home on 12 October 2017 was not caused by any work injury, and found that the right humerus, which had been fractured on that occasion, had recovered (par 8g).

12. He assessed a 0% whole person impairment (left shoulder), because he found there was no causal nexus between impairment of the left shoulder and injury on 15 February 2005. He reasoned as follows (par 10a – emphasis added):

> "**The left upper extremity had injury to the shoulder** and the arm. **The left shoulder was rated at 0% WPI based on its historic data of impairment assessments.** The left shoulder was examined by AMS Dr R Adler on 1 June 2011, about six years after the DOI on 15 February 2005 and **Dr Adler reported a normal left shoulder in his MAC**. **Dr U Dias reported a normal left shoulder in his IME**, about 10 years after the DOI **on 20 February 2015. Therefore, the left shoulder was normal for at least 10 years after the work injury on 15 February 2005.** There was no history of further work injury to her left shoulder. Borka Kuzmanovic stopped work in 2008. It is abundantly clear to me in that **the left shoulder impairment found in this examination has nothing to do with the injury on 15 February 2005**. The left arm had no rateable clinical findings in this examination."

13. He assessed a 2% whole person impairment (right shoulder), because that assessment had been made by Dr Adler in 2011, and there had been no further injury or aggravation to the right shoulder from that time until Dr Dias assessed it at 10% on 20 February 2015. He reasoned as follows (par 10b – emphasis added):

> **"The right upper extremity had injury to the shoulder. The right shoulder was rated at 2% WPI based on its injury history and its historic data of impairment assessments.** The right shoulder was injured on 16 March 2008. Three years later, AMS Dr R Adler on 1 June 2011 rated the right shoulder at 2% WPI. 20 February 2015 Dr Uthum Dias rated the right shoulder at 10% WPI. Ms Kuzmanovic stopped work in 2008 and **there was no history of further injury or aggravation to the right shoulder between the two assessments**. **I therefore cannot attribute the increased right shoulder impairment to the injury sustained on 16 March 2008. I have kept the right shoulder impairment at 2% WPI as determined by AMS Dr R Adler on 1 June 2011."**

14. He did not indicate whether any part of the current impairment was due to the fall of 12 October 2017, merely observing:

> "The right shoulder was significantly aggravated by a subsequent injury to the right arm on 12 October 2017. According the certificate of determination dated 14 May 2019, the fall on 12 October 2017 in which the applicant suffered a fracture of her right humerus was not a consequence of any injury to her left leg or back. Please refer to section 8 at dot point g for further detail."

15. At par 8g, the doctor had found, 'The humerus recovered'.

16. In those circumstances, there is no evidence on the face of the Medical Assessment Certificate that he attributed any of the existing right shoulder impairment to the fall on 12 October 2017.

Whether range of movement should have been accepted as valid measurement

17. Par 2.5 of the Guidelines provides (emphasis added):

> "Range of motion (ROM) is assessed as follows:
>
> - A goniometer or inclinometer must be used, where clinically indicated.
> - Passive ROM may form part of the clinical examination to ascertain clinical status of the joint, but impairment should only be calculated using active ROM measurements. Impairment values for degree measurements falling between those listed must be adjusted or interpolated.
> - If the assessor is not satisfied that the results of a measurement are reliable, repeated testing may be helpful in this situation.
> - **If there is inconsistency in ROM, then it should not be used as a valid parameter of impairment evaluation. Refer to paragraph 1.36 in the Guidelines.**
> - If ROM measurements at examination cannot be used as a valid parameter of impairment evaluation, the assessor should then use discretion in considering what weight to give other available evidence to determine if an impairment is present."

18. Par 1.36 provides (emphasis added):

> "AMA5 (p 19) states: 'Consistency tests are designed to ensure reproducibility and greater accuracy. These measurements, such as one that checks the individual's range of motion are good but imperfect indicators of people's efforts. The assessor must use their entire range of clinical skill and judgment when assessing whether or not the measurements or test results are plausible and consistent with the impairment being evaluated. If, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the assessor may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing.' **This paragraph applies to inconsistent presentation only**."

19. It follows that an Approved Medical Specialist may only reject range of movement as an accurate measure of impairment if inconsistency is identified. Dr Wong identified an unusually slow movement of the shoulders, which was inconsistent with that of other patients. This, together with inconsistency between her gait on entry to the room and during examination, led him to believe – by implication if not expressly – that the test results were not 'plausible and consistent with the impairment being evaluated'. The slowness of movement was an inconsistency which entitled him to reject range of movement as an accurate measure of impairment. We can identify no error in his having done so.

Left shoulder impairment

20. As indicated, Dr Wong reasoned that no part of the existing left shoulder impairment resulted from injury on 15 February 2005, because Dr Adler and Dr Dias had found the shoulder to be normal when they examined it in 2011 and 2015 respectively.

21. Dr Adler had examined the worker on 13 May 2011. In his Medical Assessment Certificate, he records that the Registrar had referred to him for assessment of whole person impairment:

    (a) the cervical spine as a result of injury on 15 February 2005, and

    (b) the right shoulder and lumbar spine, as a result of injury on 16 March 2008.

22. There is no record in his Medical Assessment Certificate that the left shoulder had been referred for examination. Probably for that reason, he did not assess the left shoulder. For some reason he did nevertheless examine it, and recorded as follows:

> "Examination of the left shoulder: Normal. No shoulder wasting. Demonstration of variable motion testing no 3 repetitions with abduction 100 degrees, 80 degrees, 150 degrees, my estimate is 150 degrees, flexion 150 degrees, 100 degrees, 80 degrees, my estimate is 150 degrees, extension 50- degrees, internal rotation 80 degrees, external rotation 60 degrees and adduction 50 degrees. No subacromial tenderness. No impingement sign. Normal non-tender acromioclavicular joint. There were no neurological deficits in the arm with reflexes, sensation and strength normal."

23. The word 'Normal' where first used in this passage, means normal in appearance. Though Dr Adler found no subacromial or acromioclavicular tenderness, no signs of impingement, and no neurological deficits, the wide range of movement elicited on abduction and flexion could be consistent with either pathology or exaggeration. By selecting 150 degrees in each case, Dr Adler demonstrated that he did not consider the lesser ranges of movement to be an accurate measure of impairment. However, he was not asked to assess whole person impairment (left shoulder), he did not do so, and his views in respect of the left shoulder do not bind the parties. Despite the conclusion to which Dr Adler apparently came, we cannot be satisfied, on the basis of this report, that the left shoulder was impaired or unimpaired in 2011 as a result of injury.

24. On 20 February 2015, Dr Dias examined the worker at the request of her solicitors and assessed a 9% whole person impairment (left shoulder), based on range of movement. He recorded:

> "Inspection of Ms Kuzmanovic's left shoulder was normal. She was tender to palpation over the anterior and lateral aspects of the glenohumeral joint.
>
> Abduction of the left shoulder was limited to 90 degrees. Flexion was limited to 90 degrees. Internal rotation was limited to 30 degrees. External rotation was limited to 50 degrees. She had a normal range of movement in the planes of extension and adduction."

25. Again, the word 'normal' where first used in this passage means normal in appearance. He goes on to describe pain symptoms and a restricted range of movement. He diagnosed chronic left shoulder impingement syndrome secondary to acute soft tissue injury. He expressed the following opinion on causation:

> "In my opinion, on the balance of probabilities, Ms Kuzmanovic's injuries relating to her cervical spine and left upper extremity arose predominantly out of the course of her employment as a cleaner and are directly related to the nature and conditions of her employment stemming from the deemed injury date of the 15th February 2005."

26. Contrary to Dr Wong's understanding, Dr Dias did not find that the left shoulder was normal. He found that it exhibited sufficient pathology and impairment to justify an assessment of 9% whole person impairment (left shoulder) as a result of injury on 15 February 2005.

27. Dr Wong misconstrued Dr Dias' findings. He relied on that misconstruction in finding that no part of the left shoulder impairment resulted from injury. That amounts to error. The error is discernible on the face of the certificate, because Dr Dias' assessment is referred to and discussed at par 10c.

28. The error cannot be cured by relying on the previous examination of Dr Adler, because in our view it was not necessarily a normal examination, and even if Dr Adler was correct in assessing a 0% whole person impairment (left shoulder) in 2011, it does not follow that there was no underlying pathology in the left shoulder resulting from injury, which could become symptomatic at a later date.

29. For those reasons, there is demonstrable error, and the certificate must be set aside.

Right shoulder impairment

30. Dr Wong assessed a 2% whole person impairment (right shoulder) as a result of injury on 16 March 2008. On the basis of range of movement, he calculated an 18% whole person impairment (right shoulder) but dismissed this as implausible due to the inconsistencies described above.

31. He reasoned as follows (at par 10a – emphasis added):

> "**The right upper extremity had injury to the shoulder. The right shoulder was rated at 2% WPI based on its injury history and its historic data of impairment assessments. The right shoulder was injured on 16 March 2008**. Three years later, AMS Dr R Adler on 1 June 2011 rated the right shoulder at 2% WPI. 20 February 2015 Dr Uthum Dias rated the right shoulder at 10% WPI. **Ms Kuzmanovic stopped work in 2008 and there was no history of further injury or aggravation to the right shoulder between the two assessments**. **I therefore cannot attribute the increased right shoulder impairment to the injury sustained on 16 March 2008. I have kept the right shoulder impairment at 2% WPI as determined by AMS Dr R Adler on 1 June 2011**."

32. As we understand his reasoning, he considered that the 2% whole person impairment as assessed by Dr Adler remained appropriate, notwithstanding Dr Dias' assessment of 10% in 2015, because there had been no further work-related injury or aggravation since Dr Adler's assessment.

33. Where impairment results from injury on a particular date, it does not follow that an increase in impairment at a later date cannot also result from the same injury, merely because there has been no further injury or aggravation since the first assessment. That reasoning, adopted by Dr Wong, was incorrect. It formed the basis for assessing a 2% whole person impairment (right shoulder) consistent with Dr Adler's assessment in 2011. As the reasoning was incorrect, it demonstrates error on the face of the certificate, and the certificate must be set aside.

34. The task of the Approved Medical Specialist was to measure permanent impairment of the right shoulder on the date of examination, using whatever method was available and permissible under the Guidelines, and to determine what part of that impairment resulted from injury on 16 March 2008, with reasons. The Approved Medical Specialist did not undertake this task. Instead, he simply assumed that impairment resulting from injury had remained stable at 2% whole person impairment, because there had been no injury or aggravation since 2011. His failure to undertake the task required of him amounted to demonstrable error.

Dr Crane's report

35. Having identified error, the Panel referred the worker for assessment by one of its members, Dr Crane, who examined her on 16 October 2019 in the presence of an interpreter. His report is set out below.

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

Dr Richard Crane confirmed the history provided by Dr S K Cyril Wong in the Medical Assessment Certificate regarding the motor accidents on 15 February 2005 and 16 March 2008, and his subsequent treatment.

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

The additional history was simply the continuation of discomfort with particular reference to both upper extremities, as was indicated in the original certificate.

3. Findings on clinical examination

This was confined to the upper extremities. There was no obvious deformity or evidence of muscle wasting. Mid-arm circumference was 34cm on the right and 33cm on the left, with maximal forearm circumference 28cm on the right and 27cm on the left.

Range of Motion of Shoulders (repetitive measurements)		
Plane of Motion	**Right**	**Left**
Flexion	40° - 50°	70° - 80°
Extension	10° - 20°	10° - 20°
Abduction	50°	50° - 70°
Adduction	10° - 20°	20°
External Rotation	50° - 80°	80°
Internal Rotation	30° - 40°	20° - 40°

There was no crepitus noted in either shoulder and the range of motion of the elbows was equal and normal bilaterally as concerned flexion, extension, supination and pronation.

The claimant stated the reason why there was restricted range of motion was due to pain mainly described in the shoulder blade areas on both sides.

I did draw her attention to the fact that the range of motion, as recorded by Dr Adler during his examination of 1 June 2011, was generally substantially better in all planes of motion. I did draw this to the attention of the claimant, who stated that the difference was 'because it is getting worse all the time.'

I also noted that passive range of motion of the shoulders demonstrated there was voluntary resistance.

The goniometer measurements I obtained did show inconsistency, both in comparison with the figures obtained by Dr Adler and also with variation during my examination of the claimant.

Applying Clause 1.36 of the *Guidelines*, this inconsistency persuades me that range of movement is an implausible measure of impairment and precludes the goniometer measurements being accepted as a valid parameter of impairment evaluation. For that reason, it is appropriate to assess impairment of the shoulders by analogy. The most appropriate analogy is impairment resulting from a **mild degree** of inflammation of an acromioclavicular joint. This joint is selected rather than the glenohumeral joint in view of the relatively minor nature of the injury. The maximum value for such a disorder is 15% WPI: AMA5 Guides, chapter 16.7, Table 16-18, page 499. In accordance with Table 16-19 on page 500, mild inflammation is assessed at 10% of this figure, giving 1.5% for each shoulder, rounded to 2% as a result of injuries in 2005 (left shoulder) and 2008 (right shoulder).

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

Not applicable."

36. We adopt the conclusions and assessment of Dr Crane.

Conclusion

37. For those reasons, the appeal is allowed. The Medical Assessment Certificate of Dr Wong dated 11 June 2019 is set aside and replaced by the attached Medical Assessment Certificate.

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*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

MEDICAL ASSESSMENT CERTIFICATE

Table 2 - Assessment in accordance with AMA5 and NSW workers compensation guidelines for the evaluation of permanent impairment for injuries received after 1 January 2002

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 Wong and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Matter No: **3226/17**
Applicant **Borka Kuzmanovic**
Respondent: **State of New South Wales**

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
1. Cervical Spine	15 February 2005	Chapter 4 P24-30	Chapter 15 Table15-5	5%	Nil	5%
2. Left Upper Extremity (Shoulder and arm)	15 February 2005	Chapter 2 P10-12	Chapter 16 P433-521	2%	Nil	2%
Total % WPI (the Combined Table values of all sub-totals)					**7%**	

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*.

Matter No: **3226/17**
Applicant **Borka Kuzmanovic**
Respondent: **State of New South Wales**

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
1. Lumbar Spine	16 March 2008	Chapter 4 P24-30	Chapter 15 Table15-3	7%	Nil	7%
2. Right Upper Extremity (Shoulder)	16 March 2008	Chapter 2 P10-12	Chapter 16 P433-521	2%	Nil	2%
3. Left Lower Extremity (knee)	16 March 2008	Chapter 3 P13-23	Chapter 17 P523 - 564	0%	Nil	0%
4. Right lower extremity (knee)	16 March 2008	Chapter 3 P13-23	Chapter 17 P523 - 564	0%	Nil	0%
Total % WPI (the Combined Table values of all sub-totals)					**9%**	

R J Perrignon
Arbitrator

Dr Richard Crane
Approved Medical Specialist

Dr Tommasino Mastroianni
Approved Medical Specialist

17 December 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*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar