

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-2502/19
Appellant: Warren Edmond Logue
Respondent: Erina Floor Coverings Pty Limited trading as
Choices Flooring
Date of Decision: 1 October 2019
Citation: [2019] NSWCCMA 140

Appeal Panel:
Arbitrator: R J Perrignon
Approved Medical Specialist: Dr Drew Dixon
Approved Medical Specialist: Dr Philippa Harvey-Sutton

BACKGROUND TO THE APPLICATION TO APPEAL

1. The appellant worker, Mr Logue, injured his left shoulder and neck at work on 1 September 2002.
2. By a Medical Assessment Certificate dated 16 July 2019, Approved Medical Specialist Dr Negus assessed an 11% whole person impairment (0% cervical spine, 11% left upper extremity – shoulder) as a result of that injury. In respect of the left shoulder, he assessed a 12% whole person impairment and deducted 1/10th for pre-existing osteoarthritis, to yield an 11% whole person impairment.
3. In doing so, he had regard to the arthritis evidenced by an x-ray of the left shoulder on 12 December 2002. He had not seen the x-ray, but relied on Dr Breit's summary of it in his report of 20 September 2017.
4. The appellant worker appeals from the assessment of the left shoulder only, on the bases that:
 - (a) Dr Negus misunderstood Dr Breit to be referring to an x-ray which pre-dated injury on 1 September 2002, and
 - (b) in any event, the arthritis demonstrated by the x-ray of 12 December 2002 was caused by injury three months earlier.
5. On 12 September 2019, the Registrar by his delegate was satisfied that the grounds of demonstrable error and application of incorrect criteria were made out, and referred the matter to this Appeal Panel for determination.
6. On 30 September 2019, 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*.

Submissions

7. The Appeal Panel has had regard to the written submissions filed by both parties. It is unnecessary to set them out here in full, but appropriate to summarise them.
8. The appellant worker submits as follows:
 - (a) The Approved Medical Specialist erred in thinking that the x-ray demonstrating arthritis and referred to by Dr Breit was taken prior to injury on 1 September 2002, when in fact it was taken on 12 December 2002, well after injury.
 - (b) In the alternative, the arthritis evidenced by the x-ray was caused by injury.
9. The respondent employer submits as follows.
 - (a) The Approved Medical Specialist did not misunderstand Dr Breit to be referring to an x-ray taken before injury. He correctly identified the x-ray as having been taken after injury.
 - (b) He considered the x-ray report (presumably, the report of it by Dr Breit), and considered that it demonstrated arthritis which pre-dated injury.

Consideration and findings

10. The Approved Medical Specialist diagnosed 'abnormal scapular kinetics which has [sic] aggravated his shoulder arthritis' (par 7), and found that osteoarthritis of the left shoulder predated injury (par 11).
11. He observed (par 10a):

"There is evidence of previous arthritis in the left shoulder and evidence for a prior dislocation episode, even though Mr Logue has no recollection of such an injury. Also, Mr Logue describes all his pain in the scapula region rather than from the Glenohumeral joint area which would be more consistent with pain from GHJ osteoarthritis."
12. He expressed his reasons for finding that the arthritis predated injury as follows (par 10c):

"In his report dated 20 September 2017, Dr Breit feels that it was not appropriate to rate an impairment as the natural history of his arthritis has superseded any impairment from his injury. He did have access to an x-ray of the left shoulder demonstrating signs of osteoarthritis from 2002 (pre-injury) that I have not sighted."
13. We interpret the word "(pre-injury)" in the above passage as qualifying the phrase which immediately precedes it – namely, "signs of arthritis from 2002" - rather than the phrase "x-ray of the left shoulder", which does not. It follows that the Approved Medical Specialist:
 - (a) has not assumed that the x-ray was taken prior to injury, but rather
 - (b) has understood that the x-ray of 12 December 2002 was taken after injury, and
 - (c) has reasoned that the osteoarthritis it showed probably predated injury on 1 September 2002.
14. We can identify no error in this reasoning, or the application of incorrect criteria.

15. On the contrary, Dr Breit in his report of 20 September 2017 went to the length of including a photocopy of the scan (the details of which are not clear in our copy) and observed (emphasis added):

“These are the original x-rays and as you will just see on the attached view there is **early inferior curtain osteophyte formation** in the humeral head.”

16. He pointed out that the curtain osteophyte had become clearer by 19 October 2010, when another x-ray was performed.
17. Notwithstanding Dr Breit’s use of the word “early”, it is highly likely that the curtain osteophyte demonstrated on 12 December 2002 predated injury, because such osteophytes, even in their early stages, are formed over a considerable period. It was well open to the Approved Medical Specialist, on that evidence, to conclude that there was pre-existing osteoarthritis of the left shoulder, which he did, and to make a deduction of 1/10th.
18. We can discern neither error, nor the application of incorrect criteria.

Conclusion

19. For those reasons, the appeal is dismissed, and the Medical Assessment Certificate of Dr Negus dated 16 July 2019 is confirmed.

Issued by

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar

