

# WORKERS COMPENSATION COMMISSION

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

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**Matter Number:** M1-527/19  
**Appellant:** Sydney Metro Taxis Fleet No 1 Pty Ltd  
**Respondent:** Michael Khan  
**Date of Decision:** 27 August 2019  
**Citation:** [2019] NSWCCMA 124

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**Appeal Panel:**  
**Arbitrator:** Marshal Douglas  
**Approved Medical Specialist:** Dr Ian Weschler  
**Approved Medical Specialist:** Dr Michael Delaney

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 7 June 2019 Sydney Metro Taxis Fleet No 1 Pty Ltd (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Michael Steiner, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 24 May 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 MAC contains a demonstrable error.
3. The Registrar is satisfied that, on the face of the application, at least one ground for 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 WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act). An Appeal Panel determines its own procedures in accordance with the WorkCover Medical Assessment Guidelines.
5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment*, 4<sup>th</sup> ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> ed (AMA 4).

### RELEVANT FACTUAL BACKGROUND

6. Michael Khan (the respondent) commenced employment as a motor mechanic with the appellant on 15 May 2014. On 27 February 2015 an explosion occurred at his place of work as a consequence of another of the appellant's employee using a drill to grind valves of a gas tank. The respondent became engulfed in flame and suffered burns to several parts of his body including to his left eye. Shrapnel also entered his left eye. He claimed compensation from the appellant under s 66 of the *Workers Compensation Act 1987* for permanent impairment due to visual impairment and impairment of his skin resulting from his injury.

7. A medical dispute arose between the parties regarding the degree of the respondent's permanent impairment. The respondent then initiated proceedings in the Commission seeking determination of his claim for compensation. On 4 March 2019 Arbitrator Mr John Isaksen held a telephone conference with the parties, during which the parties agreed to the arbitrator remitting the matter to the Registrar so that the Registrar could refer the medical dispute to an AMS to assess. The arbitrator defined the following medical dispute in these terms:

Date of injury:	27 February 2015
Body part:	Visual system; skin disorder.
Body part:	Psychological injury
Method of Assessment:	whole person impairment

8. On 5 April 2019 a delegate of the Registrar referred the medical dispute regarding the degree of the respondent's permanent impairment due to impairment of his visual system to the AMS to assess. The delegate noted in the form of referral she issued to the AMS that she was also issuing a referral to Approved Medical Specialist Dr Alan Meares to assess the permanent impairment of the respondent relating to his skin. The delegate indicated that the AMS (ie, Dr Steiner) was appointed as a lead assessor "to consolidate assessment", which thereby indicated to the AMS that he was to combine the permanent impairment he assessed the respondent to have from his injury due to the respondent's visual system with the permanent impairment that Approved Medical Specialist Dr Meares assessed the respondent to have with respect to the skin.
9. The AMS examined the respondent on 20 May 2019. As indicated above, on 24 May 2019 he issued a MAC. In that, he certified that he had assessed the respondent to have 63% permanent impairment of his visual system due to the respondent's injury on 27 February 2015 and that Approved Medical Specialist Dr Meares had assessed the respondent to have 7% permanent impairment due to the injury to his skin, which combined to a total of 66% whole person impairment.
10. The appellant's appeal with respect to the MAC relates only to the AMS's (ie, Dr Steiner's) assessment of the respondent's impairment of the visual system from the respondent's injury, and not to the assessment of Approved Medical Specialist Dr Meares with respect to the impairment of the respondent's skin.

## **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 WorkCover Medical Assessment Guidelines.
12. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the respondent to undergo a further medical examination. This is because the Appeal Panel came to the view, during its preliminary review, that the MAC does not contain a demonstrable error. The Appeal Panel sets out its reasons below for this. The Appeal Panel cannot therefore revoke the MAC and does not consequently need to assess the medical dispute that had been referred to the AMS for assessment. Section 324(3) of the 1998 Act is not engaged such that the Appeal Panel would have power to require the respondent to be examined<sup>1</sup>.

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<sup>1</sup> see also *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792

## EVIDENCE

13. 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

14. The history the AMS obtained included that the respondent had two years prior to the AMS's examination of him noticed problems with the vision in his right eye and was subsequently diagnosed with glaucoma and cataracts. The AMS noted that the respondent had operations done on his right eye.

15. The AMS recorded making the following findings from his examination of the respondent:

"His uncorrected vision on the right is 6/9 and he can just read N18 size print. On the left there is an unsightly blind eye with no perception of light. There is ptosis of the left upper eyelid.

On the right, the vision corrects to 6/9 and with a suitable reading addition he can be made to read N6 size print. The right eye is pseudophakic with a well-placed intraocular implant and a superior bleb. There is one subconjunctival suture inferiorly. His intraocular pressures are 19mmHg on the right and 8mmHg on the left. The right fundus showed a cup:disc ratio of 0.8 in the optic nerve and there was the appearance of diabetic maculopathy.

On the left the anterior chamber was very very shallow. The cornea was vascularised and there was also vascularisation of the anterior chamber. There was a dense white cataract and the eye was obviously markedly unsightly.

A field test was performed on the right eye and showed significant loss and is attached to this report."

16. The AMS summarised the respondent's injury with respect to his left eye in this way: "As far as the vision is concerned the left eye is totally blind and unsightly, he also has significant visual loss in the right eye."
17. As mentioned, the AMS assessed the respondent's impairment with respect to the respondent's visual system to be 63% whole person impairment. He provided this explanation for his assessment:

"The left eye which is the main subject of this report has 100% impairment. There is also an addition to be made to the whole person impairment for the unsightly appearance of the eye and the ptosis of the left upper lid. On the right there is 86% loss of visual field and as the eye is pseudophakia there is 54% impairment due to the visual acuity. Using the Combined Values Chart there is 94% impairment of the right eye and 100% impairment of the left which results, using the Combined Values Chart, in 96% impairment of the visual system which equates to 85% whole person impairment. Using Paragraph 8.5 I would combine this with a further 8% impairment for the unsightly appearance of the eye and the ptosis of the left upper lid which gives an overall whole person impairment of 86%. The condition of right eye would, be regarded as pre-existing or other and there is 24% permanent impairment of the visual system equating to 23% whole person impairment which overall gives 63% impairment of the visual system due to the accident."

18. As was explained by the AMS, he considered that a proportion of the respondent's permanent impairment relating to his visual system is due to a pre-existing condition, which is the glaucoma in his right eye and the consequent visual field loss and pseudophakia in that eye. The AMS made a deduction for that condition when he assessed the degree of permanent impairment of the respondent due to the impairment of the respondent's visual system arising from the respondent's injury to his left eye. That is to say, the AMS, as he explained, assessed the overall permanent impairment of the respondent with respect to the respondent's visual system to be 86%, but after making a deduction due to the contribution the pre-existing condition in the respondent's right eye made to the respondent's impaired visual system, the AMS assessed the degree of permanent impairment of the respondent due to his impaired visual system that resulted from the respondent's injury to be 63% whole person impairment. The Appeal Panel observes that what the AMS did accords with what the AMS was required to do under s 323(1) of the 1998 Act.

## **SUBMISSIONS**

19. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
20. In summary, the appellant submits that the AMS made an error by assessing the impairment of the respondent that was due to both his eyes when the respondent did not injure his right eye. The appellant submits that the AMS, by taking the right eye into account, elevated the respondent's overall impairment by more than what the AMS then deducted due to the respondent's right eye impairment. The appellant says that the AMS "added more non-work-related impairment than he has deducted". The appellant submits that the AMS "should have excluded the right eye from the assessment".
21. The respondent's submissions related to how the AMS should have assessed his impairment of his visual system under AMA 5. However, the impairment of his visual system resulting from the injury to his left eye is not assessed by reference to AMA 5, but, in accordance with [10.2] of the Guidelines, it is assessed by reference to the criteria specified in Chapter 8 of AMA 4. Hence, the respondent's submissions were largely irrelevant. The respondent did submit that the AMS had not made a demonstrable error.

## **FINDINGS AND REASONS**

22. 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.
23. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons.
24. The appellant's submissions are wrong. The medical dispute that the delegate of the Registrar referred to the AMS to assess specifically required the AMS to assess the degree of the respondent's permanent impairment resulting from his injury that was due to the respondent's impaired visual system. His visual system, of course, includes both of his eyes.
25. As mentioned above, the Guidelines required the AMS to carry out the assessment in accordance with the instructions provided in Chapter 8 of AMA 4. AMA 4 at [8.4] instructs that the assessment of a worker's impaired visual system is to be done by taking the following steps:

"Step 1: determine and record the percentage loss of central vision for each eye separately, combining the losses of near and distant distance vision.

Step 2: determine and record the percentage loss of visual field for each eye separately (monocular) or for both eyes together (binocular).

Step 3: determine and record the percentage loss of ocular motility.

Step 4: determining the level of impairment of each eye, use Table 7 [p.219] to determine visual system impairment.

Step 5: consult Table 6 [p.218] to ascertain the impairment of the whole person that is contributed by impairment of the visual system.”

26. The AMS rightly adopted that approach to assess the respondent's permanent impairment relating to his visual system. By doing so, the AMS correctly assessed the respondent's permanent impairment relating to his visual system to be 86% whole person impairment.
27. Having done that, the AMS was then required, in accordance with s 323(1) of the 1998 Act, to consider whether any of the respondent's permanent impairment was due to a pre-existing condition and if so make a deduction to the extent to which it is.
28. With respect to the deduction to be made under s 323(1), the authorities are clear and consistent as to the approach an AMS is to adopt in doing that. That is the level of a worker's post-injury impairment as at the time of assessment must firstly be determined. The AMS did that in this case, by completing the steps mandated by [8.14] of AMA 4.
29. Secondly, a worker's prior injury or pre-existing condition or abnormality must be identified. The AMS identified such a condition in this case, being the glaucoma in the respondent's right eye.
30. Thirdly, it must be determined whether a proportion of a worker's post-injury impairment is due to that prior injury or pre-existing condition. In this case, the AMS correctly determined that a proportion of the overall impairment of the respondent's visual system, which as the Appeal Panel has said, comprises both of the respondent's eyes, was due to the pre-existing condition in the respondent's right eye.
31. Lastly, the extent to which a worker's post-injury impairment is due to the prior injury or pre-existing condition or abnormality must be determined<sup>2</sup>. The Court of Appeal held in *Ryder v Sundance Bakehouse*<sup>3</sup>, that the pre-existing condition that a worker has or the worker's prior injury must make a difference to the outcome in order that a worker's impairment can be found to be due to it. If it makes a difference then, to the extent that it does, a deduction must be made<sup>4</sup>.
32. The method the AMS used in this last stage in the s 323(1) process involved the AMS working out what the impairment of the respondent's visual system would have been, were the respondent only to have had the right eye condition, and then to subtract that figure from the overall impairment the respondent has of his entire visual system, which included both the respondent's impairment due to the injury to his left eye and the pre-existing condition of the respondent's right eye. In other words, the AMS subtracted 23% (for the right eye impairment) from 86% (for the respondent's overall impairment). In the Appeal Panel's view that was a viable method for the AMS to use in order to work out the difference the respondent's right eye condition has to the respondent's overall "outcome". The Appeal Panel notes that the deduction the AMS made for the pre-existing condition in the respondent's right eye correlates with 26.7% of the respondent's overall impairment of his visual system. That is to say, the AMS, by adopting the method of subtraction to determine the extent to which the respondent's right eye condition contributes to the respondent's "outcome", found in substance that it was of the order of 26.7%. Whilst different clinicians may have different views on that, the Appeal Panel considers that it is not wrong.

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<sup>2</sup> See for example *Cole v Wenaline Pty Ltd* [2010] NSWSC78, and *Ryder v Sundance Bakehouse* [2015] NSWSC526

<sup>3</sup> [2015] NSWSC526

<sup>4</sup> *ibid*

33. This is all the more so when one considers the gravity of the consequences to the respondent that his injury to his left eye has had. The respondent had limited vision in his uninjured right eye and, in the Appeal Panel's view, his impairment arising from the injury to his left eye is much more grave than what would have been the case had he had normal vision in his right eye. The injury has resulted in his losing his only good eye and has resulted in his, in effect, being essentially blind.
34. In short, and by way of summary, the AMS assessed the medical dispute that was referred to him. The AMS made that assessment using the correct criteria. The AMS correctly assessed the respondent's overall impairment of his visual system to be 86% whole person impairment. The deduction the AMS made for the extent to which the condition in the respondent's right eye contributed to the impairment of his visual system was sound. In short, in the Appeal Panel's view, the AMS adopted a correct approach to make a deduction under s 323(1) for the extent to which the respondent's pre-existing glaucoma in his right eye contributed to the respondent's permanent impairment relating to his visual system.
35. For these reasons, the Appeal Panel has determined that the MAC issued on 24 May 2015 should be confirmed.

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 Shaw*

Andrew Shaw  
Dispute Services Officer  
**As delegate of the Registrar**

