

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M2-2599/19
Appellant:	Lucia Nesci
Respondent:	Secretary, Department of Industry
Date of Decision:	6 January 2020
Citation:	[2020] NSWCCMA 6

Appeal Panel:	
Arbitrator:	Brett Batchelor
Approved Medical Specialist:	Associate Professor Michael Fearnside
Approved Medical Specialist:	Dr Brian Noll

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 26 September 2019 Lucia Nesci (the appellant/Ms Nesci) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Ross Mellick, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 2 September 2019.
2. The appellant relies on the following ground 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 of appeal has been made out. The Appeal Panel (the Panel) has conducted a review of the original medical assessment but limited to the ground of appeal on which the appeal is made.
4. The workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.
5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment*, 4th ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. The appellant was descending some stairs at her place of employment on 26 May 2016 when she fell about seven steps. She can recall trying to regain her balance by holding on to the bannister but missed it. As she fell back, she struck her lower back, her neck and head. She did not attempt to get up. A student came by and an ambulance was called which transported her to Cooma Hospital. Ms Nesci was admitted for approximately one day. She says that the main pain she was experiencing was to her neck and back, but her primary concern was of the dizziness she had from her head injury. She was aware of some bleeding from a scalp laceration on the right posterior part of her scalp.

7. The appellant became aware of spinning of the environment when she was being transferred from one bed to another during the process of having scans performed. Vertigo became the most important of her symptoms, causing her to be away from her employment for approximately three months.
8. The main symptoms that occurred in close proximity to her injury, in addition to those of vertigo and a recurring fear of dying, were pain involving the neck and lower back, and also posteriorly situated headache which extended to the frontal region.
9. The symptoms improved to some extent and Ms Nesci was able to return to her teaching duties two to three months after her injury. She says that she was troubled by persisting neck pain, back pain, headache, fearfulness regarding dying and associated anxiety and depression which interfered with her normal duties. She was demoted to an assistant teacher, requiring supervision by another teacher up until the time she ceased work. She reduced her hours of work. Ms Nesci ceased work towards the end of 2018 on the advice of her psychologist and psychiatrist.
10. The appellant is being treated for insomnia, mild depression and chronic pain. She reports her present symptoms as involving post-traumatic stress, neck pain, low back pain, daily headache, vertigo and nightmares. There is also pain involving both upper extremities, sometimes.

PRELIMINARY REVIEW

11. The 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. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination. Although the appellant requests re-examination by a member of the Panel and submits that this is required to determine the presence of clinical features regarding Diagnosis-related estimates (DRE II) for the various areas of her spine which she says have clearly not been assessed by the AMS previously, the Panel considers that there is sufficient material in the Appeal Papers and in the MAC on which to base its decision.

EVIDENCE

Documentary evidence

13. The 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 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

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

Appellant

16. In summary, the appellant submits that a physical examination by the AMS should have taken place in respect of the lumbar spine, thoracic spine and cervical spine, as well as the left elbow.

17. The appellant then refers to the clinical findings of Dr W G D Patrick in his report dated 4 September 2018¹ who found muscle guarding and asymmetry of movement in the neck and marked muscle guarding at the cervical spine with asymmetry of movement. Reference is made to the Guidelines Ch 4 at [4.18] in respect of the symptoms required to make of a finding of DRE II.
18. The appellant submits that despite there having been clear clinical findings from her doctor (apparently referring to Dr Patrick), the MAC prepared by Dr Mellick does not address in any clear way what examination he conducted in respect of her neck, thoracic spine or lumbar spine. The appellant refers to what she says is the only comment made by Dr Mellick in respect of examination of the spine.
19. The appellant submits that it is completely unclear from the MAC whether Dr Mellick undertook examination in accordance with the Guidelines to identify verifiable radicular complaints or muscle guarding or spasm or asymmetric loss of range of movement. The appellant submits that the MAC remains silent on all these issues.
20. The appellant submits that where there is evidence from a medical practitioner of the existence of such complaints as in this case, it is incumbent on the AMS to make or record his clinical findings so that any findings of permanent impairment are clear and precise. She submits that, not only is there no record of what precise examinations and findings were made, but there is a complete failure of the AMS to make comments where his findings are different from other medical practitioners whose evidence is in the file.
21. The appellant notes that the only comment made by Dr Mellick in respect of other medical opinions is reference to Dr Fitzsimmons who gave a neurological opinion regarding vestibular disturbance. Nowhere in the MAC is there reference to the medical report of Dr Patrick, and why Dr Mellick found difference between his findings and those of Dr Patrick.
22. The appellant submits that in the circumstances outlined the MAC contains a demonstrable error and should be review by the Panel.

Respondent

23. In reply, the respondent refers to the comment of Malpass AJ in *Mahenthirarasa v State Rail Authority of New South Wales & Ors (Mahenthirarasa)*² in noting that the appellant identifies only one basis for intervention by the Panel, namely, that the MAC contains a demonstrable error. Malpass AJ said at [29]:

"A demonstrable error would essentially be an error for which there is no information or material to support the finding made - rather than a difference of opinion."
24. The respondent refers to the Findings on Physical Examination of the AMS recorded in the MAC³, together with the Details and Dates of Special Investigations, the Summary of Injuries and Investigations, and Consistency of Presentation.
25. The respondent submits that, having regard to the foregoing, it is clear that the AMS took a comprehensive history and had the appellant undergo appropriate testing before arriving at his assessment, which included straight leg raising. The respondent notes that the opinion of the AMS is consistent with that of Dr Anthony Smith⁴ in respect of the cervical spine, range of movement of either shoulder and thoracic spine. The AMS relied upon his own assessment and arrived at a position that was open to him. According to the respondent, it is not necessary for the AMS to refer to every medical report before him when producing a MAC.

¹ Appeal Papers p 50.

² [2007] NSWSC [22].

³ Appeal Papers p 23.

⁴ Report dated 15 January 2019, p 326 Appeal Papers.

26. The respondent submits that the appellant's submissions are limited to pure disagreement with the AMS, that no error has been demonstrated and that the MAC should not be interfered with.

FINDINGS AND REASONS

27. 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. An Appeal Panel is limited to determining error as alleged by the appellant but must assess in accordance with the Guidelines. Once error is made out, the Panel may "review" the MAC.
28. In *Campbelltown City Council v Vegan (Vegan)*⁵ 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.
29. The Panel notes that the appeal is limited to allegation by the appellant that the AMS does not address in any clear way what examination he conducted of the neck, thoracic spine or lumbar spine, despite "clear clinical findings" from her doctor.
30. The Panel does not accept this submission. It is apparent from the MAC that Dr Mellick examined all three spinal regions when he says that Ms Nesci gave a clear history and exhibited no abnormality of mood or cognition. He was not able to identify any evidence "of any soft tissue injury or bony abnormality on examining the spine." He did however identify "a developmental upper thoracic gibbus"⁶ (which the medical members of the Panel note is a palpable bony mass at the top of the thoracic spine, irrelevant to this case).
31. The AMS identified "...no abnormalities of contour, posture, tone, power production, coordination or sensation in the upper or lower extremities and the deep tendon reflexes were risk [sic, brisk] and symmetrical. The plantar reflexes were flexor." This indicates to the Panel that there are no neurological abnormalities in the upper or lower limbs.
32. Significantly, the AMS found no impairment of the ability of Ms Nesci to assume seated position with hips flexed and knees extended and straight leg raising was unimpaired. This meant that straight leg raising in the seated position was normal, indicating sciatic nerve irritation was not present. Quite clearly the AMS examined the lumbar spine and took his findings recorded above into account when finding 0% whole person impairment (WPI) in respect of the lumbar spine.
33. Finally, in his findings the AMS found no limitation in cervical movement. The CT of the cervical spine and brain performed on 23 May 2016 revealed no intracranial pathology, no skull fracture and no abnormality of the cervical spine other than degenerative changes of mild degree.
34. The Panel has no hesitation in accepting that the AMS examined all three spinal regions. He found, in summary, that "physical examination reveals no abnormalities."⁷ On those findings there cannot be any other finding than 0% WPI for all three spinal regions.

⁵ [2006] NSWCA 284.

⁶ Appeal Papers p 23 at [5].

⁷ Appeal Papers p 25.

35. In his “**REASONS FOR ASSESSMENT**”⁸ Dr Mellick states that in making his assessment he has taken into account his “...findings with regard to the history, the findings on examination and the documentary evidence I have received.” At [2] of the MAC the “*Documentary Evidence*” is as listed in the referral from the Registrar. This referral⁹ lists the Application and attached documents and the Reply and attached documents. These are the documents before the Panel.
36. Dr Anthony Smith examined the appellant on 15 January 2019 and produced a report of that date. He examined the cervical spine and shoulders and had access to the report of the CT scan of the cervical spine and brain, which showed mild degenerative change in the neck and no brain abnormality. He found neck movements performed at 85% of the expected range. He assessed DRE I in respect of the cervical spine 0% WPI.
37. The AMS did not refer to Dr Smith’s report.
38. Dr W G D Patrick examined the appellant on 2 August 2018 and produced a report dated 4 September 2018¹⁰. Relevantly he had access to the CT scan of the cervical spine and brain. He found muscle guarding evident at cervical spine, active flexion full, with extension of 60% of expected, and lateral rotation to the right 70% and the left 60% of expected. Dr Patrick assessed 6% WPI of the cervical spine, 5% WPI of the thoracic spine and 5% WPI of the lumbar spine.
39. The AMS did not refer to Dr Patrick’s report.
40. Dr Mellick did refer to the report of Dr Fitzsimmons, neurologist dated 21 September 2018 and noted he recorded an assessable impairment due to “minor residual sense of loss of balance and disturbance of heel toe gait after the generally successful Epley manoeuvres” [sic]¹¹. Dr Fitzsimmons assessed 4% WPI in respect of this loss of balance and disturbance of heel-toe gait. He also assessed no WPI in relation to cognitive impairment, having regard to [1.23] of the Guidelines.
41. The appellant did not take issue in respect of the assessment of the nervous system (vestibular abnormality), or the left elbow.
42. As noted above at [28], the Court of Appeal in *Vegan* held that an Appeal Panel is obliged to give reasons. There are no disputes of fact in this matter requiring resolution by the Panel. There are differences in the findings on examination and assessment between the AMS, Dr Patrick and Dr Smith. Whilst it may have been desirable for Dr Mellick to refer to the findings and assessments of Dr Patrick and Dr Smith and their assessments, there is no obligation on him to refer to all the evidence before him. Having regard to the findings of Dr Mellick based on his examination of the appellant and the material he had before him, the Panel is firmly of the view that his assessment would not be different if reference had been made to Dr Patrick and Dr Smith. The Panel finds that Dr Mellick:
- (a) took a proper history from the appellant;
 - (b) examined the appellant’s cervical, thoracic and lumbar spine;
 - (c) recorded his findings;
 - (d) had regard to the material that was referred to him by the Registrar, and
 - (e) made his assessment of WPI in respect of the cervical, thoracic and lumbar spine in accordance with his findings on examination and the material referred to him.

⁸ Appeal Papers pp 24-25 at [10.a.].

⁹ Appeal Papers p 28.

¹⁰ Appeal Papers p 50.

¹¹ Appeal Papers p 25 at [10.c.].

43. The appellant's submissions highlight disagreement between the findings and assessments between the AMS and Dr Patrick. This does not constitute a demonstrable error as referred to by Maspass AJ in *Mahenthirarasa*.
44. The decision of Malpass AJ in *Mahenthirarasa*, which was in respect of the refusal of the delegate of the Registrar to allow an appeal from the finding of an AMS in a MAC (s 327(4) of the 1998 Act), was the subject of an appeal to the Court of Appeal. Basten JA dealt with the concept of "demonstrable error" at [59] of the judgement. Whilst the decision of Malpass AJ was overturned, no issue was taken with his discussion of the concept of demonstrable error. Basten JA's comments are as follows:

"59 The concept of 'demonstrable error' is not defined, and may be open to various interpretations, ranging from the broad to the narrow. At the narrowest end of the spectrum, it may be thought that the error must be apparent from reading the certificate itself, thus equating the error with error 'on the face of the record' for the unrelated purpose of relief in the nature of certiorari. There is no obvious reason why such a construction should be adopted when the purpose is review on the merits, rather than review for legal error. The word 'demonstrable' does not in any event import such a constraint. As noted at [37] above, the example given in the second reading speech suggested that the error must be a manifest error. In *Plaintiff S157/2002 v The Commonwealth* [2003] HCA 2; 211 CLR 476 at [13], Gleeson CJ made comments relevant to such a concept, stating:

'The concept of 'manifest' defect in jurisdiction, or 'manifest' fraud, has entered into the taxonomy of error in this field of discourse. The idea that there are degrees of error, or that obviousness should make a difference between one kind of fraud and another, is not always easy to grasp. But it plays a significant part in other forms of judicial review. For example, the principles according to which a court of appeal may interfere with a primary judge's finding of fact, or exercise of discretion, are expressed in terms such as 'palpably misused [an] advantage', 'glaringly improbable', 'inconsistent with facts incontrovertibly established', and 'plainly unjust'. Unless adjectives such as 'palpable', 'incontrovertible', 'plain', or 'manifest' are used only for rhetorical effect, then in the context of review of decision-making, whether judicial or administrative, they convey an idea that there are degrees of strictness of scrutiny to which decisions may be subjected.'

45. In *Merza v Registrar of the Workers Compensation Commission & Anor*¹² Hoeben J thought that a "demonstrable error" is an error which is readily apparent from an examination of the MAC and the document referring the matter to the AMS for assessment. In that case there had been an agreed injury to the back but it was not a demonstrable error when the AMS had made his own determination of what the injury was.
46. For these reasons, the Appeal Panel has determined that the MAC does not contain a demonstrable error and that the MAC issued on 2 September 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*.

G De Paz
Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar



¹² [2006] NSWSC 939.