

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-3303/19
Appellant:	Thomas Galvin
Respondent:	Comtam Pty Ltd
Date of Decision:	6 January 2020
Citation:	[2020] NSWCCMA 3

Appeal Panel:	
Arbitrator:	Marshal Douglas
Approved Medical Specialist:	Dr Roger Pillemer
Approved Medical Specialist:	Dr David Crocker

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 12 September 2019 Thomas Galvin (the appellant) lodged an appeal against the medical assessment certificate (MAC) Dr Hugh English (AMS) issued on 3 September 2019. The MAC related to the AMS's assessment of an impairment dispute, as that term is defined in clause 4(4) of Part 18C of schedule 6 of the *Workers Compensation Act 1987* (the 1987 Act). The Appeal Panel sets out below, in more detail, what that impairment dispute was.
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 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 grounds 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 the impairment dispute was done under the table of disabilities.

RELEVANT FACTUAL BACKGROUND

6. On 15 April 1994 the appellant injured his back while working for Comtam Pty Limited (the respondent). He was at the time lifting rolls of carpet underfelt that weighed between 75 and 125 kilograms. He subsequently had surgery on his back in 1995 and in 1996.
7. He has made a claim for compensation against the respondent under s 66 of the 1987 Act for permanent impairment of his back and loss of his right and left legs at or above the knees. An impairment dispute arose between the parties regarding the extent of the appellant's impairment of his back and loss his of legs above the knees.

8. On 2 August 2019, a delegate of the Registrar referred that impairment dispute to the AMS to assess.

PRELIMINARY REVIEW

9. 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.
10. As a result of that preliminary review, the Appeal Panel determined that the MAC contained a demonstrable error. (The Appeal Panel's reasons for finding the MAC contained a demonstrable error are set out below.) This meant that the Appeal Panel would have to revoke the MAC and re-assess the impairment dispute. The Appeal Panel considered that in order for it to re-assess the impairment dispute it would need to re-examine the appellant. Dr Roger Pillemer, one of the Approved Medical Specialist members of the Appeal Panel, was appointed to do this.
11. He examined the appellant on 12 December 2019. His report to the Appeal Panel on his examination is set out below.

EVIDENCE

12. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment.

MEDICAL ASSESSMENT CERTIFICATE

13. The AMS examined the appellant on 22 August 2019. The AMS obtained a history of the appellant's injury and the symptoms the appellant subsequently experienced and the treatment he received. The AMS examined the appellant and recorded his findings from his examination in the MAC. The AMS assessed that as a result of the appellant's injury on 15 April 1994, the appellant has 20% permanent impairment of the back, 10% permanent loss of the right leg at or above the knee and 5% permanent loss of the left leg at or above the knee.
14. The AMS provided this explanation at part 10a of the MAC for his assessment:

"Mr Galvin would appear to have sustained a lumbar disc protrusion treated surgically on 2 occasions for right leg sciatica. He has residual lower back pain and right S1 paraesthesia. He is assessed based upon the Table of Disabilities. In regard to his back he has lost 20% use of his back when compared with the most severe case. In regard to the right leg, he has lost 10% function of the right leg at or above the knee. In regard to the left leg, he has lost 5% function of the left leg at or above the knee.

In making that assessment I have taken account of the following matters:-

- My history and examination in combination with my review of the brief."

15. A critical issue raised in the appeal is what documents the AMS reviewed when assessing the impairment dispute. At part 2 of the MAC, the AMS said this about the brief of documents the Commission provided him:

"Documentary Evidence

The following documents were referred by the Commission for this assessment:

- As listed in the referral form from the Registrar

NB: The initial documentation referred to a different patient with a psychiatric condition and was not further examined. A later copy of the application was received.

- CT report of the lumbar spine dated 27.4.94 demonstrating disc degeneration at L5/S1, mild degenerative spondylosis at L1-2.
- CT performed 2.5.94 – Impression: Disc protrusion at L5/S1.
- CT dated 17.2.95 comments there has been some progression of the changes demonstrated on 2.5.94 at L5/S1 with a more prominent right posterolateral herniation with impingement on the right S1 nerve root.
- Letter Dr Raymond Cook, neurosurgeon, dated 7.3.95 documents a long history of right-sided sciatica which came on in March 1994 after an incident at work.
- Further letter dated 17.3.95 documents schedule in for a lumbar microdiscectomy on 20 April 1995.
- MRI dated 11.5.95 comments recurrent/residual right posterolateral L5/S1 disc bulge.
- Letter from Dr Cook dated 29.5.95 documents recurrent surgery be performed on 14 May 1995 to remove recurrent disc at Royal North Shore Hospital.
- Letter Dr Khursandi dated 7.2.97 documents constant lower backache, paraesthesia of the right foot with prolonged standing. He assesses a 20% permanent impairment of the back.
- Dr Bob Ivers, orthopaedic surgeon, provides a PI assessment on 5.12.16 of 16% under AMA5 and GEPI.
- Dr Ridhalgh, orthopaedic surgeon, provides an IME on 21.5.18 and derives a 22% whole person permanent impairment using NSW Workers Compensation Guidelines including 1% for scarring.
- Dr Bob Ivers provides a second report on 6.9.18 deriving a 16% whole person permanent impairment using “GEPI 4”.

Additional Information

- The following information was obtained in accordance with Section 324(1) of the 1998 Act:
- I was able to view CT scans of Mr Galvin’s lumbar spine dated 17.2.95 and 2.5.94. An MRI film was also available dated 11.5.95. The films are mixed, mostly in reasonably condition, contained in one packet. There appears to be degenerative disc disease at 4-4 and 5/1 particularly. A right hemilaminectomy has been performed at L5. This appears to be 5/1 disc protrusion which is predominantly right sided.”

(Bold as per original)

16. The AMS said this at 10c of the MAC

“my brief comments regarding the other medical opinions and findings submitted by the parties and, where applicable, the reasons why my opinion differs

Other medical findings are commented on above. These were received post patient assessment. Dr Khursandi has given an impairment under the Table of Disabilities. Dr Ivers and Dr Ridhalgh have both used later assessment systems. I note you asked me to use Table of Disabilities. These systems are not directly compatible. I would agree in general with Dr Khursandi’s assessment of 7 February 1997 in terms of the spinal dysfunction. There is also some right, and to a lesser extent left, leg dysfunction which is included in my assessment and may not have been present in 1997.”
(Bold as per original)

17. The Appeal Panel observes that Dr Ridhalgh, an orthopaedic surgeon the appellant qualified to provide reports in support of his claim, had prepared a report that was attached to the Application to Resolve a Dispute dated 17 August 2018. The Appeal Panel further observes that that report was not one of the reports that the AMS specifically listed in Part 2 of the MAC. In that report Dr Ridhalgh advised his assessment of the appellant’s permanent impairment of his back and loss of use of his right and left legs at or above the knees from the injury the appellant suffered on 15 April 1994. In other words, contrary to what the AMS said at Part 10c of the MAC, Dr Ridhalgh had provided an assessment of the appellant’s impairment and losses under the Table of Disabilities.

SUBMISSIONS

18. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
19. In summary, the appellant submits that the AMS was either not provided with or did not consider the report of Dr Ridhalgh dated 17 August 2018. Insofar as the AMS made an assessment without considering Dr Ridhalgh’s assessment the MAC contains a demonstrable error.
20. In reply, the respondent submits that the appellant did not identify any error with respect to the AMS’s assessment. The AMS’s assessment was based on his examination of the appellant. The fact that the AMS did not specifically refer to Dr Ridhalgh’s report of 17 August 2018 did not mean that the AMS was not provided with a copy of it. The AMS explained the path of his reasoning for the assessment and the AMS’s assessment discloses no error. The AMS took account of all relevant facts including the treatment the appellant had and the appellant’s symptoms.

FINDINGS AND REASONS

21. 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.
22. 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.

23. An AMS does not have to refer to every item of evidence to explain his or her assessment of a worker. However, an AMS needs to consider all the evidence. It is an error for an AMS not to consider all relevant and significant material.¹
24. The Appeal Panel notes that the Commission initially provided the AMS with documents relating to another case. The documents relating to this matter were not sent to the AMS until after he had examined the appellant. The documents the AMS specifically listed in Part 2 of the MAC that had been provided to him, did not include Dr Ridhalgh's report of 17 August 2018. The AMS said in the MAC that Dr Ridhalgh had not provided an assessment under the Table of Disabilities. That is incorrect, because Dr Ridhalgh had and had detailed that assessment in his report of 17 August 2018. Based on those circumstances, the Appeal Panel considers that in all likelihood the report of Dr Ridhalgh of 17 August 2018 was not provided to the AMS.
25. If that not be the case, then the only alternative is that the AMS did not consider Dr Ridhalgh's report of 17 August 2018. This is necessarily the case because the AMS said that Dr Ridhalgh had not assessed the appellant's impairment under the Table of Disabilities whereas Dr Ridhalgh had done so and had set out his assessment in his report of 17 August 2018.
26. In the circumstance where either the AMS was not provided with Dr Ridhalgh's report of 17 August 2018 or did not consider Dr Ridhalgh's report of 17 August 2018, the AMS has failed to consider all the relevant evidence. It is not for the Appeal Panel to speculate as to what the AMS would have made of that evidence. The fact that the AMS did not consider it, amounts to an error in the AMS's assessment. Given that, the Appeal Panel finds that the MAC does contain a demonstrable error.
27. As said above, given that the MAC contains a demonstrable error the Appeal Panel must revoke the MAC and must reassess the impairment dispute. As also said above, the Appeal Panel appointed Dr Roger Pillemer to examine the appellant so as to enable the Appeal Panel to reassess the impairment dispute. Dr Pillemer provided the following report to the Appeal Panel from his examination of the appellant:

**“REPORT OF THE EXAMINATION BY APPROVED MEDICAL SPECIALIST
MEMBER OF THE APPEAL PANEL**

Matter No:	M1-3303/19
Appellant:	Thomas GALVIN
Respondent:	Contam Pty Ltd

Examination Conducted By:	Roger Pillemer
Date of Examination:	12 December 2019

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

I read Mr Galvin his history as taken by Dr Hugh English at the time of his consultation on 22 August 2019. Mr Galvin confirmed the history but also informed me that he tries to walk daily and also rest.

¹ See *Tattersall v Registrar of the Workers Compensation Commission of NSW & anor* [2017] NSWSC 453 at [14] and *Wentworth Community Housing Ltd v Brennan* [2019] NSWSC 152 [70]-[76]

He does not feel there has been any change in his condition since he had his MAC carried out in August 2019 but, on specific questioning, he is complaining of constant pain in the low back which he says goes as high as 8/10. He says when he is taking his pain tablets and is relaxing and dozing off, he can be reasonably comfortable, but that this is the only time that he does not have back pain. He gets referred pain down both lower limbs, particularly on the right side, going as far as his right foot and on the left side as far as his knee. He does get some paraesthesias in his left foot and he has constant paraesthesias in his right foot.

Symptoms are aggravated by stepping over gutters, or any jarring, or even a 'little trip' and simple things such as dragging his bag from the airport today. Sitting on low chairs will always make it difficult for him to get up and he, therefore, prefers to stand and simply lean on furniture as he did during today's consultation.

He does get relief by lying down and taking the tablets as mentioned and also getting his weight off his back by leaning on various items.

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

There was no change in Mr Galvin's history but I have simply gone into slightly more detail with regard to his symptoms, as noted in (1) above.

On specific questioning, Mr Galvin does feel that his condition has continued to deteriorate over time.

3. Findings on clinical examination

Mr Galvin is a very slimly built adult male who undresses and dresses without any particular problem and walks with a slightly unsteady, rather wide stepped gait. He is able to walk on heels and toes with difficulty, and shows significant restriction of back movement only getting his fingertips some 6cm below his knees in flexion but no extension was possible. Lateral flexion to either side was moderately reduced.

His knee reflexes are present and equal and depressed, his left ankle jerk is present but depressed and I was unable to elicit his right ankle jerk today. He also has evidence of slight weakness of eversion on the right side and he has diffuse hypoaesthesia to pinprick over the left lateral border and sole of his right foot. Please note that these are all features in keeping with S1 nerve root involvement (radiculopathy).

His left calf is 2cm larger in circumference than the right side but he does have very significant varicose veins present on the left.

In addition, he does have further diffuse hypoaesthesia below his knees on both sides (noting that the sensory loss in the S1 distribution was more distinct), in keeping with a peripheral neuropathy and as noted from the original MAC he drinks six cans of beer a day which would be the likely explanation for his peripheral neuropathy.

Mr Galvin has a well healed low back scar and complains of significant discomfort to palpation in the lower lumbar region. Importantly, there was no discomfort with axial loading.

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

Mr Galvin has not had any further investigations carried out.”

28. The Appeal Panel adopts the findings of Dr Pillemer.
29. The Appeal Panel observes from Dr Pillemer’s findings that there is objective evidence that the appellant has radiculopathy in that there is objective evidence of ongoing S1 nerve root involvement on the right side. The appellant has constant pain in his back with the intensity reaching 8/10 on occasion. The appellant requires pain medication. The appellant has referred pain down both legs but especially on the right which reaches as far as his right foot. He experienced paraesthesia in both his right and left foot. The appellant’s injury affects his walking in that his symptoms are aggravated when stepping over gutters or jarring.
30. In those circumstances the Appeal Panel considers that the appellant’s permanent impairment of the back is now of the order of 30% and that the loss of use of his right leg at or above the knee is 20% and the loss of his left leg at or above the knee is 10%, noting that his symptoms in his legs are worse on the right than the left.
31. The Appeal Panel assesses the impairment dispute accordingly.
32. For these reasons, the Appeal Panel has determined that the MAC issued on 3 September 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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received before 1 January 2002

Matter Number: 3303/19
Applicant: Thomas Galvin
Respondent: Comtam Pty Ltd

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

Assessment in accordance with the Table of Disabilities for injuries received before 1 January 2002

Body Part	Date of injury	Total amount of permanent % loss of efficient use or impairment	Proportion of permanent impairment due to pre-existing injury, abnormality or condition	Total permanent % loss of efficient use or impairment attributable to this injury (after deduction of any pre-existing impairment in column 4.)
Back	15/04/94	30%	nil	30%
Right leg at or above the knee	15/04/94	20%	nil	20%
Left leg at or above the knee	15/04/94	10%	nil	10%

Marshal Douglas

Arbitrator

Dr Roger Pillemer

Approved Medical Specialist

Dr David Crocker

Approved Medical Specialist

6 January 2020

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*

J Burdekin

Jenni Burdekin

Dispute Services Officer

As delegate of the Registrar

