WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-2535/19**
Appellant:	**G & J Spackman**
Respondent:	**Geoffrey Alan Mackenzie**
Date of Decision:	**18 December 2019**
Citation:	**[2019] NSWWCCMA 196**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**
Approved Medical Specialist:	**Dr John Ashwell**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 25 September 2019, Dr Greggory Burrow, an Approved Medical Specialist (AMS), issued a Medical Assessment Certificate (MAC) in respect of impairment resulting from injury suffered by Geoffrey Alan McKenzie (Mr Mackenzie/the respondent) to the right upper extremity (right shoulder) and lumbar spine and consequential scarring in the course of Mr Mackenzie's employment on 27 October 2005.

2. On 30 September 2019 the employer, G & J Spackman (the appellant) lodged an application for reconsideration of the MAC on the basis of two alleged "obvious errors". The respondent lodged a reply to the reconsideration application on 1 October 2019.

3. On 23 October 2019 the appellant also lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The ground of appeal relied upon pursuant to section 327 (3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) is that the MAC contains demonstrable errors.

4. The Registrar being satisfied, on the face of the application, that the ground of appeal had been made out, was of the view that it was more appropriate that the matter be referred to a Medical Appeal Panel for determination pursuant to section 327(4) of the 1998 Act rather than referred back to the AMS for reconsideration pursuant to section 329 of the 1998 Act

5. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground of appeal on which the appeal is made. The WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under section 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the WorkCover Medical Assessment Guidelines

6. 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

7. Mr Mackenzie was employed by the appellant as a farmworker. On 27 October 2005, he was involved in a motor vehicle accident in which he suffered injury to his lumbar spine and right shoulder (the subject injuries).

8. Mr Mackenzie continued to have painful symptoms in the right shoulder and low back. In 2007 he underwent a right shoulder posterior labral debridement, decompression and distal clavicle resection. On 21 December 2009, he underwent L4-S1 fusion.

9. Mr Mackenzie was examined by Dr Endrey-Walder in August 2010 for the purpose of assessment of whole person impairment (WPI) resulting from the subject injuries and a claim was made for lump sum compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act).

10. On 3 February 2011, Mr Mackenzie entered into a complying agreement with the respondent pursuant to section 66A of the 1987 Act for the payment of lump sum compensation in respect of 22% WPI of the lumbar spine and 8% WPI arising from injury to the right upper extremity (right shoulder). Those impairments were combined to give an agreed total of 28% WPI.

11. Mr Mackenzie continued to suffer painful symptoms and in February 2018 he was again examined again by Dr Endrey-Walder who then assessed Mr Mackenzie as suffering 33% WPI as result of the subject injuries. The respondent disputed that assessment and the dispute was referred to an AMS, Dr Greggory Burrows. The AMS assessed Mr Mackenzie as having 12% WPI in respect of injury to the right upper extremity (shoulder) rounded down to 11% after deduction of 1/10 for pre-existing injury, condition or abnormality. The lumbar spine was assessed at 25% WPI rounded down to 23%. Scarring was assessed in accordance with the Guidelines at 0%. The combined total assessed was 31% WPI.

PRELIMINARY REVIEW

12. 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.

13. 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. Neither party submitted that there should be a further examination and ample evidence is available to the panel to permit determination of the appeal.

EVIDENCE

Documentary evidence

14. 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

15. 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

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

17. The appellant submitted that the AMS had fallen into error both with regard to assessment of the lumbar spine and assessment of the right upper extremity.

18. With respect to the lumbar spine, no complaint is made as to the assessment of Mr Mackenzie as falling within DRE Lumbar Category IV in accordance with AMA 5 Table 15-3, nor in the application of paragraph 4.33 of the Guidelines with respect to assessment of 2% WPI for the impact upon activities of daily living.

19. The appellant submits that, in allowing a further 3% WPI pursuant to Table 4.2 of the Guidelines the AMS fell into error because assessment in respect of the effects of surgery required residual symptoms and radiculopathy following spinal surgery. The appellant submitted that the AMS had found no radiculopathy and accordingly had fallen into error in awarding further impairment pursuant to clause 4.37 of the Guidelines.

20. The appellant submitted that the AMS had also fallen into error in assessing 12% WPI in respect of the right upper extremity (shoulder) because the AMS had failed to assess the range of motion in accordance with Chapter 2.20 of the Guidelines.

21. In reply, the respondent submits that the AMS had correctly applied the Table 4.2 modifiers as radiculopathy was not required to support that assessment.

22. With respect to the assessment of the right upper extremity, the respondent submitted that a deduction in accordance with Chapter 2.20 of the Guidelines is only required where there was less than "average mobility" in the "normal/uninjured" left shoulder. The AMS determined that no deduction was necessary which effectively established that the contralateral joint did not have less than average mobility.

FINDINGS AND REASONS

23. The procedures on appeal are contained in section 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.

24. 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.

25. It is convenient to deal with the appeals in respect of the lumbar spine and the right upper extremity separately.

Lumbar spine

26. **Table 4.2 of the Guidelines is as follows:**

Procedures	**Cervical**	**Thoracic**	**Lumbar**
Spinal surgery with residual symptoms and radiculopathy (refer to 4.27 in the Guidelines)	3%	2%	3%
Second and further levels	1% each additional level	1% each additional level	1% each additional level
Second operation	2%	2%	2%
Third and subsequent operations	1% each	1% each	1% each

27. The Panel accepts the submission of the appellant that, in the absence of a finding of radiculopathy, the AMS fell into error in assigning an additional 3% pursuant to Table 4.2 with respect to “Spinal surgery with residual symptoms and radiculopathy”. Chapter 4.37 provides an example of the calculation of WPI “for persisting radiculopathy”.

28. In this case it is clear that the AMS found no radiculopathy and there can be no additional assessment of impairment in respect of the first line of Table 4.2 because the presence of radiculopathy is a necessary condition. The AMS found “the lumbar spine has been fused over 2 levels, with persistent symptoms but no radiculopathy.”

29. Demonstrable error has been established and it is necessary to review the evidence in order to assess WPI arising from injury to the lumbar spine.

30. The parties accept that the AMS correctly assessed Mr Mackenzie as falling within DRE Lumbar Category IV with interference with activities of daily living attracting a further 2% WPI. That assessment is in accordance with the evidence. DRE Lumbar Category IV attracts a base rating of 20% with a further 2% added for interference with activities of daily living.

31. The appellant appropriately does not seek to disturb the assessment of an additional 1% in respect of “second and further levels” as radiculopathy is not required in respect of that category in Table 4.2. It is appropriate to apply Table 4.2 to add a further 1% WPI in respect of surgery at two levels.

32. The assessment of WPI in respect of the lumbar spine is therefore assessed as 20% WPI in respect of assessment within DRE Lumbar Category IV, 2% in respect of interference with activities of daily living and 1% in respect of surgery at two levels making a total of 23% WPI.

33. The Panel agrees with the AMS that the imaging studies confirm pre-existing degenerative changes which probably contribute to the degree of lumbar spine impairment assessed. The Panel agrees that it is difficult to determine the extent of that contribution and a deduction of 1/10 would not be at odds with the available evidence in accordance with section 323 of the 1998 Act. After deduction of 1/10 the WPI in respect of injury to the lumbar spine as result of the subject injury is 21% after rounding.

Right upper extremity (Shoulder).

34. The AMS assessed WPI in respect of injury to the right shoulder by reference to range of motion in accordance with Chapter 2 of the Guidelines and 16.4 of AMA 5. The AMS recorded range of movement in the respective shoulders as follows:

	Right Shoulder	Left Shoulder
Flexion	160°	170°
Extension	5°	20°
Abduction	105°	170°
Adduction	10°	20°
External rotation abduction	80°	80°
Internal rotation abduction	20°	70°

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35. The AMS assessed 13% upper extremity impairment in the right shoulder pursuant to Figures 16-40, 43 and 46 of AMA 5 based on the measured range of motion. The AMS added a further 8% upper extremity impairment pursuant to Chapter 2.14 of the Guidelines.

36. The appellant submitted that the AMS had fallen into error in concluding that there was “no deductible proportion” when Chapter 2.20 of the Guidelines required a deduction.

37. Chapter 2.20 of the Guidelines provides:

> "When calculating impairment for loss of range of movement, it is most important to always compare measurements of the relevant joint(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 (see AMA 5 Section 16.4 C, page 543 [scil – correctly page 452.]"

38. The respondent submitted that the AMS had found that no deduction was necessary which implied that the range of motion measured in respect of the left shoulder was not "of less than average mobility".

39. Applying the appropriate Figures in AMA 5 (16-40, 43 and 46) to the measured range of motion in the left shoulder indicates that the left shoulder does have less than average mobility and, accordingly, a deduction in accordance with Chapter 2.20 of the Guidelines was required to be made.

40. The Panel accepts the submission of the appellant that, based on the range of motion measured by the AMS in respect of right and left shoulders, the Guidelines required that a deduction be made. The AMS fell into error demonstrated by the range of motion assessed for the left shoulder which represented a restricted range of motion. It is therefore necessary for the Panel to review the evidence in respect of the right shoulder to assess the appropriate WPI.

41. Applying Figures 16-40, 43 and 46 from AMA 5 to the range of motion measured in respect of the right shoulder yields a total of 12% upper extremity impairment assessed as follows:

	Right Shoulder	Impairment
Flexion	160°	1
Extension	5°	2.5
Abduction	105°	3.5
Adduction	10°	1
External rotation abduction	80°	0
Internal rotation abduction	20°	4
Total		12% UEI

42. Applying those Figures from AMA 5 to the range of motion measured in respect of the left shoulder yields a total of 5% upper extremity impairment assessed as follows:

	Left Shoulder	Impairment
Flexion	170°	0
Extension	20°	0.5
Abduction	170°	3.5
Adduction	20°	0
External rotation abduction	80°	0
Internal rotation abduction	70°	0
Total		5% UEI

43. In accordance with Chapter 2.20 of the Guidelines, the left shoulder is adopted as the baseline and the extent of upper extremity impairment is assessed by reference to range of motion and is accordingly calculated by deducting 5% upper extremity impairment in the left shoulder from the 12% upper extremity impairment in the right shoulder, yielding 7% upper extremity impairment.

44. Chapter 2.14 of the Guidelines make provision for assessment of an additional rating in respect of resection arthroplasty of the distal clavicle. The Guidelines provides:

> "Please note that in AMA5 Table 16-27 (p.506) the figure for resection arthroplasty of the distal clavicle (isolated) has been changed to 5% upper extremity impairment, and the figure for resection arthroplasty of the proximal clavicle (isolated) has been changed to 8% upper extremity impairment."

45. Although not referred to in the submissions, the AMS in his original assessment applied an additional 8% although that assessment is appropriate to resection arthroplasty of the *proximal* clavicle. There is no dispute that it was the *distal* clavicle that was the subject of the resection and the Panel, upon reassessment, applies Chapter 2.14 of the Guidelines to add a further 5% upper extremity impairment.

46. The additional 5% upper extremity impairment is to be added to the 7% assessed in respect of range of motion[1] yielding 12% upper extremity impairment. That impairment is converted to 7% WPI pursuant to Table 16-3 of AMA 5.

47. The radiological imaging in respect of the right shoulder demonstrates the presence of osteoarthritis which, on the balance of probabilities, contributes to the degree of WPI assessed. It is difficult to assess the degree of that contribution and again a figure of 1/10 would not be at odds with the available evidence. After deduction of 1/10 pursuant to section 323 of the 1998 Act the Panel assesses 6% WPI in respect of injury to the right upper extremity (shoulder).

48. No submissions were addressed to the assessment by the AMS of the scarring and, upon review of the evidence, the Panel accepts that the assessment of scarring in accordance with Chapter 14, Table 14.1 of the Guidelines at 0% is appropriate.

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

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar

[1] Chapter 2.14 Guidelines

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **2535/19**
Applicant: **Geoffrey Alan Mackenzie**
Respondent: **G & J Spackman**

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 Greggory Burrows 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 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. Right upper extremity (shoulder)	27/10/05	Chapter 2, para 2.14, 2.20	Chapter 16.4 Figures 16-40, 43 and 46. Table 16-3.	7%	1/10	6% (after rounding)
2. Lumbar spine	27/10/05	Chapter 4, 4.27, 33, 34, 35, 37; Table 4.2	Chapter 15, Table 15-3	23%	1/10	21% (after rounding)
3. Scarring	27/10/05	TEMSKI Chapter 14, Table 14.1		0%	Nil	0%
Total % WPI (the Combined Table values of all sub-totals)					**26%**	

Mr William Dalley
Arbitrator

Dr Jon Ashwell
Approved Medical Specialist

Dr Tommasino Mastroianni
Approved Medical Specialist

18 December 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*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar