

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-6220/18
Appellant:	Myer Pty Limited
Respondent:	Victor El Bayeh
Date of Decision:	12 December 2019
Citation:	[2019] NSWCCMA 183

Appeal Panel:	
Arbitrator:	Ross Bell
Approved Medical Specialist:	Dr Greg McGroder
Approved Medical Specialist:	Dr James Bodel

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 September 2019 the appellant Myer Pty Ltd lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr John M Harrison, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 5 August 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 ground(s) 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. The AMS sets out the background to the Application at Part 4 of the MAC,

“Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:

I took the opportunity here today to read back to him the relevant information that I had recorded in my previous MAC (6 August 2010) of the circumstances of that accident and the crush injury to his left hand that had occurred at work at Westfield Parramatta and he said that he was quite comfortable with my description of the circumstances of that accident, other than correcting me when he said it was his left ring finger that very early after that event he became aware that it began to trigger and I have repeated that error of the correct identification of that digit in the third paragraph of Page 4 of my previous MAC about four lines from the bottom and again two lines from the bottom in the last paragraph of Page 4 as well as on Page 5, second paragraph, second last line near the end and he was insistent that it was his ring finger that was affected in that way then.

Since I last saw him, he remains on the Age Pension and with his wife he has shifted to another house in Wentworthville, where they reside. He prompted me that he had had a myocardial infarct eight to nine years ago for which he had been hospitalised and from which he had recovered and that episode had meant that he had continued to be treated for a raised cholesterol and blood thinning agent and for hypertension for which he is currently taking Noten at this time.

Intervening problems: He also told me that issues in relation to lower back pain subsequently more significantly affected him and he had been put through some investigations including MRI studies of his lumbar spine and after a referral to Dr van Gelder, a practising neurosurgeon, he had advised and consented to surgery being done on his lumbar spine to try and moderate that essentially, significant lower back pain with some referred pain into the front of both his thighs that was affecting him that Dr van Gelder felt was due to an intervertebral disc prolapse at the L3/4 level in his lumbar spine.

That surgery was done at the Sydney Adventist Hospital on 17 October 2015 and Mr El Bayeh said it left him with a reduced amount of lower back lumbar pain and a significant moderation in anterior thigh discomfort on each side that had affected him.

His first motor vehicle accident was 11 June 2006 when he was in his car in a carpark at Cabramatta Shopping Centre when another vehicle accidentally reversed into the front of his leaving him with soft tissue injuries to his neck, right wrist, lower back and right knee for which he had conservative care and his injuries were said to have resolved over the subsequent two years.

He had another motor vehicle accident in July 2011. He was 'T'-boned from the right at an intersection, he had injuries to the left knee, chest, neck and lower back but most of it settled on conservative care but his left knee symptoms persisted. He had an arthroscopy done in 2011 and he had continuous pain in his left knee after that then he noticed experiences of stiffness and pain in his left index finger, his left ring finger, his right long finger which was late in 2014 and the persisting left knee pain from 5 April 2008 event. His general practitioner, Dr Prasad continued his treatment and he developed triggering in his left index finger then the right long finger. Cortisone injections were tried a couple of times and then he was later seen by Dr Yee and in August 2015, he did a left ring finger, trigger finger release and after that a right long finger, trigger finger release and his symptoms took about six months to settle, but did for a time.

Around 29 May 2017?? he still had pain and triggering in his left index finger that may have also been operated on.

From 2012 to 2013 Dr Prasad saw and treated him for low back pain when he was a sales person a Myer Pty Ltd. Investigations for that were done and he was seen by Dr van Gelder who felt that his symptoms were coming from the L3/4-disc level and did a lumbar decompression of that disc on 17 October 2015.

He felt slightly better after that but he had another (third) motor vehicle accident. That accident was on 20 January 2015, five weeks after the lumbar disc surgery when he was driving a Toyota Corolla in Parramatta at the intersection of George and Marsden Streets when the traffic lights were not working. As he entered the intersection, he was suddenly confronted by a Toyota Echo which hit the left side of his car at quite some speed and his lap sash seat belt held. Police and ambulance attended the accident, he was assessed there but he was not transferred to a hospital with ambulance report (VACIS Case No....) saying he had discussed it with the ambulance officers. He subsequently was left with symptoms of neck pain, pain in both shoulder and in his lower back that persisted.

He worked on but he was made redundant by Myer Pty Ltd on 19 September 2015 and he has not worked since."

PRELIMINARY REVIEW

7. The Appeal Panel conducted a preliminary review of the medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.
8. As a result of the preliminary review, the Appeal Panel determined that it was not necessary for a further medical examination, for the reasons given below.

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. In summary the submissions are:

Appellant

12. The appellant submits that the AMS has erred in relying on an incorrect history from the worker and taking into account injuries and symptoms in the assessment which are not consistent with the findings of the Commission constituted by an Arbitrator. The Arbitrator found that the only injury on 5 April 2008 was to the left wrist, hand and fingers.
13. The findings in the MAC are similar to the findings in the MAC of 2010 so 16% whole person impairment (WPI) cannot be justified.
14. The AMS has also erred in making an assessment for scarring which he adds to the assessment when there has been no further surgery.
15. The MAC should be revoked and the Panel consider the orders of the Arbitrator.

Respondent

16. The respondent submits that the AMS did not include the cervical spine injury or any referred symptoms in his assessment of the crush injury on 5 April 2008. This is clear from the explanation of the AMS in the MAC.

17. There has been no previous assessment of scarring and therefore the assessment of the AMS for scarring is appropriate. The MAC should be confirmed.

FINDINGS AND REASONS

18. 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.
19. 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.
20. In *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792 the Court considered s 328(2) of the 1998 Act and the meaning of “grounds of appeal on which the appeal is made”. The Court distinguished between that expression and the wording in s 327, “grounds for appeal”. The Court held that the amendment to s 328(2) restricts an Appeal Panel’s deliberations to the specific appeal points set out in the appeal submissions.
21. If a ground of appeal on which the appeal is made is successfully established, the Panel must correct the error or errors found “applying the WorkCover Guides fully” (see *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499).

Ground of appeal – assessment of left upper extremity (wrist, hand and fingers)

22. 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.”
23. The amended referral to the AMS was for assessment of “Left Upper Extremity (wrist, hand, fingers)”, for injury on 5 April 2008.
24. In addressing the overall medical picture for Mr El Bayeh, the AMS does refer to other body parts and several motor vehicle accidents as part of the general medical background. The AMS explains his assessment at Part 10.b.,

“Then, using Figures 1, Upper Extremity Impairment Evaluation Record – Part 1 (Hand) & Part 2 (Wrist, Elbow and Shoulder) PP. 516 & 517, his left hand digit losses of motion (with none at his thumb) added up to combined flexion figures of 37, 57, 33 and 29 respectively for the index to little fingers and his combined digit extension losses were 5° per finger and 20 leaving 37, 52, 33 & 24 respectively as the assessed left hand impairments then. When converted from digit to hand impairments and added, they represented a 19% left hand impairment and by Table 16-2, p.439, a 17% UEI.

Using Part 2 (Wrist) P. 517, when those calculated amounts of losses were added to the calculated UEI’s for the left wrist as 11%, using the Combined Values Chart P. 604 that gave a 26% UEI which by Table 16-3, P. 439 represents a 16% WPI to which the scarring assessment is added, using the Combined Values Chart, P. 604: 16+2 = 18%.

He therefore has

- An 18% WPI affecting his left upper extremity at the wrist, hand and fingers as a consequence of the injury at work on 5 April 2008.”

25. At Part 8.e. the AMS notes a prior motor vehicle accident,

“He has had a prior motor vehicle accident on 11/06/06 and subsequent ones in July 2011 and 20/01/2015 where his neck and other regions had been affected as I described in the report.”

26. The AMS also separates subsequent injury from the assessment at Part 8.g.,

“I have detailed that in the report in terms of other accidents and did not consider or include any additional impairments due to those subsequent two motor vehicle accidents that have occurred but I have restricted my assessment to the requested Left Upper Extremity (wrist, hand & fingers).”

27. It is clear from the above that the references to other body parts and the history of the matter, including discussion about the previous MAC have not led to any error. The references are of a general nature and do not form part of the assessment. The AMS has conducted the assessment as referred to him and restricted it to the crush injury to the wrist, hand and fingers on 5 April 2008.

28. The appellant’s submission that the AMS has included in the assessment injuries and symptoms other than the injury referred cannot be sustained. The appellant does not specify how this has occurred by reference to the explanation by the AMS of the calculations at Part 10.b. extracted above.

29. The AMS has used the correct assessment criteria and there is no demonstrable error on the face of the Certificate discerned by the Panel regarding the assessment asked of the AMS.

Ground of appeal - Scarring (TEMSKI)

30. The Panel notes that scarring was not referred to the AMS for assessment. Scarring (TEMSKI) is a separate body system governed by chapter 14 of the Guidelines as derived from Chapter 8 of AMA 5. The amended Referral dated 21 June 2019 states the body part referred as, “Left Upper Extremity (wrist, hand, fingers)”. There is no mention of scarring. The inclusion of the scarring (TEMSKI) assessment is a demonstrable error on the face of the Certificate.

Findings

31. If a ground of appeal is successfully made out and an error identified, the Panel must correct the error or errors found “applying the WorkCover Guides fully” (see *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499).¹ The Panel is able to make the assessment and correct the error in regard to the assessment of scarring without recourse to further examination of Mr El Bayeh.

32. The Panel is satisfied that the impairment is permanent, and the injury has reached maximum medical improvement.

¹ See also *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792.

33. The Panel notes that in the Certificate the AMS has presented the wrist as a separate assessment of WPI to the assessment of the hand and fingers before combining the figures, which is not the method required by AMA 5. All upper extremity impairment values (UEI) should be combined before the conversion to WPI. The AMS has done this correctly in his calculations in the body of the MAC but has not carried this through to the Certificate. The calculations involve combining 17% UEI with 11% UEI, giving 26% UEI, which on Table 16-3 of AMA 5 equates to 16% WPI, as the AMS has done at Part 10.b.
34. Removing the assessment for scarring from the AMS's final assessment of 18% WPI leaves 16% WPI overall. With the deduction applied by the AMS of 1/10 for the contribution of pre-existing factors, which is not appealed, gives 14.4 rounded to 14% WPI for the wrist, hand and fingers as shown in the Panel's Certificate below.
35. For these reasons, the Appeal Panel has determined that the MAC issued on 5 August 2019 is revoked. A new Certificate is provided below.

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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Matter Number: 6220/18
Appellant: Myer Pty Limited
Respondent: Victor El Bayeh

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 M Harrison 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 NSW Workers Compensation Guidelines	Chapter, page, paragraph, figure and table numbers in AMA5 Guides	% 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 upper extremity (wrist, hand, fingers)	05/04/2008	Chapter 3, Upper Extremity pp. 10-12	Figure 16-53b Part 2, p517 & Figures 16-28 & 29, pp.467 & 469 Figures 1 & 2, pp. 516 & 517 with Tables 16-1,2 & 3, pp. 438 & 439	16	1/10	14.4 rounded to 14
Total % WPI (the Combined Table values of all sub-totals)					14%	

Ross Bell
Arbitrator

Dr Greg McGroder
Approved Medical Specialist

Dr James Bodel
Approved Medical Specialist

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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar

