WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-654/19**
Appellant:	**Zorca Visic**
Respondent:	**Essilor Australia Pty Ltd**
Date of Decision:	**1 November 2019**
Citation:	**[2019] NSWWCCMA 157**

Appeal Panel:	
Arbitrator:	**Marshal Douglas**
Approved Medical Specialist:	**Dr Richard Crane**
Approved Medical Specialist:	**Dr James Bodel**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 16 July 2019 Zorca Visic lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Neil Berry, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 24 June 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 WorkCover Medical 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 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, 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

6. The appellant suffered injuries to her cervical spine and right shoulder in the course of her employment with the respondent, that are deemed to have happened on 3 March 2016. As a consequence of taking medications to treat those injuries, she also suffers conditions in her upper and lower digestive tracts.

7. She has claimed compensation under s66 of the *Workers Compensation Act 1987* for permanent impairment resulting from her injuries. There is a medical dispute between the parties regarding the degree of the appellant's permanent impairment. On 6 May 2019, a delegate of the Registrar referred that medical dispute to the AMS to assess. The medical dispute was defined in the referral in these terms:

> **"MEDICAL DISPUTE REFERRED FOR ASSESSMENT** (s319 1998 Act)
> the degree of permanent impairment of the worker as a result of an injury (s319(c))
> whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion (s319(d))
> whether impairment is permanent (s319(f))
> whether the degree of permanent impairment of the injured worker is fully ascertainable (s319(g))
> **Date of Injury:** 3 March 2016 (deemed)
> **Body part/s referred:** Cervical Spine, Right Upper Extremity (shoulder), Upper and lower gastrointestinal tracts
> **Method of assessment:** Whole Person Impairment."
>
> (Bold as per original)

8. As part of the referral of the medical dispute to the AMS, the Registrar's delegated provided the AMS with a brief of documents that included Certificates of Determination the Commission had issued, together with the accompanying statements of reasons, relating to determinations the Commission had made on disputed issues between the parties with respect to appellant's claim, including issues relating to her injuries. The brief also included all clinical reports and forensic reports that the parties had filed with the Commission and a signed statement of the appellant.

PRELIMINARY REVIEW

9. 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.

10. 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 was of the view that the MAC did not contain a demonstrable error and that the AMS applied the correct criteria to assess the degree of the respondent's permanent impairment. Accordingly, the Appeal Panel did not need to re-assess the medical dispute referred for assessment, and there was thus no need to examine the respondent. Further, absent the Appeal Panel concluding that the MAC contained a demonstrable error or that the AMS applied incorrect criteria, the Appeal Panel does not have the power to require the respondent to submit himself for examination.[1]

EVIDENCE

11. 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

12. The AMS examined the appellant on 13 June 2019. The history the AMS obtained, which he recorded at part 4 of the MAC, included this:

[1] NSW Police Force v Registrar of the Workers Compensation Commission of NSW [2013] NSWSC 1792

"Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:
Ms Visic told me that as far as she could remember in or about 2011 some eight months after she started work with the company, she began to develop pain in the neck and right shoulder. The pain gradually became worse and over the years, despite requesting to rotate jobs she continued to do the same work which was fast and repetitive which involved scanning, packing and despatching of ophthalmic lenses. By March 2016, her symptoms were such that she was unable to continue at work and she has not worked since that time.
Ms Visic attended her general practitioner, Dr Chris Tomka and he referred her for X-rays and a subsequent MRI scan and prescribed medications. She was subsequently referred to Dr Matthew Giblin, Orthopaedic Surgeon who suggested she have conservative treatment. She was also seen by Dr David Manohar, Pain Specialist and was given steroid injections into both shoulders and into the neck which tended to make her worse. The claimant told me today that she attributed the development of sleep apnoea and hypertension to her steroid injections.
In 2013 the claimant began to develop epigastric burning pain and bloating. There was no constipation or bleeding, although her motions were hard and painful when passed. She was given medications and this tended to settle her abdomen. She was reviewed by Dr Alexander Simring, Gastroenterologist, and underwent a gastroscopy on 1 May 2013 and then had a further gastroscopy and colonoscopy in February 2018.

• **Present symptoms:**
Ms Visic told me that her neck seems to have become progressively worse. She continues to suffer pain in her right shoulder, but feels that it is better now than it was. In terms of her gastrointestinal system, she still gets episodes of severe epigastric pain and bloating and at times feels that she will explode.

• **Present treatment**:
She takes Minax, Dymista spray, Endone and Buscopan."
(Bold as per original)

13. The AMS recorded his findings from examination in these terms at part 5 of the MAC:

"Ms Visic presented as a woman of stated years who sat comfortably and moved with normal posture and gait. She was noted to be 164 cm in height and 85 kilograms in weight.

Cervical Spine
There was diffuse tenderness to palpation. There was a full range of flexion, extension and rotation. There was no paraspinal muscle spasm and no muscle guarding and no dysmetria.

Upper Extremities
Left Upper Extremity - This was normal in all respects.
Right Upper Extremity – There was tenderness over the top of the shoulder. There was no wasting or swelling of the shoulder. There was a reduced range of movement, please see the attached worksheet. Reflexes, sensation and power were intact.

Abdomen
Examination of the abdomen revealed tenderness in the epigastrium. There was no guarding, rigidity, rebound and no palpable masses. Auscultation revealed normal bowel sounds. Anal examination revealed no evidence of haemorrhoids, anal fissure or fistula.

No other physical examination was conducted."

(Bold as per original)

14. The AMS briefly summarised within part 6 of the MAC reports of several radiological investigations the appellant had undergone as well as reports on gastroscopies and a colonoscopy she had undergone.

15. The AMS summarised the appellant's injuries at part 7 of the MAC and provided these diagnoses:

> "This is a woman who carried out fast and repetitive work and developed pain in the neck and right shoulder. She also developed a degree of gastrointestinal disturbance attributed to her medical intake, although her most recent gastroscopy and colonoscopy is reported normal apart from a constitutional rectal polyp."

16. He assessed the appellant to have 7% WPI resulting from her injuries. He provided this explanation for his assessment at part 10a of the MAC:

> **"*Cervical Spine***
> The claimant has a history of ongoing pain in the cervical spine and while there is a mild degree of tenderness, there is no muscle guarding, no muscle spasm and no specific restriction in the range of movement and no dysmetria. I therefore refer you to the AMA 5th Edition of the Guides to the Evaluation of Permanent Impairment, Chapter 15, Table 15.5 on Page 392 and I would place the claimant in DRE Category I which is a zero Whole Person Impairment.
>
> ***Right Upper Extremity***
> The claimant should be assessed using the range of movement model. Please see the attached worksheet and you will note that she is assessed as 7% Whole Person Impairment.
>
> ***Digestive System***
> The first thing to be assessed in the digestive system is the presence or absence of nutritional impairment. I therefore refer you to AMA 5, Table 6.2 (Desirable Weight by Height and Body Build) on Page 120. The claimant has a height of 164 cm and would therefore, have a desirable weight range of 51.9 – 68.8 kilograms and therefore at 85 kilograms she is well above her desirable weight range indicating that there is no nutritional impairment.
>
> The upper digestive tract is assessed using Table 6.3 on Page 121. This Table has been modified by the NSW Workers Compensation Guides to the Evaluation of Permanent Impairment, 4th Edition, Paragraph 16.9 on Page 78. It is noted that in order for there to be an assessment under Table 6.3 there needs to be "symptoms and signs". The claimant has symptoms of discomfort and bloating and possible reflux, however, her most recent gastroscopy showed a normal oesophagus and stomach and the previously reported hiatus hernia is no longer present. I would therefore be of the opinion that there is no rateable impairment for the upper digestive tract.
>
> The lower digestive tract is assessed according to Table 6.4 on Page 128. Again there needs to be "symptoms and signs". The claimant gives a history of passing hard stools but has no bleeding and has a normal colonoscopy, apart from a rectal polyp which would be considered constitutional, therefore it is my opinion that she has no rateable impairment of the lower digestive tract."
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> (Bold as per original)

17. The AMS noted that the evidence on which he relied to assess the appellant's degree of permanent impairment from her injuries, with included the consequential condition of her digestive tract, was the history he obtained, his findings from his examination and the documents with which he was briefed.

SUBMISSIONS

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

19. In summary, the appellant submits that the AMS ought to have assessed her symptoms and signs with respect to her cervical spine as correlating with DRE II rather than DRE I. The appellant submits that the AMS did not have proper regard to complaints she had made of non-verifiable radicular symptoms to Dr Richard Powell, Dr Phil Truskett, Dr David Manohar and Mr Gregory Williams. The Appeal Panel observes Drs Powell and Truskett had examined the appellant for the purpose of providing forensic medical reports and that Dr Manohar and Mr Powell are respectively a consultant physician and physiotherapist who treated the appellant.

20. The appellant also submits that the radiological evidence revealed pathology in her cervical spine that would satisfy the criteria of DRE II.

21. The appellant submits that the AMS failed to provide within the MAC a comprehensive description of her current symptoms in that the AMS's descriptions were brief compared to those reported by other clinicians who had examined her.

22. With respect to the AMS assessment of the impairment relating to her digestive system, the appellant submits that a gastroscopy Dr Simring did showed gastritis consistent with the effects of non-steroid anti-flammatory drugs and that Dr Simring considered Endone may have been responsible for her continuing constipation. The appellant submits that the AMS did not give "proper weight" to the signs and symptoms she experiences in her digestive tract as revealed in the medical evidence.

23. In reply, the respondent submits that the AMS found no dysmetria, muscle spasm or guarding from his examination of the appellant's cervical spine and given the lack of those findings the AMS appropriately assessed the appellant's signs and symptoms as correlating with DRE I. The respondent submits that the appellant in her submissions relies on opinions from specialists rather than the findings of the AMS on his clinical examination. With respect to the AMS's assessment of the appellant's impairment relating to her digestive tract, the respondent says that the AMS appropriately applied Tables 6.3 and 6.4 of AMA 5. The respondent submits, in substance that the AMS applied the correct criteria to assess the appellant's impairment and that the MAC does not contain a demonstrable error.

FINDINGS AND REASONS

24. 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.

25. 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.

26. The point of time at which the appellant's permanent impairment was to be assessed is at the time the assessment was done, which was when the AMS examined her. At the time the AMS examined the appellant, the AMS recorded that the appellant complained of symptoms in her neck and pain in her right shoulder. He did not record her making any complaint of symptoms of pain or sensory loss in a dermatomal distribution from her cervical spine. That is to say, the AMS did not obtain a history of the appellant experiencing non-verifiable symptoms at the time of assessment.

27. The Appeal Panel also notes that there is nothing within the evidence that reveals that the appellant had previously made complaints that would amount to non-verifiable radicular symptoms.

28. The symptoms of which she complained to Dr Powell when he examined her on 29 September 2017, in the form of pain extending down the superior aspect of both shoulders and intermittent numbness in her ulna 3 digits of both hands were not symptoms in the dermatomal distribution and hence were not complaints of non-verifiable radicular symptoms.

29. Similarly, the symptoms of which she complained to Dr Truscott when he examined her on 12 November 2018 did not include non-verifiable radicular symptoms. Dr Truscott noted that the appellant complained of pain in her neck and a tingling sensation in all her fingers including her thumb. Dr Truscott observed that the pain and tingling of which the appellant did complain was not described by the appellant as occurring within a radicular distribution.

30. Dr Manohar examined the appellant on 15 February 2017 and noted that the appellant described neck pain and bilateral arm pain with the neck pain extending down the right shoulder to the right elbow and down to the left shoulder. The Appeal Panel notes that this description of symptoms by the appellant to Dr Manohar was not in a dermatomal distribution and hence they are not non-verifiable radicular symptoms.

31. The appellant in her statement of 10 July 2017 does not describe any symptom that could be considered to be a non-verifiable radicular complaint. She says she suffered from paraesthesia in the fingers of her hands but did not indicate within what fingers. That evidence does not indicate that she has non-verifiable radicular complaints.

32. Paragraph 4.18 of the Guidelines makes clear that if a worker at the time the worker's impairment is assessed experiences radicular symptoms in the absence of clinical signs then the worker's impairment can be assessed as correlating with DRE II. But as mentioned, the AMS did not record the appellant, at the time he examined her, complaining of symptoms that were radicular. The symptoms she reported were not in a dermatomal distribution and hence they were not radicular symptoms.

33. As also mentioned, there is nothing within the evidence that substantiates that the appellant prior to the assessment, experienced radicular symptoms.

34. The radiological investigations that the appellant had done of her cervical spine revealed that she had degenerative changes in her cervical spine. However, the fact that there is degeneration in a person's cervical spine does not mean that the person has radiculopathy or experiences radicular pain or symptoms. For that conclusion to be drawn, the person must be exhibiting signs of radiculopathy or the symptoms of that.

35. The AMS from his examination of the appellant found that she had a full range of flexion, extension and rotation and no paraspinal muscle guarding and no dysmetria. His findings do not reveal the appellant exhibited any signs of radiculopathy.

36. In the circumstances, being where the appellant did not complain at the time of the assessment of any radicular symptoms and did not exhibit any sign of radiculopathy, the AMS was correct to assess the appellant's signs and symptoms as correlating with DRE I and therefore was correct to assess the appellant's permanent impairment of the cervical spine as being 0%.

37. With respect to the AMS's assessment of the appellant's impairment relating to her digestive tract, the AMS correctly observed that [16.9] of the Guidelines requires that a worker must experience both symptoms and exhibit signs of digestive tract disease in order that a worker can be assessed as having an impairment of the digestive tract. In the appellant's case, as the AMS observed, her most recent gastroscopy did not reveal any evidence of disease. There is no other evidence to indicate that she presently has any disease of her upper digestive tract. There is no evidence to reveal that she has any disease of her lower digestive tract. The colonoscopy the appellant had done on 21 March 2018 revealed the appellant had a polyp in her rectum but no other abnormal changes. The AMS's examination of the appellant's abdomen and anal examination revealed no evidence of disease.

38. Noting, as is highlighted in [16.9] of the Guidelines, that constipation is a symptom and not a sign, the AMS was right, in the Appeal Panel's view, given the lack of signs of any disease in the appellant's digestive tract to assess her as having 0% whole person impairment.

39. The Appeal Panel therefore considers that the AMS has applied the correct criteria to assess the appellant's whole person impairment, and has applied that criteria correctly, and that the MAC does not contain a demonstrable error.

40. For these reasons, the Appeal Panel has determined that the MAC issued on 24 June 2019 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 Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar