WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4410/20**
Appellant:	**Angela Ana Meznarsic**
Respondent:	**Benbren Pty Limited**
Date of Decision:	**4 January 2021**
Citation No:	**[2021] NSWWCCMA 1**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr James Bodel**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 29 October 2020, Angela Ana Meznarsic, the appellant, 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 14 October 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 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 (SIRA 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 history reported by the AMS at Part 4 of the MAC,

> "Mrs Meznarsic told me that she was employed by Benbren Pty Ltd which is a firm brought into being by herself and her husband. Initially she worked as the administrative art of the business and then three years before her injury the labourer left and they could not find a suitable worker and so Mrs Meznarsic took over the labourer's role.

Mrs Meznarsic told me that the business was involved in cleaning up home sites after the tradesman had finished and at the time of injury they were working at a property in Bilgola Heights. Apparently the bricklayers had finished, and it was necessary for Mrs Meznarsic to carry two buckets of bricks up a steep slope and then lift them overhead into a skip. Having done this a number of times she developed pain in both shoulders and in the neck. Her symptoms were such that she could not continue and initially the pain in the left shoulder was worse than the right.

She attended a general practitioner, Dr Lumbruru in Camden who arranged for her to have MRI scans and she was told that she had tears in both shoulders. She was referred for physiotherapy and unfortunately this did not help. She was subsequently referred to Dr Arash Nabavi, Orthopaedic Surgeon and he operated on the left shoulder in the Liverpool Day Surgery. When the patient was discharged from hospital the left arm was in a sling and there was an analgesic pump with a drip into the left arm. She was unable to see anybody to get it removed two days later and so her husband removed it with significant pain.

She told me that unfortunately the surgery did not help and her left shoulder was very stiff. She was re-admitted on 24 January 2019 and underwent a manipulation under anaesthesia and again this did not help."

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. In summary the parties submit:

Appellant

12. The AMS has erred in applying paragraph 2.14 of the SIRA Guidelines and reducing the upper extremity impairment (UEI) from 22% in each shoulder to 10%.

13. The restrictions in range of motion are consistent across various treatment providers.

14. The AMS failed to take account of the latest imaging studies in Dr Haber's clinical notes at pages 233 and 234 of the Application to Resolve a Dispute before he concluded that the range of motion found on examination was far more restricted would be expected with a partial rotator cuff tear.

15. The AMS erred in the diagnosis of only a partial rotator cuff tear of the right shoulder when the latest scans show a full thickness rotator cuff tear, and a full tear of the left rotator cuff tendon and a full thickness tear of the subscapularis tendon.

16. The MAC should be revoked, and the worker's bilateral shoulder impairment found to be 13% whole person impairment (WPI) for each, with the combined total being 28% WPI.

Respondent

17. The AMS did not err when describing the applicant's right shoulder rotator cuff tear as a partial tear. The ultrasound of December 2019 described a full tear, but prior MRI's do not describe a full thickness tear and the AMS was entitled to use his clinical judgement.

18. That the AMS did not provide a worksheet is not an error. The worksheet was subsequently provided.

19. The AMS correctly applied paragraph 2.14 of the SIRA Guidelines having found the restrictions in the range of motion and using his clinical judgement.

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.

Reduction of the assessment for each shoulder of 22% UEI to 10% UEI using paragraph 2.14 of the SIRA Guidelines.

23. The investigations of the shoulders noted by the AMS at Part 6 comprise,

> "Ultrasound Both Shoulders dated 15 December 2017 reports a full thickness tear in the right shoulder and tendinosis and supraspinatus partial tendon tear in the left shoulder.
>
> MRI scan of the Shoulders dated 2 January 2018 – In the left shoulder there is supraspinatus tendinosis with bursal surface fraying. In the right shoulder there is supraspinatus bursal fraying and a small articular surface tear.
>
> MRI Left Shoulder dated 28 November 2018 shows post- surgical changes after a rotator cuff repair and biceps tenodesis. The patient is noted to have adhesive capsulitis."

24. The AMS reports at Part 5 "Findings on physical examination",

> "Mrs Meznarsic had a markedly restricted range of movement being only able to move both arms 30 degrees from the side and 30 degrees into forward flexion (please see the attached worksheet) for her range of movement. Reflexes were brisk and equal. There was no specific sensory loss, no unilateral muscle wasting and no vascular deficits in either arm."

25. The SIRA Guidelines at paragraph 1.36 provide,

> "AMA5 (p 19) states: 'Consistency tests are designed to ensure reproducibility and greater accuracy. These measurements, such as one that checks the individual's range of motion are good but imperfect indicators of people's efforts. The assessor must use their entire range of clinical skill and judgment when assessing whether or not the measurements or test results are plausible and consistent with the impairment being evaluated. If, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the assessor may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing.' This paragraph applies to inconsistent presentation only."

26. Under "Consistency of presentation" the AMS says,

> "On two occasions the patient showed a slightly greater range of movement than when formally examined, the patient was noted to keep both arms firmly at her sides and when I indicated that the examining doctors had seen a greater range of movement she denied that that was the case."

27. The Panel considers that the reasoning of the AMS given for finding inconsistency of presentation does not establish that Ms Meznarsic was inconsistent. A "slightly greater range of movement" on casual observation when not being formally examined does not establish inconsistency. There was no reported measurement of specific differences in the range of motion in the two settings. There was nothing of substance noted by the AMS to establish that the range of motion found on examination of the shoulders was not "plausible and consistent".

28. At Part 10.b. the AMS explains,

> "With regard to her shoulders (please see the attached worksheet) and you will see that the claimant has 22% upper extremity impairment in each shoulder on the basis of her range of movement and using Table 16.3 this converts to a 13% Whole Person Impairment for each shoulder giving the patient a Total Whole Person Impairment of 24%.
>
> However, when one considers the pathology in her shoulder the range of movement is far more restricted than one would expect with a partial rotator cuff tear. There is a history that the patient may have had a capsular adhesion in the left shoulder but even with this she should have been able to at least abduct and flex each arm to 60 degrees.
>
> I therefore refer you to the NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th Edition on Page 11, Paragraph 2.14. It is indicated that rare cases of rotator cuff injury may be assessed under 'strength evaluation.' However, in this woman's case she demonstrates no specific strength and therefore it is indicated that a loss of motion does not reflect the severity of disorder associated with pain. This should be assessed by comparison with other impairments that have similar effects on upper limb function. A review of most patients with rotator cuff injuries are assessed as having a 10% upper extremity impairment and therefore in this woman's case I would consider it reasonable to assess her as having a 10% upper extremity impairment in each arm which equates with a 6% Whole Person Impairment for each shoulder.
>
> It is my view that this is a much more realistic assessment of the patient's Whole Person Impairment of his shoulders."

29. Regarding the investigations noted at Part 6, the Panel notes that the AMS has not referred to the ultrasound imaging recorded by Dr Haber in the report of 19 December 2019. This report contains the following regarding the left shoulder,

> "The ultrasound demonstrated mild thickening of the subacromial bursa.
> There was evidence of a full thickness tear of the rotator cuff tendons.
> The previously repaired supraspinatus tendon has 2 taut sutures in a proximal position.
> The tendon is markedly thinned without a focal tear seen.
> The biceps tendon ls not visualized suggestive of complete rupture. There was no sheath effusion seen.
> Subscapularis tendon has a full thickness tear measuring 17mm retraction.
> lnfraspinatus tendon is intact.
> There is no posterior joint effusion."

30. The right shoulder ultrasound report included,

> "The ultrasound demonstrated mild thickening of the subacromial bursa.
> There was evidence of a full thickness tear of the rotator cuff tendons.
> A medium full thickness rotator cuff tear involving supraspinatus tendon was identified measuring 11mm longitudinal by 13 mm transverse.
> The biceps tendon is normal in appearance. There was a small effusion seen.
> Subscapularis tendon is intact.
> lnfraspinatus tendon is intact.
> There is no posterior joint effusion."

31. Dr Haber, on 22 January 2020, reported that on examination, "There was a severe bilateral global restriction in shoulder motion", before going on to consider the treatment options including the surgery to the left shoulder as recommended to the insurer.

32. In the circumstances of this matter it is significant that the investigations reported by Dr Haber and the findings on examination were not addressed by the AMS. An explanation was required as to why, in the light of this evidence, the AMS considered the pathology to be different, and that "the range of movement is far more restricted than one would expect with a partial rotator cuff tear". This was critical to the conclusion of the AMS as to consistency; that is, whether the findings were "plausible and consistent" with the impairment. The lack of reasoning regarding Dr Haber's report and accompanying investigations gives no basis for the AMS to find inconsistency on presentation or to adopt an alternative method of assessment. That there was no explanation addressing the evidence of Dr Haber is in the Panel's view a demonstrable error on the face of the Certificate.

33. The Panel also notes there is a history of capsulitis, yet there is no report of a test for capsulitis being conducted by the AMS.

34. Paragraph 2.14 of the SIRA Guidelines provides, in part,

> "Rare cases of rotator cuff injury, where the loss of shoulder motion does not reflect the severity of the tear, and there is no associated pain, may be assessed according to AMA5 Section 16.8c 'Strength evaluation'. Other specific shoulder disorders where the loss of shoulder motion does not reflect the severity of the disorder, associated with pain, should be assessed by comparison with other impairments that have similar effect(s) on upper limb function."

35. Even if inconsistency of presentation had been established (it was not) the Panel notes that paragraph 2.14 of the SIRA Guidelines is not the appropriate approach for assessment in this matter. Paragraph 2.14 is for circumstances in which there is injury, but range of motion does not indicate the severity of impairment, making it necessary to use strength testing to reveal the impact of the injury. Paragraph 1.36 of the SIRA Guidelines is the appropriate avenue in cases of inconsistency, not paragraph 2.14.

36. There is in any case no inconsistency established that could lead to the use of an analogous method, and the original findings of the AMS on examination were a solid indication of the impairment. The Panel finds the use of paragraph 2.14 to be a demonstrable error on the face of the Certificate.

37. The respondent to the appeal submits that the AMS was entitled to exercise his own clinical judgement in determining inconsistency.[1] The Panel notes the importance of the exercise of clinical judgement by the AMS in the process of assessment. However, the errors found above go beyond the exercise of clinical judgement.

Findings

38. 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).[2] The Panel is able to make the assessment and correct the errors found above without recourse to further examination of Ms Meznarsic.

39. As noted above, the original findings on examination and the preliminary assessment based on range of motion were properly conducted by the AMS and the Panel is satisfied that the findings reflect the degree of impairment of the shoulders.

40. The Panel can correct the errors found above by simply reverting to the original range of motion assessment of the AMS and removing the alternative strength assessment under paragraph 2.14 of the SIRA Guidelines. This gives 13% WPI for each shoulder which, combined with the assessment for the cervical spine of 5% WPI, gives a total of 28% WPI, as shown in the Panel's Certificate.

41. For these reasons, the Appeal Panel has determined that the MAC issued on 14 October 2020 should be revoked, and a new MAC issued. The new Certificate is attached to this statement of reasons.

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

WORKERS COMPENSATION COMMISSION

[1] *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140; *Ferguson v State of New South Wales* [2017] NSWSC 887.
[2] See also *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792.

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Matter Number: **4410/20**
Appellant: **Angela Ana Meznarsic**
Respondent: **Benbren 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 Neil Berry 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)
Cervical spine	19.10.17 (deemed)	Ch 4 Pp 24-30	Chapter 15 Page 392 Table 15.5	5	nil	5
Right Upper Extremity (shoulder)	19.10.17 (deemed)	Ch 2 Pages 10-12	Chapter 16 Page 434ff Table 16-3	13	nil	13
Left Upper Extremity (shoulder)	19.10.17 (deemed)	Ch 2 Pages 10-12	Chapter 16 Page 434ff Table 16-3	13	nil	13
Total % WPI (the Combined Table values of all sub-totals)					**28%**	

Ross Bell
Arbitrator

Dr James Bodel
Approved Medical Specialist

Dr Tommasino Mastroianni
Approved Medical Specialist

4 January 2021

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*.

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar