

WORKERS COMPENSATION COMMISSION

RECONSIDERATION OF A DECISION BY THE APPEAL PANEL

Matter No: M1-3022/19
Appellant Bozo Mioc
Respondent: Boldway Pty Ltd
Date of Decision: 29 January 2020
Citation: [2020] NSWCCMA 12

Appeal Panel:
Arbitrator: Mr John Harris
Approved Medical Specialist: Dr Neil Berry
Approved Medical Specialist: Dr Drew Dixon

1. Mr Bozo Mioc (the appellant) suffered injury deemed to have occurred on 1 May 2004 in the course of his employment with Boldway Pty Ltd (the respondent).
2. The appellant was assessed by the Approved Medical Specialist (AMS) for the lumbar spine, right upper extremity and the upper digestive system. The AMS provided an assessment for 7% whole person impairment (WPI) of the lumbar spine and assessed the right upper extremity and the upper digestive system at 0% (the MAC).
3. The Appeal Panel (AP) provided reasons on 15 January 2020 allowing the Appeal from the decision of the AMS in respect of the upper digestive system. In the course of those reasons the AP stated:¹

“For these reasons, the MAC is revoked and a new Medical Assessment Certificate is issued. The AP notes that it was not requested to provide a combined certificate incorporating the prior MAC of Dr Bodel who assessed 7% WPI for the left lower extremity. That body part was not referred for assessment pursuant to s 325 of the 1998 Act and no request was made by the appellant to have that assessment included as part of this Medical Assessment Certificate.”
4. Accordingly, the AP issued a Medical Assessment Certificate for 8% whole person impairment (WPI) comprising 7% for the lumbar spine and 1% for the upper gastrointestinal system.
5. The appellant had previously been assessed by an Approved Medical Specialist (the previous AMS) who provided a Medical Assessment Certificate dated 3 October 2007 assessing 7% WPI of the left lower extremity (the prior MAC).²
6. That left lower extremity was not referred to the AMS in the present proceedings who did not incorporate the assessment from the prior MAC.
7. There was no ground of appeal and there were no submissions by the appellant suggesting that the AMS erred by failing to include the previous assessment for the left lower extremity.

¹ *Bioc v Boldway Pty Ltd* [2020] NSWCCMA 8 at [91]

² Reply, p 60

8. On 16 January 2020, the appellant's solicitors, NSW Compensation Lawyers, wrote to the Registrar of the Commission asserting error by the AP in failing to include the assessment of the left lower extremity in the combined assessment. It referred to the fact that a claim had been made for "threshold dispute with respect to work injury damages" and that the prior MAC had been included in the material filed in the Commission.
9. The appellant requested the Registrar to refer the matter back to the AMS or the AP for the purposes of issuing a combined Certificate, presumably incorporating the assessment of the left lower extremity.
10. The Registrar has now referred the matter back to the AP.
11. The respondent solicitor's response to the present application was:

"We have no objection to the matter being returned to the [AP] to provide a combined assessment if in fact that is the correct process."
12. The present claim for compensation pursuant to s 66 of the *Workers Compensation Act, 1987* (the 1987 Act) was not based on a combination with the assessment of the left lower extremity contained in the prior MAC. The AP noted in its reasons that the claim for s 66 compensation was not based on the prior assessment of the left lower extremity.³ In its recent letter to the Commission the appellant's solicitors did not suggest otherwise.
13. The appellant's solicitors, by reference to a document contained in the hundreds of pages filed with the Commission⁴, asserted that "it was quite clear that the Applicant did require a combined Certificate for the purposes of a threshold dispute".
14. The AP observes that the failure to include the assessment of the left lower extremity in any combined assessment lays squarely with the appellant's solicitors. The solicitors did not request an amendment to include that body part when the referral for assessment was initially issued by the Commission.
15. This fault was compounded by the appellant's solicitors when they failed to raise the issue in the appeal submissions.
16. The AP rejects the submissions of the appellant's solicitor that the error lays with the AP and that "it was quite clear that the [appellant] did require a Combined Certificate". The appellant solicitor's conduct in both agreeing to the initial referral and by failing to correct the matter in its appeal submissions meant that the issue of any combination certificate incorporating the left lower extremity was not raised with the AP.
17. Despite these observations critical of the appellant's solicitors, the AP is of the view that an amended certificate incorporating the left lower extremity should be issued by the AP.
18. The AP has the power to correct any matter pursuant to s 378(1) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). The section confers a wide discretion which should be exercised in the interest of justice: see the observations of Roche DP in *Atomic Steel Constructions Pty Ltd v Tedeschi*⁵ commenting on a similar power in s 350(3) of the 1998 Act and the observations in *Samuel v Sebel Furniture Ltd*⁶ where the power may not be exercised due to mistake or oversight by a worker's solicitors.

³ At [3]

⁴ Application, p 250

⁵ [2013] NSWCCPD 33 (*Tedeschi*)

⁶ [2006] NSWCCPD 141 at [58]

19. For the reasons set out below, the appellant is entitled to a combined assessment of 15% WPI which creates a potential entitlement to claim work injury damages. A serious injustice would occur to the appellant if an amended medical assessment certificate was not issued by the AP.
20. The assessment of multiple body parts is made pursuant to the combined tables contained in *American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA 5)* subject to any changes made by the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment (fourth edition guidelines)*.
21. Relevantly, paragraph 1.18 of the fourth edition guidelines provides:

"The Combined Values Chart in AMA5 (pp 604–06) is used to derive a percentage of whole person impairment (WPI) that arises from multiple impairments. An explanation of the chart's use is found on pp 9–10 of AMA5. When combining more than two impairments, the assessor should commence with the highest impairment and combine with the next highest and so on."
22. The appellant's solicitors incorrectly submitted that the 8% assessment made by the AP with the 7% assessment made by the previous MAC equates to a combined WPI of 15%. Under the combined tables a direct combination of 8% and 7% equates to a combined assessment of 14% WPI.
23. Applying the correct procedure pursuant to paragraph 1.18 of the fourth edition guidelines, combining the 7% for the lumbar spine with the 7% for the left lower extremity provides a combined assessment of 14%. When 14% is combined with the 1% for the upper gastrointestinal system, the final combined assessment is 15% WPI.
24. For these reasons the appellant is entitled to a combined medical assessment certificate of 15% WPI.
25. The appellant solicitor's submission that the matter return to the AMS is not feasible given that the MAC issued by the AMS has been revoked. The AP has considered the appellant's solicitors conduct as part of the discretionary exercise pursuant to s 378 of the 1998 Act. However, the AP considers the overriding interests of justice warrant an order that an amended Medical Assessment Certificate be issued.
26. The AP rescinds the Medical Assessment Certificate provided in its original reasons and issues an amended Medical Assessment Certificate attached to this statement of reasons.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE MEDICAL 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



APPEAL PANEL

AMENDED MEDICAL ASSESSMENT CERTIFICATE

Matter No: 3022/19
Applicant: Bozo Mioc
Respondent: Boldway Pty Ltd

This Certificate is issued pursuant to section 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Appeal Panel revokes the Medical Assessment Certificate of Dr T Michael Long and the Medical Assessment Certificate issued by the Appeal Panel 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 fourth edition guidelines	Chapter, page, paragraph, figure and table numbers in AMA5	% 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)
Lumbar Spine	01.05.2004 (deemed)	Chapter 4, para 4.27 – 4.37	Chapter 15.4, Table 15-3	7%	nil	7%
Right upper extremity (wrist)	01.05.2004 (deemed)	Chapter 2, pp 10-12	Chapter 16, figure 16-28 and 16-31	0%	N/A	0%
Left Lower extremity	01.05.2004 (deemed)	Chapter 3	Chapter 17, Tables 17-11, 17-12 and 17-14	7%	nil	7%
Upper Digestive System	01.05.2004 (deemed)	Chapter 16, para 16.9	Chapter 6, Table 16-3, p 121	2%	1/2	1%
Total % WPI (the Combined Table values of all sub-totals)						15%

John Harris
Arbitrator

Dr Neil Berry
Approved Medical Specialist

Dr Drew Dixon
Approved Medical Specialist

29 January 2020

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE MEDICAL 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

