WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-6519/19**
Appellant:	**Neil Morris**
Respondent:	**Enenjay Pty Ltd**
Date of Decision:	**11 June 2020**
Citation:	**[2020] NSWWCCMA 102**

Appeal Panel:	
Arbitrator:	**Carolyn Rimmer**
Approved Medical Specialist:	**Dr Mark Burns**
Approved Medical Specialist:	**Dr Brian Noll**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 9 April 2020, Neil Morris (Mr Morris) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Trevor Best, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 17 March 2020.

2. The respondent is Enenjay Pty Ltd (the respondent).

3. 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.

4. 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.

5. 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.

6. 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

7. In these proceedings, Mr Morris is claiming lump sum compensation in respect of an injury to the left lower extremity which occurred in the course of his employment when he fell about 3.5 meters backwards off a ladder on a truck and onto the ground on 18 May 2017.

8. In Certificate of Determination - Consent Orders dated 16 January 2020, Arbitrator McDonald remitted the matter to the Registrar to refer to an AMS to assess the applicant's permanent impairment as a result of an injury to his left lower extremity (ankle) and TEMSKI suffered on 18 July 2017.

9. In the Further Amended Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 11 March 2020, the matter was referred to the AMS, Dr Best, for assessment of whole person impairment (WPI) of the left lower extremity (ankle) and scarring (TEMSKI), as a result of the injury on 18 May 2017.

10. The AMS examined Mr Morris on 24 February 2020.The AMS assessed 8% WPI of the left lower extremity and 1% for scarring (TEMSKI). These assessments combined to produce a total assessment of 9% WPI as a result of the injury on 18 May 2017.

PRELIMINARY REVIEW

11. 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.

12. The appellant did not request that Mr Morris be re-examined by an AMS, who is a member of the Appeal Panel.

13. As a result of that preliminary review, the Appeal Panel determined that it was unnecessary for the worker to undergo a further medical examination because there was sufficient evidence on which to make a determination.

EVIDENCE

Documentary 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 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

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

17. Mr Morris' submissions include the following:

    (a) The AMS erred in not following Table 3.4 of the Guidelines as required and instead applied Table 17-29 of AMA 5 which Table 3.4 was meant to supersede.

    (b) The AMS did not look at the tibia-os calcis angle which states that Table 3.4 is to replace AMA 5 Table 17-29 and therefore did not apply the correct criterion as set out by Dr Murray Hyde-Page in his report of 24 January 2020.

(c) The AMS formed the following view:

> "Using Table 3.4 for my measurements, this is 5% whole person impairment which is less than the whole person impairment assessment resulting from the Range of Movement Method. According to my measurements, the preferred method is the Range of Movement Method. According to Table 17-2 of the AMA Guides-5th Edition, the Range of Motion Method cannot be combined with the DBE [Diagnostic Based Estimates] Method. However, Dr Hyde-Page has correctly (sic) combined these two methods. Consequently, he has reached a higher impairment than what is permissible by the Guides."

(d) Assuming the AMS had meant "incorrectly" when referring to Dr Hyde-Page's report, it would appear that no regard was had to the supplementary report dated 24 January 2020.

(e) In the report dated 24 January 2020, Dr Hyde-Page explained why he used a different method of reasoning to the other doctors. He stated that he followed the Guidelines "which supersedes AMA 5, in determining the level of WPI with this man's arthrodesis of the subtalar joint."

(f) The AMS made a demonstrable error in failing to make an assessment in line with the Guidelines which supersede AMA 5. The AMS failed to provide reasons why AMA 5 was utilised as opposed to the Guidelines. No regard was afforded to the report of Dr Hyde-Page dated 24 January 2020.

(g) Mr Morris should be reassessed pursuant to the Guidelines as set out in the report of Dr Hyde-Page dated 24 January 2020.

(h) The AMS failed to consider the overriding principles of the Guidelines which provide at 1.14: "The Guidelines may specify more than one method that assessors can use to establish the degree of a claimant's permanent impairment. In that case, assessors should use the method that yields the highest degree of permanent impairment."

(i) Therefore, if it is found that the AMS correctly assessed the level of WPI in accordance with Guideline criteria, the assessment of Dr Hyde-Page was also correctly performed pursuant to the Guidelines and ought to be preferred to that of the AMS as required by Clause 1.14 of the Guidelines yielding a higher level of impairment.

18. The respondent's submissions include the following:

(a) Mr Morris stated that the AMS fell into error by applying Table 17-29 of AMA 5 which had been superseded by 3.4 of the Guidelines. The AMS referred to Table 17-11 and Table 17-12 of AMA 5 but at no point in his assessment did he apply Table 17-29 of AMA 5.

(b) Table 3.4 of the Guidelines makes no reference to any limitation being placed on Tables 17-11 and 17-12 of AMA 5.

(c) The AMS referred to Dr Hyde-Page's report of 28 June 2019 and noted that Dr Hyde-Page had used the tibia-os calcis angle as the method of assessment but had not actually presented the measurements of the angle but appeared to Table 3-4 referring to an angle of less than 90 degrees.

(d) Since Dr Hyde-Page did not state the angle of the tibial-os calcis, there is no way he can determine the impairment.

(e) The AMS did measure the tibial-os calcis angle on the CT scan of the left hind foot carried out on 28 May 2019, which was the latest available radiological investigation. The AMS found the angle to vary from 106 degrees to 110 degrees. He repeated this on the earlier x-ray carried out on 12 December 2018.

(f) The AMS wrote:

> "Using Table 3.4 for my measurements, this is 5% whole person impairment which is less than the whole person impairment assessment resulting from the Range of Movement Method. According to my measurements, the preferred method is the Range of Movement Method."

(g) According to Table 17-2 of AMA 5, the Range of Motion Method cannot be combined with the DBE method. The respondent noted that the AMS stated that Dr Hyde-Page had "correctly combined those two methods" and consequentially reached a higher impairment that what is permissible by the Guidelines. The respondent noted that the use of the word "correctly" would appear to be a reference to the word "incorrectly."

(h) The Guidelines provide at 1.9 that assessors should use the method of assessment that yields the highest degree of permanent impairment. However, the appellant has not provided an assessment of the tibia-os calcis angle less that that angle found by the AMS and there should be no finding of a demonstrable error.

(i) The MAC dated 17 March 2020 should be confirmed.

FINDINGS AND REASONS

19. 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.

20. 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.

21. 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.

22. 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.

23. 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 Mr Morris' permanent impairment of the left lower extremity.

24. 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.

Discussion

25. Mr Morris submitted that the AMS erred in not following Table 3.4 of the Guidelines as required and instead applied Table 17-29 of AMA 5 which Table 3.4 was meant to supersede.

26. Table 3.4 of the Guidelines reads:

> "Tibia-os calcis angle: The table given below for the impairment of loss of the tibia-os calcis angle is to replace AMA5 Table 17-29 (p 542) and the section in AMA5 Table 17-3 (p 546) dealing with loss of tibia-os calcis angle. These two sections are contradictory, and neither gives a full range of loss of angle."

27. On page 4 of the MAC under "summary of injuries and diagnoses" the AMS wrote:

> "Mr Morris has suffered a comminuted fracture of the left os-calcis resulting in residual stiffness of the left ankle and left sub-talar joint as well as residual scar formation and sural nerve damage."

28. On page 5 of the MAC under "Reasons for Assessment" the AMS wrote:

> "An explanation of my calculations (if applicable)
> According to Table 17-11, restriction of dorsiflexion of the left ankle qualifies for 7% lower extremity impairment.
> According to Table 17-12, inversion restriction of the left ankle qualifies for 5% lower extremity impairment and eversion restriction qualifies for 2% lower extremity impairment.
> Combining these impairments, produces a total of 14% lower extremity impairment which converts to 6% whole person impairment.
> According to Table 17-37 of the AMA Guides-5th Edition, sural nerve dysesthesia qualifies for 2% whole person impairment.
> In my view, according to the Table of TEMSKI, the residual scar following surgery to the left hind foot qualifies for 1% whole person impairment.
> (Best Fit analogy)
> Therefore, combining the above produces a total of 9% whole person impairment."

29. In commenting of the other medical opinions, the AMS wrote at pages 5-6 of the MAC:

> "Dr Hyde-Page, in his report dated 28 June 2019, has used the tibia-os calcis angle as method of assessment. However, he has not actually presented the measurements of this angle and appears to have quoted Table 3.4 and used a section of that Table referring to angle of less than 90°. Today I measured that angle on the CT scan of the left hind foot, carried out on 28 May 2019 which is the latest available radiological investigation. Measuring this angle on the lower four pictures of Page 5, I found this angle to vary from 106° to 110°. This was also repeated on the earlier x-ray carried out on 12 December 2018.
>
> Using Table 3.4 for my measurements, this is 5% whole person impairment which is less than the whole person impairment assessment resulting from the Range of Movement Method. According to my measurements, the preferred method is the Range of Movement Method.
>
> According to Table 17-2 of the AMA Guides-5th Edition, the Range of Motion Method cannot be combined with the DBE Method. However, Dr Hyde-Page has correctly combined these two methods. Consequently, he has reached a higher impairment than what is permissible by the Guides."

30. The Appeal Panel reviewed the evidence in this matter including the following reports.

31. Dr Hyde-Page in his report dated 28 June 2019 wrote:

> "Whole person impairment is determined by the fact there is ankylosis of the subtalar joint of the left ankle and complete loss of the tibia-os calcis angle, as well as stiffness in the left ankle joint. There is numbness in the sural nerve.
> With reference to WorkCover Guides 3.18 Page 15 it states ankylosis of the left subtalar joint uses Table 3.1 and then this is added to the loss of the os-calcis angle using Table 3.4 on Page 20 of the Guides. In doing this 15% LEI from Table 3.1, which is added to 37% LEI from Table 3.4 to give 52% LEI.
> In the left ankle the plantar flexion is reduced to 20%. With reference to Table 17-11 Page 537of AMA Guides 5th Edition this gives 7% LEI.
> There is numbness in the sural nerve distribution along the lateral side of the left foot and with reference to Table 17-37 Page 552 of AMA Guides 5th Edition this gives 2% LEI.
> The overall LEI is found by combining 52% with 7% with 2% to give 56% LEI.
> This converts to 22% WPI."

32. Dr Bentivoglio in a report dated 17 October 2019 wrote:

> "I viewed the assessment from this gentleman's solicitor, IME. He has assessed this gentleman as having os calcis angle of 90". I have specifically drawn on the most recent x-ray of this gentleman measured the angle was greater than 115". He has assessed him as having an os calcis angle of less than 90·. That is not appropriate.
> Also, he has assessed a range of movement ankylosis involving his ankle and subtalar joint together with the os calcis angle. (DRE assessment). It is not possible to assess impairments for both of these. It is either necessary to do the os calcis angle or the range of motion model. His os calcis measurement was definitely wrong and even allowing for an os calcis angle to be somewhere between 110-115 degrees would only give a 17% lower extremity impairment which would be in keeping with my whole person impairment rating."

33. Dr Hyde-Page in a report dated 24 January 2020 wrote:

> "Dr Bentivoglio has criticized my report by stating that I did not correctly measure the tibia-os calcis angle and that I then did an inappropriate combination of WPI for the left ankle and foot by combining subtalar joint ankylosis with the WPI from loss of tibial-os calcis angle. Dr Bentivoglio has relied upon Table 17-2 page 526 of AMA Guides 5th Edition to support his opinion.
> However, I would draw your attention to WorkCover Guides page 15, paragraph 3.18, under the heading 'Ankylosis', where it states that, arthrodesis that is not in the optimum position can have other percentage of WPI added using Tables 17-15 to 17-30, AMA Guides 5th Edition.
> I have followed the direction of WorkCover Guides which supersedes AMA Guides 5th Edition and on page 20 the Guides, in looking at tibia-os calcis angle it states that Table 3.4 is to replace AMA Guides Table 17-29.
> I have therefore followed the advice of WorkCover Guides which supersedes AMA5, in determining the level of WPI with this man's arthrodesis of the subtalar joint. I would also point out that everything I have done is under the heading of ' Arthrodesis' and at no times have I consulted the Diagnosis Based Estimates Table."

34. The Appeal Panel agree with the respondent that the AMS assessed impairment under Tables 17-11, Table 17-12 and Table 17-37 of AMA 5 and that the AMS did not apply Table 17-29 of AMA 5.

35. The Appeal Panel noted that the AMS did consider whether he should make an assessment under Table 3.4 of the Guidelines. The AMS specifically stated that he had considered the relevance of the tibia-os calcis angle and that according to Table 3.4 the relevant impairment rating in this regard (according to his measurements) would have been 5% WPI (which would be 12% LEI according to Table 3.4).

36. The AMS indicated that the range of motion methodology was preferable to an assessment under Table 3.4 of the Guidelines as it provided a higher impairment rating. The AMS considered that according to Table 17-2 of AMA5 the range of motion method cannot be combined with the Diagnosis Based Estimates (DBE) method, that is, assessment under Table 3.4 of the Guidelines. The AMS noted that Dr Hyde-Page had 'correctly' [sic] combined these two methods and consequently reached a higher impairment than what is permissible by the Guidelines. The Appeal Panel agreed with the parties that the AMS used the word "correctly" by mistake and the sentence should have read: "However, Dr Hyde-Page has incorrectly combined these two methods".

37. However, the AMS in concluding that according to Table 17-2 of AMA5 the range of motion method could not be combined with the DBE method, that is, assessment under Table 3.4 of the Guidelines, did not explain why the abnormal tibia-os calcis angle (which is a separate entity not specifically related to the disorder of the subtalar joint) should not be taken into account when assessing impairment. The Appeal Panel considered that the injury to the left os-calcis (a comminuted fracture) altered the shape of calcaneum and disrupted the left sub-talar joint and there was impairment from both the sub-talar joint and, in addition, from the fracture of the os-calcis, that is, there was multiple impairment within a region.

38. The Appeal Panel concluded that the loss of tibia- os calcis angle found by the AMS constituted a separate part or entity (namely, an indication of the severity of the fracture of the calcaneus) and that this was separate to the impairment assessment relating to lack of movement of the subtalar joint. Although the impairment due to loss of tibia- os calcis angle is a DBE, it can be combined with the impairment assessed from loss of range of movement of the ankle and subtalar joint as it would constitute the combining of impairment due to there being two

separate parts or entities and the instruction in AMA5 Table 17-2 would not be applicable. In doing so, the Appeal Panel accepts that the decreased range of motion in the subtalar joint is a separate entity from the loss of tibia-os calcis angle due to the altered shape of the calcaneum resulting from comminuted fracture. Each entity could have occurred separately, and the impairments are not a duplication from the same entity.

39. The Appeal Panel concluded that, in all the circumstances, the failure by the AMS to make an assessment under Table 3.4 of the Guidelines was a demonstrable error.

40. The Appeal Panel also noted an error in the calculations in the MAC. The AMS noted that there was 10 degrees of inversion in the foot (mild) and assessed this as 5% LEI. Table 17-12 of AMA 5 provides that the correct figure to be applied for 10 degrees of inversion in the foot (mild) is 2% LEI. The Appeal Panel, therefore, assesses 2% LEI for inversion. An assessment of 5% LEI for 10 degrees of inversion in the left ankle is not an outcome permitted by, or in accordance with Table 17-12 of AMA 5.

41. In making a correction of what is an obvious error, the Appeal Panel noted that Garling J in *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC said that an Appeal Panel had a statutory obligation to conduct its assessment according to law and in particular, the provisions of s 322(1) of the 1998 Act in reviewing the AMS' medical assessment. Those provisions require an assessment of the degree of permanent impairment of an injured worker "*… to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose*". Garling J said: "That law required the Appeal Panel to apply the Guides, which as I have already explained adopt Table 17-33 of AMA-5."

42. The Appeal Panel agree with the assessment made by the AMS in respect of the calculation of impairment of the tibia-os calcis angle under Table 3.4 of the Guidelines. The AMS measured that tibia-os calcis angle on the CT scan of the left hind foot, carried out on 28 May 2019 and found this angle to vary from 106° to 110°.This resulted in 5% WPI or 12% LEI.

43. Taking into account the two errors identified above, the Appeal Panel assessed impairment as follows: 11% LEI from loss of range of motion (Tables 17-11 and 17-12 of AMA 5) combined with 12% LEI assessed under Table 3-4 of the Guidelines and then combined with 5% LEI from sural nerve damage. This results in 26% LEI which converts to 10% WPI. The assessment of 10% WPI for the left lower extremity is then combined with 1% WPI for scarring (TEMSKI) and results in a combined total of 11% WPI in respect of the injury on 18 May 2017.

44. For these reasons, the Appeal Panel has determined that the MAC issued on 17 March 2020 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*.

A Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **6519/19**
Applicant: **Neil Morris**
Respondent: **Enenjay 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 Trevor Best 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 NSW workers compensation guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality** (expressed as a fraction)	**Sub-total/s % WPI** (after any deductions in column 6)
1. Left lower extremity	**18/05/2017**	Chapter 3, Pages 13-19 Table 3-4	Chapter 17, Page 523-564 Table 17-11 and 17-12	10%	0%	**10%**
2. Scarring	**18/05/2017**	Chapter 14, Page 84, Table of TEMSKI	Chapter 8	**1%**	0%	**1%**
Total % WPI (the Combined Table values of all sub-totals)						**11%**

Carolyn Rimmer
Arbitrator

Dr Mark Burns
Approved Medical Specialist

Dr Brian Noll
Approved Medical Specialist

11 June 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*.

A Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar