

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-1305/20
Appellant: Feng Ying Liu
Respondent: Buckley Group Pty Limited (in liquidation) trading as Buckley Group Pty Limited (Deregistered)
Date of Decision: 9 February 2021
Citation No: [2021] NSWCCMA 25

Appeal Panel:
Arbitrator: Ross Bell
Approved Medical Specialist: Dr Margaret Gibson
Approved Medical Specialist: Dr Roger Pillemer

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 17 November 2020, Feng Ying Liu (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 30 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,

“Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:

The history was obtained by the interpreter by telephone. The history and examination were difficult. Ms Liu indicated multiple times because of the intensity and duration of

her pain, she was finding this overwhelming and this significantly affected her memory and recollection of events. She was unable to give me any timeframe for her injuries. She told me she was working as a laundry assistant repetitively lifting loads of washing and throwing sheets. She indicated during the course of her work, her back was becoming sore and as she twisted one day, had an acute pain in her back such that she could not move. She also described that at the same time with repetitive lifting that she was developing pain over her shoulders.

With respect to her back, she told me that she had injuries to her third, fourth and fifth lumbar discs. She repeatedly pointed to the pain in the middle of her back. She told me she was unable to walk for anything more than several minutes due to pain in the mid-lumbar spine. I was not able to extract a clear history of pain radiating into her legs. She did, at stages, indicate she had some pain on the inside of her thighs and repetitively indicated that she had some pain in her knees. She described numbness in her lower back but no numbness in her legs. She had been having treatment through a physiotherapist as well as massage. She had not had a significant exercise-based rehabilitation program and would not consider any form of exercise, as she said it exacerbated her pain. She admitted she had taken medications but could not recall which ones. She said they were of no benefit. She had not seen a pain management specialist or had any injections in her spine.

With respect to her shoulders, she described pain radiating over both shoulders into the upper portions of the arms. She told me she had had two operations on each side and said if anything, the surgery had made her pain more severe rather than helped. She had less pain radiating down into the proximal forearm. She was unable to lie on either side due to aggravating pain in the shoulder on that side. She had difficulty sleeping. She said she had been unable to lift her arms above horizontal for many years.

Again, for her shoulders, she has not persisted with an exercised based rehabilitation program. She said this made her symptoms worse.”

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 a deductible proportion to the assessment of the left and right shoulders. The deduction of 1/10 is at odds with the available medical evidence. No deduction should have been made to the left and right upper extremities.
13. The AMS says on page 3 of the MAC that there was no history of any previous injury or condition, and at page 11 made a deduction of 1/10. The AMS states that there was left and right pre-existing rotator cuff disease despite there being no medical evidence to support this finding.
14. All radiological reports post-date the injury and there were no complaints of any pre-existing condition prior to the injury.
15. The appellant relies on the relevant authorities as to the giving of reasons by an AMS, which are noted below.
16. The MAC should be revoked, and a new MAC issued without a deduction pursuant to s 323 of the 1998 Act.

Respondent

17. The AMS did not err when he concluded that there were pre-existing degenerative conditions in both shoulders after considering the evidence, including the radiological evidence, and his findings on examination.
18. The appellant has not provided definitive evidence that there was a complete absence of a pre-existing degenerative condition prior to the injury in November 1999.
19. The AMS had the report of Dr Somerville with the history of symptoms in both shoulders commencing before the incident in 1999.
20. The respondent relies on decision of the Compensation Court of New South Wales involving Ms Liu, *Feng Ying Liu v Buckley Group Pty Limited t/as Oxford Linen* (Matter 30405/2001) and deductions for the shoulders applied by the Court pursuant to s 68A of the 1987 Act as it then was.
21. The MAC should be confirmed.

FINDINGS AND REASONS

22. 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.
23. 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.

Ground of appeal – application of s 323 of the 1998 Act

24. The AMS says at Part 4, under the heading, “Details of any previous or subsequent accidents, injuries or condition” that “Ms Liu gave no history of such injuries or conditions”.
25. At Part 7, the AMS summarises,
- “Ms Liu had an injury lifting at work and developed non-specific back pain. She reports that the nature of her conditions of her employment have given her bilateral shoulder pain. Subsequent investigations have demonstrated there is degenerative disc disease consistent with age. Imaging of her shoulders has demonstrated degenerative rotator cuff pathology.”
26. In answer to the question at Part 8.e, “Is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality?” the AMS answers in the affirmative regarding the shoulders.
27. At Part 11, the AMS explains,
- “a. In my opinion the worker suffers from the following relevant previous injuries, pre-existing conditions or abnormalities:
- (i) Right shoulder rotator cuff disease
 - (ii) Left shoulder rotator cuff disease
- b. The previous injury, pre-existing condition or abnormality directly contributes to the following matters that were taken into account when assessing the whole person impairment that results from the injury, being the matters taken into account in 10a, and in the following ways:
- (i) The development of symptoms in the shoulders represents aggravation of pre-existing degenerative condition.
- c. The extent of the deduction is difficult or costly to determine so in applying the provisions of s.323(2) I assess the deductible proportion as one tenth.”
28. The AMS does not refer to any evidence supporting a pre-existing degenerative condition in the shoulders. The Panel notes no imaging or other evidence of symptoms before the employment began with the respondent in approximately 1992.
29. The Panel notes that the AMS may have been misled to an extent by the Referral which failed to transfer the date of injury from the Application to Resolve a Dispute (Application) of 12 November 1999 as a deemed date. It is possible that the AMS assumed from this omission that the injury to the shoulders occurred specifically on 12 November 1999 and that the period of employment prior was not relevant, despite the histories recorded in the materials and taken from Ms Liu by the AMS of shoulder pain associated with repetitive lifting.
30. Dr Somerville adduced the history of symptoms in both shoulders in the period before the back incident on 12 November 1999, and recorded that history in his report of 6 November 2001 that,
- “She has pain in both shoulders, which she indicated to be over the deltoid muscles. This began gradually before the back pain started. However, she first noticed it while resting at home with low back pain and it became worse after the back injury. The left side is affected more than the right. It is aggravated by moving her arm backwards and is a pulling sensation. She has numbness of the arm, which involves the entire limb. This began last year.

31. As extracted above, the AMS records in the history at Part 4, consistent with that of Dr Somerville,
- “She indicated during the course of her work, her back was becoming sore and as she twisted one day, had an acute pain in her back such that she could not move. She also described that at the same time with repetitive lifting that she was developing pain over her shoulders.”
32. These histories are consistent with the development of shoulder problems due to the heavy work in the period of the employment, and they explain why the Application specifies that the date of the injury is a “deemed” date. Ms Liu began work with the respondent in the laundry in approximately 1992 and there is no apparent basis for concluding there was any pre-existing injury or condition before the commencement of the employment.
33. The respondent submits that Dr Somerville’s report is supportive of a finding of a pre-existing condition in both shoulders and for a deduction to be made to the assessment under s 323 of the 1998 Act.
34. For a deduction to be properly made under s 323 there must be evidence that there is a pre-existing injury, condition, or abnormality; and that this element contributes to the impairment¹; and “assumption will not suffice”.
35. In *Fire & Rescue NSW v Clinen* [2013] NSWSC 629 Campbell J said,
- “As Schmidt J pointed out in *Cole and Elcheikh*, it is necessary to find a pre-existing abnormality or condition, here the latter, actually contributing to the impairment before s. 323 *WIM* is engaged. This conclusion has to be supported by evidence to that effect. Assumption will not suffice.”
36. Campbell J also noted that it is ‘... necessary for the evidence acceptable to the appeal panel to actually support the connection between a previous injury (here, pre-existing abnormality or condition) and the overall degree of impairment in the instant case.’
37. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526, Campbell J explained the requirement (emphasis in original),
- “What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if that proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of the *degree* of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the *degree* of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to the pre-existing abnormality. To put it another way, the Panel must be satisfied that but for the pre-existing abnormality, the degree of impairment resulting from the work injury would not have been as great.”
38. The authorities require no deduction under s 323 of the 1998 Act without evidence identifying a pre-existing injury, condition, or abnormality and establishing when it occurred. In this matter there is a complete absence of evidence to establish a pre-existing injury or condition before the employment with the respondent.

¹ *Cole v Wenaline Pty Ltd* (2010) NSWSC 78.

39. The respondent relies on Ms Liu's case in the Compensation Court of New South Wales determined on 8 December 2003 in which Bagnall AJ made deductions of 10% for each shoulder pursuant to s 68A of the 1987 Act. The Panel notes that the current legislative provisions and accumulated authorities regarding the 1998 Act have taken the issue of deductions for pre-existing elements a long way from the situation as it pertained in the earlier matter involving s 68A. This assessment is governed by s 323 of the 1998 Act and the principles from the authorities as discussed above. The previous determination in the Court has no relevance on this issue.
40. There is no evidence referred to by the AMS, nor is there evidence referred to by the appellant in submissions, that supports the existence of a pre-existing condition prior to the employment in 1992, let alone anything contributing to the current impairment.
41. In these circumstances the bilateral deduction of 1/10 to both upper extremities pursuant to s 323 of the 1998 Act is a demonstrable error on the face of the Certificate.

Findings

42. 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 Liu.
43. The Panel notes that the original findings on examination of the AMS for the range of motion (ROM) can be adopted as the Panel is satisfied that they reflect the degree of impairment of the shoulders. The Panel need only remove the deductions made by the AMS.
44. However, to "apply the WorkCover Guides fully" (SIRA Guidelines), the Panel finds it must adjust the following:
 - (a) The AMS made a small calculation error in arriving at the upper extremity impairment (UEI) figure from the measurements. The AMS calculated 18% UEI for the left shoulder; and 20% UEI for the right shoulder. The Panel finds that the ROM measurements recorded in fact equate to 19% UEI for each shoulder.
 - (b) The AMS notes that Ms Liu has had an excision of the distal clavicle on the left. This attracts a further 5% UEI for the left side, the inclusion of which was overlooked by the AMS. This gives 23% UEI for the left shoulder.
45. These UEI figures give 14% WPI for the left upper extremity; and 11% WPI for the right upper extremity, which gives a combined total of 23% WPI as shown in the Panel's Certificate below.
46. For these reasons, the Appeal Panel has determined that the MAC issued on 30 October 2020 should be revoked, and a new MAC issued. The new Certificate is attached to this statement of reasons.

² See also *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792.

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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Matter Number: 1305/20

Appellant: Feng Ying Liu

Respondent: Buckley Group Pty Limited (in liquidation) trading as Buckley Group Pty Limited (Deregistered)

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 Robert Kuru 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	12.11.1999 (deemed)	Ch4 pp 24-30	Page 384 Table 13.3	0	n/a	0
Right Upper Extremity (shoulder)	12.11.1999 (deemed)	Ch 2 Pages 10-12	Chapter 16 Page 434ff Table 16-3	11	nil	11
Left Upper Extremity (shoulder)	12.11.1999 (deemed)	Ch 2 Pages 10-12	Chapter 16 Page 434ff Table 16-3	14	nil	14
Total % WPI (the Combined Table values of all sub-totals)					23%	

Ross Bell

Arbitrator

Dr Margaret Gibson

Approved Medical Specialist

Dr Roger Pillemer

Approved Medical Specialist

8 February 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar