

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-2057/19
Appellant:	Hi-Tech Express Pty Ltd
Respondent:	Vai Fuimaono
Date of Decision:	13 November 2019
Citation:	[2019] NSWCCMA 165

Appeal Panel:	
Arbitrator:	Brett Batchelor
Approved Medical Specialist:	Dr Richard Crane
Approved Medical Specialist:	Dr Neil Berry

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 20 August 2019, Hi-Tech Express Pty Ltd lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr John F W Garvey, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 25 July 2019.
2. Hi-Tech Express Pty Ltd (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 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 (the 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. On 30 April 2019, Vai Fuimaono (the respondent/Mr Fuimaono) commenced proceedings in the Commission by way of an Application the Resolve a Dispute (the ARD) claiming lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) as a result of injuries he claimed he suffered on:

- (a) 1 July 2008, when he says that he injured his head, neck, left shoulder, back and both legs when he was struck by a heavy air conditioning unit;
- (b) 1 August 2001, when he says that he injured his back, both legs left shoulder and neck when lifting 60 batteries weighing approximately 35 kg, and
- (c) 14 September 2008, when he says that he injured his right leg and right foot as he was pushing a 450 kg machine up hill for about 70 metres.

7. The appellant lodged a Reply with the Commission on 20 May 2019 and the proceedings were the subject of a telephone conference on 28 May 2019 and conciliation/arbitration on 5 July 2019 before Arbitrator Richard Perrignon. At the telephone conference Mr Fuimaono was granted leave to amend the ARD to rely solely on the injury dated 1 July 2008. At the conciliation/arbitration on 5 July 2019 the Arbitrator made the following Consent Orders¹:

- 1. Award for the respondent in respect of the allegation of injury to and consequential condition of the left upper extremity and/or left shoulder as a result of injury on 1 July 2008.
- 2. The matter is remitted to the Registrar for referral to an AMS to assess the whole person impairment (WPI) (upper digestive tract) as a result of injury on 1 July 2008.
- 3. The balance of the claims made in the ARD are discontinued.

8. On 12 July the Commission issued an Amended Referral for Assessment of Permanent Impairment to Approved Medical Specialist (the AMS referral)². The date of injury specified in this referral was 1 July 2008 and the body part was the "Upper Digestive Tract" only.

9. The AMS, Dr Garvey, examined Mr Fuimaono on 22 July 2019 and issued the MAC on 25 July 2019 which contained the following assessments as a result of injury on 1 July 2008:

- (a) Upper digestive tract – 0%;
- (b) Lower digestive tract – 0%, and
- (c) Anus – 2%.

The total assessment was therefore 2%.

PRELIMINARY REVIEW

10. The 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. As a result of that preliminary review, the Panel determined that it was not necessary for the worker to undergo a further medical examination because neither the appellant Hi-Tech Express Pty Ltd nor the respondent, Mr Fuimaono, requested re-examination of the worker, and the Panel is of the view that there is sufficient material in the Appeal Papers on which to base its decision.

¹ Appeal Papers p 29.

² Appeal Papers p 28.

EVIDENCE

Documentary evidence

12. The 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

13. 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

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

Appellant

15. In summary, the appellant submits that the MAC contains a demonstrable error by providing an assessment of WPI in respect of the lower digestive tract and anus, neither of which formed part of the AMS referral and that this constitutes a demonstrable error. This is clear, according to the appellant, from an examination of that referral which is consistent with the Certificate of Determination – Consent Orders issued by Arbitrator Perrignon on 5 July 2019 (referred to in [7] above).
16. The appellant notes that the AMS assessed Mr Fuimaono as suffering 0% WPI in respect of the upper digestive tract on the basis of dyspepsia caused by *Helicobacter pylori* gastritis, which is a non-work condition. Reference is made to [16.9] on p 78 of the Guidelines.
17. The appellant notes that the AMS went on to consider the lower digestive tract where he found evidence of inflammatory bowel disease including ulcerative colitis and Crohn's disease, which is a non-work related injury. Zero percent WPI was assessed in respect of the lower digestive tract. The AMS was not asked to assess the lower digestive tract.
18. The appellant notes the assessment of the AMS of 2% WPI in respect of the anus for anal skin tags due to constipation. He acknowledged constipation alone attracts 0% WPI under the Guidelines but said that skin tags were consequential conditions and attract 1% WPI each. Table 6-5 on p 131 of AMA 5 is referred to. The AMS was not asked to assess the anus.
19. The appellant refers to the cases of *Merza v Registrar Workers Compensation Commission (NSW)*³ (*Merza*) and *Aircons Pty Limited v Registrar of the Workers Compensation Commission of NSW and Anor*⁴ (*Aircons*) in support of its submission that the MAC contains a demonstrable error, because of the discrepancy between the AMS referral and the final assessment provided by the AMS in the MAC. The AMS went beyond the scope of the AMS referral in providing an opinion on diagnosis and causation and providing an assessment of WPI in relation to the lower digestive tract and anus, in circumstances where the referral only permitted assessment of the upper digestive tract.
20. The appellant therefore submits the MAC contains a demonstrable error.

³ [2006] NSWSC 939.

⁴ [2006] NSWSC 322.

Respondent

21. In reply, the respondent submits that the MAC does not contain a demonstrable error for the purpose of s 327 of the 1998 Act. It submits that there was a medical issue between the parties as to the nature and extent of Mr Fuimaono's injuries, and that there was nothing in the material placed before the AMS which restricted the extent of his enquiry, so long as he complied with the requirements of ss 323, 324 and 325 of the 1998 Act.
22. The respondent submits that the AMS met the formal requirements of s 325 of the 1998 Act that there was an identifiable injury that could be assessed. In this case the identified injury was to the lower digestive tract which resulted in an injury to the anus as found by the AMS. The respondent submits that no more was required as a basis for a referral to an AMS for assessment.
23. The respondent submits that there is no limitation expressly or impliedly provided for in the 1998 Act as submitted by the appellant. On the contrary, the respondent submits, where the nature and extent of injury is in issue then it is necessary to call for the expertise of an AMS to identify the precise pathological process leading to injury. In this case the respondent submits it is Mr Fuimaono's anus.
24. The respondent submits that the AMS had before him all the medical material relating to Mr Fuimaono's injury. This was not a legal issue but a medical issue which was properly decided by the AMS.
25. The respondent submits that the AMS correctly exercised his clinical judgement and did not act beyond the scope of the AMS referral, which was to assess the WPI caused by the nature and extent of injury.
26. The respondent submits that the appeal should not proceed for review by a Medical Appeal Panel, and the MAC should be confirmed with reference to the lower digestive tract and anus. Otherwise, the respondent submits, the result will be clearly unfair to Mr Fuimaono.
27. The respondent submits that alternatively the matter should be referred for further assessment pursuant to s 329 of the 1998 Act.

FINDINGS AND REASONS

28. 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. An Appeal Panel is limited to determining error as alleged by the appellant but must assess in accordance with the Guidelines. Once error is made out, the Panel may "review" the MAC (see *Siddik v Workcover Authority of NSW*⁵ and *NSW Police Force v Registrar*⁶)
29. In *Campbelltown City Council v Vegan*⁷ 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.

⁵ [2008] NSWCA 116.

⁶ [2013] NSWSC 1792.

⁷ [2006] NSWCA 284.

30. In *Merza Hoeben J* said at [39]:

“39 I do not propose to, nor is it necessary, that I define what is ‘demonstrable error’ for the purposes of s327 of the Act in an exhaustive way. It is sufficient for the purposes of this matter that I conclude that ‘demonstrable error’ is an error which is readily apparent from an examination of the medical assessment certificate and the document referring the matter to the AMS for assessment.”

31. In *Aircons Malpas AJ* said at [20]:

“20 The prescription contained in subsection (1) of s325 requires the approved medical specialist (AMS) to give a certificate as to the matters referred for assessment. It is significant that the provision appears to distinguish between ‘a medical dispute’ and ‘the matters referred for assessment’. The statutory function of the AMS is to give a certificate as to those matters.”

32. On the basis of these authorities, the Panel is of the view that the MAC issued by Dr Garvey does contain a demonstrable error. The only matter referred to him for assessment was WPI as a result of the condition in the upper digestive tract as a result of injury on 1 July 2008. Dr Garvey correctly assessed this at 0%. However, he also assessed WPI as a result of conditions in the lower digestive tract and anus as a result of injury on 1 July 2008. He was not asked to do this.

33. Section 325(1) of the 1998 Act provides:

“(1) The approved medical specialist to whom a medical dispute is referred is to give a certificate (a **medical assessment certificate**) as to the matters referred for assessment.”

(Emphasis in original)

34. The orders to which the parties consented to on 1 July 2019 before Arbitrator Perrignon are set out above at [7]. The AMS referral is at [8].

35. In respect of the assessment by the AMS of the upper digestive tract, the Panel notes that the AMS set out his “**REASONS FOR ASSESSMENT**” at [10] of the MAC⁸ where he said at [10.b.] the following in respect of the upper digestive tract:

“The Worker receives 0% WPI for upper digestive tract impairment because his dyspepsia is caused by *Helicobacter pylori* gastritis which is a non-work related condition. In making that assessment, I rely on 16.9 of the Workers Compensation Commission Guidelines #4 ‘In the absence of clinical signs or other objective evidence of upper digestive tract disease, anatomic loss or alteration, a 0% WPI is to be assessed’. The evidence in this Worker points to *Helicobacter* associated gastritis and there is no objective clinical evidence of NSAIDs gastropathy, analgesic gastropathy or reactive gastropathy on either biopsy reports.”

The Panel agrees with this assessment. The medical members of the Panel note that normally it would be expected of somebody suffering from analgesic gastritis to develop the symptoms within 6 to 12 months of commencing the medications for their injury. In this man’s case, it was approximately 2012 before he reported any symptoms. On 4 August 2016, he did have a colonoscopy⁹ which reported multiple aphthous ulcers and was directed by Dr Teoh to cease all anti-inflammatory medications, and it appears that he did so¹⁰. When he underwent a repeat colonoscopy with gastroscopy on 12 July 2017¹¹ his colonoscopy was

⁸ Appeal Papers p 20.

⁹ Appeal Papers p 24.

¹⁰ See history in report of Dr P G Truskett dated 1 July 2019 Appeal Papers p 295.

¹¹ Appeal Papers pp138-139.

normal, and the histology of the gastric biopsy reported *Helicobacter pylori* which would account for his ongoing symptoms.

36. In Mr Fuimaono's case, the medical members of the Panel are of the view that at the present time in the absence of medications he has no evidence of injury from non-steroidal anti-inflammatory drugs (NSAIDs) and should be assessed at 0% WPI for the upper digestive tract.

37. The AMS went on to deal with the lower digestive tract as follows:

"With respect to the lower digestive tract (colon and rectum), the biopsy evidence of August 9, 2016 points to inflammatory bowel disease either ulcerative colitis and Crohn's disease. The radiological evidence is consistent with terminal ileitis (Crohn's disease) which is a nonwork-related condition. In any event, the subsequent colonoscopy report on July 12, 2017 indicates that the colonic mucosa showed no significant abnormality and the MR enterography of August 4, 2016 showed no acute inflammatory changes or focal bowel wall thickening or enhancement of colon which indicates that the condition had resolved."

The Panel agrees with this assessment, notwithstanding that it was a matter not referred to the AMS for assessment.

38. The AMS said the following in respect of the anus (again, a matter not referred to him):

"The Worker receives 2% WPI for anal skin tags, the result of constipation which alone attracts 0% WPI under 16.9 of the Guides #4, but the consequential condition of 2 anal skin tags which was also noted by the treating Gastroenterologist, merit 1% WPI for each anal skin tag resulting in 2% WPI for anus."

The Panel does not agree with this assessment. It is the Panel's view that skin tags represent resolution of haemorrhoids. It accepts that earlier constipation may have been implicated in producing haemorrhoids, but on the cessation of medication these resolved as is reported. There was no further bleeding from the bowel and two skin tags which do not alter anal function do not justify 2% WPI.

39. The Panel is satisfied that there is a demonstrable error in the MAC of Dr Garvey as he went beyond the scope of the referral and assessed two items that were not referred to him for assessment. For this reason, the Panel is also of the opinion that this is not a matter that warrants referral for further assessment pursuant to s 329 of the 1998 Act as submitted by the respondent.

40. For these reasons, the Appeal Panel has determined that the MAC issued on 25 July 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*.

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 2057/19
Applicant: Vai Fuimaono
Respondent: Hi-Tech Express 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 John F W Garvey 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 the Guidelines	Chapter, page, paragraph, figure and table numbers in AMA 5 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.Upper digestive tract	1 July 2008	Chapter 16, page 78, para 16.9	Chapter 6, page 121. Table 6-3	0%	0	0%
Total % WPI (the Combined Table values of all sub-totals)					0%	

The above assessment is made in accordance with the Guidelines for the Evaluation of Permanent Impairment for injuries received after 1 January 2002

Brett Batchelor
Arbitrator

Dr Richard Crane
Approved Medical Specialist

Dr Neil Berry
Approved Medical Specialist

13 November 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*.

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

