

WORKERS COMPENSATION COMMISSION

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

Matter No: M1-1342/19
Appellant: Vera Dotlic
Respondent: CFMEU (NSW Branch) Construction
Date of Decision: 9 October 2019
Citation: [2019] NSWCCMA 143

Appeal Panel:
Arbitrator: Mr John Harris
Approved Medical Specialist: Dr Richard Crane
Approved Medical Specialist: Dr Brian Noll

BACKGROUND TO THE APPLICATION TO APPEAL

1. Ms Vera Dotlic (the appellant) suffered injury on 28 April 2014 in the course of her employment with the respondent named in the proceedings as “CFMEU (NSW Branch) Construction”. Prior to the issue of the Certificate of Determination, the parties should advise the Commission of the correct legal identity of the respondent.
2. The appellant injured her lumbar spine and right knee when opening gates of the premises of the respondent.
3. The appellant subsequently underwent surgery performed by Dr Van Gelder on 21 August 2015 who performed a microscopic laminectomy at L3, and a similar procedure at L5/S1.¹
4. The respondent served a notice dated 12 April 2018² pursuant to s 74 of the *Workplace Injury Management & Workers Compensation Act 1998* (the 1998 Act). In summary form the notice asserted that the appellant had recovered from the effect of the injury to the lumbar spine and right knee and otherwise did not suffer a consequential condition to the gastrointestinal system.
5. Ms Dotlic commenced proceedings claiming permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) for the lumbar spine, right lower extremity, skin and upper and lower gastrointestinal tracts. The claim for impairment to the skin arises from the scar following the surgical procedure to the lumbar spine.
6. As an issue of a liability arose, the application was referred to a Commission arbitrator who, by consent, determined the outstanding liability issues and remitted the matter to the Registrar for referral to an Approved Medical Specialist.³

¹ Application, pg 26

² Reply, pg 8

³ Direction dated 17 April 2019

7. The claim was then referred by the Registrar to Dr Phillip Truskett, an Approved Medical Specialist (AMS), who examined the appellant and provided the Medical Assessment Certificate dated 5 July 2019 (MAC). The relevant findings by the AMS pertinent to the various grounds of appeal are set out later in these Reasons.
8. The AMS assessed the appellant as having a 13% whole person impairment of the lumbar spine less a one-tenth deduction pursuant to s 323 of the 1998 Act. The right lower extremity (knee) was assessed at 4% with a 100% deduction pursuant to s 323 of the 1998 Act and the upper gastrointestinal tract was assessed at 1% with a 100% deduction pursuant to s 323. The AMS assessed 0% whole person impairment in respect of the scar and the lower gastrointestinal tract. The appellant's combined whole person impairment was assessed at 12%.
9. The assessment of whole person impairment is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).⁴ The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth guidelines prevail.⁵

THE APPEAL

10. On 25 July 2019, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).
11. The WorkCover Medical Assessment Guidelines (the Guidelines) set out the practice and procedure in relation to appeals to Medical Appeal Panels under s 327 of the 1998 Act.
12. The appeal submissions were limited to the assessment in respect of the right lower extremity and the skin. The appellant claims, in summary, that the medical assessment by the AMS should be reviewed on the ground that the Medical Assessment Certificate contains a demonstrable error.
13. The Appeal was filed within 28 days of the date of the MAC. The submissions in support of the grounds of appeal are referred to later in these Reasons.

PRELIMINARY REVIEW

14. The Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Guidelines. As a result of that preliminary review, the Panel determined, for the reasons provided subsequently, that a ground of appeal had been made out.
15. The appellant did not request a re-examination by an AMS who is a member of the Panel⁶. The respondent made no submissions on the issue. Whilst the Appeal Panel (AP) is satisfied that a new certificate should be issued, we are otherwise satisfied that this can be done without a new assessment. This is because, for the reasons provided, we are satisfied that the clinical findings made by the AMS are correct.

⁴ The 4th edition guidelines are issued pursuant to s 376 of the s 376 of the *Workplace Injury Management and Workers Compensation Act 1998*

⁵ Clause 1.1 of the fourth edition guidelines

⁶ Appellant's submissions, paragraph 4.3

EVIDENCE

16. The AP has before it all the documents that were sent to the AMS for the original assessment and has referred to portions of the evidence and taken them into account in making this determination.
17. The relevant portions of the MAC are set out in the respective grounds of appeal.

GROUND OF APPEAL 1 – Incorrect assessment of the right knee

Submissions

Appellant's submissions

18. The appellant referred to the observations of the AMS that there was marked inconsistency and submitted that there were findings of “significant restriction in the right knee” when he found that the appellant could only bend the knee to 30 degrees and that straight leg raising was only possible to 30 degrees.
19. It was submitted that the observation by the AMS that the right knee movements seemed similar to the left was inaccurate as the only similarity occurred “in the sitting position”.
20. The appellant referred to the absent ankle jerk in the right knee and reduced hamstring which were not present in the left knee.
21. The appellant referred to the AMS findings that the same degree of loss of flexion on the uninjured side was a basis for fully deducting the entire assessment. It was submitted that the reasoning provided by the AMS for a total deduction was improper and erroneous.

Respondent's submissions

22. The respondent referred to the findings made by the AMS particularly concerning the inconsistencies observed on examination and submitted:
 - (a) The differences referred to by the AMS “were at the heart of the inconsistencies referred to by the AMS”;⁷
 - (b) The AMS explained his reasons for modifying the impairment rating;
 - (c) The AMS took a comprehensive testing and undertook a clinical examination in relying upon his assessment;
 - (d) The appellant's submissions are “limited to pure disagreement with the result of the assessment rather than having any sufficient ground for an appeal”⁸; and
 - (e) The opinion reached by the AMS was consistent with that expressed by Dr Wallace.
23. In the event that the appeal contests the finding made by AMS of a 100% deduction pursuant to s 323 of the 1998 Act, such approach is consistent with the decisions of *Treverrow v Registrar of the Workers Compensation Commission*⁹, *Pateman v Peninsula Village Ltd*¹⁰ and *Zeineddine v Matar*¹¹.

⁷ Respondent's submissions, paragraph 15(a)

⁸ Respondent's submissions, paragraph 15(f)

⁹ [2008] NSWSC 632

¹⁰ [2007] NSWSC 586

¹¹ [2009] NSWSC 646

24. No error has been established in the appellant's submissions and there was no evidence that suggests that the assessment was based on incorrect criteria.

Reasons

25. The AMS findings on examination in respect of the knees were¹²:

"On examining her knees, there was some arthritic degenerative deformity changes in both knees. There was no wasting of the muscles of the thighs. Both thighs measured 58cm in circumference, 10cm above the patella. Both calves measured 45cm at their widest point. Anterior and posterior cruciate ligaments were intact. The medial and lateral collateral ligaments were intact. There was no effusion. McMurray's test was negative.

When performing knee flexion, there was marked inconsistency on the right. When bending her knee, she could only manage 30° on the right and 80° on the left. However, in the sitting position, both knees flexed to 90°.

Range (maximal observed) of movement of the knees were as follows:

	Active ROM Right	Active ROM Left
Flexion	90°	90°
Extension	0°	0°

When passive movement of the right knee was performed, there was a great deal of cogwheeling and muscle resistance which further added to the inconsistency of knee movement."

26. The AMS identified the following inconsistencies on presentation.¹³

"There was a markedly reduced straight leg raising test on the right which did not persist when in the sitting position.

There was marked reduction in back movement which was inconsistent particularly in flexion and extension. This did appear to be feigned based on the ability to sit upright from the lying position when on the examination couch.

There was marked reduction in right knee movement from 30° when formally tested to 90° when sitting. The right knee movements seemed similar to the left.

There was total reduction of right leg sensation to the level of the groin, which did not fulfil a radicular distribution.

When asked about the level of inconsistencies in view of her variable knee movement, variable back movement and her variable right leg straight leg raise, Ms Dotlic had no explanation for this."

27. The AMS assessed the right knee as follows:¹⁴

"In relation to her right knee, reference is made to the AMA Guides, Chapter 17, Page 533, Section 17.2f and Table 17-10 on Page 537.

According to this table, both the right and left (asymptomatic) knee would equate to a mild impairment with a 4% whole person impairment, with flexion less than 110°.

¹² MAC, pg 5

¹³ MAC, pg 7

¹⁴ MAC, pg 9

Reference is made to the WorkCover Guides, Chapter 3, Page 13-20.

As outlined in the quoted sections of WorkCover Guides, there were inconsistencies noted, and according to Paragraph 1.36, Page 7, ‘...the Assessor may modify the impairment rating accordingly and describe/explain the reasons for this modification’. As noted, there was marked variation in right knee movement. The maximum movement observed was 90°.

It was also noted that the same degree of impairment exists in the left knee. Reference is made to Chapter 2, Paragraph 2.20, Page 12, where it states when outlining impairments of range of movement it is always important to compare the relevant joint on both extremities. On this basis, as both extremities have the same impairment of 4% whole person impairment, on the un-injured left knee, therefore the 4% impairment is fully deducted and equates to 0% whole person impairment.

The total WPI of her right knee is 0%.”

28. In arriving at his conclusion that there was 0% left knee impairment, the AMS appropriately refers to paragraph 1.36 of the fourth edition guidelines which indicates that range of movement should not be used for assessing impairment when there is inconsistency. The AMS is then required to arrive at a conclusion based on “clinical skill and judgement”.
29. The AMS then referred to paragraph 2.20 of the fourth edition guidelines and deducted the impairment relating for the restricted range of motion of the normal/uninjured knee from the impairment rating for the injured knee. In that respect the AMS assessed a loss of 4% whole person impairment for the loss of range of motion of both knees, ascertained the difference between the two knees was 0%, and concluded that this was the correct assessment.
30. However, the AMS then adopted a different approach in the Table by assessing 4% whole person impairment and making a deduction of 100% pursuant to s 323 deduction.
31. The respondent sought to defend the assessment by submitting, by reference to other cases, that the AMS could make a deduction of 100% pursuant to s 323.
32. The purported deduction pursuant to s 323 of 100% does not accord with paragraph 2.20 of the fourth edition guidelines. The paragraph makes it clear that the movement of the normal joint is treated as the baseline where range of motion is used. Any assessment of the uninjured joint is to be deducted from the assessment of the injured joint in arriving at the assessment of whole person impairment. In that respect, although only vaguely mentioned in the appellant’s submissions but the subject of submission by the respondent, the AMS erred because the correct assessment was 0%, not 4%, before any s 323 deduction.
33. The manner in which the AMS made a 100% deduction as opposed to applying paragraph 2.20 of the fourth edition guidelines, amounts to an error within the meaning of s 327(3)(c) of the 1998 Act: see *Marina Pitsonis v Registrar of the Workers Compensation Commission of New South Wales*¹⁵ applying Basten JA in *Campbelltown City Council v Vegan*.¹⁶
34. Having found error, the AP is required to reassess according to law: *Drosd v Nominal Insurer*.¹⁷ The reassessment is set out later in these reasons.

¹⁵ [2008] NSWCA 88 (*Marina Pitsonis*) at [40]-[42], McColl and Bell JJA (as their Honours then were) agreeing

¹⁶ [2006] NSWCA 284 at [94], McColl JA agreeing

¹⁷ [2016] NSWSC 1053

GROUND OF APPEAL 2 – Incorrect assessment of the scar

Submissions

Appellant's submissions

35. The appellant referred to the finding of the AMS that she reported occasional itchiness and submitted that this “indicates consciousness of the scarring, especially in the back where the scar cannot be easily reached”¹⁸.
36. The appellant submitted that she told Dr Truskett that “she is very self-conscious of the scar” and disputed the history taken by the AMS.
37. The appellant also submitted that she should have been awarded “at least 1%” given the “significant length which is itchy and causes self-consciousness”.

Respondent's submissions

38. The respondent submitted that the appellant did not challenge the other matters that need to be considered in arriving at the assessment. The scar is not clearly visible when usual clothing was worn.
39. The respondent submitted that the AMS was an experienced assessor who took a comprehensive history. The history obtained by the AMS was not inconsistent with any material before him including the appellant's statements. The AMS relied on his assessment and the appellant's submissions “are limited to pure disagreement” with the assessment rather than amounting to a ground of appeal.¹⁹

Reasons

40. The conclusion reached by the AMS is that the scar warranted an assessment of 0% whole person impairment. The AMS stated:²⁰

“Reference is made to AMA Guides 5, Chapter 8, Page 173-190, and the WorkCover Guides, Chapter 14, Page 73 and Table 14-1, Page 74, whole person impairment is 0%.

A 0% whole person impairment has been assigned as Ms Dotlic was barely conscious of the scar, it has a good colour match, there are no trophic changes or staple marks or suturing, anatomical location of the skin injury or deemed incision is not clearly visible, there are no contour defects, no effects on ADLs and no treatment required. This fulfils the criterion of 0% in the TEMSKI scale.”

41. Earlier in the MAC the AMS commented on the scar as follows:²¹

“In relation to her scar in her back, this does not break down but it is occasionally itchy.”

42. Paragraph 14.4 of the fourth edition guidelines refers to Table 8-2 of AMA 5 which provides for the classification of impairments due to skin disorders.

¹⁸ Appellant's submissions, pg 2

¹⁹ Respondent's submissions, paragraph 22

²⁰ MAC, pg 10

²¹ MAC, pg 4

43. Paragraph 14.4 of the fourth edition guidelines provides:
- “AMA5 Table 8-2 (p 178) provides the method of classification due to skin disorders. Three components – signs and symptoms of skin disorders, limitation in ADL and requirements for treatment – define five classes of permanent impairment. The assessing specialist should derive a specific percentage impairment within the range for the class that best describes the clinical status of the claimant.”
44. If a worker is classified as falling within Class 1 of Table 8-2 than Table 14.1 of the fourth edition guidelines is applicable. Paragraph 14.7 of the fourth edition guidelines provides:
- “The table for the evaluation of minor skin impairment (TEMSKI) (see Table 14.1) is an extension of Table 8-2 in AMA5. The TEMSKI divides class 1 of permanent impairment (0-9%) due to skin disorders into five categories of impairment.”
45. The assessment of the appropriate impairment under TEMSKI is further clarified by paragraphs 14.7-14.9 of the fourth edition guidelines. Paragraph 14-8 of the fourth edition guidelines provide:
- “The TEMSKI is to be used in accordance with the principle of ‘best fit’. The assessor must be satisfied that the criteria within the chosen category of impairment best reflect the skin disorder being assessed. If the skin disorder does not meet all of the criteria within the impairment category, the assessor must provide detailed reasons as to why the category has been chosen over other categories.”
46. Paragraph 14.9 of the fourth edition guidelines provides that where there is a range of TEMSKI categories, the AMS “should use clinical judgment to determine the exact impairment value”.
47. The AP agrees with the respondent’s submissions that the findings by the AMS that there is a good colour match in the scar, no trophic changes or staple marks or suturing, anatomical location of the skin injury or deemed incision is not clearly visible, no contour defects, no effects on ADLs and no treatment required were not the subject of contrary submission by the appellant.
48. The appellant disputed the finding by the AMS that she was barely conscious of the scar. The fact that the appellant stated that the scar was occasionally itchy is not inconsistent with the finding that she was barely conscious of it. The position of the scar and the other factual findings, such as good colour match and anatomical location support this conclusion.
49. The appellant’s assertion in her supplementary statement that the scar was “quite serious”²² does not refer to any objective features of the scar that would justify a conclusion that it was “serious”
50. The AMS otherwise distinguished his opinion from that expressed by Dr Machart on the basis that there was no adherence or visible contour defect. The fact that the AMS reached a different conclusion does not of itself amount to a demonstrable error: *Merza v Registrar of the Workers Compensation Commission*²³.
51. Based on the undisputed findings of the AMS there were a number of the descriptors in Table 14.1 of the fourth edition guidelines which suggest a 0% whole person impairment. These were that there was no adherence, no effect on the activities of daily living, no contour defects, good colour match with surrounding skin and no trophic changes from the scar.

²² Application, pg 1

²³ [2006] NSWSC 939 at [52]

52. The AP agrees with the respondent's submission that it is self-evident that the anatomic location of the scar is not clearly visible with usual clothing.
53. The AP is otherwise not satisfied that the appellant has shown error or the misapplication of correct criteria by merely asserting that she was "very self-conscious" of the scar. That assertion does not outweigh the objective features such as the position and colour contrast of the scar.
54. The various factual findings meant that the AMS was left with a choice as to where the appellant should be classified. He was required to use clinical judgment and chose the category that, in his view, best reflected the skin disorder.
55. The "pre-eminence of the clinical observations" was emphasised in *Ferguson v State of New South Wales*²⁴ when Campbell J referred with approval to *NSW Police Force v Daniel Wark*²⁵.
56. In *Parker v Select Civil Pty Ltd*²⁶ Harrison AsJ also applied these observations when analysing whether an Appeal Panel lawfully allowed an appeal by substituting its finding of Class 2 for a finding of Class 3 made by the AMS for one of the Psychiatric impairment rating scale (PIRS) categories. Her Honour stated:²⁷
- "It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ. Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error."
57. Whilst these observations were made with respect to the classification under PIRS categories for psychological injury, the notion that a difference of opinion about which reasonable minds may differ is equally apposite to the difference between 0%, 1% or 2% for TEMSKI scarring. Indeed, the lines are even more blurred in assessing TEMSKI scarring, as compared with assessment under the PIRS categories, the same descriptors may apply to different assessments.
58. The AP does not accept that the appellant has shown any error, let alone demonstrable error with respect to the assessment of 0%. Further, the AMS has properly applied Chapter 14 of the fourth edition guidelines in assessing the scar.
59. For these reasons, the Panel agrees with the respondent's submission that the AMS was entitled, on the facts as found, to assess the scar as 0% whole person impairment. No error on appeal is shown.

REASSESSMENT

60. The AP is satisfied that we can properly perform the statutory function to reassess in the absence of a re-examination. We observe that our findings on error in the quantification of the MAC does not detract, in our view, from the precise findings made by the AMS on examination and inconsistency. In that respect we adopt both the findings on assessment and comments on inconsistency. We also observe that the manner in which the AMS observed inconsistency, that is contrasting positions whilst the appellant was standing and sitting, was open to the clinical experience of the AMS.

²⁴ [2017] NSWSC 887 at [23]

²⁵ [2012] NSWCCMA 36 at [33]

²⁶ [2018] NSWSC 140

²⁷ At [71]

61. The AP does not accept the appellant's submissions that there was marked restriction in the movement of the right knee. That submission, as the respondent correctly observes, was at the very heart of the finding that there was inconsistency. The AP repeats and adopts the findings made by the AMS concerning inconsistent presentation, specifically that:

“There was a markedly reduced straight leg raising test on the right which did not persist when in the sitting position.

There was marked reduction in back movement which was inconsistent particularly in flexion and extension. This did appear to be feigned based on the ability to sit upright from the lying position when on the examination couch.

There was marked reduction in right knee movement from 30° when formally tested to 90° when sitting. The right knee movements seemed similar to the left.

There was total reduction of right leg sensation to the level of the groin, which did not fulfil a radicular distribution.

When asked about the level of inconsistencies in view of her variable knee movement, variable back movement and her variable right leg straight leg raise, Ms Dotlic had no explanation for this.”

62. Pursuant to paragraph 1.36 of the fourth edition guidelines, the assessor is then required to exercise “their entire range of clinical skill and judgement when assessing whether or not the test results are plausible”.
63. In this respect, we adopt the findings of the AMS that the observed range of movement of the injured right knee was the same as the uninjured left knee with the range of motion of both knees equating to 4% whole person impairment.
64. In these circumstances, applying paragraph 2.20 of the fourth edition guidelines, there is no impairment from range of motion.
65. In addition, we note that there was no evidence of thigh muscle wasting and no evidence of ligamentous laxity.
66. Aspects of the appellant's submissions on purported errors made by the AMS in respect of the assessment of the range of motion of the right knee are misconceived. The appellant referred to the findings by the AMS of an absent knee jerk and reduced hamstring. These examination findings pertain to establishing radiculopathy from the lumbar spine and are not related to the knee. These examination findings are set out in the MAC with respect to the back and are specific matters set out in paragraph 4.27 of the fourth edition guidelines in ascertaining whether there is radiculopathy. Therefore, these examination findings have nothing to do with the knee.
67. We accept that injury to the right knee is conceded and proved. However, on the findings made by the AMS and adopted by us, there is no whole person impairment from the right knee. In that respect, the pathology shown on the scans does not, of itself, justify any assessable impairment.²⁸
68. We otherwise adopt the assessment of the lumbar spine which was not the subject of contrary submission. We have previously set out our reasons for the assessment in respect of the skin.

²⁸ See Application, pg 68 and Table 17-33 of AMA 5

DECISION

69. For these reasons, the overall assessment is unchanged and the MAC is confirmed. However, a new Medical Assessment Certificate is attached and replacing the original MAC reflecting and consistent with these further Reasons.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE MEDICAL APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL

MEDICAL ASSESSMENT CERTIFICATE

Matter No: 1342/19
Applicant: Vera Dotlic
Respondent: CFMEU (NSW Branch) Constructions

This Certificate is issued pursuant to section 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Appeal Panel revokes the Medical Assessment Certificate of Dr Phillip Truskett and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

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)
Skin	28 April 2014	Chapter 14	Chapter 8	0%	N/A	0%
Lumbar spine	28 April 2014	Chap 4, para 4.33 – 4.37	Chapter 15, Table 15-3	13%	One-tenth	12%
Right Lower Extremity	28 April 2014	Ch 1, par 1.36; Ch 2, par 2.29; Chap 3.	Chapter 17	0%	N/A	0%
Total % WPI (the Combined Table values of all sub-totals)					12%	

John Harris
Arbitrator

Dr Richard Crane
Approved Medical Specialist

Dr Brian Noll
Approved Medical Specialist

9 October 2019

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE MEDICAL APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar

