WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M2-5049/19**
Appellant:	**Penelope Edwards**
Respondent:	**Secretary, Department of Education**
Date of Decision:	**30 April 2020**
Citation:	**[2020] NSWWCCMA 81**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr Harry Stern**
Approved Medical Specialist:	**Dr Michael Delaney**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 14 February 2020, Penelope Edwards (the appellant/Ms Edwards) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Ian Wechsler, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 17 January 2020.

2. The appellant relies on a ground of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act): the MAC contains a demonstrable error.

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

4. The WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the WorkCover Medical Assessment Guidelines.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 4th ed (AMA 4).

RELEVANT FACTUAL BACKGROUND

6. Ms Edwards suffered an intracerebral haemorrhage in the left occipital lobe when she fell, striking her head, in the course of her employment on 29 January 2010. She was found to have suffered right homonymous hemianopia and suffered persisting problems with loss of peripheral vision, headaches and dizziness.

7. In January 2019 Ms Edwards was assessed by an ophthalmologist, Dr Frank Bors, who diagnosed left occipital traumatic haemorrhage resulting in right inferior quadratic peripheral homonymous visual field loss. Dr Bors assessed 25% whole person impairment in respect of injury to the visual system.

8. Dr Michael Steiner examined Ms Edwards at the request of the respondent. Dr Steiner diagnosed a "subtle right inferior quadrantinopia" and assessed 8% whole person impairment arising from injury to the visual system.

9. Ms Edwards's claim for lump-sum compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of impairment arising from injury to the visual system was referred to the AMS who assessed 9% whole person impairment resulting from injury to the visual system on 29 January 2010.

PRELIMINARY REVIEW

10. 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.

11. The appellant sought re-examination of Ms Edwards. However, re-examination cannot be performed to determine if a ground of appeal is made out and can only be undertaken after error on the face of the record is established.[1] For the reasons set out below the Panel is satisfied that no appealable error has been identified. The Panel is satisfied that sufficient information is available for determination of the appeal.

EVIDENCE

Documentary evidence

12. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

13. The AMS assessed Ms Edwards taking into account the material attached to the Application to Resolve a Dispute and the Reply, the history and examination carried out on 17 December 2019 which included the Humphrey visual field test. That assessment was appropriate and in accordance with the Guidelines.

SUBMISSIONS

14. Both parties made written submissions which have been considered by the Appeal Panel.

15. The appellant submits that:

    (a) the AMS erred in failing to assess "absolute field defect".

    (b) the AMS erred in finding the "absolute field defect" "due to the upper lids and therefore artefactual" without full and proper explanation.

    (c) It is the role of the AMS to assess impairment of injury not to make findings on the nature and extent of the referred injury for assessment.

    (d) the AMS erred in failing to assess "inferior field changes".

[1] *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South* Wales [2013] NSWSC 1792 at [33].

16. In reply, the respondent submits that:

    (a) The AMS had assessed Ms Edwards in accordance with the Guidelines and had provided a satisfactory explanation for his conclusion.

    (b) it was appropriate for the AMS to assess the extent of injury to the visual system as a result of the work accident in order to assess permanent impairment, and

    (c) the AMS had correctly concluded that there was no impairment to be assessed pursuant to the Guidelines in respect of inferior field change.

FINDINGS AND REASONS

17. 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.

18. 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.

19. The AMS was provided with and considered the reports of the treating neuro ophthalmologist, Dr Jen Sandbach, as well as reports of the respective independent medical experts, Dr Frank Bors and Dr Michael Steiner. The AMS conducted an appropriate examination and testing, the results of which are recorded in the MAC. The AMS reported:

    > "Computerised visual fields (Humphreys 30-2) were mildly abnormal with loss of sensitivity to light in the pattern deviation in both eyes especially right inferiorly but there was *no significant absolute scotoma* seen on greyscale map" (emphasis added).

20. The AMS noted the results of testing, recording:

    > "The first visual field on 9 February 2010 shows an absolute complete dense right homonymous hemianopia in keeping with an acute left occipital lobe haemorrhage.
    >
    > A subsequent visual field at Westmead Eye Clinic on 10 May 2010 shows considerable resolution of the field defect but still there is right incongruous inferior homonymous defect. Subsequent visual fields show further improvement in variability. Dr Bors' visual field on 15 January 2019 show very little inferior changes but some superior changes which could be artifactual due to the eyelids. Dr Steiner's Medmont visual fields on 6 June 2019 show a right inferior homonymous incongruous defect which is more significant than the visual fields in my examination on 17 December 2019.
    >
    > Dr Jen Sandbach's correspondence on 7 November 2011 documents a right inferior quadratic depression of her fields on 10-2 visual field test which she attributes to the intracranial haemorrhage in 2010 and the cause of Ms Edwards's acquired dyslexia."

21. Based on the history and examination obtained on 17 December 2019, the Humphrey's visual field test performed on that day and the documentation provided, the AMS assessed 10% impairment of visual function in both eyes, resulting in 9% whole person impairment in accordance with Table 8.7 and Table 8.6 of AMA 4.

22. The AMS explained the basis of his assessment. He noted that corrected vision was normal. He explained:

> "Ms Edwards's visual field defect is relative and not absolute and cannot be assessed using the methods outlined in Section 8.2 Visual Fields on pages 8/211 - 28/216 of the American Medical Association 'Guide to the Evaluation of Permanent Impairment Fourth Edition (AMA 4)'.
>
> Ms Edwards's dyslexia is a direct result of her relative left inferior homonymous visual field defect because she lacks the capacity to quickly scan letters or words right of her fixation point. Since this lack of visual function is not reflected in a measured decrease in visual fields because there is no absolute scotoma to be measured, I will award 10% impairment of visual function to both eyes.
> (See paragraph 3, page 8/209 AMA 4)"

23. In coming to that conclusion the AMS explained that he had taken into account:

- "Profound history of acquired dyslexia post head injury
- MRI evidence of left occipital lobe haemorrhage
- Past visual field changes confirming a dense complete absolute homonymous hemianopia
- Evidence of significant visual field resolution
- My visual field assessment showing an essentially normal greyscale area with scattered areas in the right inferior homonymous hemianopia quadrants of decreased sensitivity seen on the pattern deviation map indicating a relative inferior homonymous field loss but there was no absolute scotoma.
- Dr Jen Sandbach (a neuro ophthalmologist) reported a right relative homonymous scotoma is the major cause of Ms Edwards's acquired dyslexia.
- Ms Edwards had glasses at the time of the accident therefore her corrected near and distance vision will be used for assessment purposes (see Chapter 10, P53 10.4 of NSW Workers Compensation Guidelines 1 April 2016)"

24. The AMS noted that Dr Bors had found an absolute field defect in assessing 27% whole person impairment. The AMS did not agree with that finding but agreed with the findings and opinion of Dr Sanbach who assessed a relative field defect[2].

25. The opinion of the AMS was based on his consideration of the test results and appropriate examination of the appellant and was open to the AMS in the circumstances.[3]

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[2] The term "relative" field defect/scotoma applies when an object can be seen but only when it is made brighter or larger (that is where there is reduced sensitivity). The term "absolute" defect/scotoma applies where there is no response to a stimulus regardless of brightness or size (an absence of sensitivity).
[3] Chapter 2.8 of AMA 4 notes "the physician must utilise the entire gamut of clinical skill and judgement in assessing whether or not the results of the measurements or test are plausible and relate to the impairment being evaluated."

26. In the opinion of the Panel the explanation provided by the AMS for the assessment provides a full and comprehensive explanation for his conclusion and no error is demonstrated.

27. The appellant submits that the AMS had erred in failing to assess "absolute field defect". The findings of the AMS make it clear that there was no "absolute field defect" to assess arising from the subject injury. The AMS explained that any absolute field defect was artifactual, that is, due to physical factors unrelated to the subject injury. The AMS explained that, in this case, this was due to the upper eyelids. That explanation was open on the evidence and available to the AMS. No further explanation was required.

28. The AMS was required to assess "the degree of permanent impairment of the worker as a result of an injury" (section 319(c) of the 1998 Act). A visual field defect resulting from other causes was not to be considered for assessment. No error is demonstrated in that regard.

29. The appellant also submitted that the AMS had fallen into error to the extent that he had "made findings on the nature and extent of the referred injury for assessment". The appellant submitted that this was not the role of the AMS.

30. In *Jaffarie v Quality Castings Pty Ltd*[4] Roche DP said:

> "… In a claim for lump-sum compensation, the physical consequences of the injury (in relation to the assessment of whole person impairment as a result of the injury) are not within the exclusive jurisdiction of the Commission. They are within the exclusive jurisdiction of the AMS."

31. In making that observation the Deputy President took into account the reasoning of Emmett JA in *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd*[5] (*Bindah*) where His Honour said (at [110]):

> "However, that is not to say that there is no scope for an approved medical specialist or Appeal Panel to make findings of fact necessary for the performance of the function that they are given under the Management Act. Questions of causation are not foreign to medical disputes within the meaning of that term when used in the Management Act. A medical dispute is a dispute about or a question about any of the matters set out in s 319. Those matters include the degree of permanent impairment of a worker as a result of an injury, and whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality. The words in bold in relation to each of those matters call for a determination of a causal connection. Thus, the language of causal connection is squarely within the definition of "medical dispute". Having regard to the conclusive effect of s 326, it is desirable to avoid drawing a rigid distinction between jurisdiction to decide issues of liability and jurisdiction to decide medical issues. There is no bright line delineating causation from medical evidence. Issues of causation may well involve disputes between medical experts that must be resolved by an approved medical specialist or by an Appeal Panel (see Zanardo v Tolevski [2013] NSWCA 449 at [35])."

32. The assessment of impairment arising from injury to the visual system necessarily involved the AMS in determining what impairment arises from the injury and what was attributable to other unrelated factors. The findings of the AMS were within his role as defined in *Bindah* and *Jaffarie*, and in accordance with the Guidelines and Chapter 2 of AMA 5 which sets out the "Rules for Evaluation" of permanent impairment. No error is demonstrated in this regard.

[4] [2014] NSWWCCPD 79 at [250]
[5] [2014] NSWCA 264

33. The appellant further submitted that the AMS had erred in failing to assess “inferior field changes”. The Panel accepts that the appellant is intending to assert that the AMS should have assessed impairment arising from inferior field changes.

34. The AMS did in fact assess the inferior field changes, finding that these were relative and not absolute. The AMS gave his reasons based upon consideration of the result of testing (there was no significant absolute scotoma seen on greyscale map). That finding was confirmed by the report of Dr Sanbach who noted; “Visual field testing shows persistence of the right predominantly inferior *relative scotoma*” (emphasis added).

35. The Guidelines direct assessment in accordance with Chapter 8 of AMA 4. Paragraph 8.2 “Visual Fields” requires assessment of impairment of visual fields due to absolute scotoma but a finding of relative scotoma is not a basis for assessment of impairment. The absence of a rating arising from inferior field changes was explained by the AMS as based on his visual field assessment which showed “essentially normal greyscale area with scattered areas in the right inferior homonymous hemianopia quadrants of decreased sensitivity seen on the pattern deviation map indicating a relative inferior homonymous field loss but there was no absolute scotoma”.

36. The AMS specifically noted; “The inferior field changes are relative decrease[d] sensitivity and cannot be assessed using section 8.2 of AMA 4” which explained the difference of opinion with Dr Bors.

37. On the evidence before him the AMS correctly assessed inferior field changes as relative and accordingly not capable of assessment in accordance with the Guidelines and Chapter 8.2 of AMA 4. No error is demonstrated.

38. Upon review of the MAC and the available evidence, the Panel is satisfied that no error is demonstrated and the MAC issued on 17 January 2020 should be confirmed.

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 Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar