WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4933/19**
Appellant:	**Jan Neridah Kinealy**
Respondent:	**State of New South Wales – Central Coast Local Health District**
Date of Decision:	**2 March 2020**
Citation:	**[2020] NSWWCCMA 35**

Appeal Panel:	
Arbitrator:	**Carolyn Rimmer**
Approved Medical Specialist:	**Dr Drew Dixon**
Approved Medical Specialist:	**Dr Philippa Harvey-Sutton**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 27 November 2019, Jan Neridah Kinealy (Ms Kinealy) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tim Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 7 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 Workers Compensation Medical Dispute 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 Workers Compensation Medical Dispute 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. In these proceedings, Ms Kinealy is claiming lump sum compensation in respect of an injury to the right upper extremity on 22 October 2016.

7. The matter was referred to the AMS, Dr Anderson, in the Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 16 October 2019 for assessment of whole person impairment (WPI) of the right upper extremity and scarring (TEMSKI), as a result of the injury on 22 October 2016.

8. The AMS examined Ms Kinealy on 28 October 2019. He assessed 9% WPI of the right upper extremity and 0% for scarring. These assessments combined to produce a total assessment of 9% WPI as a result of the injury on 22 October 2016.

PRELIMINARY REVIEW

9. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.

10. The appellant requested that Ms Kinealy be re-examined by an AMS, who is a member of the Appeal Panel.

11. As a result of that preliminary review, the Appeal Panel determined that it was necessary for Ms Kinealy to undergo a further medical examination because there was insufficient evidence on which to make a determination.

EVIDENCE

Documentary evidence

12. 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.

Further medical examination

13. Dr Harvey-Sutton of the Appeal Panel conducted an examination of the worker on 12 February 2020 and reported to the Appeal Panel.

Medical Assessment Certificate

14. 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

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

16. Ms Kinealy’s submissions include the following:

    - The AMS erred in limiting assessment of upper extremity impairment (UEI) and WPI to the injured right finger.
    - In respect of incorrect criteria:

        (a) the AMS failed to give proper or sufficient reasons as to why he declined to assess the UEI and WPI for the right wrist and shoulder, each being a component of the worker's injured right upper extremity that has sustained impairment stemming from the subject injury, and

(b) the AMS incorrectly applied the provisions of the AMA 5 and the Guidelines by failing to combine the UEIs for the right wrist and shoulder to the UEI assessed for the right middle finger, before converting the total UEI (for the right upper extremity) to WPI.

- In respect of error, the AMS erred in failing to consider pertinent parts of the medical evidence before him. The AMS erred in failing to properly assess the UEI and WPI for the right upper extremity, to include the impairments to the right wrist and shoulder, which was at odds with significant parts of the medical evidence.
- Ms Kinealy, at paragraph 29 of her statement dated 23 September 2019, stated: "The pain has spread to my right shoulder over time .... ".
- Dr James Bodel, at page 2 of his report dated 4 June 2019 summarised the worker's injuries and noted "Right middle finger" and "Right hand'' and "Consequential problem involving the right arm".
- At page 3 of his report, Dr Bodel noted: "The pain over time has spread to involve the right shoulder and she is taking medication including up to three Endone tablets per day". "She has pain that radiates up to the shoulder."
- Dr Bodel found a restricted range of shoulder movement and a restricted range of wrist movement on the right side. At page 6 of his report, Dr Bodel wrote: "She has subsequently developed consequential stiffness in the region of the right wrist and the right shoulder and has undergone multiple surgical procedures to improve function".
- At page 7 of his report, Dr Bodel wrote: "There is a direct causal link between the episode of injury that occurred in the index finger and the consequential condition in the wrist and the shoulder that have occurred as a result of that accident." At page 8 of his report, Dr Bodel wrote: "This lady's current symptoms and the totality of her problems with the right upper limb have arisen as a consequence of the work injury".
- Dr Mina Nakhla, treating General Practitioner, provided a report dated 16 September 2019 which stated: "The outcome of the surgery was uneventual [(sic] and resulted in permanent deformity and stiffness, that affected the whole R arm now''. "Ms Kinealy has sensory loss in a distribution of C7/C8 nerve R hand. There is C7/C8 neurological involvement".
- Dr David Bradshaw, treating Orthopaedic/Hand Surgeon, in a report dated 6 April 2018 wrote: "She also reports pain radiating up her upper limb as far as the shoulder and intermittent swelling, discolouration, pain and an atypical burning type pain across the whole hand". Dr Bradshaw performed a right middle finger trigger release and a right wrist extended median neurolysis on 24 October 2016.
- Dr Constantine Glezos, treating Specialist Orthopaedic Surgeon, in a report dated 18 October 2018, said: "Jan's main complaint is of ongoing numbness, weakness and pain in the hand which radiates up to the neck at times". In a report dated 13 December 2018, Dr Glezos wrote: "The MRI excludes any cervical pathology and the repeat NCS show ongoing median nerve sensory dysfunction at the right wrist".
- Dr Pillemer in his report dated 8 August 2019 noted that Ms Kinealy had ongoing problems with her right upper extremity. He wrote: "I note that she has also had three surgical procedures on her right wrist and hand .... ".

" ... ever since the injury she felt numbness in the whole of her right hand apart from her thumb, extending up the forearm region and every now and then she would get sharp shooting pains extending up towards her right shoulder region…Noting the full range of pain free cervical movement suggests that she may well have had traction injuries of the C7 and C8 nerve roots or possibly a brachia/ plexus traction injury”.

- The AMS failed to have regard to the weight of the available evidence regarding the right wrist and shoulder and focused on the evidence that dealt solely with the right middle finger.
- At page 3 of the MAC, the AMS recorded the following: "The right hand feels numb ... She describes pain radiating from the volar surface of the right hand all the way up to the shoulder”.
- However, at page 4 of the MAC, the AMS wrote: "It is emphasised that there is no history of injury to any other component such as the wrist, shoulder or any other joint mechanism of the right upper extremity"." ... there is no history of any association with the wrist, shoulder or any other major joint of the right upper extremity". This was incorrect, having regard for the contemporaneous complaints made by Ms Kinealy and evidenced in the reports detailed above. The overwhelming weight of the available evidence establishes that Ms Kinealy, since the date of injury, both contemporaneously and on an ongoing basis, complained of impairment to her right hand, wrist/forearm and shoulder.
- Section 322(2) of the 1998 Act provides that: "Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker”.
- The AMS has erred in failing to assess the obvious and documented impairments to Ms Kinealy's right wrist and shoulder (right upper extremity) together with the impairment to the right middle finger, which all stem from the subject injury. This constitutes a demonstrable error in the MAC.
- Having regard for all of the available evidence, the only finding open to the AMS was to factor in the impairments to the right wrist and shoulder into his calculations of UEI and WPI.

17. The respondent’s submissions include the following:

- In response to the appellant’s submission that the MAC contains a demonstrable error:

  (a) the matters raised by the appellant do not provide the basis for the ground of appeal, and

  (b) the MAC does not contain a demonstrable error within the meaning of s 327(3)(d) of the 1998 Act. In response to the appellant’s submission that the assessment was made on the basis of incorrect criteria:

  (a) the matters raised by the appellant do not provide a basis for the ground of appeal, and

  (b) the assessment was not made on the basis of incorrect criteria within the meaning of s 327(3)(c) of the 1998 Act.

- The assessment is correct and 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. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 (*Siddik*). The Court held that while prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gateway, it can consider other grounds capable of coming within one or other of the s 327(3) heads, if it gives the parties an opportunity to be heard. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation.

21. Section 327(2) was amended with the effect that while the appeal was to be by way of review, all appeals as at 1 February 2011 were limited to the ground(s) upon which the appeal was made. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 Davies J considered that the form of the words used in s 328(2) of the 1998 Act being, 'the grounds of appeal on which the appeal is made' was intended to mean that the appeal is confined to those particular demonstrable errors identified by a party in its submissions.

22. In this matter, the Registrar has determined that he is satisfied that at least one of the grounds of appeal under s 327(3)(d) is made out, in relation to the AMS's assessment of Ms Kinealy's right upper extremity.

23. The Appeal Panel reviewed the history recorded by the AMS, his findings on examination, and the reasons for his conclusions as well as the evidence referred to above. The Appeal Panel accepts the findings on examination that the AMS made in the MAC.

Assessment of right upper extremity

24. Ms Kinealy submitted that the AMS erred in limiting assessment of UEI and WPI to the injured right finger and in failing to consider pertinent parts of the medical evidence before him. Ms Kinealy argued that the AMS failed to give proper or sufficient reasons as to why he declined to assess the UEI and WPI for the right wrist and shoulder, each being a component of Ms Kinealy's injured right upper extremity that has sustained impairment stemming from the subject injury.

25. On page 2 of the MAC under "Present symptoms", the AMS wrote:

> "The right hand feels numb. Occasionally, it is also cold. She describes pain radiating from the volar surface of the right hand all the way up to the shoulder."

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26. On page 4 of the MAC, the AMS wrote:

> "Mrs Kinealy gives a history of a hyper-extension injury to her right middle finger, which occurred in October 2016. It was identified that this caused damage to the collateral ligaments of the PIP joint. It is emphasised that there is no history of injury to any other component such as the wrist, shoulder or any other joint mechanism of the right upper extremity."

27. Under "Reasons for Assessment" the AMS wrote;

> "The impairment of the right middle finger relies on the virtual ankylosis of the proximal interphalangeal joint and also the gross sensory dysfunction on either side of the finger. From Page 463, Figure 16-23, the ankylosis gives 53% finger impairment. From Page 438, Table 16-01, this equates to 8% impairment of the hand. This in turn is converted to 7% upper extremity impairment from Table 16-02 on Page 439.
>
> The neurological dysfunction is identified in Table 16-15 on Page 492 of AMA 5. The maximum impairment for the radial palmar digital nerve is 5% upper extremity impairment and on the ulnar side, is 4%. These figures are added, giving 9% upper extremity impairment.
>
> This is combined with the 7% upper extremity impairment from the ankylosis of the joint. Bearing in mind that the neurological sensation is extremely dense on each side of the finger, the maximum sensory impairment has been selected."

28. At Part 10(c) of the MAC, the AMS wrote:

> "The only other report in the file in which whole person impairment is calculated is from Specialist Orthopaedic Surgeon, Dr James Bodel in his report of 04/06/19. He has also given impairments associated with this event of the right wrist and shoulder. For the reasons already given, I am not persuaded that this is appropriate and that the whole person impairment should be restricted to the injured part alone. Therefore, there is quite a divergence in the impairment assessments."

29. The matter was referred to the AMS for assessment of the right upper extremity. The claim made by Ms Kinealy was based on the assessment of Dr Bodel, who calculated a total WPI based on restriction of movement in the right shoulder, restriction of movement in the right wrist, restriction of range of movement in the right middle finger, sensory loss in the right middle finger and joint replacement in the right middle finger. The respondent did not dispute injury to the right shoulder or right wrist.

30. The AMS determined that the WPI should be restricted to the injured part alone, that is the right middle finger. He decided that there is no history of injury to any other component such as the wrist, shoulder or any other joint mechanism of the right upper extremity. While the Appeal Panel accepted that there was no history of a frank injury to any other component apart from the right middle finger on 22 October 2016, the AMS failed to consider the question of whether there was a secondary condition affecting the wrist or shoulder. Further, the issue of injury is a matter for an Arbitrator to determine and not an AMS (*Ooi v NEC Business Solutions Limited* [2006] NSW WCCPD131, *Connor v Trustees of the Roman Catholic Church* [2006] NSW WCCPD124 [at 43]). The Appeal Panel considered that the AMS erred in determining that there was no injury to the right shoulder and wrist.

31. The Appeal Panel also considered that the AMS had failed to provide adequate reasons for excluding an assessment of the wrist and shoulder given the evidence in this matter and, in particular, the fact that Ms Kinealy had three operations on her hand including surgery on her wrist.

32. As noted above, Dr Harvey-Sutton re-examined Ms Kinealy on 12 February 2020. Dr Harvey-Sutton provided the following report.

> **"1. The worker's medical history, where it differs from previous records**
> I read her the history relating to the injury from the MAC of Dr Tim Anderson and she indicated that it was correct.
>
> **2. Additional history since the original Medical Assessment Certificate was performed**
> Nil.
>
> **3. Findings on clinical examination**
>
> I observed Ms Kinealy in the waiting room and also in the consultation room. She was of short, slight physique of reported height 4'6½" and weight 36kg.
>
> She presented in a genuine and straightforward manner and there were trophic changes of debility on clinical examination.
>
> In relation to her right upper limb, she described having pain in her middle finger, like a hot pin and it goes all the way up through her arm, including her right wrist and right shoulder.
>
> She showed me how she had cleaned the scanner on the day of the accident and how the accident occurred and her short height was consistent with the nature of the injury occurring.
> She had restricted ranges of movement of the right shoulder. She had no restricted range of movement of the left shoulder.
>
> On formal examination of active ranges of shoulder movements, as measured with a goniometer and according to AMA5 methodology, the ranges of shoulder movements were as follows:

MOVEMENT	RIGHT	LEFT	NORMAL
Flexion	140º	180º	60º
Extension	40º	50º	60º
Abduction	120º	180º	20º
Adduction	20º	50°	30º
Internal rotation	60º	90º	80º
External rotation	60º	90º	80º

> There were positive shoulder impingement tests on the right side but not the left side.
>
> There was no restriction of elbow movement in the right elbow or the left elbow.
>
> There was no restricted range of left wrist movement.
>
> There was a restricted range of right wrist movement. On formal examination of active ranges of wrist movements, as measured with a goniometer and according to AMA5 methodology, the ranges of wrist movements were as follows:

MOVEMENT	RIGHT	LEFT	NORMAL
Flexion	50°	60°	60°
Extension	50°	60°	60°
Radial deviation	20°	20°	20°
Ulnar deviation	25°	30°	30°
Pronation	80°	80°	80°
Supination	80°	80°	80°

In the right hand/fingers, there was a full range of finger movements in both hands, except the middle finger of the right hand. On formal examination of active ranges of middle finger movements, the ranges of middle finger movements were—30° of active flexion in the proximal interphalangeal joint of the right middle finger, and lack of 20° of active extension. There was a full range of metacarpophalangeal movement and distal interphalangeal movement in that area.

There was partial sensory loss involving the whole of the right middle finger involving the ulnar and the radial digital nerves.

There was scarring consistent with surgery to the finger, with well healed surgical scars, including at the wrist and thumb of the hand and about the right middle finger. There was colour contrast of the surrounding skin as a result of pigmentary changes. She was easily able to locate the scars. She was conscious of the scars. There were minimal trophic changes on the scars. The anatomic location of the scars is usually visible with usual clothing. There was minor contour defect. There was no adherence.

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

There have been no further investigations performed."

33. The Appeal Panel has adopted the report and findings of Dr Harvey-Sutton.

34. The Appeal Panel also adopted the following calculations made by Dr Harvey Sutton.

35. In relation to the right shoulder:

MOVEMENT	FIG/PAGE NO.	RANGE OF MOTION	IMPAIRMENT (UE)
Flexion	Fig.16-40, page 476	140°	3% UE
Extension	Fig.16-40, page 476	40°	1% UE
Abduction	Fig.16-43, page 477	120°	3% UE
Adduction	Fig.16-43, page 477	20°	1% UE
Internal rotation	Fig.16-46, page 479	60°	2% UE
External rotation	Fig.16-46, page 479	60°	0% UE
Sub Total			**10% UE**

36. In relation to the right wrist:

MOVEMENT	FIG/PAGE NO.	RANGE OF MOTION	IMPAIRMENT (UE)
Flexion	Fig.16-28, page 467	50°	2% UE
Extension	Fig.16-28, page 467	50°	2% UE
Radial deviation	Fig.16-31, page 469	20°	0% UE
Ulnar deviation	Fig.16-31, page 469	25°	1% UE
Pronation	Fig.16-37, page 474	80°	0% UE
Supination	Fig.16-37, page 474	80°	0% UE
Sub Total			**5% UE**

37. In relation to the middle right finger, the range of movement in the proximal interphalangeal joint of the right middle finger and the associated partial sensory loss involving the whole of the right middle finger was assessed using Figure 16-23 on page 463 and a sensory impairment using Table 16-7 on page 448. This gave a total of 62% digital impairment. This converted to a 12% impairment of the hand using Table 16-1 on page 438 and from Table 16-2 on page 439 and a 11% UEI.

38. There was also the joint replacement, which was assessed using Table 16-27 on page 506 and that accounted for a 2% UEI.

39. Therefore, in relation to the region of the right middle finger therefore there was a total of 13% UEI.

40. In summary the Appeal Panel assessed 10% UEI of the right shoulder, 5% UEI of the right wrist and 13% UEI of the right middle finger.

41. These assessments were combined using the Combined Values Chart on page 604 of the AMA 5 Guides, giving a 26% UEI in total. This converted to a 16% WPI.

42. In respect of scarring, the Appeal Panel assessed 1% WPI under the TEMSKI scale. Dr Harvey-Sutton found that there was scarring consistent with surgery to the finger, with well healed surgical scars, including at the wrist and thumb of the hand and about the right middle finger. There was colour contrast of the surrounding skin as a result of pigmentary changes. Ms Kinealy was easily able to locate the scars and was conscious of the scars. There were minimal trophic changes on the scars. The anatomic location of the scars is usually visible with usual clothing. There was minor contour defect. There was no adherence.

43. Therefore, in total, the Appeal Panel assessed 17% WPI as a result of the injury on 22 October 2016.

44. For these reasons, the Appeal Panel has determined that the MAC issued on 7 November 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **4933/19**
Applicant: **Jan Neridah Kinealy**
Respondent: **State of New South Wales – Central Coast Local Health District**

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 Anderson 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 the Guidelines**	**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)**
Right upper extremity	22/10/16	Chap 2; P 10	P 463; F16-23 P 448; F 16-07 P 438; F 16-01 P 439; F16-02 &03 P 506; F 16.27 P 476; F16.40 P 477; F16.43 P 479; F 16.46	16%	0	16%
Scarring	22/10/16	Page 74 T 14.1		1%	0	1%
Total % WPI (the Combined Table values of all sub-totals)					**17%**	

Carolyn Rimmer
Arbitrator

Dr Drew Dixon
Approved Medical Specialist

Dr Philippa Harvey-Sutton
Approved Medical Specialist

2 March 2020

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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar