WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-2217/19**
Appellant:	**Van Nguyen**
Respondent:	**Pasarela Pty Ltd**
Date of Decision:	**13 February 2020**
Citation:	**[2020] NSWWCCMA 23**

Appeal Panel:	
Arbitrator:	**Marshal Douglas**
Approved Medical Specialist:	**Dr Drew Dixon**
Approved Medical Specialist:	**Dr Tomasino Mastroianni**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 December 2019 Van Nguyen (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Greggory Burrow, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 4 November 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 *Workplace Injury Management and Workers Compensation Act 1998* (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. On 7 October 2015, the appellant, while working for Pasarela Pty Ltd (the respondent), fell backwards onto his buttocks, breaking his fall with his arms stretched behind him. It is agreed that he suffered a left distal radial wrist fracture in that incident.

7. In prior proceedings in the Commission (765/18) the appellant alleged that he also injured his right wrist, left and right shoulders, and lumbar spine in the incident. The respondent disputed that the appellant suffered injury to his right wrist, shoulders and lumbar spine. The matter came before arbitrator Mr Wynyard who, on 16 May 2018, found the appellant did not suffer injuries to his shoulders or lumbar spine in the incident of 7 October 2015. The arbitrator entered an award for the respondent with respect to a claim the appellant had made in those earlier proceedings for compensation under s 66 of the *Workers Compensation Act 1987* (1987 Act). The arbitrator also, although not recording it in the Certificate of Determination that issued in those earlier proceedings, initially gave the parties "leave to approach" in the event that there was "a difficulty with the s 60 expenses"[1], for which the appellant had also claimed compensation in those earlier proceedings in the Commission.

8. In proceedings presently before the Commission, the appellant claims to have suffered a condition in his right shoulder due to the "over use" of his right upper extremity as a consequence of the agreed injury he suffered to his left wrist on 7 October 2015. The respondent disputed that to be the case. That dispute came before arbitrator Mr Burge for determination. Following an arbitration hearing on 16 July 2019, the arbitrator issued a Certificate of Determination on 11 September 2019, together with his statement of reasons, in which he recorded that as a result of the injury to the appellant's left wrist on 7 October 2015 the appellant also suffered a consequential condition in his right upper extremity (shoulder).

9. In the present proceedings before the Commission the appellant seeks determination of a claim he has made against the respondent for compensation under s 66 of the 1987 Act with respect to permanent impairment he says he has from the injury to his left wrist and the consequential condition in his right shoulder. There exists a medical dispute between the parties regarding the degree of permanent impairment the appellant has from that injury and consequential condition. Following the arbitrator issuing the Certificate of Determination on 11 September 2019 a delegate of the Registrar referred that medical dispute to the AMS to assess.

PRELIMINARY REVIEW

10. 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.

11. During its preliminary review, the Appeal Panel considered a request by the appellant that a member of the Appeal Panel, who is an Approved Medical Specialist, re-examine him.

12. Under s328(2) of the 1998 Act, the Appeal Panel, when reviewing the MAC to determine whether the MAC contains a demonstrable error or whether the AMS's assessment was based on incorrect criteria, must limit itself to considering the grounds of appeal the parties have raised in their respective submissions. Based on the matters the parties have raised in their respective submissions, the Appeal Panel is of the view, for reasons set out below, that firstly, the MAC does not contain a demonstrable error and, secondly, the AMS applied the correct criteria to assess the medical dispute that had been referred to him. The Appeal Panel therefore lacks the power to require the appellant to undergo a further medical examination.[2]

13. Moreover, absent the Appeal Panel finding, based on the matters the parties raised in their respective submissions, that the MAC contains a demonstrable or that the AMS made the assessment based on incorrect criteria, the Appeal Panel must confirm the MAC. The Appeal Panel therefore will not re-assess the medical dispute. There is therefore no utility in examining the appellant.

[1] Transcript in 755/18 page10 line 25
[2] NSW Police Force v Registrar of the Workers Compensation Commission of NSW [2013] NSWSC 1792

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 AMS examined the appellant on 22 October 2019.

16. The AMS noted in the MAC that the Commission had provided him the Application to Resolve a Dispute that the appellant filed to initiate the present proceedings in the Commission (ARD); the documents attached to the ARD; the documents attached to an application to admit late documents the appellant filed on 15 October 2019; the respondent's Reply; the documents attached documents to the Reply; and the Certificate of Determination of 11 September 2019 the arbitrator issued in the present proceedings before the Commission.

17. The AMS obtained a history that he set out within part 4 of the MAC.

18. The AMS recorded in the MAC the following findings from his examination of the appellant:

> "Mr Nguyen stands 160cm tall, weighs 62kg and appears of average stature.
>
> He sat comfortably. He wore a blue Neoprene sleeve on his left wrist.
> Examination of the upper extremities showed no evidence of CRPS.
>
> Examination of the shoulders showed gross loss of active range of motion bilaterally, including the unaffected contralateral left shoulder. Active shoulder range of motion included:

Movement	Right	Left
Flexion	30°	50°
Extension	5^0	10^0
Abduction	40^0	50^0
Adduction	10^0	15^0
External rotation abduction	80^0	90^0
Internal rotation abduction	10^0	80^0

> Internal and external rotation examination was held with me supporting the arm into abduction with gentle passive movement.
>
> Impingement sign on the right was positive, so was the reverse impingement sign.
>
> The right shoulder was non-focally and globally tender, including over the clavicle, AC joint, acromion, scapula spine, lesser and greater tuberosities.
>
> Stressing the rotator cuff was globally, non-focally weak at MRC Grade IV.
>
> During examination of both shoulders, active and passive range of motion which was performed gently, quietly and slowly, Mr Nguyen was remarkably demonstrative during all parts of the examination in a non-focal, non- pathological fashion.
>
> Examination of the elbow showed bilateral symmetrical movement, including 0° of extension, 140° of flexion, 90° of supination and 90° of pronation.
>
> Examination of the left wrist showed no swelling, discolouration or deformity.
>
> I noted that right wrist active range of motion was reduced, although it is claimed to be uninjured.

Range of motion included:

Movement	Left	Right
Dorsiflexion	30^0	60^0
Volar flexion	40^0	60^0
Radial deviation	10^0	15^0
Ulnar deviation	10^0	15^0

Left Wrist
There was no carpal or radioulnar joint instability. There was tenderness about the ulnar side of the wrist, however. The digits and thumb showed full movement and the neurovascular exam was normal."

19. The AMS provided the following "summary of injuries and diagnoses":

> "Mr Nguyen suffered a left distal radial wrist fracture as a result of the work fall on 07/10/2015, had nonoperative treatment, had persisting symptoms and his treating hand surgeon has confirmed that persisting diagnosis of distal radial mal-union and recommended corrective osteotomy. Mr Nguyen is reluctant to pursue surgical intervention and there has been no further interventional treatment. No interventional treatment is planned for the future.
>
> WCC has confirmed that the right shoulder condition is subsequential to the left wrist injury.
>
> Right shoulder x-rays and ultrasound reported on 02/02/2017 show a small full thickness tear of the supraspinatus.
>
> Mr Nguyen specifically denies any pre-work incident history or left wrist condition and specifically denies any previous fracture or injuries. In contrast, the initial post-incident x-rays appear to show a well corticated distal ulnar styloid fragment, which implies it is chronic and longstanding, that is, there is evidence of a pre-existing injury.
>
> Dr Pillemer, Orthopaedic Surgeon in his independent medical examination on 07/12/2017 reported similar concerns. Doctor concluded that the work injury resulted in a relatively undisplaced crack fracture in the distal radius extending to the distal radioulnar joint and that there was a pre-existing healed fracture of the distal radius and the distal ulnar styloid. That is, Dr Pillemer believed there had been pre-existing distal radial fracture which resulted in mal-union.
>
> I also note the cortication around the distal styloid fracture, seen on the initial x-rays but note that the slope of the distal radius appeared to be neutral initially, progressively collapsed into dorsal tilt, indicating that there was an acute significant fracture as a result of the work injury.
>
> It is my opinion then that despite the apparent chronicity of the appearance on x-rays and at initial presentation, that indeed Mr Nguyen did suffer a relatively significant distal radial fracture as a result of the work incident which resulted in subsequent mal-union and dorsal tilt of the fracture of his radius, as described by his treating hand surgeon. Further, there is no other clinical evidence of a pre-existing disease.
>
> I would therefore, whilst acknowledging Dr Pillemer's opinion, believe that the preponderance of evidence is such that there was no pre-existing significant injury."

20. The Appeal Panel notes that Dr Pillemer is an orthopaedic surgeon who examined the appellant at the request of the respondent's insurer's solicitors. Dr Pillemer provided those solicitors a report dated 7 December 2017 that is attached to the respondent's Reply.

21. The AMS made the following comments on the appellant's presentation during examination:

> "It is my opinion that Mr Nguyen displays significant abnormal illness behaviour and inconsistency of presentation in terms of history and the severity of his complaints and examination by way of non-focal complaints of tenderness about the shoulder and the wrist and that the severity of this condition is not as bad as he claims and the physical exam showed elements of significant inconsistency by way of severe range of motion reduction, not consistent with the known diagnosis of a small right shoulder rotator cuff tear. A rotator cuff tear of the size of Mr Nguyen's does not result in loss of active range of motion to 30° only. Often there is a painful arc, sometimes there can be loss of 20° to 30° range of motion.
>
> There is abnormal loss of range of motion of the normal contralateral side, both in the shoulder and the wrist and a suitable deduction, as per instructions, of SIRA Paragraph 1.27 and 1.28 and 3 is required and will be detailed in later sections.
>
> I note Dr Pillemer had similar concerns where he gave the opinion that "Mr Nguyen has minimal, if any residual impairment as a result of his fall" and that Mr Nguyen has "fairly significant generalised complaints which I am unable to account for on an orthopaedic basis". Dr Pillemer suggested that ongoing disability and inability to return to work was on the basis of a "psychological condition" and that any ongoing incapacity was arising from his "pain behaviour". On this basis, Dr Pillemer found no evidence of "residual WPI as a result of his injury on 07/10/2015".
>
> I find myself in some partial agreement with Dr Pillemer's concern that there is a degree of abnormal illness behaviour."

22. The AMS assessed the appellant to have 6% whole person impairment due to the injury to the appellant's left wrist and 4% whole person impairment due to the condition in the appellant's right shoulder consequent upon the appellant's left wrist injury, combining to a total of 10% whole person impairment. The AMS said he based his assessment on a "comprehensive history and examination, thorough review of the documents made available by WCC with reference to AMA 5 and SIRA Guides (2016)". The AMS provided the following explanation for his assessment:

> "Left Upper Extremity (Wrist)
> Loss of active range of motion: AMA 5 figure 16-28, 31: 14% upper extremity impairment.
>
> I note that the contralateral right wrist also has loss of active range of motion equivalent to 4% upper extremity impairment.
>
> In accordance with instructions from SIRA regarding unexplained loss of contralateral range of motion in the opposite extremity and inconsistent presentation as noted above, impairment of the right wrist upper extremity to be deducted from the left, this equates to 10% upper extremity impairment related to the left wrist.
> 6% whole person impairment
>
> Right Upper Extremity (Shoulder)
> AMA 5 loss of active range of motion 16-40, 43, 46 results in 24% upper extremity impairment. I note the left contralateral normal shoulder also has loss of active range of motion, resulting in 18% upper extremity impairment. This results in a total of 6% upper extremity impairment related to the right shoulder.
> 4% whole person impairment"

23. The AMS noted that Dr Pillemer had assessed the appellant did not have any permanent impairment resulting from the injury on 7 October 2015. The AMS also noted that this was because Dr Pillemer had found evidence of the appellant having a pre-existing radial fracture and that the appellant had exhibited abnormal illness behaviour. The AMS said he "partly" agreed "with Dr Pillemer and that he had "accounted for the abnormal illness behaviour in assessment of whole person impairment".

SUBMISSIONS

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

25. The Appeal Panel found the appellant's submissions poorly articulated. It was unclear as to whether the appellant was challenging only the AMS's assessment with respect to the left wrist or only the assessment with respect to the right shoulder or both. The Appeal Panel treated the appellant's submissions as relating to the AMS's assessment of both the appellant's impairment with respect to the left wrist and with respect to the right shoulder.

26. In summary, the appellant submits that the AMS erred and applied incorrect criteria by referring to impairment in his right wrist and left shoulder and deducting the impairment the AMS assessed him to have in these joints from the impairment the AMS assessed him in his left wrist and right shoulder when assessing the degree of permanent impairment he had in his left wrist and right shoulder from the injury he suffered on 7 October 2015. The appellant submits that the Guidelines do not require the impairment in the contralateral joints to be deducted. Further, the appellant submits there was no evidence that prior to his suffering injury he had impairment in either wrist and in either shoulder. The appellant submits that there was an absence of evidence that he suffered restriction of movement in his wrists and shoulders before his injury. The appellant submits that there needs to be evidence that here was a pre-existing condition in the contralateral joints that were not referred for assessment for impairment in order that any impairment in those contralateral joints can be deducted from the joints that were referred to the AMS to assess for impairment. The appellant submits that the AMS did not make any enquiry whether he had injured his right wrist.

27. The appellant also submits that the AMS did not accept Dr Pillemer's conclusion that his loss of range of movement of his left wrist is due to abnormal illness behaviour. The appellant submits that, because the AMS did not accept that, the AMS should have also disregarded Dr Pillemer's conclusion that his loss of range of movement of the right wrist is also due to abnormal illness behaviour.

28. The appellant notes that the AMS did not refer to Dr Endrey-Walder's report, which was part of the appellant's Application to Resolve a Dispute. The appellant submits that this is a demonstrable error.

29. In reply, the respondent submits that there is no evidence that the appellant injured his right wrist or left shoulder as a result of the incident of 7 October 2015 or as a result of subsequent incidents. Further, arbitrator Mr Wynyard in proceedings WCC765/18 held that he could not "be satisfied that the injury to the right wrist, the shoulders and lumbar spine are connected to the injury".

30. The respondent referred to [2.20] Guidelines and submits that, based on the instruction therein, the AMS correctly used the contralateral joints as a baseline and deducted the impairment due to the restricted range of movement in those joints from the impairment due to the restricted range of movements in the joints that had been referred for assessment.

FINDINGS AND REASONS

31. 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, as mentioned earlier, the review is limited to the grounds of appeal on which the appeal is made.

32. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons.

33. The Appeal Panel observes that neither party challenged the method by which the AMS assessed that appellant's impairment, namely loss of range of movement of the left wrist and right shoulder.

34. The Guidelines at 2.20 read as follows:

> "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 serves as a baseline and is subtracted from the calculated impairment for the involved joint. The rationale for this decision should be explained in the assessor's report (see AMA5 Section 16.4c, p 543)."

35. The AMS did not in the MAC explain his rationale for deducting the impairment he assessed the appellant to have in the right wrist and left shoulder, being the contralateral uninjured joints, from the impairment he assessed the appellant to have in the appellant's joints that were referred to assessment, beyond noting that the Guidelines required that to be done. The fact that the AMS did not more fully explain the rationale for doing that does not mean, in the Appeal Panel's view, that the MAC contains an error.

36. Saying that slightly differently, the fact that the AMS explained in a very narrow manner his rationale for why, when using the method of loss of range of movement of a joint to assess the degree of permanent impairment in that joint from an injury, the impairment in a contralateral uninjured joint is deducted from the impairment of the injured joint, does not mean the AMS erred by deducting the appellant's impairment in his uninjured contralateral joints from the appellant's impairment in the joints referred for assessment so as to establish the degree of the appellant's impairment in the referred joints that resulted from his injury. Moreover, the fact that the Guidelines require this to be done, in a circumstance where the impairment is being assessed by reference to the lack of range of movement in a joint, means that the AMS did not apply incorrect criteria to assess the appellant's permanent impairment.

37. The rationale for doing this is revealed in both [2.20] of the Guidelines and [16.4c] at page 453 of AMA 5. It is done because in a circumstance where there is an uninjured joint then the movement in that uninjured joint serves as a "baseline" of what a worker's movement in the injured joint would most likely have been immediately before injury occurred to the joint. What is being done is establishing the impairment a worker has as a consequence of an injury to a joint by comparing the function of that injured joint after injury with what it was likely to have been before the injury. If there is no history of injury to the contralateral joint before or after the injury to the joint that has been referred for assessment, then the best method by which that is done is to use the uninjured contralateral joint as a "baseline" of what the worker's impairment in his or her injured joint was most likely to have been before injury.

38. As mentioned, neither party challenged the fact that the AMS adopted the loss of range of motion in the left wrist and right shoulder as the method to assess the appellant's impairment. Further neither party challenged the AMS's findings from his examination. The Appeal Panel notes that the AMS's impairment values based upon his findings are correct.

39. Based on the history he obtained and his clinical examination, the AMS found that the appellant did not suffer injury to his left shoulder or right wrist in the incident of 7 October 2015 or beforehand.

40. Arbitrator Mr Wynyard made a finding in the prior proceedings between the parties that the appellant did not suffer an injury in the incident of 7 October 2015 to his right wrist and left shoulder. The parties are estopped from asserting to the contrary in the present proceedings.

41. In the circumstances, the Appeal Panel considers that the AMS was correct to deduct the impairment he found the appellant to have in his right wrist from the impairment he found the appellant to have in his left wrist when assessing the impairment the appellant had with respect to his left wrist as a result of the injury. In doing so, the AMS applied the correct criteria to assess the appellant's impairment of his left wrist.

42. Similarly, the Appeal Panel considers that in the circumstances set out, the AMS by deducting the impairment value for the range of movement of the uninjured contralateral left shoulder from the total impairment value due to the loss of range of movement of the right shoulder applied the correct criteria to assess the appellant's impairment of the right shoulder due to the injury to his left wrist on 7 October 2015. The MAC does not contain a demonstrable error as a consequence of the AMS having done so.

43. In terms of the appellant's submission to the effect that there was no evidence of impairment in either of his wrists or shoulders prior to the injury, the Appeal Panel observes that the fact that the appellant did not suffer injury to his right wrist in the incident or to his left shoulder in the incident, or beforehand, and the fact that there is no evidence of his suffering injury to either of those joints subsequently, indicates that he did have impaired movement in those joints preceding the date of his injury, and by inference, had impaired movement in his left wrist and right shoulder immediately before he suffered injury. That circumstance, therefore, is the evidence of his having impairment in both his wrists and shoulders immediately before the time he suffered injury. In other words, as already explained, the fact that he had suffered no injury in either wrist or in either shoulder prior to the date of his injury and the fact that he did not suffer injury to his right wrist or left shoulder after the date of his injury, means that the impairment the AMS found him to have in his right wrist and left shoulder at the time of examination is the evidence of the level of the impaired movement he had in both wrists immediately before the time of his injury.

44. With respect to the appellant's submission to the effect that AMS should have rejected Dr Pillemer's opinion that the appellant's loss of movement in the right wrist was due to abnormal illness behaviour on the basis that the AMS rejected Dr Pillemer's opinion that the loss of movement of the appellant's left wrist was due to abnormal illness behaviour, the Appeal Panel considers that the appellant has misinterpreted what the AMS said in the MAC. The AMS disagreed with Dr Pillemer insofar as Dr Pillemer found that the appellant's injury to his left wrist comprised "a relatively undisplaced crack fracture in the distal radius extending to the distal radoulnar joint and that there was a pre-existing healed fracture of the distal radius and the distal ulnar styloid and that there had been a pre-existing distal radial fracture which resulted in mal-union". The AMS considered that in the event of 7 October 2015 the appellant did suffer "a relatively significant distal radial fracture" that "resulted in a subsequent mal-union and dorsal tilt of the fracture of the fistus". It is on that point only that the AMS departed from the opinion of Dr Pillemer. That is the AMS considered that there was no evidence of a pre-existing significant injury, whereas Dr Pillemer did. The AMS considered, as did Dr Pillemer, that the appellant displayed significant abnormal illness behaviour.

45. There is no error in the MAC, in the Appeal Panel's view, as a consequence of the AMS comparing and contrasting his diagnosis of the appellant's left wrist injury with the diagnosis the Dr Pillemer made, nor is there any error as a consequence of the AMS juxtaposing his conclusions on the appellant's presentation and examination with Dr Pillemer's comments on the same during his respective examination of the appellant.

46. With respect to the appellant's submission that the AMS erred by not failing to refer in the MAC to the opinion of Dr Endrey-Walder's report, the Appeal Panel notes that the AMS said in the MAC that he had regard to all the material that the Registrar had listed in the referral, which included the ARD and the attached documents. Those attached documents included Dr Endrey-Walder's report of 29 October 2018. Dr Endrey-Walder is a general and trauma surgeon, who examined the appellant at the request of the appellant's lawyer. An AMS does not have to refer to every item of evidence to explain his or her assessment of a worker. What an AMS must do is explain the actual path of reasoning by which the AMS made his or her assessment of a worker's impairment.[3] It is an error for an AMS not to consider all relevant and significant material, but here the Appeal Panel infers that the AMS had regard to the report of Dr Endrey-Walder but in terms of explaining his assessment of the appellant's impairment the AMS did not need to contrast his opinion of the appellant's injuries and impairments with that which Dr Endrey-Walder had expressed on the issue in his respective report. Simply put, in the Appeal Panel's view there is no evidence from the face of the MAC that the AMS disregarded the report. The Appeal Panel is satisfied that the AMS was provided with Dr Endrey-Walder's report. The Appeal Panel is not satisfied from what is before it that the AMS failed to consider Dr Endrey-Walder's report.

47. For these reasons, the Appeal Panel has determined that the MAC issued on 4
November 2019 should be confirmed.

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

[3] See Wingfoot Aust Partners Pty Ltd v Kocak [2013] 252, applied by Harrison ASJ in Broadspectrum (Aust) Pty Ltd v Fiona Louise Wills [2018] NSWSC 1320, Ivaneza v Dalsil Constructions Pty Ltd [2017] NSWSC 219 per Button J