

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-1536/20
Appellant: Phillip Johnstone
Respondent: T & T Metal & Asbestos Services Pty Limited
Date of Decision: 17 February 2021
Citation No: [2021] NSWCCMA 33

Matter Number: M2-1536/20
Appellant: T & T Metal & Asbestos Services Pty Limited
Respondent: Phillip Johnstone
Date of Decision: 17 February 2021
Citation No: [2021] NSWCCMA 33

Appeal Panel:
Arbitrator: R J Perrignon
Approved Medical Specialist: Dr John Ashwell
Approved Medical Specialist: Dr Tommasino Mastroianni

APPEAL AND CROSS-APPEAL

1. The appellant worker, Mr Johnstone, appeals from the Medical Assessment Certificate of Approved Medical Specialist Dr Ho dated 29 July 2020.
2. The employer (the cross-appellant) appeals from Dr Ho's further Medical Assessment Certificate dated 11 December 2020.

BACKGROUND

3. Mr Johnstone injured his left shoulder and elbow, and his right shoulder, in the course of demolition work on 3 December 1996 (deemed date). He filed an *Application for Assessment by an Approved Medical Specialist*, seeking an assessment of whole person impairment with respect to the shoulders to determine whether he exceeded the threshold of 20% whole person impairment, for the purposes of section 32A of the *Workers Compensation Act 1987*.
4. In his Application, he alleged injury in the following terms:

“Deemed injury 3.12.1996 by reason of aggravation, acceleration or deterioration caused by the nature and conditions of the applicant's employment between in or about June 1996 and 3 December 1996 - injury to left upper extremity (elbow, shoulder) and right upper extremity (shoulder).”

5. By pleading his injuries as aggravations, accelerations or deteriorations, and relying on a deemed date of injury, he invoked the operation of section 16 of the Act. That section relevantly provides that where an injury consists in the aggravation, acceleration or deterioration of a disease, the injury shall be deemed to have happened at the time of the worker's incapacity. In this case, the worker alleged that the aggravations occurred over the period June 1996 to 3 December 1996.
6. Initially Mr Johnstone was referred by the Registrar to Approved Medical Specialist Dr Ho for assessment of the shoulders.
7. By his first Medical Assessment Certificate dated 29 July 2020, Dr Ho assessed a 14% whole person impairment (8% right upper extremity - shoulder; 6% left upper extremity - shoulder). In doing so, he first assessed 9% in respect of the right shoulder and 7% in respect of the left, and then deducted 1/10 from each to account for a pre-existing condition.
8. The worker appealed from the Medical Assessment Certificate of 29 July 2020, on two bases, namely:
 - (a) that Dr Ho should have assessed the left elbow as well, but omitted to do so; and
 - (b) that the deductions of 1/10th were in error.
9. By consent of the parties, the first allegation was addressed on 22 October 2020. On that occasion Arbitrator McDonald granted leave to amend the worker's *Application for Assessment by an Approved Medical Specialist* 'to clarify that ... assessment was sought in respect of right upper extremity (shoulder) and left upper extremity (shoulder and elbow)'. By consent, she remitted the matter for referral back to Dr Ho to:
 - (a) assess the left elbow, and
 - (b) combine that assessment with the 14% whole person impairment already assessed in the respect of the shoulders.
10. On 11 December 2020, Dr Ho issued a second Medical Assessment Certificate, assessing a 2% whole person impairment in respect of the left elbow. He appears to have neglected to combine that with the 14% already assessed, but that is easily remedied.
11. The left elbow having now been assessed, it remains to determine whether the deduction in respect of the assessment of the shoulders was in error, as Mr Johnstone alleges.
12. On 21 January 2021, the Registrar by his delegate was satisfied that demonstrable error was made out in respect of that deduction, and referred the matter to this Appeal Panel for determination.

CROSS-APPEAL

13. The employer (cross-appellant) appeals against the assessment of the left elbow in the second Medical Assessment Certificate of 11 November 2020.
14. It submits that par 2.18 of the Guidelines required an assessment of 1% whole person impairment (left upper extremity - elbow), and the Approved Medical Specialist misapprehended its meaning and misapplied it.
15. On 21 January 2021, the Registrar by his delegate was also satisfied that a ground of appeal was made out in respect of the assessment of the left elbow, as alleged by the cross-appellant, and referred that matter also to this Appeal Panel for determination.

PRELIMINARY REVIEW

16. On 16 February 2021, the Appeal Panel conducted a preliminary review of the original medical assessments in the absence of the parties and in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (4th edition) (the Guidelines).
17. The Panel identified errors as alleged by the appellant and cross-appellant. Those errors were capable of correction without a further examination of the worker.

Submissions

18. Both parties have filed written submissions which have been taken into account. It is not necessary to repeat them in full, but they may be summarised briefly as follows.
19. In respect of his appeal from the assessment of the shoulder, the appellant worker submits that error is demonstrated for the following reasons.
 - (a) There was no basis for the deduction of 1/10th to account for a pre-existing condition of the shoulders, as there was no evidence of such a condition.
 - (b) The Approved Medical Specialist has not given reasons for making the deduction.
 - (c) Contrary to the principle in *Cole v Wenaline* [2010] NSWSC 78, he has merely assumed that because there is a pre-existing condition, it must contribute to impairment.
 - (d) No such deduction was made in respect of the left elbow, which would have been expected if a deduction were appropriate in respect of the shoulders.
20. The respondent employer responds as follows.
 - (a) At [8e], the Approved Medical Specialist found that a proportion of the impairment of both shoulders was affected by previous injury, pre-existing condition or abnormality, and deducted 1/10th to account for it, as did Dr Patrick upon whose assessment the worker relied. On the radiological and other evidence, and on the basis of his clinical examination, that finding was open to the Approved Medical Specialist and the deduction was appropriate.
21. In respect of the cross appeal, the employer's brief submissions are summarised above. The worker does not seek to be heard on the cross appeal.

Reasoning of the Approved Medical Specialist

22. Dr Ho examined the worker's shoulders on 23 July 2020, and his left elbow on 3 December 2020.
23. In his first Medical Assessment Certificate, he noted at [4] the worker's refusal to tell him the history of his injury, and inferred from the evidence it was "a heavy lifting injury initially causing problems in the left elbow and left shoulder and subsequently, the right shoulder as well". He noted that the worker had come to surgery of each shoulder twice, many years ago.
24. He measured and recorded the range of movement of each shoulder at [5], and noted the results of various MRI and ultrasound scans at [6].
25. He diagnosed at [7], "strain injury to both shoulders [ending] up with rotator cuff problems" with, despite surgery, "residual problem with pain, loss of full movement and weakness".

26. He gave the following brief reasons at [10b] for making a 1/10th deduction in respect of each shoulder pursuant to section 323:

“I believe there should be contribution from pre-existing conditions, and I think a deduction of 1/10 is appropriate for contribution from other factors”.

27. In his further Medical Assessment Certificate of 11 December 2020, he repeated the history above. On examination of the left elbow, he recorded at [5] restrictions in the range of movement of the elbow, tenderness over the lateral condyle and a positive stress test.
28. He diagnosed at [7] “tennis elbow” with pain and mild loss of movement.
29. He gave the following reasons at [10] for assessing a 2% whole person impairment - emphasis added:

“To assess the impairment using AMA Guide 5th Edition, figure 16 – 34, 36. 10° extension loss will have 1% upper limb impairment. 130° flexion is also 1%. While supination and pronation both are 0%. So, he has 2% upper limb impairment based on the range of motion module, which will give rise to 1% whole person impairment. **However, using WorkCover Guide page 12, section 2.18, the diagnosis of lateral epicondylitis with focal tenderness, positive stress test will indicate presence of lateral epicondylitis and will account for 2% whole person impairment. They are not combinable, so I will pick the highest one, which is 2% whole person impairment.**”

Medical Assessment Certificate dated 29 July 2020: section 323 deduction (shoulders)

30. In order for an Approved Medical Specialist to make a deduction for a pre-existing condition pursuant to section 323, he or she must be satisfied that a condition existed before the relevant injury. Where, as here, the injury consisted in aggravations which occurred over a particular period - in this case, June 1996 to 3 December 1996 - the condition must have existed prior to that period.
31. As indicated, the worker himself alleged that his employment had aggravated a pre-existing disease. So much resulted from the way in which he pleaded his injury in his *Application for Assessment by an Approved Medical Specialist*, and from his reliance on section 16 of the 1987 Act. There was no dispute between the parties that he had aggravated a pre-existing disease of the shoulders and left elbow. That was the nature of the injuries pleaded, and the basis for the referrals for assessment.
32. In those circumstances, the Approved Medical Specialist was left with no alternative but to find, as he did, that there was a pre-existing condition of some sort. That was necessarily implied by the way the worker had framed his application.
33. However, as the appellant points out, an Approved Medical Specialist is not entitled to assume that, because there was a pre-existing condition, it follows that it contributes to impairment. In *Wenaline*, the Supreme Court set aside a majority decision of the Appeal Panel, which had assessed injury to L5/S1 after making a 50% deduction for the effects of a previous L5/S1 discectomy. Schmidt J explained at [29] and following:

“28. It is apparent from the way in which the majority [of the Appeal Panel] reasoned to its conclusion, that it proceeded on the basis of an assumption. The assumption was that even though the treatment of the first injury to the plaintiff's spine in 1976 had succeeded, with the results to which the dissenting member of the panel referred, the very fact of the existence of that prior injury, ‘irrespective of outcome’, resulted in an impairment which must have contributed to the impairment which arose after the second injury. As the majority explained, it was of the view, ‘hypothetically’, that if the plaintiff had been examined before the second injury, given his history, he would have been assessed as suffering from a 10% of whole person impairment, under AMA 5.

29. As the plaintiff argued, to so approach the exercise required to be undertaken by s 323, was to fall into an error of law. The section is directed to a situation where there is a pre-existing injury, pre-existing condition or abnormality. For a deduction to be made from what has been assessed to have been the level of impairment which resulted from the later injury in question, a conclusion is required, on the evidence, that the pre-existing injury, pre-existing condition or abnormality caused or contributed to that impairment.
30. Section 323 does not permit that assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will always, 'irrespective of outcome', contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality. The extent that the later impairment was due to the earlier injury, pre-existing condition or abnormality must be determined. The only exception is that provided for in s 323(2), where the required deduction 'will be difficult or costly to determine (because, for example, of the absence of medical evidence)'. In that case, an assumption is provided for, namely that the deduction 'is 10% of the impairment'. Even then, that assumption is displaced, if it is at odds with the available evidence.
31. The reason for this statutory approach can readily be seen. It is entirely possible that a person could suffer such a catastrophic injury, that the presence or absence of any previous injury, pre-existing condition or abnormality, would make no difference at all to the impairment which resulted from the later injury. An injury which results in death, is an obvious example, albeit not one which would arise for consideration under this section. A more relevant example, in this case, is a second injury which severed the spine. Or, as was discussed in the authorities, an earlier injury which was asymptomatic, may or may not contribute to the impairment which results from a second injury. That is a matter of fact to be assessed on the evidence led in each case. An assumption of the kind here made, namely that surgery to the lumber spine, irrespective of outcome, must always result in a level of residual impairment which contributes to the level of impairment which follows a later injury, has no role to play in that assessment. What must be determined on the evidence is whether any proportion of the permanent impairment present after the second injury was due to the earlier injury."
34. It follows that, in order to make a deduction, an Approved Medical Specialist must take a threefold approach:
 - (a) First, find that an injury, condition or abnormality existed in the affected body part prior to injury.
 - (b) Second, determine that it currently contributes to the permanent impairment assessed.
 - (c) Third, quantify that contribution and made an appropriate deduction.
35. For the reasons given, Dr Ho had no alternative but to accept that there was a pre-existing disease. There is no error in that.
36. Second, he was obliged to determine whether that disease - being a 'condition', to use the language of section 323 - contributed to current impairment. In order to do so, he had at least to identify what the condition was. He did not do so. Without doing so, he could not determine whether the condition or abnormality was contributing to impairment.

37. So far as we can see, he did not even consider that issue. He proceeded on the kind of assumption proscribed in *Wenaline*, without giving reasons for making the deduction.
38. That demonstrates error, and the Medical Assessment Certificate must be set aside.
39. It is unnecessary to consider the worker's further submissions on the deduction.
40. Having identified error in respect of the deduction, we are obliged on review to assess afresh whether a deduction is appropriate and, if so, to quantify it.
41. We have reviewed the radiological evidence. There is nothing in that evidence that persuades us that, prior to the period of injury in 1996, any of the pathologies identified on the scans existed in either shoulder prior to injury, save for tendinopathy of the left supraspinatus tendon.
42. In respect of the right shoulder:
 - (a) Dr Rimmer mentions an x-ray report dated 30 January 1998, revealing osteoarthritis of the right shoulder. We have reviewed that report. It does not mention osteoarthritis. Scans performed years later do so, but that does not prove that osteoarthritis pre-dated injury in 1996.
 - (b) X-ray performed on 24 April 2014 revealed a deformity of the outer end of the clavicle and acromioclavicular joint. However, the x-ray of 30 January 1998 described the distal clavicle as being of 'a slightly bulbous appearance suggestive of previous trauma, and the AC joint a showing 'slight irregularity and narrowing'.
 - (c) The latter findings post-date injury in 1996 and may well result from that injury. They do not prove the existence of injury, or a pre-existing condition or abnormality of the right shoulder before injury in 1996.
43. In respect of the left shoulder:
 - (a) Dr Rimmer mentions an MRI performed on 7 July 1995 which revealed tendonitis/tendinopathy of the supraspinatus tendon.
 - (b) Similar pathology was evidenced in a subsequent ultrasound of 6 December 1996.
 - (c) Though there is no radiological evidence of pre-existing arthritis of the left shoulder, we are satisfied that there was pre-existing tendinopathy in that shoulder, amounting to a pre-existing condition in terms of section 323.
44. Neither Dr Patrick nor Dr Rimmer gave reasons for making a 1/10th deduction in respect of the shoulders.
45. In respect of the right shoulder, we are not able to identify a previous injury, or pre-existing condition or abnormality. However, the way in which the appellant framed his claim was that he suffered injury by way of aggravation of a disease process. That necessarily implies the existence of a pre-existing disease in both shoulders. The Registrar referred the matter for assessment of whole person impairment as a result of the pleaded injury. We are therefore bound to accept that there was some pre-existing disease or other of the right shoulder that was aggravated by injury in 1996, and we do so.
46. As indicated, we are satisfied on the basis of the scans that there was a pre-existing condition of the left shoulder - namely tendinopathy of the supraspinatus.

47. It remains to consider whether the pre-existing disease (or condition, to use the language of section 323) of the right shoulder, and the pre-existing tendinopathy of the left shoulder, currently contributes to the assessed permanent impairment and, if so, to quantify that contribution.
48. As we do not know what the disease of the right shoulder was, we are unable to find that it currently contributes to impairment of either shoulder. It follows that no deduction is available in respect of the right shoulder.
49. In any event, having regard to the nature of the injuries suffered in 1996, to the multiple surgeries which followed in respect of each shoulder, to the pathology demonstrated on more recent scans, and to the results of Dr Ho's clinical examination, we consider it is likely that any pre-existing disease of the right shoulder, and any pre-existing tendinopathy of the left, has been completely superseded by injury.
50. For all those reasons, the appropriate deduction in respect of either shoulder is nil.

Medical Assessment Certificate dated 11 December 2020: application of par 2.18

51. As indicated, Dr Ho purported to apply par 2.18 of the Guidelines in assessing a 2% whole person impairment (left upper extremity - elbow).
52. Paragraph 2.18 provides as follows, under the heading, 'Epicondylitis of the elbow' - emphasis added:

"This condition is rated as **2% UEI (1% WPI)**. In order to assess impairment in cases of epicondylitis, symptoms must have been present for at least 18 months. Localised tenderness at the epicondyle must be present and provocative tests must also be positive. If there is an associated loss of range of movement, these figures are not combined, but the method giving the highest rating is used."
53. There is no issue between the parties that the preconditions for applying par 2.18 were met.
54. The cross-appellant is correct in submitting that where, as here, par 2.18 applies, the appropriate assessment is 2% UEI, which equates to 1% whole person impairment. The worker does not submit to the contrary.
55. Dr Ho misapplied par 2.18. Though doubtless inadvertent, this amounts to demonstrable error, and requires that the Medical Assessment Certificate dated 11 December 2020 be set aside and replaced.
56. There is no basis for supporting the assessment of 2% whole person impairment by reference to range of movement of the elbow. As Dr Ho indicated at [10], assessment on that basis would also yield a 1% whole person impairment.

Conclusion

57. For the reasons given:
 - (a) The worker's appeal from the Medical Assessment Certificate of 20 July 2020 is allowed.
 - (b) The Medical Assessment Certificate of 20 July 2020 is set aside and replaced by the attached Medical Assessment Certificate.
 - (c) The employer's cross-appeal against the Medical Assessment Certificate of 11 December 2020 is allowed.
 - (d) The Medical Assessment Certificate of Dr Ho dated 11 December 2020 is set aside and replaced by the attached Medical Assessment Certificate.

58. As the elbow and shoulder both form part of the upper extremity, it has been necessary to combine Dr Ho's assessment of each - 11% UEI (left shoulder) and 2% UE (left elbow) - to yield a 13% UEI for the left upper extremity, which equates to 8% whole person impairment.

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 Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 1536/20
Applicant: Phillip Johnstone
Respondent: T & T Metal & Asbestos Services 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 Ho dated 11 December 2020 and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

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 S323 for pre-existing injury, condition or abnormality (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
1. Right upper extremity - shoulder	3 December 1996		Figure 16-40, 43, 46	9	Nil	9
2. Left upper extremity - shoulder and elbow	3 December 1996	NSWWC Guidelines 4 th Edition, page 11, par 2.8		8	Nil	8
Total % WPI (the Combined Table values of all sub-totals)					16%	

R J Perrignon
Arbitrator

Dr John Ashwell
Approved Medical Specialist

Dr Tommasino Mastroianni
Approved Medical Specialist

17 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*.

A Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar

