

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1- 4412/20
Appellant: George Turuwhenua
Respondent: Central Coast Council
Date of Decision: 20 January 2021
Citation No: [2021] NSWCCMA 11

Appeal Panel:
Arbitrator: Ross Bell
Approved Medical Specialist: Dr Brian Noll
Approved Medical Specialist: Dr Mark Burns

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 5 November 2020, George Turuwhenua (appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr John Baker an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 23 October 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 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 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. The AMS provides a useful summary of events including the history of the injury at Part 4, “Brief history of the incident/onset of symptoms and of subsequent related events, including treatment.

On 28 October 2015, Mr Turuwhenua was shovelling soil around a water main underneath a storm water drain and he twisted his back. He experienced a sharp pain to his back radiating to the right leg. He consulted a general practitioner, Dr Tran at Dora Creek. Treatment with physiotherapy and analgesic was not effective. He was referred by the Central Coast Council to Dr Mark Coughlan. On 2 May 2016, Dr Marc Coughlan carried out a right sided foraminotomy. The operation was not effective. On 13 December 2016 Dr Marc Coughlan performed an L5/S1 laminectomy decompression, again with no success. Mr Turuwhenua had a further operation with Dr Marc Coughlan on 21 August 2017 when an L5/S1 anterior lumbar fusion was performed. He continued to have low back pain radiating down his right lower extremity down to the heel. Dr Coughlan recommended consultation with pain management. Mr Turuwhenua consulted Dr John Prickett and A/Prof Paul pain management specialist for consideration for a spinal stimulator. After consideration spinal stimulator was not inserted.”

PRELIMINARY REVIEW

7. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.
8. 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 the grounds of appeal can be addressed without recourse to re-examination.

EVIDENCE

Documentary evidence

9. 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

10. 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

11. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel and are briefly summarised below.

Appellant

12. The appellant submits that the AMS has erred in failing to record the history of Mr Turuwhenua using Lyrica in addition to Tramadol before noting that Mr Turuwhenua “...has significant constant pain at the right buttock which was relieved to a degree by medication”. This has the potential to alter the assessment including the way radiculopathy has been considered by the AMS.

13. Because he failed to acknowledge the Lyrica medication designed to treat neuropathic pain the AMS has not taken a complete history regarding the potential entitlement to a 3% WPI adjustment for radiculopathy. The AMS notes symptoms in the legs and errs in not finding radiculopathy as found by Dr Coughlan, Dr Wallace, and Dr Fitzsimons.
14. If the AMS has not erred in his findings as to radiculopathy he has erred in not applying an allowance of between 1% and 3% WPI for the effects of treatment under paragraphs 1.31 and 1.32 of the SIRA Guidelines.
15. The MAC should be revoked and an assessment including an allowance for either radiculopathy or the effects of treatment substituted.

Respondent

16. The respondent submits that there is no demonstrable error or use of incorrect criteria. The AMS was entitled to rely on his own findings on examination. The AMS explains where his findings on examination differed from those of Dr Fitzsimons and Dr Wallace.
17. The appellant's reference to medications is not relevant to an objective clinical assessment as to the presence of radiculopathy.
18. The AMS has given detailed reasons as to why he did not find radiculopathy present, and where he differed from other assessors.
19. The MAC should be confirmed.

FINDINGS AND REASONS

20. 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.
21. In *Campbelltown City Council v Vogan* [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.

Ground of appeal – Findings on examination that radiculopathy is not evident

22. At the history at Part 4, under "Present symptoms", the AMS records,

"There is pain radiation down the back of the right lower extremity to the heel with pins and needles sensation down to the right foot. There is no loss of touch sensation and no weakness at the lower extremities."

23. The AMS says at Part 5 "Findings on examination",

"Neurological examination showed no unilateral atrophy and no muscle weakness at the lower extremities. There was no reproducible numbness but a tingling sensation at the back and lateral aspects of the right leg. Knee reflexes were absent on both sides. Ankle reflexes were symmetrically diminished. Left straight leg raising test reached to 70 degrees with no pain. Right straight leg raising test was restricted to 20 degrees by low back pain."

24. At Part 10.c. the AMS discusses the findings of other assessors,

“At this examination, I could not confirm Dr Robin Fitzsimons’ findings of dysaesthesia on the lateral border of the right foot, diminished power of right toes and asymmetry of ankle reflexes. I could not confirm Dr Raymond Wallace findings of decreased light touch sensation at the lateral aspect of the right foot. Therefore, diagnosis of postoperative radiculopathy could not be supported.”

25. The Panel does not accept the submissions of the appellant that the absence of any mention of Lyrica by the AMS could have affected the findings as to radiculopathy. The criteria for radiculopathy are evaluated in the light of the findings on clinical examination by the AMS, and the use of pain medication is not relevant to this evaluation as set out at paragraphs 4.27 - 4.29 of the SIRA Guidelines.

26. The Panel notes the importance of the exercise of clinical judgement by the AMS in the process of assessment. As the Supreme Court noted in *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140 (*Parker*),

“In *Ferguson v State of New South Wales* [2017] NSWSC 887 at [23], Campbell J cited with approval *NSW Police Force v Daniel Wark* [2012] NSWCCMA 36 (*Wark*), where it is stated at [33]:

‘...the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face. ...’

27. The appellant submits that the AMS should have found radiculopathy because it was found by other assessors. However, it is not required of the AMS to adopt any of the medical opinions relied upon by the parties. An AMS is required to exercise their own clinical judgement, and a difference of opinion is not a ground of appeal. In *Mahenthirarasa v State Rail Authority of New South Wales & Ors* [2007] NSWSC 22 Malpass AJ considered the Second Reading speech referring to s 327 of the 1998 Act, and made the comment that, “A demonstrable error would essentially be an error for which there is no information or material to support the finding made – rather than a difference of opinion.”

28. The clinical examination of the AMS was a key element of the information upon which the assessment was based. There is no error apparent in the findings reported by the AMS regarding radiculopathy, and the differences with the other assessors’ findings is acknowledged and explained.

29. The Panel discerns no error on the face of the Certificate under this ground and the correct criteria were applied regarding radiculopathy.

Ground of appeal – failure to take account of the use of Lyrica medication and apply increased WPI allowance for the effects of treatment (SIRA Guidelines, paragraphs 1.31 - 1.32)

30. The Panel notes that the AMS did not mention the use of Lyrica (pregabalin) specifically in the MAC. At Part 4 he notes under “Present treatment” that “Mr Turuwhenua has no specific treatment for his lumbar spine injury. Mr Turuwhenua takes Tramadol for pain relief.”

31. Under “Present symptoms” the AMS records, “Mr Turuwhenua has mild pain at the lumbar spine but he has significant constant pain at the right buttock which was relieved to a degree by medication.”

32. Contrary to the submissions of the appellant, the Panel notes that Lyrica is medication for the management of pain. Paragraphs 1.31 and 1.32 of the SIRA Guidelines provide (emphasis added),

“1.31 In circumstances where the treatment of a condition leads to a further, secondary impairment, other than a secondary psychological impairment, the assessor should use the appropriate parts of the Guidelines to evaluate the effects of treatment, and use the Combined Values Chart (AMA5, pp 604–06) to arrive at a final percentage of WPI.

1.32 Where the effective long-term treatment of an illness or injury results in apparent substantial or total elimination of the claimant’s permanent impairment, but the claimant is likely to revert to the original degree of impairment if treatment is withdrawn, the assessor may increase the percentage of WPI by 1%, 2% or 3%. This percentage should be combined with any other impairment percentage, using the Combined Values Chart. **This paragraph does not apply to the use of analgesics or anti-inflammatory medication for pain relief.**”

33. The Panel notes that it is likely the AMS was indeed aware of the use of Lyrica, given it is mentioned in the materials before him, including Mr Turuwhenua’s statement of 31 July 2020 (at paragraph 24). In any case, that the AMS did not refer specifically to Lyrica being used by Mr Turuwhenua when recording that the right buttock pain was “relieved to a degree by medication” is of no consequence because the SIRA Guidelines rule out any increase in the percentage of WPI for such pain medication.
34. The Panel finds this ground of appeal is not made out.

Findings

35. The Panel discerns no demonstrable error on the face of the Certificate regarding the grounds of appeal; nor has the AMS used incorrect criteria.
36. For these reasons, the Appeal Panel has determined that the MAC issued on 23 October 2020 is confirmed.

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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

