WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1255/19**
Appellant:	**Xuan Loan Trieu**
Respondent:	**Georges Apparel Pty Ltd**
Date of Decision:	**3 September 2019**
Citation:	**[2019] NSWWCCMA 128**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**
Approved Medical Specialist:	**Dr Roger Pillemer**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 12 June 2019 Xuan Loan Trieu (Ms Trieu/the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Neil Berry, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 15 May 2019.

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 grounds of appeal on which the appeal is made.

4. The WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the WorkCover Medical Assessment Guidelines.

5. The assessment of 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. Ms Trieu commenced employment as a machinist with George's Apparel Pty Ltd (the respondent) in February 2011. She operated a sewing machine making school uniforms.

7. Ms Trieu developed neck pain, left elbow pain and pain in her shoulders, the left shoulder being more painful than the right. She was treated conservatively with physiotherapy and medication. She attempted to return to work but was unable to continue with her employment as a machinist.

8. Subsequently Ms Trieu was involved in motor vehicle accident in October 2014 in which she aggravated the pain in her neck and left shoulder.

9. Ms Trieu was examined by an Independent Medical Expert, Dr Ellis who assessed 24% whole person impairment resulting from work tasks that Ms Trieu had performed with the respondent. Dr Ellis assessed the cervical spine as falling within DRE Category III at 15% with a further 1% in respect of impairment of activities of daily living. He assessed 10% whole person impairment in respect of the left upper extremity.

10. Ms Trieu's solicitors made a claim for lump-sum compensation in respect of injury to the cervical spine and left upper extremity deemed have occurred on 10 July 2014 based on the assessment by Dr Ellis.

11. Ms Trieu was examined by Dr Breit at the request of the respondent. Dr Breit assessed injury to the cervical spine as falling within DRE Category I and accordingly assessed 0% whole person impairment. He also assessed the left upper extremity at 0% whole person impairment.

12. An Application to Resolve a Dispute was filed in the Commission seeking lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act). The respondent disputed the assessment of Dr Ellis and the medical dispute was referred to an AMS, Dr Neil Berry.

13. The AMS assessed impairment of the cervical spine as falling within DRE II and assessed 5% whole person impairment with respect to the cervical spine with a further 2% in respect of impairment of activities of daily living. The AMS assessed the left upper extremity at 2% whole person impairment. That assessment was based upon measurement of range of motion of the left shoulder compared with measurement of the range of motion of the right shoulder which the AMS considered to be "normal/uninjured". The cervical and left upper extremity assessments were combined to 9% whole person impairment.

PRELIMINARY REVIEW

14. 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.

15. 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 sufficient information was available to the Panel to enable determination of the appeal.

EVIDENCE

Documentary evidence

16. 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

17. The submissions of the parties address two discrete aspects of the AMS's reasons recorded in the MAC. The AMS assessed the left upper extremity impairment based upon measurement of the range of motion of the shoulder. The AMS reported:

> "The left shoulder is assessed on the range of movement model and it is noted that there is a restricted range of movement and that there is also a restricted range of movement in the right shoulder.

There is a history of referred pain into the shoulder as a result of the neck injury from her work accident but she was noted to have a normal range of movement and the right shoulder was not affected by her motor accident.

I have therefore assessed the upper extremity impairment of both the right shoulder and the left shoulder on the range of movement model and you will see that the left shoulder is assessed as an 11% upper extremity impairment and the right shoulder is assessed at 7% upper extremity impairment.

I would therefore take her right shoulder findings as her baseline and deduct this from the assessed upper extremity impairment for the left shoulder giving her a 4% upper extremity impairment which from Table 16.3 on page 439 gives her a 2% whole person impairment as result of work injury."

18. The AMS provided his worksheets relating to his assessment of range of motion. With respect to the left shoulder the AMS recorded external rotation and internal rotation of 60° which he recorded as contributing 1% upper extremity impairment. The same range of motion is recorded in respect of the right shoulder with 1% upper extremity impairment assigned.

SUBMISSIONS

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

20. In summary, the appellant submits that the AMS has fallen to error in assigning 1% upper extremity impairment in respect of the measured external and internal rotation of the left shoulder. The appellant submits that the appropriate upper extremity impairment under figure 16-46 of AMA 5 assigns is 2%.

21. The respondent accepts that submission and agrees that the total left upper extremity impairment should be 12%. The parties agree that the same error has been made with respect to assessment of the right upper extremity impairment.

22. The appellant further submits that the AMS also fell into error in applying Clause 2.20 of the Guidelines. The right shoulder was assessed by the AMS as having a reduced range of motion which he adopted as a baseline for assessment of the extent of impairment in the left upper extremity by subtracting the upper extremity impairment in respect of the right shoulder from the upper extremity impairment of the subject left shoulder. The appellant submits that the Guidelines provide that this method of assessment requires that the baseline contralateral joint be "normal/uninjured" when this in fact was not the case.

23. In reply, the respondent submits that the AMS was correct in applying Clause 2.20 of the Guidelines, pointing to evidence which the respondent submitted established that Ms Trieu's right shoulder was appropriately regarded as "normal/uninjured".

FINDINGS AND REASONS

24. 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.

25. 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.

26. The parties agree and the Panel accepts that the AMS incorrectly recorded the extent of upper extremity impairment applicable to an assessed range of motion in the shoulder of 60° internal and external rotation. Figure 16-46 of AMA 5 (page 479) assigns a value of 2% to that assessed range of motion and the total upper extremity impairment in respect of the left shoulder should have been assessed at a total of 12%.

27. A similar error is recorded in respect of external and internal rotation of the right shoulder resulting in a total right shoulder impairment of 7% when the appropriate application of Figure 16-46 would have assigned a value of 8% upper extremity impairment. If Clause 2.20 of the Guidelines is appropriately applied then the difference between the subject left shoulder impairment and the right shoulder impairment remains at 4% as assessed by the AMS.

28. The appellant, however, submits that the AMS erred in applying Clause 2.20 of the Guidelines. That clause provides:

> "When calculating impairment for loss of range of movement, it is most important to always compare measurements of the relevant joints(s) in both extremities. If a contralateral 'normal/uninjured' joint has less than average mobility, the impairment value(s) corresponding to the uninvolved joint served as a baseline and is subtracted from the calculated impairment for the involved joint. The rationale for this decision should be explained in the assessor's report (see AMA5 section 16.4c, page 543 [sic – page 453]".

29. AMA 5 Section 16.4c sets out the method for motion impairment calculation and relevantly provides:

> "*If a contralateral 'normal' joint has a less than average mobility*, the impairment value(s) corresponding to the uninvolved joint can serve as a baseline and are subtracted from the calculated impairment for the involved joint. The rationale for this decision should be explained in the report."

30. The appellant submits that the right shoulder was not "normal" or "uninjured" and therefore did not represent an appropriate baseline. The appellant referred to Ms Trieu's statement in which she said that she had developed pain in her right shoulder. The treating rheumatologist, Dr Liew, had recorded complaints of pain in the right shoulder since September 2013. The treating neurosurgeon, Dr McKechnie, had recorded complaints of neck pain radiating across both shoulders. MRI scan reports also recorded a history of neck pain extending to both upper limbs.

31. The respondent submitted that it was open to the AMS to conclude on the evidence before him that the right shoulder was normal/uninjured and was appropriately used as a baseline in accordance with Clause 2.20. The respondent noted that Dr Ellis had not adopted Clause 2.20. Dr Ellis in his report dated 24 May 2016 had not referred to the right shoulder and had recorded that "There is no additional assessable impairment for the neck and upper limbs as a consequence of the motor vehicle accident [scil in October 2014] on assessment today."

32. The respondent noted the absence of radiological investigations of the right shoulder. Dr Liew had "made a diagnosis of aggravation of degenerative disease in the cervical spine and overuse syndrome particularly in the left arm. He suggested no investigations into the right arm."

33. The respondent submitted that the AMS had noted that Dr Ellis had made no deduction in respect of the right shoulder implying that there had been no restriction in the right shoulder when seen by Dr Ellis. The AMS had commented that this was at odds with the findings of Dr Breit and his own findings on examination of the right shoulder.

34. The Panel accepts the submission of the appellant that it was not open on the evidence before the AMS to conclude that the right shoulder was "normal/uninjured" and so appropriate to be used as a baseline accordance with Clause 2.20 of the Guidelines.

35. Dr Ellis in his report dated 24 May 2016 noted a history including "Neck pain spread to both shoulders and arms, worse on the left side, to the hands, and the thumbs were involved on each side, worse on the left side." He noted that any increase in symptoms following the motor accident in October 2014 had resolved. In his supplementary report dated 20 July 2016 Dr Ellis referred to "the pre-existing impairment assessment of neck, left shoulder, arm and to a lesser extent the right arm, related to work injuries…"

36. The treating general practitioner, Dr Trang, in his referral letter to the physiotherapist dated 28 January 2015 refers to a "moderate to severe back of neck pain which radiated to her upper shoulders/upper back/scapular region." He noted "she also reported to have radiation of pain to both upper limbs/hands".

37. In his request for approval of acupuncture treatment dated 25 February 2018 Dr Tran recorded a history of "chronic neck pain with radiculopathy both upper limbs (shoulders/arms and both wrist pain)" The report in respect of the MRI scan of the cervical spine dated 27 March 2018 to Dr Trang recorded a history of "chronic neck pain with radiculopathy both upper limbs".

38. The treating neurosurgeon, Dr McKechnie, in his report dated 28 June 2018 noted complaints of neck pain "radiating across both shoulders, arms and hands, worse on the left side."

39. Dr Breit recorded "There is said to be pain on both sides of the neck radiating into trapezius only on the right but on the left, all the way down the arm to the wrist the left thumb and index finger going on to complain the hands fatigue readily." Dr Breit measured range of motion in the right arm 130° elevation, 30° extension, 100° abduction, 20° adduction and 80° rotation in both directions.

40. In his earlier report dated 2 May 2016 Dr Breit noted "there is bilateral neck pain radiating into the right shoulder. It also radiates into the left shoulder then all the way down to the thumb." Dr Breit on that occasion recorded significantly reduced range of motion in the right shoulder.

41. The report of Peak Conditioning dated 3 February 2016 noted "high levels of pain on a consistent basis without known reasoning [sic] as to the cause especially in the bilateral shoulders, wrists and fingers, left knee, cervical, thoracic and lumbar spine."

42. The AMS noted that on examination there was a restricted range of movement in both shoulders. He reported:

> "There is a history of referred pain into the shoulder as a result of the neck injury from her work accident but she was noted to have a normal range of movement and the right shoulder was not affected by a motor accident."

43. Dr Perla in his report dated 11 December 2015 did not record any complaints of symptoms in the right shoulder and noted "active range of movement was normal" in respect of the right shoulder although the report in evidence does not include the measured range with respect to internal and external rotation. Dr Keller in his Earning Capacity Assessment dated 6 August 2015 did not refer to right shoulder symptoms referring to "reduced range of motion in the neck, back, left shoulder".

44. Both Dr Breit and the AMS measured a reduced range of motion in the right shoulder.

45. The Panel accepts that Ms Trieu has regularly reported painful symptoms in the right shoulder to her treating doctors and Dr Ellis. Although there have been variable measures of the range of motion in the right shoulder and no investigations, the consistent history of pain in the right shoulder establishes that the right shoulder could not be said to be “normal” for the purposes of Clause 2.20 of the Guidelines.

46. Although the AMS noted the normal range of movement recorded by a number of medical practitioners, that observation was at odds with the assessment of Dr Breit and his own measurement of the range of motion in the right shoulder.

47. The Panel concludes that the AMS fell into error in accepting the right shoulder as “normal” in the light of the consistent history given to treating doctors of pain in the right shoulder. Consideration of the whole of the evidence establishes that it was not appropriate to use range of motion in the right shoulder as a baseline for assessment of the left shoulder impairment.

48. The Panel is satisfied that demonstrable error has been made out both with respect to the calculation of upper extremity impairment based upon measurement of external and internal rotation and the adoption of the right shoulder as a baseline for assessment of the left shoulder as the right shoulder could not be considered “normal”.

49. The Panel accepts that the motor vehicle accident in October 2014 has not contributed to the assessment of the level of Ms Trieu’s impairment. The evidence supports a conclusion that any aggravation of pathology had resolved prior to assessment by the AMS.

50. The parties have not addressed submissions to the range of motion measured by the AMS with respect to the left shoulder and the Panel accepts that the measurements, carried out in accordance with the Guidelines, form an appropriate basis for assessment of the left upper extremity impairment in respect of the shoulder. The Panel considers that Ms Trieu is appropriately assessed as having 12% upper extremity impairment which Table 16-3 of AMA 5 converts to 7% whole person impairment.

51. No submissions have been addressed to the assessment of the AMS with respect to the cervical spine. Noting the results of examination by the AMS and other medical practitioners whose reports were in evidence, the radiological imaging and the history provided by the appellant, Ms Trieu is appropriately assessed pursuant to AMA 5 as falling within DRE Cervical Category II warranting a rating of 5% whole person impairment in respect of the cervical spine.

52. No submissions have been addressed to the assessment of impact on the activities of daily living by the AMS and the Panel accepts that the complaints detailed by the appellant and the history provided to medical practitioners supports the finding of 2% whole person impairment for interference with activities of daily living pursuant to the Guidelines, paragraph 4.34. The total whole person impairment in respect of the cervical spine is accordingly assessed at 7%.

53. The combined value of impairment to the cervical spine (7%) and left upper extremity (7%) is 14% whole person impairment as result of injury deemed have occurred on 10 July 2014.

54. There is no evidence of any prior injury or pre-existing condition or abnormality which would warrant a deduction pursuant to s 323 of the 1998 Act.

55. For these reasons, the Appeal Panel has determined that the MAC issued on 15 May 2019 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **1255/19**
Applicant: **Xuan Loan Trieu**
Respondent: **Georges Apparel Pty Ltd**

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

The Appeal Panel revokes the Medical Assessment Certificate of Dr [insert name of Doctor] 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 WorkCover Guides**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Sub-total/s % WPI (after any deductions in column 6)**
1. Cervical spine	10/07/2014	Chapter 4, page 25 paras 4.17-4.35 Page 28 para 4.34	Chapter 15, Page 392, para 15.6, Table 15-5	7%	nil	7%
2. Left upper extremity (shoulder)	10/07/14	Chapter 2	Chapter 16 para 16.4 figures 16-40, 43 and 46	7%	Nil	7%
Total % WPI (the Combined Table values of all sub-totals)					**14%**	

Mr William Dalley
Arbitrator

Dr Tommasino Mastroianni
Approved Medical Specialist

Dr Roger Pillemer
Approved Medical Specialist

3 September 2019

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.*

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar