WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-835/19**
Appellant:	**George Weston Foods Ltd**
Respondent:	**Ganeshwaran Gounder**
Date of Decision:	**1 May 2020**
Citation:	**[2020] NSWWCCMA 83**

Appeal Panel:	
Arbitrator:	**Mr John Harris**
Approved Medical Specialist:	**Dr Margaret Gibson**
Approved Medical Specialist:	**Dr Roger Pillemer**

BACKGROUND TO THE APPLICATION TO APPEAL

1. Mr Ganeshwaran Gounder (the respondent) suffered injury whilst in the course of the employment with George Weston Foods Ltd (the appellant). The respondent suffered an accepted compensable injury to the right shoulder on 8 April 2015 and a consequential condition to the left shoulder.

2. The respondent claimed compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) based on the report of Dr Woo dated 20 August 2018.[1] Dr Woo assessed the respondent at 16% whole person impairment (WPI).

3. No liability issues were raised by the appellant. A notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) asserted that the respondent did not reach the threshold for the entitlement to permanent impairment compensation.

4. An Application to Resolve a Dispute (Application) was then filed claiming permanent impairment compensation pursuant to s 66 of the 1987 Act.

5. The s 66 claim was then referred by the Registrar of the Workers Compensation Commission to Dr Assem, an Approved Medical Specialist (AMS) who initially examined the respondent and provided a Medical Assessment Certificate dated 10 April 2019 (former MAC). The AMS then concluded that the respondent displayed markedly restricted movement on repetitive testing and "marked inconsistency in shoulder range of motion compared to the findings of other medical examiners".[2] Assessment of WPI was then delayed.

6. The assessment was subsequently referred to the AMS who again examined the respondent and provided a Medical Assessment Certificate dated 13 February 2020 (MAC). The AMS determined that the respondent had combined WPI of 15% comprising 8% impairment of the left upper extremity and 8% for the right upper extremity.

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[1] Application, pages 1-11.
[2] Former MAC, paragraph 7.

7. The assessment of WPI is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[3] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth edition guidelines prevail.[4]

8. The relevant findings by the AMS pertinent to the various grounds of appeal are set out later in these Reasons.

THE APPEAL

9. On 28 February 2020, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).

10. 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 (the Guidelines).

11. The appellant claims that the medical assessment by the AMS should be reviewed on the ground that the assessment was made on the basis of incorrect criteria and/or that the MAC contains a demonstrable error.

12. The Appeal was filed within 28 days of the date of the MAC. The submissions in support of the grounds of appeal are referred to later in these Reasons.

REVIEW

13. The Appeal Panel (AP) conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Guidelines. As a result of that preliminary review, the AP determined that no ground of appeal had been established.

14. The appellant did not request a re-examination. The respondent submitted that the matter can be determined on the papers.

15. As no error has been established the AP is not otherwise empowered to undertake a further assessment.[5]

EVIDENCE

16. The AP has before it all the documents that were sent to the AMS for the original assessment and has taken them into account in making this determination. Where relevant, these documents are referred to in the Reasons of the AP.

17. Dr Woo was qualified by the respondent and provided a report dated 20 August 2018. The doctor assessed impairment based on loss of range of motion at 8% for each extremity.[6] The doctor incorrectly combined the assessments to 16% WPI when the corrected assessment using the combined tables is 15%.

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[3] The 4th edition guidelines are issued pursuant to s 376 of the *Workplace Injury Management and Workers Compensation Act 1998.*

[4] Clause 1.1 of the fourth edition guidelines.

[5] *New South Wales Police Force v Registrar of the Workers Compensation Commission* [2013] NSWSC 1792 at [32]-[33].

[6] Application, p 3.

18. Dr Breit was qualified by the appellant and provided a report dated 19 December 2018.[7] On examination, the doctor reported no obvious wasting or deformity and stated that "both shoulders displayed the same features of deliberate and unbelievable restriction of movement".[8]

19. Dr Breit concluded that the respondent was "deliberately limiting his range of movement". The doctor opined that range of movement was an inappropriate mode of assessment in these circumstances. Dr Breit provided an assessment of 9% WPI.

SUBMISSIONS and REASONS

Incorrect application of fourth edition guidelines - clause 1.36

Submissions

20. The appellant noted that the AMS examined the respondent on two occasions, originally in early 2019 and for the purposes of the current MAC. It submitted that on both occasions the AMS noted marked inconsistencies on physical examination and that the respondent appeared to be self-limiting his performance. It was noted that these observations were consistent with the opinion expressed by Dr Breit in a report dated 19 December 2018 where the doctor noted evidence of deliberate and unbelievable restriction of movement.

21. The appellant referred to the opinion expressed by the AMS that range of motion was not a reliable and valid method of determining the level of impairment.

22. The appellant submitted:[9]

> "[T]here can be no doubt that the Approved Medical Specialist did not consider range of motion to be an appropriate method for determining level of impairment. However, the Approved Medical Specialist then adopts assessments of Dr Woo, which are in fact based on range of motion.
>
> The Appellant submits that on the Approved Medical Specialist's own findings and the balance of the evidence, range of motion is not correct criteria for the assessment of Whole Person Impairment in relation to the Respondent worker and that by adopting Dr Woo's Assessments, which were based on range of motion, the assessment has been made on the basis of incorrect criteria."

23. The appellant submitted that this was an application of incorrect criteria as discussed by Wood J in *Campbelltown City Council v Vegan*.[10]

24. The appellant submitted that for the same reasons, there was an error which is readily apparent from the MAC. This is a demonstrable error as discussed by Hoeben J in *Merza v Registrar of the Workers Compensation Commission*.[11]

25. It was submitted that whilst the AMS correctly referenced paragraph 1.36 of the fourth edition guidelines as "providing an approach where there is inconsistency on presentation, yet he has failed to adopt that approach for the purposes of assessment of this worker."[12]

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[7] Reply, p 1.
[8] Reply, p 3.
[9] Appellant's submissions, paragraphs 2.7-2.8.
[10] [2004] NSWSC 1129.
[11] [2006] NSWSC 939.
[12] Appellant's submissions, paragraph 2.11.

26. The appellant further submitted that the AMS, by adopting measurements taken by another practitioner on another day, has not complied with clause 1.6a of the fourth edition guidelines.

27. The respondent referred to the history of the matter including the nature of the injury and the assessments undertaken by Dr Woo. It was noted that Dr Woo recorded the largest range of motion found by any medical examiner and "this represented the most accurate recording of the Respondent's impairment".

28. It was submitted that the conclusion reached by the AMS was "both sensible and logical" as later examinations were complicated by a developing pain syndrome and that it is "logical that those measurements taken by Dr Woo in 2018 represent the true underlying impairment."

29. The respondent noted that the appellant does not suggest any method which could be used to assess impairment and that Dr Breit offered no reasoning as how he arrived at an assessment of 9%.

30. The respondent referred to the appellant's construction of paragraph 1.6a of the fourth edition guidelines and submitted that it failed to consider the concluding words of the paragraph. The respondent submitted:

> "In any event, the AMS has complied with paragraph 1.6a. He conducted an examination and reached a clinical assessment that the presentation on the day of the assessment did not represent a proper measure of whole person impairment. The AMS considered that assessment together with the relevant medical material to reach a conclusion that was both logical and consistent with the guidelines."

Reasons

31. Clause 1.36 of the fourth edition guidelines provides:

> "AMA5 (p 19) states: 'Consistency tests are designed to ensure reproducibility and greater accuracy. These measurements, such as one that checks the individual's range of motion are good but imperfect indicators of people's efforts. The assessor must use their entire range of clinical skill and judgment when assessing whether or not the measurements or test results are plausible and consistent with the impairment being evaluated. If, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the assessor may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing.' This paragraph applies to inconsistent presentation only."

32. The reasons of the AMS relevant to assessment were:[13]

> "Active range of motion was markedly restricted on repetitive testing. He claimed that his condition has gradually worsened from the assessment completed by Dr Breit on 19 December 2018. I also brought to his attention that Dr Woo examined him on 20 August 2018 and again in 2019 with a much better range of motion. He reiterated that his condition has continued to deteriorate.
> …
> He continued to have marked restriction in shoulder motion on repeated testing despite verbal encouragement. Surprisingly, even flexion of his elbow more than 90° was accompanied by shoulder pain. Even wrist flexion, extension, radial deviation and ulnar deviation were accompanied by complaints of sharp pain in both shoulders which is anatomically untenable. Neurological examination was normal."

[13] MAC, paragraph 5.

33. The AMS found that the respondent displayed inconsistent presentation and stated:[14]

> "He has a marked inconsistency in shoulder range of motion compared to the findings of other medical examiners. The limitations observed were not consistent with the pathology identified on radiological imaging. Range of motion testing was therefore not a valid and reliable method of determining his level of impairment."

34. The AMS stated that his assessment was based on a consideration of historical details, the continuing complaints, his findings on examination, the investigations and the attached medical documentation[15]. The reasons provided for the assessment of 15% were as follows:[16]

> "Mr Gounder continues to demonstrate a marked restriction in shoulder motion. Although his movements have improved since my previous assessment, there is still some internal inconsistencies and inconsistencies with the range observed by other medical examinations. He appeared to self-limit his performance as noted by complaints of shoulder pain with movements at remote areas including wrist flexion, extension and radial deviation. Range of motion was therefore not a reliable and valid method of determining his level of impairment as it cannot be reproduced by other medical examiners.
>
> In order to resolve the dispute, I have taken into consideration reports of Dr Woo dated 20 August 2018 where he clearly awarded a combined whole person impairment of 16%. In a further report by Dr Woo on 17 June 2019, he demonstrated a similar restriction in shoulder motion. Dr Woo considered that Mr Gounder had stabilised for the purpose of assessment of whole person impairment and considered that his shoulder movements were consistent. I have therefore accepted the maximum range of motion observed by Dr Woo to be a more accurate method of determining his level of impairment which were reproduced as follows."

35. Clause 1.36 of the fourth edition guidelines provides the AMS with the ability/power to modify the impairment rating where there is "inconsistent presentation" and relevantly provides that:

> "the assessor may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing".

36. The AP does not accept the appellant's construction of clause 1.36 that the AMS cannot use prior range of motion assessments in making the determination. The wording of the provision states that the AMS may "modify the impairment rating accordingly". A plain construction of these words is that the AMS can reduce the impairment subject to explaining the reasons for the modification in writing. It is not inconsistent with the wording in the clause that an AMS could use prior ranges of motion in making the assessment of WPI.

37. The AMS has explained his reasons and said he based the decision on a consideration of historical details, the continuing complaints, his findings on examination, the investigations and the attached medical documentation.

38. Given the manner in which the respondent has exaggerated his movements, the ultimate determination of the AMS may be seen as generous. However, the manner in which the ground of appeal was articulated is that the AMS was not entitled to use a prior range of movement when evaluating a worker in accordance with clause 1.36. The AP does not accept that this is a proper construction of this provision.

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[14] MAC, paragraph 7.
[15] MAC, paragraph 9.
[16] MAC, paragraph 10(a).

39. The appellant noted that the AMS stated that "range of motion was therefore not a reliable and valid method of determining … level of impairment"[17] and then inconsistently proceeded to assess on a basis that he indicated was inappropriate. The AP reads the AMS' observation as meaning the range of motion demonstrated during the assessment was not a reliable and valid method of demonstrating assessment. The AMS obviously determined that the prior range of motion was acceptable for the reasons he provided.

40. In *Marina Pitsonis v Registrar of the Workers Compensation Commission*[18] (*Marina Pitsonis*), Mason P stated:[19]

> "The reasons of an administrative decision-maker (especially one who is not a judge) are not to be *'construed minutely and finely with an eye keenly attuned to the perception of error'* (see *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at 271-2, approving *Collector of Customs v Pozzolanic* (1993) FCR 280 at 287). A court should exercise restraint lest it mistakes looseness in language for errors of substance."

41. Similar observations were made by Handley AJA in *Lukacevic v Coates Hire Operations Pty Limited* [2011] NSWCA 112[20] and recently by the Court of Appeal in *Vannini*.[21]

42. The AP is of the view that the comments made by the AMS are also aptly described as looseness in language rather than one of substance.

43. Accordingly, the AP does not accept that the AMS has applied incorrect criteria as discussed by the Court of Appeal in *Marina Pitsonis*[22] and by Basten JA in *Campbelltown City Council v Vegan*[23].

44. The appellant otherwise submitted that the application of incorrect criteria also amounted to a demonstrable error. The concept of "demonstrable error" was recently discussed by the Court of Appeal in *Vannini v Worldwide Demolitions Pty Ltd* (*Vannini*),[24] where Gleeson JA observed that, consistent with the observations of Basten JA in *Mahenthirarasa v State Rail Authority of New South Wales,* a "demonstrable error must be apparent in findings of fact or reasoning contained in the medical assessment certificate, although the error may be established in part by reference to materials that were before the approved medical specialist".[25]

45. The AP does not accept that there is any demonstrable error in the manner in which the AMS reached his assessment. The AMS explained his reason and, as we discussed, was entitled to reach the decision he ultimately made.

46. The appellant otherwise submitted that the decision to adopt a prior range of motion was inconsistent with clause 1.6a of the fourth edition guidelines. Clause 1.6a provides:

> "Assessing permanent impairment involves clinical assessment of the claimant as they present on the day of assessment taking account the claimant's relevant medical history and all available relevant medical information to determine … the degree of permanent impairment that results from the injury".

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[17] MAC, paragraph 10(a).
[18] [2008] NSWCA 88.
[19] with whom McColl JA and Bell JA agreed (as their Honours then were)) at [31].
[20] at [107], Hodgson JA agreeing.
[21] [2018 NSWCA 324 at [1], [94] and [113].
[22] at [40]-[42], McColl and Bell JJA (as their Honours then were) agreeing.
[23] [2006] NSWCA 284 at [94], McColl JA agreeing.
[24] [2018] NSWCA 324 (*Vannini*) at [90].
[25] *Vannini* at [86].

47. The clause requires the AMS to use his clinical assessment as the worker presents on the day of the assessment. However, the clause clearly states that the AMS is not restricted to these matters.

48. The AMS clearly used his clinical assessment in assessing the respondent on the day of the assessment. He used that clinical assessment in determining that he would not accept the gross and exaggerated responses made by the respondent. However, the clause does not prevent the AMS from using historical information and indeed, the clause specifically directs attention to those matters.

49. The reasons provided by the AMS are a determination on the date of the assessment taking into account historical matters in making that assessment.

50. The AP does not accept that the decision reached by the AMS is in breach of clause 1.6a of the fourth edition guidelines.

51. We do not accept that an application of incorrect criteria and/or demonstrable error is shown based on this ground and on how the appeal has been argued.

DECISION

52. For these reasons, the Medical Assessment Certificate given in this matter is confirmed.

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*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar