

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-3323/19
Appellant: Rhonda Lee Hackett
Respondent: Hills Parcel Direct Pty Limited
Date of Decision: 18 December 2019
Citation: [2019] NSWCCMA 191

Appeal Panel:
Arbitrator: R J Perrignon
Approved Medical Specialist: Dr Gregory McGroder
Approved Medical Specialist: Dr James Bodel

BACKGROUND TO THE APPLICATION TO APPEAL

1. The appellant worker, Ms Hackett, injured her right knee on 20 February 2009, when she tripped and fell down some stairs at work. She came to right knee arthroscopy in September 2009, and total knee replacement surgery in November 2012.
2. On 16 September 2019, Approved Medical Specialist Dr Kuru assessed a 14% whole person impairment (14% right lower extremity – knee; 0% scarring) as a result of injury on 20 February 2009.
3. The appellant worker appeals from Dr Kuru's assessment of scarring only, on the basis that he failed to apply the criteria in Table 14.1 of the NSW workers compensation guidelines for the evaluation of permanent impairment (4th edition) (the Guidelines).
4. On 7 November 2019, the Registrar by his delegate was satisfied that the ground of demonstrable error was made out in respect of the assessment of scarring and referred the matter to this Appeal Panel for determination.
5. On 18 November 2019, the Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the *Guidelines*. Having identified error of the kind asserted by the appellant, the Panel referred the worker for examination by Dr McGroder, whose report appears below.

Submissions

6. 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 as follows.
7. The appellant worker submits that the Medical Assessment Certificate demonstrates error and the application of incorrect criteria, for the following reasons:
 - (a) In assessing 0% whole person impairment (scarring), the Approved Medical Specialist relied on par 14.6 of the *Guidelines*, which provides, "... uncomplicated scars for standard surgical procedures do not, of themselves, rate an

impairment". He found that the surgical scarring was 'well healed' (page 3) and 'uncomplicated and typical of the surgery she has undergone' (page 6). He reasoned that 0% whole person impairment was therefore appropriate, without applying the criteria in Table 14.1.

- (b) Those criteria were applied by Dr Guirgis, who gave explicit reasons and correctly assessed a 2% whole person impairment (scarring). Though he referred to Dr Guirgis' report and assessment, the Approved Medical Specialist did not engage with Dr Guirgis' reasoning with respect to scarring.

8. The respondent submits in summary as follows:

- (a) The Approved Medical Specialist correctly found that the worker had uncomplicated scarring from standard surgical procedures, describing them as 'typical of the surgery she has undergone' and 'well healed'. He correctly applied par 14.6 of the *Guidelines* in assessing a 0% whole person impairment (scarring).
- (b) Dr Guirgis did not correctly apply the criteria in Table 14.1. He merely listed the criteria without explaining which of them applied or why and did not otherwise give reasons for selecting an assessment of 2% whole person impairment. He failed to consider or apply paragraph 14-6.
- (c) Par 14-7 and Table 14.1 of the *Guidelines* provides for a range of 0%-4% whole person impairment in this circumstance, from which an Approved Medical Specialist is entitled to make an assessment based on his clinical judgment. That is what the approved medical specialist did, with reasons, correctly applying the principle of 'best fit'. His assessment should not be disturbed.

Reasoning of the Approved Medical Specialist

- 9. The Approved Medical Specialist examined the worker on 27 August 2019. He took a history of injury to the right knee, and of subsequent surgical interventions. He diagnosed aggravation of underlying osteoarthritis of the right knee.
- 10. On examination, he observed: "She has a well healed wound centered over the knee, as appropriate for a knee replacement. There are also arthroscopic portals."
- 11. Under the heading, "Reasons for assessment", he explained:

"According to paragraph 14.6 page 73 of the SIRA Guidelines, uncomplicated scars from standard surgical procedures rate 0% impairment for scarring. The scar from Ms Hackett's surgery is uncomplicated and typical of the surgery she has undergone."
- 12. Noting that, in respect of his report and that of Dr Guirgis, "examination findings are significantly different", he observed: "I have not assessed impairment due to scarring under TEMSKI, as her wounds are typical of the surgery that she has undergone."

Consideration and findings

- 13. Par 14.6 of the *Guidelines* provides: "A scar may be present and rated as 0% WPI. Note that uncomplicated scars for standard surgical procedures do not, of themselves, rate an impairment".
- 14. The quoted reasoning of the Approved Medical Specialist demonstrates that he interpreted par 14.6 to mean that, where a scar results from standard surgical procedures and is uncomplicated, an assessment of 0% is required. For that reason, he did not determine whether the scarring met any of the criteria in Table 14.1.

15. Paragraphs 14-7 to 14-9 provide as follows:

“14.7 The table for the evaluation of minor skin impairment (TEMSKI) (see Table 14.1) is an extension of Table 8-2 in AMA5. The TEMSKI divides class 1 of permanent impairment (0–9%) due to skin disorders into five categories of impairment. The TEMSKI may be used by trained assessors (who are not trained in the skin body system), for determining impairment from 0–4% in the class 1 category, that has been caused by minor scarring following surgery. Impairment greater than 4% must be assessed by a specialist who has undertaken the requisite training in the assessment of the skin body system.

14.8 The TEMSKI is to be used in accordance with the principle of ‘best fit’. The assessor must be satisfied that the criteria within the chosen category of impairment best reflect the skin disorder being assessed. If the skin disorder does not meet all of the criteria within the impairment category, the assessor must provide detailed reasons as to why this category has been chosen over other categories.

14.9 Where there is a range of values in the TEMSKI categories, the assessor should use clinical judgement to determine the exact impairment value.”

16. Paragraphs 14-6 to 14-8 must be read together, and with Table 14-1. In that context, par 14.6 means that an uncomplicated scar resulting from standard surgical procedures does not, by reason only of its existence, attract a whole person impairment rating of greater than 0%. It does not mean that such a scar must attract a 0% whole person impairment, notwithstanding the fact that it fits the criteria for greater whole person impairment in Table 14.1.
17. In our view, the Approved Medical Specialist has adopted the latter meaning, and misunderstood the effect of par 14.6. In assessing scarring, he should first have examined the scarring, and determined the extent, if any, to which it met the criteria in Table 14.1. His omission to do so amounts to demonstrable error, and the Medical Assessment Certificate must be set aside.
18. Table 14.1 lists criteria for assessing impairment in the following five categories: 0% whole person impairment, 1% whole person impairment, 2% whole person impairment, 3-4% whole person impairment, or 5-9% whole person impairment. The ‘best fit’ principle applies: par 14.8. Where impairment falls within either of the latter two ranges, the Approved Medical Specialist must use his or her clinical judgment to assess where in the range the relevant impairment falls: par 14.9.
19. Contrary to the respondent’s submissions, par 14.9 does not have the effect that an Approved Medical Specialist may use clinical judgment, without more, to select any integer in the range 0%-4%. In each case, the Approved Medical Specialist must examine the scarring and determine the extent to which it fits the criteria in each of the five categories in the preceding paragraph. That was not done in this case. Where the impairment falls within the range 3-4%, or 5-9%, he or she must exercise clinical judgment in determining where within the relevant range it falls: par 14.9.

Report of Dr McGroder

20. Dr McGroder examined the worker on 4 December 2019 at the request of the Panel. His report and assessment appears below.

“1. The workers medical history, where it differs from previous records

Mrs Hackett’s knee replacement was carried out in November 2012 by Dr Mitchell, Orthopaedic Surgeon. He has since retired and her current specialist is Dr Dunkley. She saw him recently and he told her that she may benefit from a revision procedure,

predominantly because of problems with irritation from the patella. She is thinking that she may go ahead and have this surgery.

She said that she is not happy with the result of the surgery as the knee clicks all the time, it doesn't feel stable and her knee swells. It is painful, even at rest, and she finds that she limps and the knee is aggravated easily.

With regard to her scarring, she said that she has seen other people who have had knee replacements and their scars are a lot neater than hers. She said that the scar that she has is noticeable and is in a prominent position and unless she wears shorts that go past her knee or long skirts, people notice the scar and comment on it. She sometimes wears a brace over the knee. She said that she can see the staple marks in the scar, whereas these aren't apparent on the scars of other people who have had this procedure. She feels overall that it is an unsightly scar.

2. Additional history since the original Medical Assessment Certificate was performed

The only additional history is that she may have a revision procedure performed, but there is no evidence before me to suggest that such a procedure is likely to occur within the next twelve months.

3. Findings on clinical examination

The scar over the anterior aspect of the right knee was readily apparent. There was a minor colour contrast, with the scar itself paler than the surrounding skin. The scar was 16cm long and that over the tibial area had a somewhat jagged appearance. The scar was 3mm to 4mm in width. The scar above the patella involving the quadriceps had a minor contour defect. There was no adherence, however, throughout the scar. The staple marks were clearly visible along the length of the scar. There was no evidence of any saphenous nerve involvement.

4. Results of any additional investigations since the original Medical Assessment Certificate

Not applicable.

5. Assessment

Using the 'best fit' principle on the TEMSKI scale, I assess a 1% whole person impairment (scarring)."

Conclusion

21. The Panel adopts the report and assessment of Approved Medical Specialist Dr McGroder.
22. For the reasons given above, the appeal is allowed. The Medical Assessment Certificate of Dr Kuru dated 16 September 2019 is set aside and replaced with the attached Medical Assessment Certificate.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 3323/19
Applicant: Rhonda HACKETT
Respondent: Hills Parcel Direct Pty Limited

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 Kuru and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Body Part or system	Date of Injury	Chapter, page and paragraph number in SIRA guidelines	Chapter, page, paragraph, figure and table numbers in AMA5 Guides	% WPI	WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
Right lower extremity	20/02/2009	Table 3.3, Page 19 Page 21 AMA, Para 17.35		16%	1/10	14%
Scarring	20/02/2009	TEMSKI		1%	Nil	1%
Total % WPI (the Combined Table values of all sub-totals)					15%	

R J Perrignon
Arbitrator

Dr Gregory McGroder
Approved Medical Specialist

Dr James Bodel
Approved Medical Specialist

18 December 2019

I CERTIFY THAT HIS 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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

