WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1- 6692/19**
Appellant:	**Jillian Smith**
Respondent:	**Port Macquarie Community Pre-School**
Date of Decision:	**2 July 2020**
Citation:	**[2020] NSWWCCMA 119**

Appeal Panel:	
Arbitrator:	**Carolyn Rimmer**
Approved Medical Specialist:	**Dr James Bodel**
Approved Medical Specialist:	**Dr David Crocker**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 10 March 2020, Jillian Smith (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Murray Hyde Page, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 10 March 2020.

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 assessment was made on the basis of incorrect criteria,
    - 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 ground(s) of appeal on which the appeal is made.

4. The Workers compensation medical dispute 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 Workers compensation medical dispute 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,* 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. In these proceedings, the appellant is claiming lump sum compensation in respect of an injury to the lumbar spine on 1 March 2016 that occurred in the course of her employment as a childcare worker with the respondent. The appellant, while undertaking treatment to the lumbar spine, sustained an injury to her left lower extremity (ankle).

7. On 30 January 2020, in a Certificate of Determination - Consent Orders, Senior Arbitrator Capel remitted the matter to the Registrar for referral to an AMS for assessment of whole person impairment (WPI) of the lumbar spine and left lower extremity as a result of the injury sustained on 1 March 2016.

8. The matter was referred to the AMS, Dr Hyde Page, in the Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 4 February 2020 for assessment of WPI of the lumbar spine and left lower extremity as a result of the injury on 1 March 2016.

9. The AMS examined the appellant on 25 February 2020. He assessed 0% WPI of the lumbar spine and 0% WPI of the left lower extremity. Therefore, the total assessment was 0% WPI in respect of the injury on 1 March 2016.

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 Workers Compensation medical dispute assessment guidelines.

11. The appellant requested that she be re-examined by an AMS, who is a member of the Appeal Panel.

12. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because there was sufficient evidence by way of medical reports and clinical investigations in relation to assessment of the lumbar spine and left lower extremity on which to make a determination.

Fresh evidence

13. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.

14. The admission of 'fresh evidence' into an appeal was considered by Deputy President Fleming in *Ross v Zurich Workers Compensation Insurance* [2002] NSWWCC PD7 (*Ross*). The principles set out in *Ross* are relevant and have been applied to the admission of fresh evidence by an Appeal Panel (see discussion in *Australian Prestressing Services Pty Ltd v Vosota* WCC10798-04). In *Ross* the Deputy President stated:

> "A number of authorities have considered the tests at common law for the introduction of fresh evidence in appellate proceedings before the Courts. The relevant tests are firstly, that the evidence which is sought to be admitted on appeal was not available to the Appellant at the time of the original proceedings or could not have been discovered at that time with reasonable diligence, and secondly that the evidence is of such probative value that it is reasonably clear that it would change the outcome of the case (*Wollongong Corporation v Cowan* (1955) 93 CLR 435; *McCann v Parsons* (1954) 93 CLR 418; *Orr v Holmes* (1948) 76 CLR 632). These tests are addressed to the underlying principle of the need for finality in litigation and the importance of the ability of the successful party to rely on the outcome of the litigation. They are also addressed to the fundamental demands of fairness and justice in the instant case."

15. The appellant seeks to admit the following evidence:

    (a) report of Carly Groves dated 27 March 2020, and
    (b) statement of the appellant (undated).

16. The appellant submitted that these documents were not available at the date of the assessment by the AMS.

17. The respondent submitted that the statement evidence did not constitute "additional relevant information". In *Petrovic v B C Serv No 14 Pty Ltd & Ors* [2007] NSWSC 11546 (*Petrovic*), Hoeben J considered the requirement of s 327(3)(b), stating:

> "In my opinion the words 'availability of additional relevant information' qualify the words in parentheses in s327(3)(b) in a significant way. The information must be relevant to the task which was being performed by the AMS. That approach is supported by subs 327(2) which identifies the matters which are appealable. They are restricted to the matters referred to in s326 as to which a MAC is conclusively taken to be correct. In other words, 'additional relevant information' for the purposes of s327(3)(b) is information of a medical kind or which is directly related to the decision required to be made by the AMS. It does not include matters going to the process whereby the AMS makes his or her assessment. Such matters may be picked up, depending on the circumstances, by s327(3)(c) and (d) but they do not come within subs 327(3)(b)." (at [31])

18. The respondent submitted that the matters raised in the appellant's statement concerned the process whereby the AMS made his assessment. In *Marina Pitsonis v Registrar of the Workers Compensation Commission & Anor* [2008] NSWCA 88 (*Marina Pitsonis*), this type of statement evidence was considered and rejected:

> "Those dependent on the applicant showing that the doctor failed to record or to record correctly things she had told him face a double difficulty. They are not demonstrable on the face of the Certificate. And they seek, in effect to cavil at matters of clinical judgment in that matters unrecorded are likely to be matters on which the specialist placed no weight. The same can be said about factual matters recorded in one part of the Certificate that did not translate into the decision favourable to the applicant now contended for." (at [59])

19. The respondent submitted it is to be presumed that the AMS recorded an accurate history and undertook a proper examination, notwithstanding the appellant's contention to the contrary.

20. The appellant also sought to rely on the report from her physiotherapist, Ms Carly Groves, dated 27 March 2020. The respondent noted that It did not appear that the appellant sought to rely upon any reports from Ms Groves in the Application to Resolve a Dispute (ARD) although there were two reports from Ms Groves' practice dated 19 July 2016 (pp 43 and 44 of the ARD), but it was unclear as to whether Ms Groves or one of the other physiotherapists in the practice was the author.

21. The respondent submitted that the requirements of s 327(3)(b) of the 1998 Act had not been satisfied in respect to Ms Groves' report given the report could have been reasonably available before the AMS's appointment. The respondent argued that the appellant had ample opportunity to obtain a report from Ms Groves prior to the AMS examination, and, in fact, before the filing of her ARD. There was no valid explanation as to why a report from Ms Groves could not have been obtained earlier.

22. The respondent noted that the question of the admissibility of additional relevant information was not whether the evidence existed before the date of examination. The question was whether it could have been reasonably obtained. The evidence from Ms Groves stated that her findings recorded related to "the last two and a half months". The appellant submitted that the evidence from Ms Groves should be preferred over the opinion expressed by the AMS as to whether or not the appellant has experienced an improvement in her symptoms following the Independent Medical Examiner (IME) assessments relied upon by the parties. The respondent submitted that it was clear the evidence contained in the report of Ms Groves could have been reasonably obtained well prior to the date on which it was obtained.

23. The respondent submitted that to allow a matter to proceed on this basis would "open the floodgates" and allow any party to proceed to an Appeal Panel by creating or obtaining some evidence after the date of examination, which was not consistent with the context and purpose of the appeal procedure contained in s 327 of the 1998 Act.

24. In relation to the appellant's statement, the Appeal Panel accepts that the statement of the appellant was not available before the examination by the AMS and could not have been reasonably obtained as it related to events that took place during the examination by the AMS.

25. In *Lukacevic v Coates Hire Operation Pty Ltd* [2011] NSWCA 1122 (*Lukacevic)*, the majority concluded that the admission of such evidence was a matter of discretion and that the discretion exercised by the Appeal Panel not to admit the evidence did not miscarry. It was further held that matters relevant to the exercise of the discretion included "the importance of finality in litigation, that procedural fairness for the respondent would entitle it to seek a response from the AMS, and the fact that the issues raised were 'not contemplated as part of the appeal mechanism'" (per Handley JA at [111]). Hodgson JA (who agreed with Handley JA) made the following observations (at [76] to [78] and at [80] but omitting reference to legislative provisions and case law):

> "Suppose that the worker disputes that the history set out in the certificate was the history he/she gave, and/or disputes the observations recorded in the certificate. . . An appeal panel dealing with an appeal brought on that basis could properly determine that it should not entertain and rule on this kind of dispute between the worker and the AMS concerning what occurred on the occasion of the worker's examination by the AMS. It could then determine that, in those circumstances, the only effective way of dealing with the appeal would be for a member of the appeal panel to conduct another medical examination. This procedure itself gives rise to the possibility of procedural unfairness. A dispute by the worker as to the history set out in the certificate, or the observations made by the AMS, can be readily raised; and it could be raised honestly or dishonestly, on strong or flimsy grounds. Having regard to the matters I have set out, in my opinion it would be reasonable for an appeal panel not to admit evidence raising such a dispute unless that evidence had substantial prima facie probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, by simply raising such a dispute, going to a matter relevant to the correctness of the certificate, a worker could put the appeal panel in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of (the 1998 Act). I think it was well open to the appeal panel, having regard to the evidence it had, to maintain its non-admission of the worker's additional evidence, while at the same time concluding on the whole of the evidence that the AMS had taken an adequate history and recorded it correctly."

26. The Appeal Panel accepted that the statement of the appellant was not "additional relevant information" which is a separate ground of appeal under section 327(3)(b). In *Lukacevic*, Hoeben J held that a statutory declaration addressing the way in which an AMS carried out his examination was not "additional relevant information" as it was not information of a medical kind or which directly related to the decision made by the AMS. However, the Appeal Panel noted that Hoeben J did state that once the matter came before an Appeal Panel, the matter in the statutory declaration could be considered by the Appeal Panel.

27. However, what was also made clear by *Lukacevic* is that the lack of a formal procedure to deal with an attack on the manner in which an AMS conducts an examination meant that there was no way in which an AMS could respond to the allegations made against him or her or, for that matter, were there any means by which a respondent could obtain evidence from the AMS rebutting allegations made by a worker. These were matters going to procedural fairness and relevant to the exercise of the discretion in relation to the admission of such evidence.

28. The Appeal Panel was not satisfied in the present case that the further evidence, that is, the appellant's statement, sought to be relied upon by the appellant was of prima facie probative value and for that reason declined to receive it into evidence or have regard to it.

29. The Appeal Panel also noted that although the statement of the appellant came within the literal definition of "fresh evidence" as referred to in section 328(3), such evidence since was quite contrary to the purpose of the Act. The Appeal Panel did not understand the intention of the legislature to be that such criticisms of an AMS ought to be admitted as fresh evidence. The Appeal Panel believed that the purpose of the legislation was to give some prima facie credence to the opinion of an AMS in situations where he has examined the client and all the competing medical views. The system would not be able to operate properly if the AMS's view could be overturned merely because of some untested documentary evidence as to the events that occurred during the examination. It should also be noted that the appellant was not a medical practitioner or health professional and her evidence therefore concerning the details of the examination by the AMS would have little, if any, probative value.

30. In relation to the report of Ms Groves dated 27 March 2020, the appellant made no submissions as to whether the report could have been obtained from Ms Groves before the assessment by the AMS on 25 February 2020.

31. The Appeal Panel had reservations in respect of the report of Ms Groves dated 27 March 2020, particularly in relation to a lack of detail and its accuracy. Ms Groves did not identify the dates when she made various findings. The Appeal Panel noted that Ms Groves identified a substantial gastrocnemius wasting in the left leg but did not provide a measurement of the wasting. This finding of wasting by Ms Groves was at odds with the finding made by the AMS on examination. The AMS measured the appellant's calves and found they were of an equal circumference and there was no muscle wasting. Dr Ho, in his report dated 18 April 2018, noted that there was symmetrical muscle bulk in the lower limbs.

32. Further, the assessment of permanent impairment is to be made on the basis of the worker's presentation on the day of assessment by the AMS, meaning that whatever was observed, or thought to be observed, by Ms Groves sheds no real light on the situation as at the time of the assessment by the AMS and certainly not on what occurred during the course of that assessment.

33. The Appeal Panel also considered that the appellant could have obtained an up to date report from Ms Groves prior to the examination by the AMS. Such a report could have been reasonably obtained by the appellant. Therefore, the Appeal Panel declined to receive Ms Groves' report into evidence.

34. The Appeal Panel determines that the following evidence should not be received on the appeal:

    (a) statement of Jillian Smith (undated), and
    (b) report of Carly Groves dated 27 March 2020.

EVIDENCE

Documentary evidence

35. 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

36. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

37. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.

38. The appellant's submissions include the following:

- The AMS's assessment that permanent impairment was in accordance with DRE Category I was inconsistent with his acceptance that the appellant reported ongoing low back pain and stiffness with pain radiating into her left hip and down into the left leg and his finding of sensory changes in her left lower leg.

- The Guidelines are silent in relation to whether active or passive range of movements ought to be recorded for assessment in relation to the lower limb. The Guidelines do however identify at Paragraph 2.5, that whilst passive range of movement may form part of the clinical examination, impairment should only be calculated using active range of movement measurements.

- The AMS at page 4 of the MAC recorded the appellant's range of movement but did not identify whether these are the active or passive ranges of movement. The appellant alleges that the assessment of her using a passive range of movement means that the assessment is based on the incorrect criteria with the only way to identify her active range of movement is for the appellant to undergo a further examination.

- The AMS reviewed the medical evidence and advised that the reason for the significant difference between his assessment of permanent impairment and that of the previous assessment was that the appellant had experienced an improvement in her symptoms.

- This opinion was inconsistent with the opinion of the appellant's treating physiotherapist, Ms Carly Groves, who in her report of 27 March 2020 expressed the opinion that in the last two and a half months, the appellant's physical examination has been worse due to the appellant's preparation for moving to Queensland. Ms Groves identified ongoing impairment which the AMS failed to identify including a substantial gastrocnemius wasting in the left leg. The AMS did not identify wasting of the left leg.

- The MAC was based on the incorrect criteria and contained a demonstrable error, resulting in an incorrect assessment of her permanent impairment.

- It is appropriate for the worker to be re-examined by an AMS, who is a member of an Appeal Panel.

39. The respondent's submissions include the following:

- There was no evidence that the examination by the AMS was in any way materially defective and the AMS's examination amounted to a proper medical examination. There was no evidence to the contrary and the Appeal Panel should be satisfied as to the AMS's experience.

- The additional evidence relied upon by the appellant seeks to take issue with and cavil with the assessment undertaken by the AMS. In addition, the report from Ms Groves was reasonably available to be obtained by the applicant prior to the AMS examination.

- The further documents do not fall within the definition of s 327(3)(b) and it should be disregarded.

- In relation to the assessment of the lumbar spine, an AMS is required to undertake an assessment of a worker as they present on the day of the assessment, and not at any other time. The Guidelines provide that assessing permanent impairment involves a clinical assessment of a worker as they present on the day of assessment taking into account relevant medical history and all available relevant medical information. An AMS is also permitted to determine what weight should be given to the documents referred to him, including documents that record prior medical history and symptoms.

- It is to be presumed that the AMS recorded an accurate history and findings on examination, and took account of the matters recorded in the various documents referred to him, notwithstanding the appellant's contention to the contrary.

- From the detailed comments recorded by the AMS in the MAC, it was clear that the worker's symptoms and presentation did not warrant an assessment within DRE Lumbar Category II.

- The AMS recorded discomfort in the lower back area, weakness in the left leg, and variable sensory change in the left leg which did not accord with a conclusion of the appellant suffering from dysmetria and muscle guarding, and/or non-verifiable radicular symptoms. In the event those conditions/symptoms were present on the AMS's examination, he would have recorded such, and rather, the AMS has expressly recorded that neither of those findings were present on examination.

- The AMS's assessment is a matter entirely within his own clinical judgment. The AMS's opinion should be conclusively presumed correct. The MAC was extensive and indicated that the AMS undertook a full and adequate examination of the appellant, including obtaining a full and proper history. The findings clearly accorded with a finding of DRE Lumbar Category I.

- There was no evidence to suggest that the AMS conducted a limited examination of the appellant. His thorough examination led him to the conclusion the appellant's examination did not give rise to a finding of an assessable lumbar spine impairment. There was no evidence to support the contention that the AMS's assessment in that regard contains a demonstrable error or has been made on the basis of incorrect criteria.

- In relation to the assessment of the left lower extremity, it is correct that the AMA 5 recommends active movements be taken and that the Guidelines identify at Paragraph 2.5 that "Passive ROM may form part of the clinical examination to ascertain clinical status of the joint, but impairment should only be calculated using active ROM measurements". This is exactly the approach the AMS has undertaken. The AMS was no doubt well aware of the above provisions.

- From the appellant's statement it was noted "Dr Hyde Page held my foot when moving in each direction to get my foot to move further than I could when he did not assist the movement of my left foot". It would therefore appear that the AMS observed both an active and passive range of movement of the appellant's left foot. The AMS does not have to expressly state that he has based his assessment on the appellant's active range of motion, as such is inherently implied given the AMS is no doubt well aware of the provisions of both the AMA 5 and the Guidelines.

- The appellant takes issue with and seeks to cavil with the examination conducted by the AMS and a purported lack of identification of what range of movement he based his findings on. The respondent disputed those submissions, and submitted there has been no demonstrable error or use of incorrect criteria in the AMS's assessment of the appellant's left lower extremity.

- The AMS provided a comprehensive MAC following his thorough review of the appellant and the evidence provided by the parties. The conclusions reached by the AMS were clearly available to him based on the material produced between the parties and his examination.

- There is no evidence to support the appellant's contention that the assessment by the AMS in respect to the appellant's lumbar spine and left lower extremity was based on a demonstrable error and/or was made on the basis of incorrect criteria. Further, it is disputed that the appellant has relied upon any additional relevant information that would fall under the provision of s 327(3)(b).

- The appeal should be dismissed.

FINDINGS AND REASONS

40. 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.

41. 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.

42. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 (*Siddik*). The Court held that while prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gateway, it can consider other grounds capable of coming within one or other of the s 327(3) heads, if it gives the parties an opportunity to be heard. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation.

43. Section 327(2) was amended with the effect that while the appeal was to be by way of review, all appeals as at 1 February 2011 were limited to the ground(s) upon which the appeal was made. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 Davies J considered that the form of the words used in s 328(2) of the 1998 Act being, 'the grounds of appeal on which the appeal is made' was intended to mean that the appeal is confined to those particular demonstrable errors identified by a party in its submissions.

44. In this matter, the Registrar has determined that he is satisfied that a ground of appeal under s 327(3 (d) is made out in relation to the AMS's assessment of the appellant's lumbar spine.

45. The Appeal Panel reviewed the history recorded by the AMS, his findings on examination, and the reasons for his conclusions as well as the evidence referred to above. The Panel accepted the findings on examination that the AMS made in the MAC.

Assessment of the lumbar spine left lower extremity

46. Under "Present symptoms" the AMS wrote:

> "Present symptoms: She has ongoing low back pain and stiffness, with pain radiating into her left hip and down her left leg.
>
> She gets tingling and numbness in the left lower leg and foot. She states that on occasions her foot becomes discoloured and it is affected by the cold weather. She has stiffness in the ankle and avoids walking on rough and uneven surfaces."

47. Under "Findings on physical examination" the AMS wrote:

> "I observed her throughout the interview and she appeared to be moving very comfortably and freely throughout. I observed her as she walked away from the consultation and she appeared to be walking normally, with no discomfort.
>
> On examining her lumbar spine, she indicates discomfort in the lower lumbar area but she had full flexion and extension, as well as rotation and tilt to the left and right. There was no evidence of any dysmetria or muscle guarding. She had no radicular symptoms.
>
> While lying on the examination couch, she had normal straight leg raise with negative sciatic tension. She had normal power and equal reflexes. There was no muscle wasting. She had some variable sensory change in her left lower leg.
>
> On examining her left foot and ankle, she had no swelling or tenderness. The foot and ankle were normally aligned and there was no evidence of any skin changes, sweating or colour changes. She had good peripheral circulation. There was no tenderness or dysaesthesia.
>
> She had equal circumference of her left and right calf. There was normal power around her left foot and ankle.
>
> Her range of movement in her ankles and feet were:
>
Left	Right
Flexion 15°	15°
Extension 50°	50°
Inversion 25°	25°
Eversion 15°	15°

> Overall, today's examination of her lumbar spine and lower limbs was normal."

48. Under “Summary of injuries and diagnoses” the AMS wrote:

> “It appears that Jillian Smith suffered an acute low back strain, at work on the 1 March 2016, while she and a co-worker lifted a heavy solid timber table. She had conservative treatment with physiotherapy and analgesia. In the course of treatment, she suffered a lateral left ankle strain. She only got back to doing clerical work and caring for one disabled child, rather than her normal childcare work, before resigning and moving to Port Douglas in the middle of 2016. She subsequently returned to live in Port Macquarie at the end of 2016 and had investigation of her left ankle and foot, including an MRI scan. It appears the MRI scan caused her to develop welts on her skin. She ended up not needing any specific treatment from her Foot and Ankle Surgeon, Dr Dean Pepper, but was also assessed by a Rheumatologist, Vascular Surgeon and Dermatologist in Port Macquarie.
>
> On today’s assessment, she has ongoing low back pain and stiffness with symptoms down her left leg into her left foot and ankle. I note she has a history of pre-existent low back injury and complaint going back to 2004, as well as a further injury to the lower back in 2014. She had previously had no trouble with the left ankle and foot.”

49. Under “Reasons for Assessment”, the AMS wrote:

> “I have concluded that Jillian Smith has 0% WPI as a consequence of work injuries suffered to her lumbar spine and left lower extremity from injury on 1 March 2016. She suffered on that occasion an injury to her lumbar spine. She subsequently had a consequential injury to her left ankle and foot, as I have noted…
>
> In her lumbar spine, on today’s examination she has no muscle guarding or dysmetria, no radicular symptoms in her lower limbs and there is no evidence of radiculopathy. With reference to AMA Guides 5th Edition page 384, she has DRE Category I lumbar spine injury that gives 0% WPI (WorkCover Guides page 28 to 29). She therefore has 0% WPI as a consequence of her lumbar spine injury.
>
> In her left lower extremity, today’s examination was completely normal, particularly around her left ankle and foot. She has maintained full range of movement in her ankle and foot and there is normal alignment. There is no evidence of any peripheral nerve entrapment or CRPS. She has normal strength around her ankle and foot. With reference to AMA Guides 5th Edition Lower Limb Chapter, she has 0% WPI.
>
> There are no other injuries to assess and she therefore has 0% WPI as a consequence of work injuries suffered on the 1 March 2016.”

50. In commenting on other medical opinions, the AMS wrote:

> “I have come to the conclusion that Jillian Smith has made a very good recovery from her left foot and ankle condition, which was very difficult to diagnose and this is clearly seen in the other doctors’ reports, particularly her treating doctors. However, on today’s examination she had normal movement of her left foot and ankle and there was no evidence of CRPS.
>
> Overall, I am satisfied there is no level of whole person impairment related to her left foot and ankle condition.

> However, I did note that she does have evidence of ongoing low back pain, but with today's examination she did not have any muscle guarding or dysmetria. She had no radicular symptoms and there was no evidence of radiculopathy in her lower limbs. With these findings, I can only come to the conclusion that she DRE Category I lumbar spine injury that gives 0% WPI. I note that I have undertaken my assessment six to nine months since the reports of Dr Ho and Dr Panjratan and it would appear that she has shown significant improvement in her back condition during this time, that she no longer has any evidence of muscle guarding or dysmetria."

51. AMA 5 provides that DRE Category I applies when there are "no significant clinical findings, no observed muscle guarding or spasm, no documentable neurologic impairment, no documented alteration in structural integrity, and no other indication of impairment related to injury or illness; no fractures". DRE II requires either:

> "clinical history and examination findings compatible with a specific injury; findings may include significant muscle guarding or spasm observed at the time of the examination, asymmetric loss of range of motion, or nonverifiable radicular complaints, defined as complaints of radicular pain without objective findings; no alteration of the structural integrity and no significant radiculopathy"

or

> "individual had a clinically significant radiculopathy and has an imaging study that demonstrates a herniated disc at the level and on the side that would be expected based on the previous radiculopathy, but no longer has radiculopathy following conservative treatment."

52. Paragraph 4.18 of the Guidelines provides that:

> "DRE II is a clinical diagnosis based upon the features of the history of the injury and clinical features. Clinical features which are consistent with DRE II and which are present at the time of assessment include radicular symptoms in the absence of clinical signs (that is, non-verifiable radicular complaints), muscle guarding or spasm, or asymmetric loss of range of movement. Localised (not generalised) tenderness may be present…"

53. The appellant submitted that the assessment of DRE I for the lumbar spine was inconsistent with acceptance by the AMS that the appellant reported ongoing low back pain and stiffness with pain radiating into her left hip and down into the left leg and his finding of sensory changes in her left lower leg.

54. The Appeal Panel reviewed the evidence in this matter.

55. Dr Panjratan, in his report dated 26 July 2019, wrote:

> "Examination revealed normal lumbar lordosis. She complained of pain to the left of the midline at the facet joints with the pain going vertically upwards and downwards.
> She was tender at the left facet joint at L4/5.
>
> She could bend down to the level of the knees, after which she developed pain. Extension was good but she had a pinching sensation at the final range. Left and right lateral flexlon was symmetrical to the upper level of the knees. Rotation towards the sides was normal but she felt a burning on rotating towards the right. The right SLR was normal. The left SLR was to 60°."

56. Dr Panjratan noted that the MRI of the lumbar spine performed on 25 May 2016 showed a lumbar disc protrusion at L3/4 with probable nerve root compression on the left with possible lateral disc protrusion at L4/5 on the left but no signs of nerve root compression.

57. Dr Panjratan made a diagnosis of low back pain localised at L5/S1 clinically. He concluded that the appellant had a DRE Category II lumbar injury and assessed 7% WPI in respect of that injury. Dr Panjratan had noted that domestic chores were done by the appellant's daughter or partner and she no longer did gardening. He reported that there was no problem with personal care but sometimes it was difficult for her to bend down and put on shoes and socks. He made no deduction for any pre-existing injury or condition.

58. Dr Tim Ho, in his report dated 9 August 2018, assessed the appellant as having a DRE Category II lumbar spine injury due to muscle guarding/spasm. He added 3% (which the Appeal Panel assumed was for Activities of Daily Living (ADL) which resulted in an assessment 8% WPI for the lumbar spine.

59. Dr Ho reported that the appellant needed assistance with heavy duty domestic ADLs due to pain, such as vacuuming, kitchen cleaning, bathroom cleaning and making beds, but reported being independent with personal ADLs and light duty domestic ADLs such as dish washing, cooking and laundry.

60. The Appeal Panel noted that the AMS on examination found the appellant had some variable sensory change in her left lower leg. The AMS also noted that the appellant had ongoing low back pain and stiffness, with pain radiating into her left hip and down her left leg and got tingling and numbness in the left lower leg and foot.

61. The Appeal Panel concluded, on balance, that the findings of the AMS amounted to non-verifiable radicular complaints and that the AMS had erred in assessing the appellant as DRE I Lumbar Category. The history of the injury and clinical features which included non-verifiable radicular complaints were sufficient to rate the appellant as DRE II Lumbar Category. The Appeal Panel assessed 5% WPI and added 2% WPI for ADL.

Assessment of left lower extremity

62. The appellant submitted that in relation to the left lower extremity the AMS recorded the appellant's range of movement but did not identify whether these are the active or passive ranges of movement.

63. Dr Panjratan, in his report dated 26 July 2019, noted that "the ankle movement appeared normal with pain". In a supplementary report dated 9 August 2019, he stated that he did not think that the appellant had suffered an injury to the left peroneus longus tendon or have any superficial peroneal nerve pain.

64. Dr Ho, in his report dated 9 August 2018, assessed 11% LEI (Lower Extremity Impairment) for loss of motion in the left ankle, and 3% LEI for sensory dysaesthesia and pain of the superficial peroneal nerve which combined to equal 14% LEI and 6% WPI.

65. As noted in *Phillip John Carmody v Walter Merriman and Sons Pty Ltd* [2003] NSWWCCPD 27 the MAC represents an assessment of the AMS's findings on the day of examination.

66. The position of an AMS was considered by James J in *Jones v Registrar of the Workers Compensation Commission* [2010] NSWSC 481 (*Jones*). At [49] James J said:

> "The second defendant was an approved medical specialist having the qualifications stated in the Medical Assessment Certificate. Under the ... Guidelines he was required to assess the degree of permanent impairment, by himself making a clinical assessment and by applying the diagnostic criteria In AMA 5. He was not in a position of having to decide which of two conflicting bodies of evidence he should accept, for example whether he should [either of the medical specialist retained by opposing side].

> 50. The second defendant clearly made a clinical examination of the plaintiff and he stated in his certificate his finding that 'the range of motion in the cervical spine was symmetrical'. There is a presumption of regularity that the AMS had performed such tests as might be required to determine whether the range of motion in the cervical spine was symmetrical or asymmetrical. The medical science the second defendant was applying was not controversial and his reasons were not required to be extensive or detailed."

67. In short, there is a presumption that an AMS, being an expert trained in the assessment criteria and methodology, has conducted an appropriate examination and he was aware of, and has considered and applied, the appropriate assessment criteria when reaching conclusions in the exercise of his clinical skill and judgement. That is not, of course, to say that the presumption will not be rebutted and error identified and cured if such error is apparent.

68. The Appeal Panel considered that position here is analogous to that in *Jones.* What is material is that the observations, whether within or outside the formal clinical examination, were made by the AMS using his clinical skill and judgement and that the range of motion found by him in the exercise of that clinical skill and judgment was recorded and founded the assessment of impairment he made. The findings as to the range of movement recorded in the MAC under "Findings of physical examination" were sufficiently precise as to support the inference that the AMS has taken care to accurately record them. Having regard to the presumption of regularity which attended that task, the Appeal Panel considered that the range of movement measurements were properly taken in accordance with Guidelines and AMA 5 and that the reasons given by the AMS in respect of assessment of the left ankle and foot were adequate. The Appeal Panel considered it appropriate to presume or infer, in the absence of any probative evidence to the contrary, that in making his assessment of the left foot and ankle the AMS did in fact assess the active range of movement.

69. The Appeal Panel considered that an AMS does not have to expressly state that he has based his assessment on the appellant's active range of motion. The Appeal Panel was satisfied that the AMS was well aware of the provisions of both the AMA5 and the Guidelines.

70. Finally the Appeal Panel noted that the appellant submitted that the AMS advised that the reason for the significant difference between his assessment of permanent impairment and that of the previous assessment was that the appellant had experienced an improvement in her symptoms, but this opinion was inconsistent with the opinion of Ms Groves. The report of Ms Groves of 27 March 2020 was not admitted. As noted above, the assessment of permanent impairment is to be made on the basis of the worker's presentation on the day of assessment by the AMS.

71. The Appeal Panel was not satisfied in relation to the assessment of the left lower extremity that there had been an incorrect application of relevant assessment criteria or a demonstrable error in the MAC.

72. In conclusion, the Appeal Panel considered that there has been an incorrect application of relevant assessment criteria, that is, the Guidelines and a demonstrable error in the AMS's assessment of the lumbar spine. The Appeal Panel agreed with the assessment made by the AMS in respect of the left lower extremity. This results in a total assessment of 7% WPI as a result of the injury on 1 March 2016.

73. For these reasons, the Appeal Panel has determined that the MAC issued on 10 March 2020 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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION
APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

This Certificate is issued pursuant to section 325 of the *Workplace Injury Management and Workers Compensation Act* 1998.

Matter Number: **6692/19**
Applicant: **Jillian Smith**
Respondent: **Port Macquarie Community Pre-School**

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

Table - Whole Person Impairment (WPI)

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in NSW workers compensation guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality** (expressed as a fraction)	**Sub-total/s % WPI** (after any deductions in column 6)
1. Lumbar spine	1 March 2016	Chapter 4 Pages 28 & 29	AMA 5 page 384 DRE Category II	7%	0%	**7%**
2. Left lower extremity	1 March 2016	Chapter 3, Pages 13-19	AMA 5 Chapter 17, Page 523-564	**0%**	0%	**0%**
Total % WPI (the Combined Table values of all sub-totals)					**7%**	

Carolyn Rimmer
Arbitrator

Dr James Bodel
Approved Medical Specialist

Dr David Crocker
Approved Medical Specialist

2 July 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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar