

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-6139/19
Appellant:	Aaron Parker
Respondent:	Hitachi Construction Machinery (Australia) Pty Ltd
Date of Decision:	30 June 2020
Citation:	[2020] NSWCCMA 116

Appeal Panel:	
Arbitrator:	John Wynyard
Approved Medical Specialist:	Dr Phillipa Harvey-Sutton
Approved Medical Specialist:	Dr James Bodel

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 9 April 2020, Aaron Parker, the appellant lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Robert Kuru, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 1 April 2020.
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 Guides) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed (AMA 5). "WPI" is reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 23 January 2020, the delegate of the Registrar referred this matter to an AMS for assessment of WPI caused by injury to the right lower extremity (knee), scarring (TEMSKI) and consequential medical conditions of the lumbar spine and left lower extremity (knee) caused by injury on 5 October 2013.

7. The Certificate of Determination of 22 January 2019 was also referred to.
8. The AMS took a history that on 4 October 2013, whilst Mr Parker was unloading equipment from the back of a crew truck, he twisted his knee as he stepped over the tailgate. He had some time off and returned to his regular duties, albeit with continuing pain in the knee.
9. On 5 March 2015, whilst repairing an excavator in a coal mine, Mr Parker twisted his right knee as he was stepping down onto a walkway.
10. Mr Parker was referred to Dr Peter Berton, Knee Surgeon and, after investigations, came to an arthroscopy on 27 January 2016. Symptoms persisted and he came to a reconstruction of the medial patella femoral ligament on 23 September 2016. The following year he had a right sided anterior cruciate ligament reconstruction, on 3 May 2017. This procedure involving the harvesting of hamstring tendons. As to the consequential injuries, the AMS simply noted that Mr Parker went on to develop back pain and pain in his left knee¹.
11. The AMS found a combined table WPI of 10%.

PRELIMINARY REVIEW

12. 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.
13. The appellant requested a re-examination by a Panel AMS. As no error by the AMS was established, the application is refused.

EVIDENCE

Documentary evidence

14. 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

15. 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

16. Both parties made written submissions which have been considered by the Appeal Panel.

FINDINGS AND REASONS

17. 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.
18. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 (*Vegan*), 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.

¹ Appeal papers page 27.

19. Mr Parker alleged that the AMS fell into error in four respects:

- The Activities of Daily Living (AOL) assessment was incorrect.
- The assessment of Mr Parker's scarring was incorrect.
- The examination of Mr Parker's right knee was conducted on incorrect criteria.
- The examination of Mr Parker's left knee was also carried out using incorrect criteria.

Activities of daily living

20. The AMS assessed an entitlement of 1% WPI. He said:²

"Social activities/ADL

He is significantly restricted in his level of function. He has difficulty performing household maintenance and gardening chores. His wife attends to most of the domestic cleaning."

Submissions

21. The 1% WPI assessed was inadequate, it was submitted. The AMS had described the restrictions in Mr Parker's activities of daily living, which included a recognition that there was difficulty in performing household maintenance, relevantly, and that Mrs Parker attended to most of the domestic cleaning activities
22. It was submitted that the AMS had not adequately disclosed his reasoning. *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43 (*Wingfoot*) and *AA/ Limited v Fitzpatrick* [2015] NSWSC 1108 (*Fitzpatrick*) were referred to.
23. The respondent referred to the appellant's statement, which made no reference to activities of daily living by Mr Parker. The respondent submitted that the matters noted by the AMS did not necessarily equate to an inability by Mr Parker to do those activities. It could be inferred from the findings by the AMS that Mr Parker does attend to some domestic cleaning activity and gardening chores.

Discussion

24. Chapter 4.33, 4.34 and 4.35 provide:

"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.

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. (As written).

YARD/GARDEN/SPORT/RECREATION 1%

HOME CARE 2%

SELF CARE 3%"

[The diagram is omitted, as its effect is described below]

² Appeal papers 25.

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."

25. It can be seen therefore that the criteria set out in chapter 4.35 have to be considered in the context of the overall discretion given to an AMS by virtue of the expression in bold, "as a guide" in Chapter 5.34. It follows that the examples described in Chapter 5.35 are not intended to be read as strict criteria, but are simply examples to assist the AMS.
26. We were not referred to any material either within Mr Parker's statement or the medical evidence that specifically related to these restrictions. It would appear that the AMS formed his judgment based upon his discussion with Mr Parker. As he is not bound by strict criteria when assessing the level of ADLs, he is entitled to form his judgment based upon his consultation with Mr Parker. The AMS has a discretion, and whilst other minds might reach a different conclusion, his assessment is within his discretion. He had the advantage of seeing Mr Parker and questioning him.

Scarring

27. The AMS made the following findings on physical examination regarding Mr Parker's scarring³:

"...There was also a longitudinal scar over the proximal tibia...."

28. The AMS assessed 1% WPI for the scarring. In explaining his calculations he said⁴:

"(ii) Skin (TEMSKI):

According to SIRA Guidelines page 74, Table 14.1 on the basis that the claimant is conscious of the scars, the claimant is able to locate them and there are minimal trophic changes, I award 1% WPI."

29. The AMS noted the assessment of 3% made by Dr Gehr.⁵

Submissions

30. We were referred to Table 14.1 of the Guides⁶. The appellant submitted that the AMS had erred in not considering many of the evaluative criteria set out in Table 14.1. It was submitted that the AMS had only considered three of the criteria, and had not considered a further seven.
31. The appellant repeated his submission that the AMS had not explained his path of reasoning in that he had mentioned only three of the criteria therein set out and that he had fallen into error in failing to discuss the remaining criteria which the appellant submitted was relevant.

³ Appeal papers page 25-26.

⁴ Appeal papers page 28.

⁵ Appeal papers page 28.

⁶ At page 78.

32. Again the submission was made that the AMS had not exposed his reasoning sufficiently and had infringed the principles in the cases above referred to.
33. The respondent referred to this criticism and submitted that those criteria identified by the AMS were consistent with the Guidelines. The respondent submitted that it was not necessary for the AMS to refer to criteria that did not apply. An inference could be drawn that the criteria were not mentioned because they did not apply.
34. The respondent submitted that the AMS had focussed his attention on the relevant criteria.

Discussion

35. The TEMSKI Scale is so called because “TEMSKI” is a mnemonic for “Table for the Evaluation of Minor Skin Impairment,” which is the title of Table 14.1 of the Guides.⁷ The Table has six columns. The first is entitled “criteria,” and the remaining five columns describe five categories of WPI - either 0%, 1%, 2%, 3-4% or 5-9% - depending on the criteria identified by the assessor and described by reference to the first column. The criteria are set out by reference to five topics in the first column.
36. Each of the five categories has different criteria attached to it, although some descriptions are quite similar.
37. The first topic in column one is called “location” and contains criteria for each class depending on such things as the scar’s location and visibility from the point of view of what clothing can be worn.
38. The next topic is “contour”. It again refers to similar but slightly different categories of the criteria, depending on which class is being considered.
39. The next topic is “ADL/Treatment”, and again the criteria required depend on what category is being considered.
40. The last topic is “Adherence to underlying structures,” the criteria for which vary between no adherence for the lower three classes and “some adherence” for the higher two classes.
41. Of some significance is the footnote to the Table which says:

“This Table uses the principle of ‘best fit’. You should assess the impairment of the whole skin system against each criteria and then determine which impairment category best fits (or describes) the impairment. Refer to 14.8 regarding application of this table.”
42. Table 14.8 provides:

“14.8 The TEMSKI is to be used in accordance with the principle of ‘best fit’. The assessor must be satisfied that the criteria within the chosen category of impairment best reflect the skin disorder being assessed. If the skin disorder does not meet all of the criteria within the impairment category, the assessor must provide detailed reasons as to why this category has been chosen over other categories.”
43. It should also be noted that Chapter 14.6 which was inserted with the 2016 edition of the Guides provides:

“14.6 A scar may be present and rated as 0% WPI.

⁷ Guides page 74

Note that uncomplicated scars for standard surgical procedures do not, of themselves, rate an impairment.”

44. It can be seen that this category of assessment also relies to a great extent on the visual appearance of the scars. The AMS is in the best position to evaluate the appropriate category as he is able to inspect it visually. In an assessment of scarring, an AMS also has a discretion as to his evaluation, as can be seen from the footnote to the Table, and the provisions of Chapter 14.8.
45. We concur with the respondent that it was not necessary for the AMS to give an exhaustive explanation for his findings. Given the discretion that he has in making this assessment, his explanation as to the reasons why he has made the assessment we find to be unremarkable.
46. We shall consider the appellant’s variously made claims that the AMS did not consider the guidelines or the evidence later in these reasons.

Right and left knees

47. The appellant made two complaints about the right and left knee assessment. Both related to the circumstances of the examination.
48. The AMS found that upon physical examination:

“Mr Parker walked with a bilateral antalgic gait. He had neoprene knee braces on bilaterally with a rigid Donjoy type brace on the right. The right knee had normal valgus alignment of 5°. There were healed arthroscopic portals and anterior lateral scars over the patella and distal femur.

..... There was an effusion in the knee.

Range of motion was from 0° to 110°. There was no significant anterior drawer and collateral ligaments were stable at 0° and 30°.

With respect to the left knee, there were no scars or effusion and again, the knee was normally aligned. Range of motion was from 0° to 115°. There was no anterior drawer and again, collateral ligaments were stable at 0° and 30°.

Otherwise, the lower limbs were neurologically intact with symmetrical reflexes and intact peripheral power. The hips were of normal range of motion. Peripheral pulses were present.”

Submissions

49. Firstly, the appellant alleged that incorrect criteria had been applied by the AMS, as he had failed to indicate that he had used a goniometer in assessing range of motion. It followed therefore that a goniometer had not been used.
50. Secondly, it was alleged that the AMS had failed to indicate that he had removed the knee braces before he assessed range of motion. It followed therefore that he had not removed the knee braces before measuring range of motion.
51. As neither alleged failure was mentioned, the appellant submitted, an inference was available that the relevant errors had been made. If that was unclear, the appellant argued, then in any event the AMS had failed to disclose an adequate path of reasoning.

Discussion

52. These submissions were advanced on the same erroneous assumption. The appellant has made an assumption that because neither a goniometer nor knee braces had been mentioned by the AMS, he had fallen into error. No evidence was referred to in support of these allegations. There was no statement from the appellant that a goniometer had not been used, or that the AMS had measured his knee movements with the knee brace in situ. The allegations had no basis but the wildest supposition.
53. In any event there is a presumption of regularity that attends administrative decisions, and the presumption applies to an AMS. In *Jones v Registrar Workers Compensation Commission*⁸ His honour James J said at [50]:
- “...There is a presumption of regularity that the AMS had performed such tests as might be required to determine whether the range of motion in the cervical spine was symmetrical or asymmetrical. The medical science the second defendant [the AMS] was applying was not controversial and his reasons were not required to be extensive or detailed.”
54. His honour James J had earlier referred to the presumption of regularity at [36], adopting the dicta of the Court of Appeal in *Bojko v ICM Property Service Pty Ltd* [2009] NSWCA 175.
55. The use of a goniometer is sometimes a standard part of the measurement by an AMS of range of motion, as indeed is provided by the guidelines. The presumption of regularity extends to an assumption that an AMS would perform his examination in accordance with the guidelines and usual practice. It also extends to the presumption that an AMS would have considered the evidence and the relevant guidelines in the performance of his duties. Presumptions are of course rebuttable, but in the absence of evidence to substantiate the appellant's allegations, we are satisfied that the AMS is entitled to its benefit.
56. Further, the medical experts on the Panel agree that the findings on examination could not have been produced, had the appellant's knee brace still been in place. Moreover, they agree it would be extremely unlikely that any registered medical practitioner would conduct a physical examination with a knee brace in place.
57. In summary, the appellant made assumptions regarding what the AMS considered and how he conducted his examinations, for which there is no evidence beyond mere speculation.
58. So far as the repeated claims that the AMS did not adequately disclose his path of reasoning are concerned, it is not necessary for an AMS to refer to each action he took, nor to every document he perused. As we mentioned at [18] hereof, the obligation by an AMS to give adequate reasons depends on the circumstances of each case. The AMS has referred to the correct guidelines in his Table⁹, and no relevant disputes of fact have arisen. His reasons have been adequate to explain his assessment.
59. For these reasons, the Appeal Panel has determined that the MAC issued on 1 April 2020 should be confirmed.

⁸ [2010] NSWSC 481.

⁹ Appeal papers page 30

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 MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

