WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4684/19**
Appellant:	**Simon John Etcell**
Respondent:	**Cobar Management Pty Ltd**
Date of Decision:	**17 April 2020**
Citation:	**[2020] NSWWCCMA 75**

Appeal Panel:	
Arbitrator:	**Jane Peacock**
Approved Medical Specialist:	**Dr Roger Pillemer**
Approved Medical Specialist:	**Dr Gregory McGroder**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 13 December 2020 Mr Simon John Etcell (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Gregory Burrow, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 15 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).

PRELIMINARY REVIEW

6. 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.

7. As a result of the Appeal Panel's preliminary review, the Appeal Panel determined that it was necessary for the worker to undergo a further medical examination as the Appeal Panel was satisfied that the AMS had made an error in the assessment of the thoracic spine as set out in the Panel's reasons below.

EVIDENCE

Documentary evidence

8. 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

9. Dr Roger Pillemer of the Appeal Panel conducted an examination of the worker on 13 March 2020 and reported to the Appeal Panel.

Medical Assessment Certificate

10. 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

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

FINDINGS AND REASONS

12. 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.

13. 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.

14. The matter was referred by the Registrar to the AMS as follows:

> "The following matters have been referred for assessment (s 319 of the 1998 Act):
>
> - **Date of injury:** **20/12/2011**
> - **Body parts/systems referred:** **Cervical spine**
>   **Thoracic spine**
> - **Method of assessment:** **Whole Person Impairment"**

15. The AMS assessed as follows:

Body Part or system	Date of Injury	Chapter, page and paragraph number in WorkCover Guides	Chapter, page, paragraph, figure and table numbers in AMA5 Guides	% WPI	% WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality	Sub-total/s % WPI (after any deductions in column 6)
Cervical spine	20/12/11	Chapter 4 Page 24-29	Chapter 15 Page 392 Table 15-5	7%	1/10	6%
Thoracic spine	20/12/11	Chapter 4 Page 24-29	Chapter 15 Page 389 Table 15-4	0%	nil	0%
Total % WPI (the Combined Table values of all sub-totals)					**6%**	

16. The worker appealed. The complaint on appeal relates to the assessment in respect of the thoracic spine. There is no complaint in respect of the cervical spine.

17. In summary, the appellant submitted on appeal that an error was made in the assessment of the thoracic spine because evidence of compression fractures were wrongly excluded by the AMS.

18. In summary, the respondent submitted that the AMS has not erred and that the MAC should be confirmed.

19. The role of the AMS is to conduct an independent assessment on the day of examination. The AMS is required to take a history, conduct a physical examination, review the special investigations, make a diagnosis and have due regard to other evidence and other medical opinion that is before the AMS. The AMS must bring his clinical expertise to bear and exercise his clinical judgement when making an assessment of impairment and make such assessment in accordance with the criteria in the Guides.

20. Here the AMS took a history as follows:

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment: On 20/12/2011, in the underground mine at work, Mr Etcell was changing a light on a large mining machine, standing on a ladder 2m off the round when he fell backwards, landing on his back and striking his head on a steel bench. Upon landing, he was not knocked out, but he was dazed. Over several minutes, he managed to get himself back up noting head, neck and upper thoracic pain. He was transported to the surface and taken by ambulance to Cobar Hospital and admitted overnight and had x-rays.

The next day he went home to Dubbo and had CT scans on 21/12/2011 at Orana Radiology. The CT scans of the chest, cervical and thoracic spines were performed and reported 'Rotational kyphoscoliosis of the thoracic spine with end plate disc protrusions and spondylitic bone reaction, with 20% wedging of the 2 mid thoracic vertebral bodies which **could be developmental** or due to compression fractures. No paravertebral soft tissue abnormality is seen. ….. Mild degenerative bone reaction is noted around some of the lower cervical discs, particularly C7/T1, no posterior disc protrusion is evident. No hematoma, neck mass or lymphadenopathy is seen.'

Mr Etcell came under the care of his GP. He was certified unfit for work for several months, had extensive non-operative treatment including physio, hydro, acupuncture and medication, and returned to part time restricted duties about 2 months later. He eventually upgraded to full time work but continued with restricted duties including 5kg lifting restriction and no sitting or standing greater than 60 minutes at a time.

He continued having neck and back symptoms ongoing but continued working, however he suffered a left shoulder injury at work in 2014, came under the care of Dr Cass, had initial shoulder surgery which was unsuccessful and had revision shoulder surgery which was also unsuccessful. He has significant ongoing left shoulder problems.

He has been told by Dr Cass that he will require shoulder replacement at some stage.

He also complains of right shoulder symptoms and apparently surgery is planned on the right shoulder in the next several months.

During the shoulder problems, he was discharged from his work from a safety point of view and had retraining as a disability worker and for the last 3½ years has been a disability support worker with 'Life Without Barriers' working permanent part time. Initially, he supervised foster children and meetings, and he is now working in a Disability Support Home, but he avoids heavy lifting and usually works with another adult.

- Present treatment: Mr Etcell takes no significant analgesia currently, but uses Panadol Osteo, as required.

He continues to attend physiotherapy on a weekly-fortnightly basis and performs his own hydrotherapy.

He underwent massage, acupuncture and injections for 8 years. He is involved in none of these now and no surgery is planned for the short or medium term.

- Present symptoms: **Cervical Spine:** Mr Etcell continues to experience midline cervical spine pain, probably worse on the right than the left, into the trapezial area, referred pain to the back of his occiput but also intermittently down his right shoulder, elbow and wrist. He has pain also referred to the left trapezius and describes intermittent numbness into the left

hand, particularly the thumb. The pain is worse with neck movement, by way of prolonged driving or office work.

Thoracic Spine: Mr Etcell continues to experience interscapular, mid thoracic pain that he measures at 6/10. It is constant and worse with activity.

- Details of any previous or subsequent accidents, injuries or condition: There have been none.

- General health: Mr Etcell suffers from depression, has no medical allergies, does not smoke and does not drink. Apart from the 2 shoulder surgeries noted, his health is benign.

- Work history including previous work history if relevant: Mr Etcell attended high school to Year 10 and finished training as a mechanic. He spent 2 decades working as a mechanic and 10 years working at CSA Mines, and the last 3½ years as a disability support worker.

Apart from his shoulders, he has had no other compensable injuries.

- Social activities/ADL: Mr Etcell is married and lives with his de facto partner in rental accommodation at Dubbo. They have 5 children. The youngest four, from 4-13 years of age, live at home and all are well. His partner is well.

Since his injury, Mr Etcell has had difficulties performing home chores and receives gratuitous assistance from his family. He has had to pay a neighbour to mow the lawns since his injury.

He is able to drive for about an hour but had to sell his motor bike because of recurrent thoracic and neck pain.

He is unable to ride a bicycle because jarring activities irritate the neck and back.

Sports and Hobbies: Mr Etcell is a keen target shooter and has continued with this recreation."

21. The AMS conducted a physical examination which he recorded as follows:

"Mr Etcell is a large man weighing 160kg, standing 196cm tall.

He sat comfortably but rose cautiously and dressed and undressed with caution and protection.

Examination of the upper extremities showed no evidence of CRPS. He did not use a brace or a sling.

Examination of the cervical spine showed normal alignment, but there was no spasm or guarding. Cervical movements were reduced by one half with end range pain. He complained of radicular-type pain, particularly into the left arm and complained of altered sensation in a non- dermatomal distribution from the tip of his shoulder to the inner aspect of his proximal arm.

There was weakness and wasting about the left shoulder particularly about the deltoid and rotator cuff with well healed, almost invisible arthroscopic scars from the known 2 shoulder surgeries.

There was no radicular pattern wasting or weakness of either upper extremity. The biceps and triceps jerks were symmetrical but absent.

Examination of the thoracic spine showed a kyphosis with mid thoracic tenderness between the scapulae. Thoracic rotation was reduced by two thirds.

He had multiple tattoos across his chest and both arms and the upper back."

22. The AMS reviewed the special investigations as follows:

> "20/01/2012: Localised bone scan reported 'Findings are not suggestive of acute fracture'. 'There is moderate kyphosis of the mid thoracic spine with associated low grade discovertebral changes in the mid thoracic region, most marked at T6-T10."

23. The AMS summarised the injury and diagnosis as follows:

> "Mr Etcell fell off a 2m ladder at work in 2011 and had neck and back pain thereafter. Initial CT scan showed compression and loss of vertebral height of the thoracic spine with no acute injury to the cervical spine but with some spondylitic changes at both areas.
> Subsequent bone scan in January 2012 excluded an acute fracture.
>
> The working diagnosis at one stage and reported by Dr Danny O'Keefe, Orthopaedic Surgeon, in a medicolegal report and Dr Tim Anderson, Occupational Physician, in reports in 2018 and 2019, reported thoracic vertebral crush fractures because of the wedging seen on the CT scan, **but did not report that the bone scan excluded an acute fracture**.
>
> ***That is, the bone scan specifically excluded compression fractures of the thoracic spine***.
>
> The diagnosis then is as per Dr Smith's report in April 2019 of degenerative changes in the cervical spine and similar spondylitic changes on the back of Scheuermann's disease (a developmental background constitutional condition) with specific exclusion of acute thoracic compression fractures.
>
> There was no evidence of radiculopathy today, but he has radicular-like symptoms into the left hand in particular."

24. The AMS explained his assessment of impairment in respect of the thoracic spine as follows:

> "**Thoracic Spine:** AMA-5, Table 15-4: DRE Category I: 0% WPI. There is no observed muscle guarding and no neurological impairment.
>
> There is kyphosis present at the initial CT scan consistent with a background constitutional component like Scheuermann's disease. Bone scan specifically excluded acute fracture but wedging in a number of vertebral bodies which is consistent with Scheuermann's disease as opposed to acute injury."

25. The AMS made comment on the other evidence before him as relevant to the right upper extremity and scarring as follows:

> "12/04/2019: Dr Smith confirms compression of the thoracic spine as seen on the CT scan post-work incident, but highlights that the subsequent bone scan excluded any acute bone injury and identifies the background diagnosis of pre-existent albeit asymptomatic Scheuermann's disease resulting in kyphoscoliosis. Dr Smith then assesses thoracic impairment at 0%. I agree for the reasons above.
>
> In relation to the cervical spine, Dr Smith also assesses DRE Category II at 5% whole person impairment but makes no additional impairment for impact of ADLs. I somewhat disagree with Dr Smith's assessment. Dr Smith makes assessment of the impact of ADL, no comment on pre-existing degenerative changes in the cervical spine and does not assess for deductible proportion.

Dr Tim Anderson, Occupational Physician comes to the conclusion there were 2 level compression fractures of the thoracic spine because of the appearance of the CT scan and assesses permanent impairment based on that diagnosis, which is not unreasonable, except that the bone scan specifically excluded acute compression fractures as a result of the work incident. Any impairment due to the pre-existing disease must be disregarded as per AMA 5 and serial instructions. The ongoing impairment then is related to an exacerbation of pre- existent Scheuermann's disease where there is no evidence of spasm, guarding, structural loss or radiculopathy of the thoracic spine on examination today.

In the initial report of June 2018, Dr Anderson records no symptoms related to the cervical spine. In a follow up report in April 2019, Dr Anderson records 'He obviously did have a lot of pain in the neck, although this seems to have been overshadowed to a greater degree by the condition of his mid thoracic spine. As a result, virtually no specific attention was paid to the cervical spine.'

Dr Anderson records that there were no significant features demonstrated in the cervical spine CT scan, but we agree that there is impairment related to the cervical spine consistent with DRE Category II and he made no additional impairment assessment for impact of ADLs, given that this had already been covered in assessment of the thoracic spine.

I note Dr Anderson made no deduction for pre-existing disease regarding the cervical spine despite minor degenerative changes being commented upon on the CT scan and seen on my review of the CT scan images today."

26. The panel notes that the history is that the appellant has fallen from a height of 2 metres, has had ongoing problems with his thoracic spine ever since then, and that on examination there was tenderness between the scapulae and thoracic rotation was reduced by two-thirds.

27. In determining the DRE category for the thoracic spine, the AMS has stated that "There is no observed muscle guarding or spasm and no neurological impairment". On this basis he has placed the appellant in DRE category l. However, the AMS seems to have ignored the extent of the injury as well as the signs and symptoms recorded in his MAC, which should have made him consider DRE category ll, or if not, to have explained why he did not consider this alternative. As noted, the Guides state that "If an assessor is unable to distinguish between two DRE categories, then the higher of these categories should apply" [Guidelines: page 24 item 4.7].

28. The pertinent issues which suggest a DRE II rating, as recorded in the MAC, include:

- History and the extent of the injury : "…standing on a ladder 2m off the ground when he fell backwards landing on his back…
  Symptoms: "Mr Etcell continues to experience interscapular, mid thoracic pain that he measures at 6/10. It is constant and worse with activity".
- Physical signs: "… mid thoracic tenderness between the scapulae. Thoracic rotation was reduced by two thirds".

29. In addition, the AMS indicates that "There is no significant evidence of abnormal illness behaviour", that is, he accepts all of the above. In these circumstances, and irrespective of whether compression fractures were wrongly excluded, the Guidelines require a clear statement of why DRE l was preferred to DRE ll.

30. In these circumstances, the Appeal Panel was satisfied that the AMS made an error in the assessment of the thoracic spine. The appellant was re-examined by an AMS member of the Appeal Panel. Dr Pillemer conducted a re-examination on 13 March 2020 and provided a report to the Appeal Panel as follows:

REPORT OF THE EXAMINATION BY APPROVED MEDICAL SPECIALIST MEMBER OF THE APPEAL PANEL

Matter No:	**M1-4684/19**
Appellant:	**Simon John ETCELL**
Respondent:	**Cobar Management Pty Ltd**

Examination Conducted By:	**Roger Pillemer**
Date of Examination:	**13 March 2020**

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1. The workers medical history, where it differs from previous records

I read Mr Etcell the history that he gave to Dr G Burrow at the time of his consultation on 13 December 2019. Mr Etcell accepted this history and did not want to change or add anything.

2. Additional history since the original Medical Assessment Certificate was performed

On specific questioning today, Mr Etcell informs me that he was complaining of constant pain in the interscapular region extending over a distance of some 12cm with symptoms ranging between 4-9/10. On specific questioning he does get some radiation around his chest wall on both sides going as far as the mid-axillary line.

Symptoms are aggravated by *'fatigue'*, particularly when he has been up and about for any length of time, and he informs me that he is looking after people with disabilities but does not do any physical activity. He does get some relief by having hot showers and doing his own hydrotherapy in a warm pool and taking his Panadol Osteo.

It should be noted that Mr Etcell has significant problems with both shoulders particularly on the left side, and his treating shoulder specialist has suggested that he might eventually require a total shoulder replacement.

3. Findings on clinical examination

Mr Etcell is a tall, strongly and heavily built adult male with a very significant increase in his body mass index.

Findings in relation to his cervical spine and upper extremities are similar to those noted at the time of his Medical Assessment Certificate.

As far as the thoracic spine is concerned, he does complain of tenderness to palpation in the upper/mid-thoracic region and when he flexes forward, his thoracic rotation is painful and more reduced on the right than on the left. These symptoms are all in keeping with non-verifiable radicular complaints.

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

Mr Etcell has not had any further investigations carried out."

31. The Panel notes that the appellant fell from a height of two metres. The fact that he has constant pain in his thoracic region which he has had since his injury, and that his symptoms are very genuine, would on their own place him in DRE Category II of his thoracic spine.

32. In addition he does also have localised tenderness but importantly there is evidence of asymmetry on rotation. This would certainly place him in DRE Category II of the thoracic spine (AMA Guides to the Evaluation of Permanent Impairment, 5th Edition: Page 389, table 15-4. Asymmetric loss of range of movement and non-verifiable radicular complaints).

33. DRE II equates to 5% WPI for the thoracic spine. No additional impairment can be added for ADLs, as this has already been given for the cervical spine.

34. Noting that there is no complaint on appeal about the cervical spine assessment, the assessment of the appeal is as follows:

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in WorkCover Guides**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**% WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality**	**Sub-total/s % WPI (after any deductions in column 6)**
Cervical spine	20/12/11	Chapter 4 Page 24-29	Chapter 15 Page 392 Table 15-5	7%	1/10	6%
Thoracic spine	20/12/11	Chapter 4 Page 24-29	Chapter 15 Page 389 Table 15-4	5%	nil	5%
Total % WPI (the Combined Table values of all sub-totals)					**11%**	

35. For these reasons, the Appeal Panel has determined that the Medical Assessment Certificate issued on 15 November 2019 should be revoked and a new Medical Assessment issued. A new Medical Assessment 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

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **4684/19**
Applicant **Simon John Etcell**
Respondent: **Cobar Management Pty Ltd**

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 Gregory Burrow 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 AMA5 Guides**	**% WPI**	**% WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality**	**Sub-total/s % WPI (after any deductions in column 6)**
Cervical spine	20/12/11	Chapter 4 Page 24-29	Chapter 15 Page 392 Table 15-5	7%	1/10	6%
Thoracic spine	20/12/11	Chapter 4 Page 24-29	Chapter 15 Page 389 Table 15-4	5%	nil	5%
Total % WPI (the Combined Table values of all sub-totals)					**11%**	

Jane Peacock
Arbitrator

Dr Roger Pillemer
Approved Medical Specialist

Dr Gregory McGroder
Approved Medical Specialist

17 April 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*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar