WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-3980/19**
Appellant	**Toll Holdings Pty Ltd**
Respondent:	**Phillip Williamson**
Date of Decision:	**18 February 2020**
Citation:	**[2020] NSWWCCMA 24**

Appeal Panel:	
Arbitrator:	**Mr John Harris**
Approved Medical Specialist:	**Dr Bran Noll**
Approved Medical Specialist:	**Dr David Crocker**

BACKGROUND TO THE APPLICATION TO APPEAL

1. Mr Phillip Williamson (the respondent) suffered injury in the course of employment with Toll Holdings Pty Ltd (the appellant) on 8 August 2011 and 29 January 2016.

2. A claim for compensation pursuant to s 66 *Workers Compensation Act 1987* (the 1987 Act) was made by letter dated 18 March 2019.[1] The s 66 claim was based on the reports of Dr Bodel dated 4 October 2018 and 10 February 2019.

3. Dr Bodel assessed the respondent as having 8% whole person impairment (WPI) of the right upper extremity due to loss of range of motion of the right shoulder, 7% WPI for the cervical spine and 1% for the skin.[2] The assessments were based on injuries received on 8 August 2011 and 29 January 2016.

4. The appellant immediately qualified Dr Frank Machart to assess the respondent. Dr Machart assessed the impairment of the right upper extremity related to the shoulder at 8% WPI, reduced this to 6% for pain behaviour and deducted one-half for the 2011 injury and made a one-tenth deduction pursuant to s 323 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). The doctor accordingly assessed the WPI of the right upper extremity as result of the January 2016 injury at 3%.

5. The respondent then commenced proceedings in the Commission seeking permanent impairment compensation for the right upper extremity and the neck resulting from the "nature and conditions of employment together with aggravating incidents on June 2011 and 29 January 2016". The pleading did not refer to any claim in respect of the skin which was associated with the scar from the surgical procedures to the right shoulder.

6. The claim was referred to a Commission Arbitrator who made consent orders remitting the claim to the Registrar for referral to an Approved Medical Specialist (AMS) in accordance with the pleading (Consent Orders).[3]

[1] Application, p 2.
[2] Application, p 12.
[3] Amended Certificate of Determination dated 5 September 2019.

7. The Registrar then issued a Referral for Assessment in accordance with the Consent Orders. (Referral).

8. Both the Consent Orders and the Referral specified the body parts for assessment as the "right upper extremity" and the "cervical spine". There was no mention to the skin in either the Consent Orders or the Referral.

9. The assessment of WPI was then referred to Dr Tim Anderson, an AMS, who examined the respondent and provided the Medical Assessment Certificate dated 5 November 2019 (MAC).

10. The relevant findings made by the AMS pertinent to the various grounds of appeal are set out later in these Reasons.

11. The respondent was assessed by the AMS as having a 29% WPI of the right upper extremity for loss of movement of the shoulder, elbow and wrist. The AMS made no deduction pursuant to s 323 of the 1998 Act. The AMS assessed 0% WPI for the cervical spine.

12. The assessment of WPI 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

13. On 2 December 2019, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).

14. 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.

15. The appellant claims that the medical assessment should be reviewed on the ground that the MAC contains a demonstrable error and/or the assessment was made on the basis of incorrect criteria within the meaning of s 327(3) of the 1998 Act.

16. 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.

17. The respondent did not file an opposition to the appeal.

PRELIMINARY REVIEW

18. The Appeal Panel (AP) 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 AP determined, for the reasons provided subsequently, that a ground of appeal had been established.

19. The appellant did not request a re-examination by an AMS who is a member of the AP.

[4] The 4th edition guidelines are issued pursuant to s 376 of the 1998 Act.
[5] Clause 1.1 of the fourth edition guidelines.

20. On 6 February 2020, the AP issued the following direction:

> "The Appeal Panel (AP) refers to the submissions filed by the appellant. Notwithstanding the appellant's submissions, the parties are referred to the decision of the Court of Appeal in *Jaffarie v Quality Castings Pty Ltd* [2018] NSWCA 88 at [75]-[76] and [80] per White JA (Macfarlan and Leeming JJA agreeing on this point), that the jurisdiction of the Commission, as opposed to that of the AMS, is to determine 'the nature of the injury sustained'.
>
> Noting that the respondent worker has not filed an opposition, the AP directs the respondent to file and serve any submissions by close of business, 13 February 2020 in opposition to the appeal and whether the AMS also erred by making liability findings."

EVIDENCE

21. 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.

GROUND OF APPEAL – ASSESMENT OF THE WRIST AND ELBOW

Submissions

Appellant's submissions

22. The appellant referred to paragraph 1.6(c) of the fourth edition guidelines and submitted that the reasons provided by the AMS were "totally devoid of any explanation as to the causal connection between the impairments assessed in respect of the Applicant's right elbow and wrist and the Applicant's employment"[6]. Reference was made to authorities such as the High Court decision in *Wingfoot Australia Partners Pty Ltd v Kocak*[7] and decisions of the Supreme Court in *Western Sydney Local Health District v Chan*[8] and *Farr v Insurance Australia Ltd*[9].

23. The appellant submitted the AMS was required to explain why the impairment was due to the to the respondent's employment and how it was related.[10] Reference was made to the contrary factual matters such as the absence of prior complaint to the wrist and elbow and that neither Dr Bodel nor Dr Machart found any impairment of those body parts.

24. The appellant submitted that there was "no information or material to support the finding" made by the AMS which amounted to a demonstrable error as considered by the Court of Appeal in *Vannini v Worldwide Demolitions Pty Ltd*[11].

25. The appellant also submitted that the wrist and elbow were not referred to the AMS. Whilst the referral specified the right upper extremity, it should be "considered in the context of the medical evidence before the Arbitrator who referred the matter"[12] and "that the reference to 'right upper extremity' did not properly frame the nature of the injury referred"[13].

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[6] Appellant's submissions, paragraph 12.
[7] (2013) 252 CLR 480 at 501.
[8] [2015] NSWSC 1968 at [13].
[9] [2014] NSWSC 1435 at [30].
[10] Appellant's submissions, paragraph 16.
[11] [2018] NSWCA 324 at [77]-[80].
[12] Appellant's submissions, paragraph 30.
[13] Appellant's submissions, paragraph 30.

Respondent's submissions

26. The respondent made no submissions and did not respond to the Direction.

Reasons

27. The AMS stated:[14]

> "Mr Williamson gives a history of two specific injuries which have affected his right shoulder. The first of these occurred in June 2011 and the second in January 2016, which was some 4 ½ years later. His activities on both occasions were very similar, with tightening down the strapping on the first occasion and tightening down the chains on the second occasion. He had a surgical procedure, which consisted of a labral repair and also some further decompressive measures of the right shoulder following the first injury. This gave him quite a good result and he was able to return to work within a few months satisfactorily. He was able to continue on with his quite arduous occupation as a long-distance driver until the second injury of January 2016.
>
> Following this event and subsequent surgery, he never achieved a particularly effective result and was unable to continue with his occupation.
>
> At this assessment, the right shoulder was very dysfunctional. It was also very obvious that there was dysfunction of the right elbow and wrist, albeit to a very much lesser extent.
>
> No other event or circumstances were forthcoming to explain the condition of the right elbow and wrist. Since there was no specific instruction that this assessment was solely for the shoulder, the effects to the elbow, wrist and hand are also included."

28. The appellant's submissions concerning the right of any AMS to make findings on injury are misconceived. An AMS does not determine injury. References to authorities under motor accident legislation are misconceived as there are significant differences between the motor accident legislation and the workers compensation scheme for the role of medical assessors.

29. The question of the respective roles of the Commission and an AMS have been discussed in a number of recent decisions of the Court of Appeal including *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine*[15] (*Hine*) and *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd* [16] (*Bindah*).

30. In *Inghams Enterprises Pty Ltd v Belokoski*[17] Deputy President Snell referred to the reasoning of Roche DP in *Jaffarie v Quality Castings Pty Ltd* (*Jaffarie No 1*)[18] and stated that "the Commission (in the bifurcated system) has jurisdiction to determine whether a worker suffered injury, and the nature of the injury."[19]

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[14] MAC, pp 4-5.
[15] [2016] NSWCA 213.
[16] [2014] NSWCA 264.
[17] [2017] NSWWCCPD 15
[18] [2014] NSWWCCPD 79 at [259] – [261].
[19] at [222].

31. More recently in *Jaffarie v Quality Castings Pty Ltd (Jaffarie No 2)* White J stated:[20]

> "What was said by Emmett JA at [109], quoted above at [70], must be understood in the context of the issues before the court in *Bindah*. I do not understand his Honour to mean that anything which falls within the definition of 'medical dispute' in s 319 will necessarily be outside the jurisdiction of an arbitrator.
>
> Under s 105(1) of the WIM Act the Commission has exclusive jurisdiction to examine, hear and determine all matters arising under the WIM Act and the *Workers Compensation Act*. This is subject to specific exclusions contained in both the WIM Act and the *Workers Compensation Act*. The specific exclusion in s 65(3) of the *Workers Compensation Act* does not extend to any medical dispute within the meaning of s 319 of the WIM Act, but only to a subset of such disputes, being a dispute about the degree of permanent impairment of an injured worker. Even a medical dispute concerning permanent impairment of an injured worker cannot be referred for assessment under Pt 7 of Ch 7, except by the Registrar and then where liability is not in issue, or, if in issue, liability has been determined by the Commission (ss 293(3)(a) and 321(4)(a)). The medical assessment is conclusive only in respect of the matters referred to in s 326 which are not as extensive as the matters falling within the definition of medical dispute in s 319."

32. His Honour endorsed the proposition that the jurisdiction of the Commission, as opposed to that of the AMS, is to determine "the nature of the injury sustained"[21] and noted that this was consistent with the orders of the earlier decision of the Court of Appeal in *Jaffarie v Quality Castings*[22] remitting the matter for re-determination in accordance with the reasons of the Deputy President in *Jaffarie No 1*.

33. The parties were issued a direction referring them to the Court of Appeal decision in *Jaffarie (No 2).*

34. To the extent that the appellant submitted that the AMS can determine whether the respondent sustained injury to the wrist and the elbow injury, that submission is incorrect and inconsistent with binding Court of Appeal authority.

35. The error by the AMS is that he purported to assess body parts that were not the subject of a claim and not disputed.

36. Section 325 of the 1998 Act provides that the AMS is to provide a certificate as to the matters referred for assessment.

37. The meaning of "matters referred for assessment" in s 325 was considered in *Aircons Pty Ltd v Registrar of the Workers Compensation Commission (NSW)*[23] (*Aircons*) and by the Commission in *O'Callaghan v Energy World Corporation Ltd*[24](*O'Callaghan*).

38. In *Aircons* the matter was referred to one AMS, Dr Fry who is a plastic surgeon, to assess scarring and skin discolouration and to another AMS, Dr Bodel, to assess restriction of movement. The Court held that the Medical Assessment Certificate issued by Dr Fry contained a demonstrable error because he had not given a certificate as to matters referred to him. During the course of his Reasons, Malpass AJ stated:[25]

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[20] [2018] NSWCA 88, Macfarlan and Leeming JJA agreeing on this point.
[21] at [80]
[22] [2015] NSWCA 335
[23] [2006] NSWSC 322
[24] [2016] NSWWCCPD 1 at [90]
[25] at [18]-[21]

> "18 By way of introduction to dealing with the contentions of the parties, it may be helpful to observe that it is a matter of importance that the medical dispute referral, identify with precision the matters that are referred for assessment. A failure to do so may infect the whole assessment process.
>
> 19 Counsel for the second defendant has contended that the arbitrator was not empowered to make the referrals that were made in this case. This is one of those matters that has not been fully argued. In the light of the minimal argument that has taken place, I am not satisfied that this contention is well founded. In this context, it suffices to observe that the referrals would appear to fall within the compass of, inter alia, (c) of the definition.
>
> 20 The prescription contained in subsection (1) of s325 requires the approved medical specialist (AMS) to give a certificate as to the matters referred for assessment. It is significant that the provision appears to distinguish between 'a medical dispute' and 'the matters referred for assessment'. The statutory function of the AMS is to give a certificate as to those matters.
>
> 21 I am satisfied that the medical assessment certificate given by Dr Fry contains demonstrable error. He has addressed matters other than those referred to him for assessment. He has not given a certificate as to the matters referred for assessment. This has seen him venture outside that area and one of the consequences is that there is overlapping with the assessment made by Dr Bodel. The supplementary certificate given by Dr Bodel was founded on the correctness of the certificates that both he and Dr Fry had given. Accordingly, the supplementary certificate is infected with the error contained in the earlier certificate of Dr Fry."

39. In *O'Callaghan* the claimant was originally assessed for permanent impairment restricted to the lumbar spine. An application was then made to reconsider the orders of the Commission to enable an appeal to be filed against the Medical Assessment Certificate based on a deterioration in the worker's condition pursuant to s 373(3)(a) of the 1998 Act. This application was dismissed[26] and an appeal against that decision was dismissed, principally on the basis that the threshold requirements under s 352(3) of the 1998 Act had not been made out.

40. Ms O'Callaghan argued that her condition had deteriorated and sought an assessment in respect of the cervical spine. No claim for permanent impairment had previously been made in respect of the cervical spine and the original Medical Assessment Certificate was limited to the assessment of impairment of the lumbar spine.

41. During the course of his Reasons, Roche DP stated:[27]

> "I do not accept that *Aircons* does not relate to the circumstances contemplated by grounds (a) and (b). Once it is accepted, as it must be, that a s 327 appeal is 'against a medical assessment', *Aircons* is directly relevant and binding. As held in that case, an AMS can only give a certificate as to the matters referred for assessment. To say that the Medical Appeal Panel is not restricted to the matters in the original referral to the AMS ignores the fact that a matter does not get to a Medical Appeal Panel unless and until the Registrar is satisfied that, on the face of the application and any submissions made in support of it, at least one of the grounds for appeal specified in subsection (3) has been made out."

[26] *O'Callaghan v Energy World Corporation Ltd* [2015] NSWWCC 261.
[27] at [84].

42. Roche DP referred to the decision of the Court of Appeal in *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW*[28] as being consistent with this interpretation.

43. In *Tomislav & Ranka Divljak v Workers Compensation Commission*[29] the Supreme Court quashed the decision of the Appeal Panel and remitted the matter back for determination. The Court held that the assessment of the anus was incorrectly undertaken in the absence of any notified dispute for that body part.[30]

44. The decision also relied on a failure by both the AMS and the Appeal Panel to provide proper reasons on the existence of the secondary condition[31]. It is unfortunate that the Court was not referred to relevant authority on the distinct roles between an AMS and the Commission and was not referred to either *Jaffarie (No 2)* or other Court of Appeal authority such as *State of New South Wales v Bishop* (*Bishop*)[32]. In *Bishop* the Court held that the determination of a consequential condition was a matter for a Commission Arbitrator.

45. These authorities make it clear that an AMS is restrained by the nature of the referral and the medical dispute. There was no claim by the respondent for impairment to the wrist and the elbow. In those circumstances there was no medical dispute and the AMS was not entitled to assess those parts.

46. The Referral should have specified, with some particularity, the part of the upper extremity being assessed. The parties entered into the Consent Orders and did not object to the Referral when it was issued. Despite the vagueness in the Referral, the right wrist and elbow were not the subject of claim and dispute, were not before the AMS and could not be assessed.

47. Section 327(3)(d) provides that the error must be "demonstrable". In *Vannini v Worldwide Demolitions Pty Ltd* (*Vannini*),[33] Gleeson JA observed that, consistent with the observations of Basten JA in *Mahenthirarasa v State Rail Authority of New South Wales,* a "demonstrable error must be apparent in findings of fact or reasoning contained in the medical assessment certificate, although the error may be established in part by reference to materials that were before the approved medical specialist".[34]

48. As no claim was made and no medical dispute existed for the wrist and elbow, the AMS erred in assessing these body parts. The assessment of the wrist and elbow was a demonstrable error within the meaning of *Vannini*. This ground of appeal is upheld.

49. In these circumstances it is unnecessary to consider the other grounds of appeal in relation to purported error by the AMS in assessing the wrist and the elbow. We have otherwise noted that portions of the appellant's submissions on an AMS determining injury are misconceived.

50. The matter requires reassessment according to law: *Drosd v Nominal Insurer*[35] (*Drosd*). The reassessment is set out later in these Reasons.

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[28] [2007] NSWCA 147 per Campbell JA at [94], Hodgson JA agreeing.
[29] [2018] NSWSC 760.
[30] At [39].
[31] At [37]-[39].
[32] [2014] NSWCA 354 (Basten JA at [20]), (Emmett JA at [84]-[85], Gleeson JA agreeing at [93]).
[33] [2018] NSWCA 324 (*Vannini*) at [90].
[34] *Vannini* at [86].
[35] [2016] NSWSC 1053.

GROUND OF APPEAL – ASSESSMENT OF THE SHOULDER

Submissions

Appellant's submissions

51. The appellant submitted that "there was an error in the way the assessment was conducted and WPI calculation arrived at".[36] After setting out the measurements of range of motion recorded by the AMS, the appellant submitted:[37]

> "The above demonstrates that whilst Dr Anderson's recorded range of movement of the right shoulder was less than normal in all planes of movement, there were also three planes of movement of the left shoulder (which was not referred for assessment given no injury was sustained to that part of the Applicant's body) which were less than normal. That would, *prima facie*, suggest that regardless of the injury to the right shoulder there was some pre-existing impaired range of movement of the right shoulder given the reduced range of movement in the left uninjured, shoulder. With reference to that, it is submitted that merely relying on the recorded range of movement was not an appropriate manner by which to assess any impairment of the Applicant's right shoulder given it had the propensity to yield a false result, noting the limitations of the left shoulder.
>
> Furthermore, clause 2.5 of the Guidelines provides that:
>
> - *A goniometer or inclinometer must be used, where clinically indicated…*
> - *If there is inconsistency in ROM* [Range of Movement], *then it should not be used as a valid parameter of impairment evaluation…*
> - *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 evidence to determine if an impairment is present.*
>
> Each of the above was not followed as:
>
> (a) There is no indication in the MAC that a goniometer or inclinometer was used.
>
> (b) The inconsistency in the ROM, between the right injured and left uninjured shoulder, meant that Dr Anderson should have referred to clause 1.36 of the Guidelines.
>
> (c) Flowing on from the above, ROM was not a reliable way of determining the Applicant's impairment and another method should have been used."

[36] Appellant's submissions, paragraph 18.
[37] Appellant's submissions, paragraphs 20-22.

Respondent's submissions

52. The respondent did not file submissions.

Reasons

53. The AMS recorded findings on examination for both shoulders and noted that the "presentation was completely consistent".[38]

54. The appellant submitted that there is no indication in the MAC that a goniometer or inclinometer was used.

55. The basis for this submission does not arise from a reading of the MAC.

56. It is clear from a plain reading of s 327(3) of the 1998 Act that the moving party must show that the assessment was made on the basis of incorrect criteria or the certificate contains a demonstrable error. The plain words of the section accord with the reasoning of Davies J in *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales & Ors*[39] that the appellant must establish relevant error as defined in the section.

57. Assuming, in favour of the appellant, that the AMS was required to use a goniometer or inclinometer, there is no suggestion that one was not used. There is a presumption of regularity that the AMS has performed such tests as might be required: *Jones v the Registrar of the Workers Compensation Commission* (*Jones*)[40]. A similar presumption arises with respect to regularity which affects administrative action: *Bojko v ICM Property Services Pty Ltd*[41] and *Jones*[42].

58. The particular measurements recorded by the AMS show precision with respect to the six ranges of movement in the shoulder.

59. In these circumstances there is every reason to accept that the AMS used a goniometer. The appellant has not established this alleged error.

60. The appellant's other submissions alleging "inconsistency" are rejected.

61. The AMS is required to measure the uninjured left shoulder. Pursuant to paragraph 2.20 of the fourth edition guidelines, the AMS is to assess the difference of range of motion between the injured and uninjured shoulder.

62. Paragraph 2.20 of the fourth edition guidelines relevantly provides:

> "If a contralateral 'normal/uninjured' joint has less than average mobility, the impairment value(s) corresponding to the uninvolved joint serves as a baseline and is subtracted from the calculated impairment for the involved joint."

63. The fact that there was some minor restriction, is not a sign of inconsistency but simply normal movement for a particular worker which may not accord with the standard set in AMA 5.

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[38] MAC, p 5
[39] [2013] NSWSC 1792 at [33]
[40] [2010] NSWSC 481 at [50].
[41] At [36] per Handley JA, with whom Allsop and Giles JJA agreed.
[42] At [36].

64. It is otherwise unclear from the appellant's submissions as to the basis for "inconsistency". The AMS did not make this finding and it is not apparent from the MAC how the range of motion of either shoulder shows inconsistency.

65. The suggestion that the uninjured shoulder has some restriction in movement in 2019 does not otherwise mean that prior to 2011 there was a pre-existing condition. We address this issue later in these Reasons including the requirement, provided by paragraph 2.20 of the fourth edition guidelines, to make an appropriate adjustment for loss of motion of the uninjured shoulder.

66. It is unclear from the appellant's grounds of appeal set out at paragraph 51 above whether it is alleged that the AMS erred by failing to make a deduction pursuant to s 323 of the 1998 Act. The submissions do not articulate a proper basis for alleging demonstrable error. The AP has otherwise determined that the right upper extremity must be reassessed according to law. In these circumstances our reasons on reassessment set out below include our findings that there should be no s 323 deduction.

REASSESSMENT

67. The AP previously noted that the appellant did not request that the respondent be re-examined.

68. Given the AMS's finding that there was consistency and our acceptance of this finding, the AP accepts and applies the detailed measurements of both shoulders. The findings by the AMS were:

Shoulder Movements

MOVEMENT	RIGHT	LEFT
Flexion	45°	180°
Extension	0°	5°
Abduction	45°	180°
Adduction	0°	50°
Internal rotation	10°	80°
External rotation	20°	60°

69. The AMS assessed the loss of movement of the right shoulder at 27% upper extremity impairment[43] (UEI). The measurements recorded by the AMS for the loss of range of motion of the left shoulder equates to 3% UEI.[44] This loss is due to the loss of extension in the left shoulder.[45]

70. The AP considers that the loss of range of motion of the left shoulder should be deducted from the loss of range of motion of the right shoulder pursuant to paragraph 2.20 of the fourth edition guidelines.

71. The loss of range of motion of the left shoulder is not attributable to another cause such as neck pathology or neck radiation. The AMS recorded only occasional neck pain with no radiation. Further, any neck symptoms would not impact on loss of shoulder extension which was a significant component of the loss of motion in the left shoulder and not typical of cervical spine pathology.

[43] MAC, p 6.
[44] AMA 5, Figures 16-40, 16-43 and 16-46.
[45] AMA 5, Figure 16-40.

72. In these circumstances it is appropriate, pursuant to paragraph 2.20 of the fourth edition guidelines, to deduct the loss of range of left shoulder motion from the assessment of the loss of range of right shoulder motion.

73. The right shoulder UEI is 24% after the deduction for the loss of range of motion of the left shoulder. Pursuant to Table 16-3 of AMA 5, 24% UEI converts to 14% WPI.

74. The AP does not find any s 323 deduction.

75. The plain x-ray taken in 2016 is reported as showing only early degenerative changes in the glenohumeral joint. This x-ray does not establish a condition pre-existing the 2011 injury. The assessment of permanent impairment is based on both the 2011 and 2016 injuries. There is otherwise no suggestion in the evidence that the respondent had problems with either shoulder prior to the 2011 injury.

76. In these circumstances we agree with the findings made by the AMS that the respondent had no pre-existing condition in the right shoulder. We note the contrary opinion expressed by Dr Machart that there should be a one-tenth deduction pursuant to s 323 of the 1998 Act for unrelated osteoarthritis[46]. It is unclear on what basis Dr Machart made this diagnosis and the AP does not accept that the 2016 scans show osteoarthritis pre-existing the 2011 injury.

77. There are no other relevant incidents other than the two work injuries. We are satisfied in those circumstances that the 14% WPI results from the injuries in 2011 and 2016.

78. The AP is satisfied, given the duration of symptoms and the nature of the surgical procedures, that the impairment is permanent.

79. There were no submissions concerning the assessment of the cervical spine. Accordingly, the AP adopts the findings by the AMS for that body part.

80. The AP observes that a claim was made for the skin based on the surgical scar. That body part was not pleaded in the Application to Resolve a Dispute, not mentioned in the Consent Orders or otherwise included as part of the Referral. The AP has no power to assess that body part as it was not referred for assessment: *Inghams Enterprises Pty Ltd v Hickey*[47].

DECISION

81. For these reasons, the MAC is revoked and a new Medical Assessment Certificate is issued. The new Medical Assessment 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 MEDICAL APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar

[46] Reply, p 9.
[47] [2018] NSWWCCMA 10.

WORKERS COMPENSATION COMMISSION

APPEAL PANEL

MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter No: **3980/19**
Applicant: **Philip Williamson**
Respondent: **Toll Holdings Pty Ltd**

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

The Appeal Panel revokes the combined Medical Assessment Certificate of Dr Tim Anderson 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 fourth edition guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA 5**	**% WPI**	**WPI deductions pursuant to s 323 for pre-existing injury, condition or abnormality (expressed as a fraction)**	**Sub-total/s % WPI (after any deductions in column 6)**
Right upper extremity (shoulder)	June 2011 and 29/01/16	Chap 1, p 7 and Chap 2, p 10	Chap 16, Table 16-3, Fig 16-40, 16-43 and 16-46	14%	nil	14%
Cervical Spine		Chap 4, p 24	Chap 15, Table 15-5	0%	N/A	0%
Total % WPI (the Combined Table values of all sub-totals)					**14%**	

John Harris
Arbitrator

Dr Brian Noll
Approved Medical Specialist

Dr David Crocker
Approved Medical Specialist

18 February 2020

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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar