WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-913/20**
Appellant:	**State of New South Wales**
Respondent:	**Denise Royal**
Date of Decision:	**7 July 2020**
Citation:	**[2020] NSWWCCMA 122**

Appeal Panel:	
Arbitrator:	**Mr John Harris**
Approved Medical Specialist:	**Dr Brian Stephenson**
Approved Medical Specialist:	**Dr David Crocker**

BACKGROUND TO THE APPLICATION TO APPEAL

1. Ms Denise Royal (the respondent) suffered injury in the course of the employment with the State of New South Wales (the appellant). The injury is described in the pleadings as caused by the nature and conditions of employment from 2 May 2012 to 1 July 2019 which has been described in the various documents as having occurred on 2 May 2012.

2. The respondent claimed compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) based on the report of Professor Ghabrial dated 1 July 2019.[1] Professor Ghabrial assessed the respondent at 24% whole person impairment (WPI) for injuries to the left and right lower extremities, the left upper extremity (shoulder) and the skin.

3. No liability issues were raised by the appellant.[2]

4. The s 66 claim was referred by the Registrar of the Workers Compensation Commission to Dr David Lewington, an Approved Medical Specialist (AMS), who initially examined the respondent and provided a Medical Assessment Certificate dated 30 March 2020 (the MAC).

5. The AMS determined that the appellant had a combined WPI of 19% comprising 5% impairment of the left upper extremity, 7% for both the left and right lower extremity and 1% for scarring.

6. The assessment of whole person impairment is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[3] 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 edition guidelines prevail.[4]

[1] Application to Resolve a Dispute (Application), p 22.
[2] Letter of offer dated 2 December 2019 (Application, p 21).
[3] The 4th edition guidelines are issued pursuant to s 376 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act)
[4] Clause 1.1 of the fourth edition guidelines.

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

THE APPEAL

8. On 27 April 2020, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).

9. 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 (the Guidelines).

10. The appellant claims that the medical assessment by the AMS should be reviewed on the ground that the assessment was based on incorrect criteria and/or that the MAC contains a demonstrable error within the meaning of s 327(3) of the 1998 Act. The grounds of appeal were limited to error with respect to the assessment of the left and right lower extremities.

11. 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.

REVIEW

12. 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 that a ground of appeal had been established.

13. The appellant did not request a re-examination and submitted that the matter can be reassessed on the papers. The appellant submitted that the AMS had made other assessments of lower limb impairments which could be applied by the AP.[5]

14. The respondent did not address the issue although she submitted that no error had been established.

EVIDENCE

15. The AP has before it all the documents that were sent to the AMS for the original assessment and has taken them into account in making this determination. Where relevant, these documents are referred to in the Reasons of the AP.

SUBMISSIONS and REASONS

Ground of Appeal 1: use of Muscle Manual Testing for the lower extremities

Submissions

16. The appellant submitted that the AMS erred is applying manual muscle testing as the preferred method of testing of the lower extremities when pain was present on examination and where muscle testing varied between Dr Powell, Dr Ghabrial and the AMS.[6]

17. The appellant submitted that the respondent's complaints were "mostly pain focused" and referred to complaints of pain recorded in the reports of Dr Powell dated 13 November 2019 and Professor Ghabrial dated 13 July 2019.

[5] Appellant's submissions, paragraphs 56-66.
[6] Appellant's submissions, paragraph 38.

18. The appellant referred to decisions of other Medical Appeal Panels where they held that it was inappropriate to use muscle strength testing in the presence of pain.

19. The appellant also submitted that an examination of the reports of Professor Ghabrial, Dr Powell and the AMS showed that grades of muscle function "differed by more than one Grade in respect of the left lower extremity between the three doctors".

20. It was noted that Professor Ghabrial assessed Grade 3 power of the left lower extremity and Grade 4 power on the right lower extremity. Dr Powell assessed Grade 5 power of plantar flexion as the respondent was able to perform repeated single heel raises.

21. The appellant also submitted that the AMS only referred to the first report of Dr Powell dated 24 July 2019 rather than the further report dated 13 November 2019. This was "more than a speculative error".[7]

22. It was submitted that there was a demonstrable error and/or the MAC was based on incorrect criteria "because the AMS has not fully considered all the evidence before him".[8]

23. The appellant submitted that the muscle wasting should be applied to the left side only as the next highest impairment and the right lower extremity should be 0%.

24. The respondent submitted that there is no suggestion that the respondent's performance at assessment "was inhibited by pain or the fear of pain" in accordance with Part 17.2e of AMA 5.[9]

25. The respondent submitted that the assessment made by the AMS was a variation of only one grade from Professor Ghabrial.

Reasons

26. The relevant findings by the AMS on the presence of pain were as follows:[10]

> **"Present symptoms**
>
> There is persisting right more than left heel pain in the vicinity of the Achilles tendon and lower calf. This is particularly noted at rest or when more immobile. She has no difficulty walking approximately 1 km on an even surface and difficulty with uneven surfaces.
>
> She has difficulty wearing enclosed shoes which aggravates heel pain."

27. In respect of muscle strength, the AMS stated:[11]

> "She was able to raise up on both heels and partially on both toes and included during single leg stance. There was mild weakness bilaterally with plantar flexion against resistance, Grade 4+/5."

28. The AMS recorded that the respondent was "pleasant and cooperative" and there "were no signs of inconsistency".[12]

[7] Appellant's submissions, paragraph 58.
[8] Appellant's submissions, paragraph 59.
[9] Respondent's submissions, p 2.
[10] MAC, p 2.
[11] MAC, p 4.
[12] MAC, p 4.

29. The reasons of the AMS relevant to assessment were:[13]

> **"Ankle Muscle Strength Impairment**
>
> Strength impairment is evaluated using Tables 17-7 and 17–8, Pages 531-532, A.M.A 5. On today's examination there was Grade 4 mild weakness of ankle plantar flexion bilaterally. It should be noted that while there was slightly more on the left side, this is a categorical, not ordinal scale. Both left and right sided mild weakness fell into the same category and equivalent to 7% W.P.I.
>
> **Calf Muscle Wasting Impairment**
>
> Referencing the W.C.C Guides 4th Edition, Paragraph 3.14 there is moderate wasting of the left calf equivalent to 11% L.E.I and 4% W.P.I.
>
> Referencing Table 17 – 2, muscle strength impairment cannot be combined with range of movement impairment or muscle atrophy. Choosing the greatest impairment, the W.P.I for each lower limb is 7% for strength impairment."

30. Part 17.2e of AMA 5 articulates when Manual Muscle Testing is inappropriate and provides:[14]

> "Measurements can be made by one or two observers. If the measurements are made by one examiner, they should be consistent on different occasions. If made by two, they should be consistent between examiners. Even in a fully cooperative individual, strength may vary from one examination to another, but not by more than one grade. If they vary by more than one grade between observers, or by the same examiner on separate occasions, the measurement should be considered invalid. In those individuals, impairment estimates should not be made using this section. Individuals whose performance is inhibited by pain or the fear of pain are not good candidates for manual muscle testing, and other evaluation methods should be considered for them."

31. The fourth edition guidelines reinforce the requirements for the use of muscle strength testing contained in AMA 5. Clause 3.15 of the fourth edition guidelines provides:

> "The Medical Research Council gradings for muscle strength are universally accepted. They are not linear in their application, but ordinal. Only the six grades (0–5) should be used, as they are reproducible among experienced assessors. The descriptions in AMA5 Table 17-7 (p 531) are correct. The results of electrodiagnostic methods and tests are not to be considered in evaluating muscle testing, which can be performed manually. AMA5 Table 17-8 (p 532) is to be used for this method of evaluation."

32. The appellant submitted that the "AMS recorded pain in the lower extremities, and you will observe that the worker's complaints were mostly pain focused."[15] It referred to previous complaints of pain recorded by Dr Powell and Professor Ghabrial.

33. The appellant referred to the decision of the Appeal Panel in *Thompson v TNT Australia Pty Ltd*[16] where that Panel stated that manual muscle strength testing "cannot be used in the presence of pain"[17].

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[13] MAC, p 7.
[14] AMA5, p 531.
[15] Appellant's submissions, paragraph 39.
[16] [2009] NSWWCCMA 50 (*Thompson*)
[17] At [27].

34. It is noted that one of the present AP members was on that Panel.

35. The respondent correctly articulated that AMA 5 provides that manual strength testing cannot be used where "performance is inhibited by pain or the fear of pain". The general statement made in *Thompson* that manual strength testing cannot be used "in the presence of pain" is wider than provided by AMA 5.

36. We do not accept that the test articulated in *Thompson* correctly defines the restriction contained in Part 17.2e of AMA 5 for manual strength testing in the presence of pain. This is because Part 17.2e refers to the restriction where "performance is inhibited by pain or the fear of pain" whereas the Panel in *Thompson* stated that muscle strength testing "cannot be used in the presence of pain"[18].

37. The respondent also referred to the MAP decision of *Schell v Drennan Enterprises Pty Ltd* (*Schell*).[19] In its reasons that Panel stated:[20]

> *"*The Panel feels that for the assessment of a painful knee the correct method of assessment is either muscle wasting, decreased range of motion, arthritis or diagnosis based estimate."

38. The AP observes that *Schell* did not state, as the respondent submitted, a general principle with respect to the lower extremity but purportedly one with respect to the knee.

39. Of more relevance is that the Panel's decisions in *Thompson* and *Schell* were determining appeals by workers where the respective AMSs had found that it was inappropriate, in the circumstances of those cases, to assess impairment based on manual muscle testing in the presence of pain. The workers were the appellants, as the employer is in this case, and were required to show demonstrable error in the MAC or the application of incorrect criteria.

40. The AMS has determined that it was appropriate to assess impairment based on manual muscle testing. Accordingly, the appellant must show that the AMS erred in applying manual muscle testing contrary to AMA 5 and the fourth edition guidelines. The appellant does not establish error because other workers were unsuccessful in establishing, on their own facts, that manual muscle testing was appropriate.

41. The resolution of error, if there be one, must be on applying the present facts to the criteria provided in AMA 5.

42. Whilst the respondent had some heel pain, there is no indication that her performance was "inhibited by pain". In this respect we agree and adopt the respondent's submissions that "there is no suggestion in the assessment performance was inhibited by pain or the fear of pain".

43. We observe that the examinations undertaken by Professor Ghabrial and Dr Powell did not reveal loss of power due to pain. Indeed, Dr Powell stated that he found Grade 5 power on both occasions because the appellant could perform "repeated single leg heel raises indicating grade five power of plantar flexion."[21] As the doctor found no loss of power there is no basis for suggesting that the examination performed by Dr Powell was inhibited by pain.

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[18] At [27].
[19] [2005] NSWWCCMA 63.
[20] *Schell* at [25].
[21] Reply, p 35.

44. Professor Ghabrial assessed power of the calf muscle on the right side at Grade 4[22]. On the left side the doctor assessed power at Grade 3. Whilst Professor Ghabrial mentioned that the appellant had some pain, the AP accepts that a plain reading of his opinion is that the testing was not inhibited by pain.

45. The meaning of incorrect criteria was discussed by the Court of Appeal in *Marina Pitsonis v Registrar of the Workers Compensation Commission*[23] and by Basten JA in *Campbelltown City Council v Vegan*.[24]

46. The AP does not accept that the AMS has applied incorrect criteria because the respondent reported some heel pain. Manual muscle testing is not recommended if the respondent's "performance was inhibited by pain or the fear of pain". In the circumstances of this case we are not satisfied that the appellant has shown error in using manual muscle testing as the accepted method of assessing permanent impairment.

47. The appellant otherwise submitted that this amounted to a demonstrable error.

48. The concept of "demonstrable error" was discussed by the Court of Appeal in *Vannini v Worldwide Demolitions Pty Ltd* (*Vannini*),[25] where Gleeson JA observed that, consistent with the observations of Basten JA in *Mahenthirarasa v State Rail Authority of New South Wales*[26] 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".[27]

49. It is unclear from the submissions how the MAC purportedly contains a demonstrable error other than by the application of incorrect criteria. The AP is not satisfied that the appellant has established error based on the ground that the AMS applied manual muscle testing in circumstances where the respondent reported heel pain in the vicinity of the Achilles tendon.

50. This argument is rejected.

51. The appellant also submitted that there was error in the application of Part 17.2e of AMA 5 due to the assessment of different grades found by the various doctors on different occasions.

52. The appellant correctly identified that the assessments of muscle testing for the left lower extremity ranged from Grade 3 (Professor Ghabrial) to Grade 5 (Dr Powell). The appellant noted that the range for the right lower extremity was Grade 4 (Professor Ghabrial and the AMS) to Grade 5.

53. The AP accepts that the assessment of the left lower extremity varied by more than one grade in respect of the left lower extremity. The respondent's submission, that the grades only varied by one, fails to acknowledge the obvious difference in the assessment of the left lower extremity between Professor Ghabrial and Dr Powell. In these circumstances the assessment of the left lower extremity based on manual muscle testing was contrary to Part 17.2e of AMA 5 because there was a variation of more than one grade of testing conducted by examiners. The provision provides that, in these circumstances, the "measurement should be considered invalid".

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[22] Application, p 15.
[23] (*Marina Pitsonis*) [2008] NSWCA 88 at [40]-[42], McColl and Bell JJA (as their Honours then were) agreeing.
[24] [2006] NSWCA 284 at [95], McColl JA agreeing.
[25] [2018] NSWCA 324 (*Vannini*) at [90].
[26] [2008] NSWCA 101.
[27] *Vannini* at [86].

54. The variation of more than one grade of the left lower extremity means that this measure of assessment for the left lower extremity is considered invalid. Accordingly, in these circumstances the assessment of the left lower extremity was based on incorrect criteria.

55. This aspect of the appeal is upheld.

56. The appellant initially accepted that there was a variation of only one grade in respect of the right lower extremity. However, its submissions then incorrectly applied the error made by the AMS for the left lower extremity to the right lower extremity.

57. There is no application of incorrect criteria in respect of applying manual muscle testing for the right lower extremity as the variation between the three doctors only varied by one grade. We do not read Part 17.2e of AMA 5 to mean that because manual muscle testing cannot be used for one lower extremity than it cannot be applied for the other extremity.

58. That aspect of the appeal is rejected.

Ground of Appeal 2: Failure to consider evidence

Submissions

59. The appellant submitted that the AMS referred to the first report of Dr Powell dated 24 July 2019 but did not refer the recent report dated 13 November 2019.[28]

60. The appellant referred to the error established in *Cobbin v Amazons Entertainment World Wide Pty Ltd*[29] (*Cobbin*) where the Appeal Panel concluded that the AMS had not considered a medical report because he stated that no reports were submitted. It was submitted that the failure to refer to Dr Powell's second report "is more than a speculative error" and had committed a demonstrable error and or the MAC was made on the basis of incorrect criteria "because the AMS has not fully considered all the evidence before him."[30]

61. The respondent did not address this submission.

Reasons

62. The AMS referred to Dr Powell's first report dated 24 July 2019 when he noted that he did not provide an assessment of the left and right ankle at that stage because there was "planned surgery for the right ankle". Dr Powell then recorded that the respondent could perform "repeated single heel raises".[31]

63. In his second report Dr Powell stated that he found "on both occasions" that the respondent could "perform repeated single heel raises indicating grade five power of plantar flexion".[32]

64. There is no difference in the findings made by Dr Powell on manual muscle testing between his two examinations. The AMS clearly read the first report. It is difficult to understand the appellant's complaint when Dr Powell's reasoning was unchanged on this aspect in his second report.

[28] Appellant's submissions, paragraph 56.
[29] [2018] NSWWCCMA 46.
[30] Appellant's submissions at [57]-[58].
[31] Reply, p 9.
[32] Reply, p 40.

65. In *Marina Pitsonis* Mason P stated:[33]

> "I do not exclude the possibility that a Certificate might be capable of challenge by way of judicial review on the ground that there was, for example, a denial of procedural fairness. Sometimes, but only sometimes, the failure of a decision-maker to hear or address relevant factual material or arguments will ground a successful challenge upon this ground."

66. An AMS does not need to refer to all the evidence. In *Tudor Capital Australia Pty Ltd v Christensen*[34] McColl JA[35] citing *Mifsud v Campbell*[36] noted that there was a failure to give adequate reasons when the decision maker ignored "evidence critical to an issue". Her Honour stated:

> "There will be a failure to give adequate reasons where a decision-maker ignores evidence critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the decision-maker."

67. Whilst there may be error in failing to refer to material, the opinion expressed by Dr Powell on muscle testing in his second report did not differ from the opinion expressed in his first report. The appellant did not articulate why the failure to refer to the second report was critical.

68. In the absence of an explanation by the appellant as to how the failure was critical, the AP does not accept that there was relevant error in circumstances where the AMS was clearly aware when reading the first report that Dr Powell had assessed Grade 5 power.

69. The fact that a doctor's assessment differed from the AMS does not of itself amount to error: *Merza v Registrar of the Workers Compensation Commission*.[37] Furthermore, the AMS was entitled to rely on his own clinical expertise when assessing the respondent based on manual muscle testing. Given the specificity of the reasons provided by the AMS, the AP is clearly satisfied that he properly examined and clearly explained his findings.

70. The AP otherwise notes that the appellant referred to *Cobbin* where there was a failure to refer to evidence. That decision provides little guidance to the present facts. A mere reference to other authority which found error does not assist unless the error is explained on the present facts.

71. This ground is rejected.

REASSESSMENT

72. Having found error, the AP is required to assess according to law: *Drosd v Nominal Insurer.*[38]

73. There was no relevant ground of appeal contesting the assessments of the left upper extremity and the skin. The AP specifically endorses those assessments. The AP has rejected the appellant's submissions for the right lower extremity. Accordingly, we adopt the findings by the AMS of the right lower extremity.

74. The AP adds that whilst we have found an application of incorrect criteria, we believe that the findings in the MAC are clear and show precise reasoning.

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[33] At [60] Mason P stated (at [60], McColl and Bell JJA agreeing (at [63]-[64])
[34] [20176] NSWCA 260.
[35] Macfarlan JA agreeing at [425].
[36] (1991) 21 NSWLR 725 at 728 per Samuel JA.
[37] [2006] NSWSC 939 at [51].
[38] [2016] NSWSC 1053.

75. We agree with the appellant's submission that the respondent can be reassessed based on the clear findings made by the AMS. The AP adopts the examination findings noting that there was no inconsistency on presentation.

76. The respondent cannot be assessed for the left lower extremity based on manual muscle strength impairment because there was a variation of more than one grade between examiners. Dr Powell assessed Grade 5 and Professor Ghabrial assessed Grade 3 Muscle Function.

77. In these circumstances the AP applies the findings by the AMS for calf muscle wasting in accordance with the appellant's submission. This means that the respondent has a 4% WPI of the left lower extremity.

78. Given the duration of the symptoms the AP is satisfied that the impairments are permanent. There is otherwise no basis to make any deduction pursuant to s 323 of the 1998 Act.

DECISION

79. 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

APPEAL PANEL

MEDICAL ASSESSMENT CERTIFICATE

Matter No: **913/20**
Applicant: **Denise Royal**
Respondent: **State of New South Wales**

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

The Appeal Panel revokes the Medical Assessment Certificate of Dr David Lewington 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 AMA5**	**% 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)**
Left Lower Limb	2 May 2012	Chapter 3, Paragraph 3.14	Chapter 17 Part 17.2d	4%	Nil	4%
Left Upper limb	2 May 2012	Chapter 2 paragraphs 2.14 – 2.16, 2.5 and 2.20	Chapter 16, Figures 16-40, 16-43 and 16-46	5%	Nil	5%
Right Lower limb	2 May 2012	Chapter 3, Paragraph 3.15	Chapter 17, Table 17-7 and 17-8, pp 531-2	7%	N/A	7%
Skin	2 May 2012	Chapter 14, Pg 74, Table 14.1		1%	Nil	1%
Total % WPI (the Combined Table values of all sub-totals)					17%	

John Harris
Arbitrator

Dr Brian Stephenson
Approved Medical Specialist

Dr David Crocker
Approved Medical Specialist

7 July 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar