

WORKERS COMPENSATION COMMISSION

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

Matter No:	M1-664/19
Appellant:	Dazallis Pty Ltd
Respondent:	Catherine Louise Plumridge
Date of Decision:	1 August 2019
Citation:	[2019] NSWCCMA 109

Appeal Panel:	
Arbitrator:	Mr John Harris
Approved Medical Specialist:	Dr Drew Dixon
Approved Medical Specialist:	Dr David Crocker

BACKGROUND TO THE APPLICATION TO APPEAL

1. Ms Catherine Plumridge (the respondent) suffered injury on 25 August 2013 in the course of her employment with Dazallis Pty Ltd (the appellant).
2. The respondent brought proceedings claiming permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act). The body parts claimed were the left lower extremity and chronic pain based on chronic regional pain syndrome (CRPS)
3. The respondent served notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act). The respondent denied liability in respect of the nature of the damage to the right knee and disputed that the respondent suffered from CRPS.¹
4. The appellant then commenced proceedings in the Commission. At a telephone conference heard before a Commission Arbitrator, issues of liability were determined by consent. The Arbitrator made the following consent orders:
 1. The application is remitted to the Registrar to be referred to an AMS for assessment of the right lower extremity (knee) and Complex Regional Pain Syndrome (CRPS).
 2. The date of injury is 25 August 2013. The Application and Reply are to be provided to the AMS.
5. The matter was then referred by the Registrar to Dr Jonathan Negus (the AMS). The AMS examined the respondent and provided a Medical Assessment Certificate dated 3 May 2019 (MAC). The relevant findings by the AMS pertinent to the various grounds of appeal are set out later in these Reasons. The AMS assessed the right lower extremity at 0% and the CRPS at 33%.

¹ Reply, page 34

6. The assessment of whole person impairment is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).² 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.³

THE APPEAL

7. On 13 May 2019, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).
8. The Workers compensation medical dispute assessment guidelines (the 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 Guidelines.
9. The appellant claims, in summary, that the medical assessment by the AMS with respect to the assessment of range of motion of the lower extremity should be reviewed on the ground that the MAC contains a demonstrable error and/or the assessment was made on the basis of incorrect criteria.
10. 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.

PRELIMINARY REVIEW

11. 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.
12. The appellant submitted that a re-examination may be required.⁴ The respondent made no submissions on this issue. For the reasons subsequently provided, the AP has rejected the appellant's grounds of appeal and there is no basis for the respondent to be re-examined.⁵
13. The AP observes that, whilst the grounds of appeal were properly particularised, the submissions were expressed without reference to the grounds. This made it difficult to analyse specific submissions with respect to the grounds of appeal.
14. Further, the appellant relied on alternative grounds for appeal under s 327, that is that the assessment was made on the basis of incorrect criteria (s 327(3)(c)) or that the medical assessment certificate contained a demonstrable error (s 327(3)(d)). However, the specific grounds of appeal did not articulate which ground for appeal were relied upon.
15. These observations are made as the AP agrees with the respondent's submissions that the manner in which the application to appeal was drafted has raised some difficulty analysing the grounds of appeal.

² The 4th edition guidelines are issued pursuant to s 376 of the *Workplace Injury Management and Workers Compensation Act 1998*

³ Clause 1.1 of the fourth edition guidelines

⁴ Appellant's submissions, paragraph 24

⁵ *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales & Ors* [2013] NSWSC 1792 (*Police Force*) at [32]-[33]; *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Dickinson* [2016] NSWSC 101

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 the evidence is referred to under the Grounds of Appeal.

REASONS BY AMS

17. The relevant portions of the MAC are set out herein.
18. The examination on physical findings were described by the AMS as follows:⁶

“Ms Plumridge was generally very twitchy and anxious throughout the examination. Approximately half way through the consultation, she needed to take some medication although I am not sure exactly what it was and she described that this was both for her pain and her anxiety. Following the medication, she went from being anxious and tearful into more of a euphoric and disinhibited state.

She walked into the room with a cane in her left hand which is opposite to what would be expected for right knee pain. She was slow and unbalanced walking into the room.

Throughout the examination when she was sitting, she was sat at 90° at the hip, holding her knee between 30° and 65° of flexion and holding her ankle between 20° and 35° plantarflexion when sitting and walking. She was wearing thongs and described severe pain when putting the thongs on. She held her foot in an equinus position with an inability to bring her heel to the ground when walking.

Consistent with previous examinations, she warned me that were I to touch her right leg anywhere without prior warning or in such a way as to cause her pain, then she might as a reflex strike me with her hand or her cane. This made the examination very difficult and limited. After a reasonable period of time I was able to assess the temperature of the dorsum of the right foot and found it to be colder than the dorsum of the left foot. Both feet were without socks and in thongs. She did have some mottled colour change in the right foot during the examination when I took her from sitting to a standing position. She did also demonstrate allodynia with extreme pain on light touch. She was hypersensitive throughout the right leg. There was also some swelling around the foot. I was unable to assess for swelling in the calf, knee or thigh.”

19. The following measurements were provided by the AMS for loss of motion of individual joint movement:⁷

Hip ROM	Degrees	LEI %
Flexion	90	5
Extension	0	0
Abduction	30	0
Adduction	20	5
Internal rotation	10	5
External rotation	20	5

ADDING the above gives Hip 20% LEI

⁶ MAC, p 4

⁷ MAC, p 7

Knee ROM		
Flexion	65	20
Extension	30	35
ADDING the above gives 55% LEI		
Ankle ROM		
Plantar flexion	35	0
Flexion contracture	20	30
Extension	N/A	0
ADDING the above gives 30% LEI		
Great Toe ROM		
MTPJ Ext	25	2
IPJ flex	10	2
Lesser toes		
MTPJ ext	0	2
ADDING the above gives 6% LEI		

20. The AMS described the respondent's consistency of presentation in the following terms:⁸

"Her presentation was consistent throughout the examination and consistent with the injury, as described to me. She was highly emotional throughout the examination with initial anxiety and low mood with a dramatic change to euphoria and disinhibition following medication taken half way through the examination. However, her story and description of her symptoms remained consistent."

21. In providing reasons for assessment, the AMS stated:⁹

"I have assessed Mrs Plumridge as suffering from CRPS1 both clinically and according to the AMA5 guides, detailed in the next section. I am aware that the bone scan did not find positive findings for CRPS1. However, she satisfied the clinical criteria today from an Orthopaedic surgeon perspective and for the AMA5 guides and she has been diagnosed by multiple clinicians over the last several years.

I have not assessed her knee as arthritic according to the AMA5 guides as I do not see this as an appropriate diagnosis and I do not have the appropriate radiographic films to assess these measurements.

It was very difficult to examine Mrs Plumridge to the level that I would usually assess a patient due to her labile mood, allodynia and pain responses. Therefore, I have used my best observational estimates for ranges of motion when I couldn't directly measure them."

22. The AMS also observed that he based his assessment on a number of factors including "a comprehensive physical examination".¹⁰

GROUND OF APPEAL 1

23. This ground is pleaded as:

"Assessing the worker based on the range of motion method, in circumstances where he did not actually undertake a physical assessment of each joint for which an assessment was provided."

⁸ MAC, p 5

⁹ MAC, p 6

¹⁰ MAC, p 6

Submissions

Appellant's submissions

24. The appellant submitted:¹¹

“[T]he AMS has fallen into demonstrable error and/or made his assessment based on incorrect criteria in respect of his assessment of the right lower extremity, as he did not actually undertake an assessment of the worker in respect of each joint assessed, as required by the AMA 5 Guides and the SIRA Guidelines.”

25. Reference was made to Part 17.2f of the AMA 5. It was submitted that the AMS must undertake a physical examination in order to assess the range of motion for each joint and that it was “apparent” that the AMS was “unable to undertake a physical examination in order to assess the range of motion for each joint” as he stated that he “couldn’t directly measure” each joint.¹²

26. The AMS was subject to “onerous requirements” including, citing p 533 of AMA 5, taking three measurements or range of movement.¹³ The AMS had not undertaken a “physical examination” of the entire lower extremity and no assessment based on range of motion should have been made. Accordingly, the range of motion assessment should not be accepted as being valid.¹⁴

27. The AMS stated that he could not undertake an actual physical examination and had used his “best observational estimates”.¹⁵

28. The appellant accepted that the assessor is entitled to utilise their full range of experience and certain assessments may be reached partly on an intuitive basis: *Vitaz v Westform (NSW) Pty Ltd*¹⁶. It was conceded that:¹⁷

“There could be occasions therefore where an AMS’ observations of the worker constitute a valid basis for assessment.”

29. It was disputed that range of motion assessments constitute a circumstance as AMA 5 or the fourth edition guidelines “make no provision for ROM assessment to be reached on the basis of observation.”

Respondent's submissions

30. The respondent submitted that the ground of appeal “is based on an erroneous view of the facts” as the AMS did make an assessment of each relevant joint as shown in the measurements listed on p 7 of the MAC.

31. The respondent referred to the MAC where the AMS stated:¹⁸

“I have used my best observational estimates for ranges of motion when I couldn’t directly measure them.”

¹¹ Appellant’s submissions, paragraph 9

¹² Appellant’s submissions, paragraph 11

¹³ Appellant’s submissions, paragraph 11

¹⁴ Appellant’s submissions, paragraph 12

¹⁵ Appellant’s submissions, paragraph 14

¹⁶ [2011] NSWCA 254 at [43]

¹⁷ Appellant’s submissions, paragraph 14

¹⁸ MAC, pg 7

32. It was submitted:¹⁹

“Implicit in this is that he did carry out physical measurements of various joints. Also implicit is that he decided against this path for some joints and instead used his observational estimates. It demonstrates no error that he did not set out the detail of which joint was assessed by physical measurement or observation as the case may be. That is because it is a matter for his clinical judgment as to what to record.”

33. The respondent submitted that “best observational estimates” is an appropriate methodology when a direct measurement cannot be used for the type of reasons described by the AMS such as “labile mood, allodynia and pain responses.” Reference was made to paragraph 2.5c of AMA 5.

34. The respondent observed that the range of motion tables for the lower extremities in chapter 17 of AMA 5 “generally describe the use of the goniometer when making measurements”. However, the respondent submitted that if this was not possible, then it was perfectly acceptable for the AMS to modify the approach as long as this was set out in writing. The AMS did this in the present case.²⁰

Reasons

35. The appellant’s submission that the AMS did not undertake a “physical examination” do not accurately quote what is set out in the MAC. Relevantly the AMS stated that he used his “best observational estimates for ranges of motion when I couldn’t directly measure them.”²¹ The AMS also stated that he conducted a “comprehensive physical examination.”²²

36. It was factually inaccurate for the appellant to repeatedly submit that the AMS did not conduct a physical examination.

37. The AMS records precise measurements for loss of range of motion. He also stated that he expressly found consistent presentation.²³ Paragraph 3.16 of the fourth edition guidelines provides that range of motion cannot be used as a valid parameter when there is inconsistency.

38. The respondent referred to s 2.5c of AMA 5 which is repeated at paragraph 1.36 of the fourth edition guidelines. That provision relevantly provides:

“AMA 5 (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 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.”

39. Both paragraph 1.36 and 3.16 of the fourth edition guidelines specify that range of motion cannot be used where there is inconsistent presentation. Part of determining inconsistent presentation is an assessor using his or her “entire range of clinical skill and judgment” in determining whether the test results are plausible and consistent.

¹⁹ Respondent’s submissions, paragraph 5.1.2

²⁰ Respondent’s submissions, paragraph 5.1.4

²¹ MAC, p 6

²² MAC, p 6

²³ MAC, p 5, paragraph 7

40. The AP observes that clinical observation is an invaluable tool in determining consistency and can be more reliable than measurement made under physical examination. Part of that observation is referred to by the AMS under the heading “Findings On Physical Examination” when he recorded observations when the respondent was sitting. That paragraph in the MAC does not mean the AMS limited his observations to an examination whilst the respondent was sitting or indeed walking.²⁴ It is a record of observation comparing his results with what he observed whilst the respondent was sitting. Further, it would be medically impossible for the AMS to record the results for range of motion listed at p 7 of the MAC, such as some of the hip movements, from observing a person sitting.
41. It appears that this ground of appeal is principally based on an appeal asserting the application of incorrect criteria because of the submission that the measurements were not conducted in accordance with AMA 5 and the fourth edition guidelines. This submission would fall within the meaning of s 327(3)(c) of the 1998 Act: see *Marina Pitsonis v Registrar of the Workers Compensation Commission of New South Wales*²⁵ applying Basten JA in *Campbelltown City Council v Vegan*.²⁶
42. The appellant accepted that an assessor is required to use his full range of experience and certain matters may be reached on an intuitive basis, citing *Vitaz v Westform (NSW) Pty Ltd*.²⁷ Further, the fourth edition guidelines specifically provide that recourse must be had to the “entire range of clinical skill and judgment” when assessing whether the test results are plausible and consistent.²⁸
43. The AMS was faced with a difficult task in assessing a person who had been assessed by a number of specialist medical practitioners,²⁹ and the AMS, as suffering from CRPS. The AMS clearly stated³⁰ that he assessed the respondent under Chapter 17 of the fourth edition guidelines which specifically relates to the evaluation of permanent impairment from chronic pain. The appellant’s submissions were principally directed to Chapter 17 of AMA 5 which relates to assessment of the lower extremity.
44. The AMS was satisfied that the respondent satisfied the diagnostic criteria for CRPS Type 1. No issue has been taken with respect to that assessment.
45. The AMS is then required to consider, after diagnosing CRPS Type 1, the following under Chapter 17 of the fourth edition guidelines. Those requirements include:
 - Rating the extremity impairment resulting from loss of motion of each individual joint involved;
 - Rating the extremity impairment resulting from sensory deficits and pain;
 - Combining the extremity impairment for loss of joint motion with the impairments for pain or sensory deficit using the combined tables;
 - Converting the final extremity impairment to whole person impairment.

²⁴ Appellant’s submissions, paragraph 18

²⁵ [2008] NSWCA 88 (*Marina Pitsonis*) at [40]-[42], McColl and Bell JJA (as their Honours then were) agreeing

²⁶ [2006] NSWCA 284 at [94], McColl JA agreeing

²⁷ [2011] NSWCA 254 at [43]

²⁸ Paragraph 1.36 of the fourth edition guidelines

²⁹ See Dr Mohabbati - 25 August 2017; Dr Khan – 13 June 2018; Dr Deshpande – 29 June 2016; Dr Roe – 15 April 2015; Dr Dave – 7 November 2015; Dr Nabavi – 1 August 2017

³⁰ MAC, paragraph 10

46. The appellant has referred to the obligations under Chapter 17 of AMA 5 with respect to the assessment of the lower extremity. It was assumed by the appellant that this Chapter, as modified by Chapter 3 of the fourth edition guidelines, applied to assessing CRPS.
47. The AP opines, in its medical expertise that the pain exhibited by the respondent is entirely consistent with the diagnosis made by the AMS. The appellant has not taken issue with the AMS finding that the respondent suffers from CRPS Type 1. It is entirely expected that, in these circumstances, an examination of the lower extremity would be extremely difficult.
48. The AP does not accept the appellant's submissions based on an analysis of Chapter 17 of AMA 5 pertaining to assessment of the lower extremity necessarily apply with respect to assessment of range of motion based on CRPS as provided by Chapter 17 of the fourth edition guidelines.
49. Chapter 17 of the fourth edition guidelines direct the AMS to examine the loss of joint motion "of each individual joint involved" when assessing CRPS. There are no criteria in Chapter 17 of the fourth edition guidelines to choose an alternative basis to assess, unlike the provisions of Chapter 17 of AMA 5 which specifically apply to the lower extremity.³¹
50. In our view, the requirements under Chapter 17 of the fourth edition guidelines in assessing loss of motion of the affected joints reflect the difficulties with respect to assessing chronic pain. In those circumstances, references to Chapter 17 of AMA 5 (lower extremity) may not be practicable or required. The present case is an example of this.
51. There is a further distinct problem with the appellant's submissions. It was repeatedly submitted that the AMS did not undertake a physical assessment or examination in complying with the requirements of Chapter 17 of AMA 5 when assessing range of motion. It was unclear what was meant by those terms.
52. Section 17.2f of AMA 5 provides that the "Figures 17-1 to 17-6 illustrate **one method** of measuring range of motion in the lower extremity" (emphasis added).³² As the Appeal Panel held in *Brown v Westpac Corporation Ltd*³³, and we agree, compliance with assessing range of motion does not require the use of a goniometer. If the appellant was asserting that compliance with 17.2f of AMA 5 required the use of a goniometer, then we do not accept that submission.
53. The AP is satisfied that the AMS applied the correct criteria under Chapter 17 of the fourth edition guidelines when assessing loss of range of motion for CRPS. The AMS was entitled to assess the loss of motion for each individual joint involved in the manner in which he undertook this difficult task. As stated previously³⁴, where there is any inconsistency between the fourth edition guidelines and AMA 5, the fourth edition guidelines prevail.
54. Accordingly, we do not accept that there was a breach of Chapter 17 of the fourth edition guidelines in the manner in which the AMS undertook this assessment.
55. Section 327(3)(d) provides that the error must be "demonstrable". In *Vannini v Worldwide Demolitions Pty Ltd (Vannini)*,³⁵ 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

³¹ See AMA 5, 176.2

³² See AMA 5 at p 533

³³ [2017] NSWMA 71 at [42]

³⁴ Paragraph 6

³⁵ [2018] NSWCA 324 (*Vannini*) at [90]

before the approved medical specialist”.³⁶ The AP rejects the appellant’s submission that there has been error, let alone “demonstrable” error.

56. The AP does not accept that the use of observations, where necessary as part of a comprehensive physical examination, constitutes a demonstrable error. We otherwise repeat our reasons in accepting that the process undertaken by the AMS was acceptable clinical skill and expertise in the circumstances of this case.
57. For these reasons, this ground of appeal is rejected.

GROUND OF APPEAL 2

58. This ground is pleaded as:

“Relying upon ‘observational estimates’ to determine the range of motion assessment and without specifying what his ‘observations’ were.”

Submissions

Appellant’s submissions

59. The AMS has not stated “what observations he even undertook.” Strict requirements apply to range of motion assessment to ensure accuracy. The AMS has not stated whether the observational estimates were repeated and how he ensured consistency.³⁷
60. Reference was made to the observations by the AMS of the respondent whilst she was sitting. It was submitted that the AMS has not stated how he ensured the accuracy of the ranges of motion and how they could be reflective of how the respondent “chose to sit during the examination, not the full range of motion that may be present in each joint.”³⁸
61. The AMS was faced with a difficult task by a worker who would not permit a full examination. The range of motion method could not be adopted where the “AMS had not actually assessed range of motion of each joint.”³⁹ It was not open to the AMS to rely upon his observations as evidencing the range of motion and he has not properly outlined those observations.

Respondent’s submissions

62. The respondent submitted that this ground of appeal is “factually inaccurate” as “the AMS provided significant detail of what his observations were as set out on page 7 of his certificate.”⁴⁰

Reasons

63. The AP agrees with the respondent’s submissions and adds further comments.
64. The AMS set out precise findings at p 7 of the MAC. Those findings were based, in part, on physical examination which he described in another part of the MAC as a “comprehensive physical examination”. We accept that those measurements record an accurate summary of the AMS findings.

³⁶ *Vannini* at [86]

³⁷ Appellant’s submissions, paragraph 17

³⁸ Appellant’s submissions, paragraph 18

³⁹ Appellant’s submissions, paragraph 19

⁴⁰ Respondent’s submissions, paragraph 5.2.1

65. The AMS set out in part, some of his observations when he described the range of motion displayed by the respondent whilst both sitting and walking.⁴¹
66. It is difficult to understand whether this ground of appeal is based on demonstrable error or the application of incorrect criteria. This ground of appeal appears to be based on a failure by the AMS to properly describe his “observations”.
67. The AP does not accept that this is a demonstrable error. In these circumstances the nature of the appellant’s submissions raises the need for caution in the terms expressed by Mason P in *Marina Pitsonis v Registrar of the Workers Compensation Commission* when his Honour stated:⁴²

“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.”

68. Similar observations were made by Handley AJA in *Lukacevic v Coates Hire Operations Pty Limited*⁴³ and recently by the Court of Appeal in *Vannini*.⁴⁴
69. We do not accept that it is either a demonstrable error or an application of incorrect criteria for the AMS not to spell out his observations. In any event, for the reasons previously provided⁴⁵, some of these observations were described within the body of the MAC.
70. This ground of appeal is rejected.

GROUND OF APPEAL 3

71. This ground is pleaded as:

“Failing to ensure consistency with respect to each range of motion assessment.”

Submissions

72. The appellant referred to paragraph 3.16 of the fourth edition guidelines. It submitted that the AMS ‘has failed ... to justify that assessment method in the circumstances of the case’ and ‘has not demonstrated that his ‘assessment’ was repeated for consistency.⁴⁶
73. The respondent submitted that it is a matter for the AMS’ clinical judgment “whether sufficient consistency is achieved and whether any comment about this needs to be made in his or her certificate.” In the absence of comment it should be inferred that the AMS was satisfied as to this requirement and no error is demonstrated.⁴⁷

⁴¹ MAC, p 4, paragraph 5

⁴² [2008] NSWCA 88; McColl JA and Bell JA (as their Honours then were) agreeing at [31]

⁴³ [2011] NSWCA 112 at [107], Hodgson JA agreeing

⁴⁴ [2018] NSWCA 324 at [1], [94] and [113]

⁴⁵ Paragraph 40 herein

⁴⁶ Appellant’s submissions, paragraph 20

⁴⁷ Respondent’s submissions, paragraph 5.3.1

Reasons

74. The AP again repeats that the AMS stated that the respondent's presentation was "consistent throughout the examination and consistent with the injury". The AMS did not find that there was "inconsistent presentation".
75. The AMS noted that the first half of the assessment was difficult because the respondent was "twitchy and anxious".⁴⁸ This behaviour changed when the respondent took some medication when her emotional state was then described as "euphoric and disinhibited".
76. The AMS did not find that there was inconsistent presentation. That conclusion was a matter for the AMS in his clinical determination. The AMS noted the strict requirements contained in Table 17.1 of the fourth edition guidelines as to whether the appellant suffered from CRPS.
77. The AP otherwise repeats our previous finding in the first ground of appeal that the AMS complied with Chapter 17 of the fourth edition guidelines when assessing CRPS.
78. Section 17.2f of AMA 5 provides that where a restricted range of motion has an "organic basis" then three measurements should be taken. That provision does not mean that the measurements must be repeated and, in any event, where the restricted range is not due to an organic basis.
79. It is submitted that the assessment was not repeated for consistency. The basis for that submission does not arise from a plain reading of the MAC. In our view it is otherwise not surprising and expected that the AMS did not state that he "repeated for consistency". His finding that the respondent was consistent suggests the alternative, that is, he was satisfied of consistent presentation.
80. It is clear from a plain reading of s 327(3) of the 1998 Act that the moving party must show that the assessment was made on the basis of incorrect criteria or the certificate contains a demonstrable error. The plain words of the section accord with the reasoning of Davies J in *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales & Ors*⁴⁹ that the appellant must establish relevant error as defined in the section.
81. Further, there is a presumption of regularity that the AMS has performed such tests as might be required: *Jones v the Registrar of the Workers Compensation Commission (Jones)*⁵⁰. A similar presumption arises with respect to regularity which affects administrative action: *Bojko v ICM Property Services Pty Ltd*⁵¹ and *Jones*⁵².
82. There is every reason to accept, that the AMS complied with his obligation to test for consistency with respect to the extent of the range of motion. The AMS stated that "presentation was consistent". That conclusion suggests the contrary to what is contended by the appellant.
83. The AP is not satisfied that error has been shown in respect of this ground.

GROUND OF APPEAL 4

84. This ground is pleaded as:

⁴⁸ MAC, paragraph 5

⁴⁹ [2013] NSWSC 1792 at [33]

⁵⁰ [2010] NSWSC 481 at [50].

⁵¹ At [36] per Handley JA, with whom Allsop and Giles JJA agreed

⁵² At [36]

“Failing to examine the uninjured left lower extremity to determine whether any modification to the assessment should be made as required by the Guidelines.”

Submissions

85. The appellant submitted that it was “not apparent from the MAC that the AMS undertook an examination of the uninjured left lower extremity”⁵³ and to compare this with the right side. This is “an explicit requirement under the Guidelines, and failure to comply is further evidence of error.”⁵⁴
86. The respondent submitted that it is a matter for the AMS’ clinical judgment as to whether there should be any comment about this in the certificate. It was submitted that in the absence of the any comment “it should be inferred the AMS was satisfied with respect to the situation of the other limb providing appoint of comparison.
87. The respondent submitted that “no error is demonstrated by simply asserting that he has failed to do so.”⁵⁵

Reasons

88. The appellant is presumably referring to paragraph 3.17 of the fourth edition guidelines which relevantly provides:

“When calculating impairment for loss of range of movement, it is most important to always compare measurements of the relevant joint(s) in both extremities. If a contralateral ‘normal/uninjured’ joint has less than average mobility, the impairment value(s) corresponding to the uninvolved joint serves as a baseline, and is subtracted from the calculated impairment for the involved joint. The rationale for this decision should be explained in the assessor’s report (see AMA 5 Section 16.4c, p454).”
89. The appellant’s submissions correctly commenced by accepting that it was “not apparent” from the MAC that the AMS undertook an examination of the uninjured left lower extremity. That is the correct description of what is contained in the MAC. However, the appellant then asserts there is a “failure to comply” by the AMS which is purportedly further evidence of error. The failure to comply, as asserted by the appellant, is a failure to purportedly measure the uninjured left leg, not a failure to record it in the MAC.
90. It is not clear that there was a failure by the AMS to comply with the requirement set out in paragraph 3.17 of the fourth edition guidelines.
91. This ground of appeal should be examined in the circumstances of the case. There is no suggestion in the material that the left leg had any pre-existing conditions and this was not raised in the medical opinion.
92. The appellant is required to show error. The appellant’s inconsistent submission is that it was either “not apparent” that the AMS examined the left leg or he “failed to comply” with his obligation.
93. Given the respondent’s medical history, it could be inferred that the AMS did not believe it was significant such that he comment on the issue. The AP accepts that, in these circumstances, the nature of the appellant’s submissions raises the need for caution based

⁵³ Appellant’s submissions, paragraph 22

⁵⁴ Appellant’s submissions, paragraph 22

⁵⁵ Respondent’s submissions, paragraph 5.4.1

on the authorities set out earlier in these reasons.⁵⁶ Similarly, the presumption of regularity is otherwise against the appellant's argument.

94. This ground of appeal is rejected.

DECISION

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

1 August 2019

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE MEDICAL APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

H Mistry

Heena Mistry
Dispute Services Officer
As delegate of the Registrar



⁵⁶ See at paragraph [67]-[68] herein