WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4010/19**
Appellant:	**George Zaatini**
Respondent:	**All Asian Food Pty Limited**
Date of Decision:	**19 February 2020**
Citation:	**[2020] NSWWCCMA 26**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr David Crocker**
Approved Medical Specialist:	**Dr Drew Dixon**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 14 November 2019 George Zaatini lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr George Weisz, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 21 October 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 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. It is convenient to extract the background recorded by the AMS at Part 4 of the MAC,

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:
>
> Mr Zaatini while being pleasant during interview, gave a rather long and difficult history from which I recorded the following.

He stated that in 2007 he started to work for a food company as a deliverer, initially with a small van, but later on with a truck. He had to load, unload and deliver to various areas of Sydney. He worked 8-10 hours a day, 5 or 6 days a week. His duties also required jumping off the truck and lifting, as no forklifts were available. He stated that his several injuries occurred during this intensive physical work: he developed neck, low back, mid-back, shoulders and knees symptoms. He was treated by several family practitioners, mainly with oral medications and physical therapy. Some injections were received, but were only of short-lived benefit. He continued to work till 2017, was off since, as the constant pain in all the affected areas prevented him from any heavier physical duties. He has no sphincter problem and no erectile dysfunction. During the last year, with his car, he is transporting disabled kids to school, twice a day, 5 days a week.

- Present treatment: He is on daily oral medications: twice Neurophen a day and twice Tramadol tablets, occasionally enhanced by Voltaren anti-inflammatory oral medication."

PRELIMINARY REVIEW

7. 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.

8. 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 for the reasons given below.

EVIDENCE

Documentary evidence

9. 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

10. The parts of the medical certificate given by the AMS are set out, where relevant, in the body of this decision.

SUBMISSIONS

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

12. The appeal concerns only the additional whole person impairment (WPI) for the impact on the activities of daily living (ADLs) as part of the assessment of the lumbar spine. The other elements of the lumbar spine assessment and the assessments of the other body parts referred to the AMS are not appealed.

Appellant

13. In summary, the appellant worker submits that the AMS has erred in not allocating a higher additional percentage than the 1% he found for the impact on ADLs. The AMS should have found 3% WPI additional, or alternatively at least 2%.

14. While the AMS is not bound by the opinion of previous assessors relied on by the parties, Dr Truskett records a history of restrictions in ADLs consistent with 3% even though he did not provide an assessment for the back.

15. Dr Bodel also takes the history of moderate impact on ADLs and finds 2% additional applicable.

16. Dr Silva did not canvas the range of ADLs relevant to the additional allowance, and his finding of 1% additional should be disregarded.

17. Even though Dr Bodel found 2% additional applicable, the Panel should add 3%.

Respondent

18. There was no error by the AMS, and the correct criteria have been followed. The finding of the AMS was open to him.

19. The appeal is limited to a disagreement and is insufficient grounds for appeal. The submission for 3% WPI for ADLs is not based on any medical evidence.

20. The MAC should be confirmed.

FINDINGS AND REASONS

21. 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.

22. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

Discussion

23. The AMS says under "present symptoms",

> "He is experiencing constant neck pain, intense low back pain, pain and restrictions in mobility of each shoulder and in each knee."

24. Then, under "Social activities/ADL" the AMS records,

> "Mr Zaatini stated to have limitations in several activities of daily life (standing, driving, travelling, walking, climbing stairs), in self hygiene such as dressing, showering, bathing and has difficulties in prolonged writing and grasping).
> He also has difficulty in finding night time comfort and needs medications for it."

25. The Panel notes the "summary of injuries and diagnoses" at Part 7 of, "Pathology of traumatic nature was found in the lumbar spine, namely annular disc tear, in addition to the degenerative changes."

26. As noted above, the respondent submits that the finding of 1% additional was open to the AMS, and the appeal is about a difference of opinion which is not a valid ground of appeal.

27. In *Mahenthirarasa v State Rail Authority of New South Wales & Ors* [2007] NSWSC 22 (*Mahenthirarasa*) the Court said: "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.".

28. The Panel notes the importance of the exercise of clinical judgement by an AMS in the process of assessment, as expressed by the Supreme Court in *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140 (*Parker*),

> "In *Ferguson v State of New South Wales* [2017] NSWSC 887 at [23], Campbell J cited with approval *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36 ('*Wark*'), where it is stated at [33]:
>
> > '…the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face. …'"

29. Further elements for consideration on the impact of ADLs include the history taken, and the medical reports relied on by the parties. It seems to the Panel that there is some discord between the finding on ADLs by the AMS on one hand, and the history taken by him together with the other medical reports on the other.

30. The respondent submits that the AMS, while reporting the history provided by Mr Zaatini, did not necessarily accept what was said to him in finding the additional 1%. However, the AMS did not raise any issues he had with the history taken. He did say under "consistency of presentation" that, "Mr Zaatini was partially consistent in examination and presented a very large extent of non-organic clinical picture." However, there is no connection made by the AMS between this and the issue of the ADLs. The AMS proceeded to find DRE Lumbar Category II, and to find that an additional amount for ADLs was applicable.

31. The process is one governed by paragraphs 4.33-4.35 of the Guidelines, discussed further below. Self-reporting is not the only element to be considered, but the clinical findings and the other reports before the AMS are also to be addressed. The respondent submits in this regard that the only assessor to find 2% additional for ADLs is Dr Bodel.

32. Dr Truskett, in his report of 4 March 2019, was not asked to give an assessment of the back. However, he takes a similar history of the back symptoms to that taken by the AMS, before discussing the impact of the back problems on the ADLs,

> "Because of his symptoms he is unable to run or jog. He can walk for approximately ten minutes. He has trouble on stairs. He can walk hills with caution. He is unable to vacuum or make a bed. He cannot mow the lawns and a provider is paid $40.00 per month for the last 18 months to do. He does not cook by choice. He cannot do heavy shopping. He is able to drive a motor vehicle for approximately 45 minutes. He used to play soccer socially with friends but is no longer able to do so. He can perform all acts of daily living. He cannot perform any yard duties. He is able to socialise. He can no longer go to the park with his children. He seems to have little disability in relation to his gastrointestinal tract."

33. Dr Bodel says in his reports of 18 July 2018,

> "He can drive an automatic motor vehicle and his driving tolerance is no more than 20 minutes. He struggles with all household maintenance and cleaning activities and in particular any activity that requires him to bend, twist or lift or use his arms overhead. He cannot kneel or squat."

34. In assessing the WPI for the back Dr Bodel says,

> "This gentleman's activities of daily living have been moderately compromised in accordance with Item 4.30 on Page 30 and Item 4.34 and Item 4.35 on Page 28 of the 4th Edition of the WorkCover Guidelines, giving a 2% loading and a 7% Whole Person Impairment overall."

35. Dr Silva in his report of 25 February 2019 says,

> "For the last 12 months he has had some difficulty with lawn mowing because of back pain and he pays a gardener to do that, about $40 to $50 each visit.
>
> Before the date of the injury and even now it is his wife who has been cleaning the inside of the house.
>
> Therefore, under ADLs he attracts only 1% WPI in contrast to Dr Bodel's award of 2% WPI under ADLs.
>
> He last played any sports such as table tennis or soccer over 20 years ago."

36. Dr Silva does not report activities other than mowing the lawn, cooking, and house cleaning. The last two are irrelevant to the issue of ADLs in this matter in accordance with paragraph 4.34 of the Guidelines extracted below, as is the sport activity Dr Silva notes has not been engaged in for over 20 years. In his assessment Dr Silva says, "I am awarding 1% WPI for difficulty with lawn mowing." Dr Truskett and Dr Bodel address more of the relevant activities, Dr Truskett more recently than Dr Bodel.

37. As the respondent submits, the Guidelines govern the way in which the impact on ADLs is considered. Paragraph 4.33 provides,

> "4.33 Impact of ADL. Tables 15-3, 15-4 and 15-5 of AMA5 give an impairment range for DREs II to V. Within the range, 0%, 1%, 2% or 3% WPI may be assessed using paragraphs 4.34 and 4.35 below. An assessment of the effect of the injury on ADL is not solely dependent on self-reporting, but is an assessment based on all clinical findings and other reports."

38. Paragraph 4.34 refers to a diagram to be used, and 4.35 sets out the way it is to be interpreted,

> "4.34 The following diagram should be used as a guide to determine whether 0%, 1%, 2% or 3% WPI should be added to the bottom of the appropriate impairment range. This is only to be added if there is a difference in activity level as recorded and compared to the worker's status prior to the injury.
>
> …
>
> 4.35 The diagram is to be interpreted as follows:
>
> Increase base impairment by:
>
> - 3% WPI if the worker's capacity to undertake personal care activities such as dressing, washing, toileting and shaving has been affected
> - 2% WPI if the worker can manage personal care, but is restricted with usual household tasks, such as cooking, vacuuming and making beds, or tasks of equal magnitude, such as shopping, climbing stairs or walking reasonable distances
> - 1% WPI for those able to cope with the above, but unable to get back to previous sporting or recreational activities, such as gardening, running and active hobbies etc."

39. Paragraph 4.35 is clear as to the way the diagram at paragraph 4.34 is to be interpreted. Given the history taken by the AMS as well as by Dr Truskett and Dr Bodel on the ADLs, 1% does not sit comfortably when considering paragraph 4.35. The examples given there are not narrowly prescriptive, but the histories recorded by the AMS and the practitioners other than Dr Silva record restrictions commensurate with greater than the 1% category.

40. There is a "presumption of regularity" with the clinical examination by an AMS, and not all findings need be supported by extensive reasons.[1] However, the exercise in this matter involves factual matters as to how the symptoms affect aspects of Mr Zaatini's daily life. In many instances it will be apparent on the face of the Certificate as to why an AMS has arrived at an additional percentage of WPI because the history, findings, and the other reports are consistent with that conclusion. In this instance however the apparent differences between the evidence and the conclusion of the AMS is such that an explanation was necessary.

41. *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140 (*Parker*) was a matter about the Psychiatric Impairment Rating Scale (PIRS) categories, which is quite different to this matter, but the principle is somewhat analogous. The Guidelines set out a series of available categories for ADLs as is the case with the PIRS, in general, with the AMS charged with determining the applicable category.

42. The Court said in *Parker*, finding the Panel in that matter erred in equating a difference of opinion with a demonstrable error at [70],

> "To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence."

43. The Panel is of the view that given the history taken by the AMS and the supporting evidence of Dr Bodel and Dr Truskett is consistent with greater than 1% additional. Dr Silva addressed relatively few relevant ADLs. There was a need for the AMS to explain the process of reasoning for the conclusion that 1% was applicable rather than a higher amount. The explanation of the AMS is limited to, "+ 1% for reduced activities of daily life …". (Part 10.b.)

44. This is not a matter in which the Panel merely considers it "more appropriate" to add greater than 1% WPI, but one in which the error found is inadequate reasoning for the conclusion. It is apparent on the face of the Certificate, given the evidence, that reasons were necessary to make it possible to understand the conclusion.

45. The AMS did address the correct criteria and it was a matter for the AMS to apply his clinical expertise, as discussed in relation to *Parker* above. However, in the circumstances of this matter to omit some explanation for the conclusion of 1% despite the history taken and the reports of Dr Bodel and Dr Truskett, which are consistent with that history, is a demonstrable error on the face of the Certificate.

[1] *Bjkov v ICM Property Services Pty Limited* [2009] NSWCA 175; and *Jones v The Registrar* WCC [2010] NSWSC 481

Findings

46. If a ground of appeal is successfully made out and an error identified, the Panel must correct the error or errors found "applying the WorkCover Guides fully" (see *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499). The Panel can make the assessment and correct the error regarding the additional WPI for ADLs without recourse to further examination of Mr Zaatini.

47. The Panel is satisfied that the impairment is permanent, and the injury has reached maximum medical improvement. There is no subsequent injury.

48. The Panel rejects the submission of the appellant that an additional 3% WPI is applicable. The evidence does not support that degree of restriction in terms of paragraph 4.35, and no assessor found it applicable.

49. Assessing to the additional amount available for ADLs, the Panel finds that the additional WPI applicable in relation to the lumbar spine is 2%. As extracted above, the history taken by the AMS, as well as the histories recorded by Dr Bodel and Dr Truskett, which are more complete than that of Dr Silva, squarely align with 2% in terms of paragraph 4.35 of the Guidelines.

50. Applying this to the lumbar assessment by the AMS of DRE Lumbar Category II, which was not appealed, gives 7% WPI for the lumbar spine. Combining the other assessment sub-totals with the lumbar spine gives 7+4+2+2+0 = 15% WPI, as reflected in the Panel's Certificate below.

51. For these reasons, the Appeal Panel has determined that the MAC issued on 21 October 2019 is revoked. A new Certificate is provided below.

52. 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

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Matter Number: **4010/19**
Appellant: **George Zaatini**
Respondent: **All Asian Food Pty Limited**

This Certificate is issued pursuant to s 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Appeal Panel revokes the Medical Assessment Certificate of Dr George Weisz and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - Whole Person Impairment (WPI)

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in NSW Workers Compensation Guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**WPI deductions pursuant to s 323 for pre-existing injury, condition or abnormality** (expressed as a fraction)	**Sub-total/s % WPI** (after any deductions in column 6)
Lumbar spine	12.05.2017	Ch 4, Page 24	Ch 15.4 Page 384	7	0	7
Right upper extremity	12.05.2017	Ch 2, Page 10	Ch.16.4i, Page 433 Fig. 16-40, 16-43; 16-46	2	0	2
Left upper extremity	12.05.2017	Ch 2, Page 10	Ch. 16.4i, Page 433 Fig. 16-40, 16-43, 16-43	4	0	4
Right lower extremity	12.05.2017	Ch 3, Page 13	ch.17.2; Page 540 Table 17-31; page 544	2	0	2
Left lower extremity	12.05.2017	Ch 3, Page 13	ch.17.2; Page 540 Table 17-31; page 544	0	0	0
Total % WPI (the Combined Table values of all sub-totals)					**15%**	

Ross Bell
Arbitrator

Dr David Crocker
Approved Medical Specialist

Dr Drew Dixon
Approved Medical Specialist

19 February 2020

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

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar