

# WORKERS COMPENSATION COMMISSION

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

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<b>Matter Number:</b>	<b>M2-2888/15</b>
<b>Appellant:</b>	<b>Tuscany Foods Pty Ltd</b>
<b>Respondent:</b>	<b>Charles Muscat</b>
<b>Date of Decision:</b>	<b>4 July 2019</b>
<b>Citation:</b>	<b>[2019] NSWCCMA 89</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Marshal Douglas</b>
<b>Approved Medical Specialist:</b>	<b>Dr John Dixon-Hughes</b>
<b>Approved Medical Specialist:</b>	<b>Dr Neil Berry</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 15 May 2019, Tuscany Foods Pty Ltd lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Richard Crane, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 17 April 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, 4<sup>th</sup> ed* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> ed* (AMA 5).

### RELEVANT FACTUAL BACKGROUND

6. On 11 October 2006, the respondent suffered both an injury to his thoracic spine and a hernia when he strained his upper back while working for the appellant. He claimed compensation from the appellant for permanent impairment that he said resulted from his injury. A medical dispute arose between the parties regarding the degree of the respondent's permanent impairment from the injury.

7. That medical dispute was referred to the AMS to assess. On 26 February 2016, the AMS issued a Medical Assessment Certificate in which he certified that, with respect to the respondent's thoracic spine, the degree of permanent impairment of the respondent from the injury was 0% and that, with respect to the respondent's hernia, the degree of permanent impairment of the respondent's digestive system was not fully ascertainable. The AMS declined to make an assessment of the degree of the respondent's permanent impairment that was due to the hernia the respondent suffered as a consequence of the injury.
8. The Commission then issued a Certificate of Determination on 1 June 2016 in these terms:
  - “1. The applicant suffers 0% permanent impairment of the thoracic spine resulting from injury on 11 October 2006.
  2. The applicant has no entitlement to lump sum compensation of the thoracic spine resulting from injury on 11 October 2006.
  3. The degree of permanent impairment resulting from injury to the applicant in respect of digestive system (hernia) on 11 October 2006 is not fully ascertainable.
  4. Either party may apply to restore proceedings when the Applicant has attained maximum medical improvement

Brief statement of reasons

5. This Certificate of Determination is issued in accordance with the Medical Assessment Certificate issued under Part 7 of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998*.
  6. The proceedings were commenced after 2 April 2013 and therefore no order is made as to costs.”
9. The appellant subsequently applied to have the proceedings restored and the medical dispute, insofar as it related to the respondent's degree of permanent impairment of his digestive system, was again referred on 5 December 2018 to the AMS to assess.
10. As mentioned, the AMS issued the MAC with respect to his assessment of that medical dispute on 17 April 2019. He again found that the respondent's permanent impairment was not fully ascertainable and he again declined to make an assessment of the respondent's permanent impairment.
11. The Appeal Panel notes, for completeness, that the form of referral by which this medical dispute was referred back to the AMS was amended on 11 January 2019. What that amendment was is not apparent to the Appeal Panel from the documents before it, but given neither party addresses on it in their respective submissions, the Appeal Panel infers that it was of no relevance to the matters raised in the appeal.

**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 Workers Compensation Medical Dispute Assessment Guidelines.
13. In its application for appeal, the appellant had sought that the respondent be re-examined. During its preliminary review, the Appeal Panel considered whether it had power to do so and whether it should do so.

14. For reasons that are set out below, the Appeal Panel came to the view, during its preliminary review, that the MAC does not contain a demonstrable error. Further, the Appeal Panel also came to the view that the AMS applied the correct criteria when assessing the medical dispute that had been referred to him and applied the criteria correctly. Because the Appeal Panel was of the view that the MAC does not contain a demonstrable error and that the AMS had applied the correct criteria, the Appeal Panel cannot revoke the MAC and the Appeal Panel would not therefore be assessing the medical dispute that had been referred for assessment. Accordingly, s 324(3) of the 1998 Act is not engaged and the Appeal Panel does not have power to require the respondent to be examined<sup>1</sup>.

## EVIDENCE

15. 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.

## The MAC

16. The history the AMS set out in the MAC included that since his last examination of the respondent on 20 February 2016, the respondent's hernia had always been out and was very difficult to reduce. Further, when the respondent does reduce it, it "pops" out almost immediately. The AMS noted that the respondent "made it perfectly clear that he is intending to have the hernia repaired but realises his degree of obesity is very off-putting for any surgeon". The AMS further noted that the respondent "intends to ask his general practitioner to refer him to a surgeon who is experienced in bariatric surgery to enable him to lose weight". The AMS noted that the respondent recently had coronary artery surgery. The AMS noted that the respondent smokes 10 cigarettes a day.

17. The AMS made the following findings from his examination of the respondent:

"Mr Muscat was grossly overweight. His height was 172cm and weight 125kg. He was wearing a very ineffective hernia belt which was not really controlling the hernia at all.

Abdominal examination revealed the hernial mass was approximately 29cm transversely by 15cm longitudinally. There was a very marked cough impulse and Mr Muscat was able to reduce the hernia with great difficulty but it came out almost immediately. It is mainly supraumbilical in position and a small 4cm supra-umbilical incision is noted from when the hernia was first operated on."

18. The AMS provided a summary of the respondent's injury, insofar as it related to the hernia, and a summary of his diagnosis of that element of the respondent's injury in these terms:

"Mr Muscat developed a para-umbilical hernia following the work incident in 2006. He had a repair of a para-umbilical hernia before the work incident, which was done laparoscopically in 2005. The recurrent hernia was repaired again on 27 October 2010 and since then it has recurred again.

Mr Muscat has informed me that his surgeons have said he must lose weight before they will be prepared to operate on the hernia again. He has made a definite decision that he will lose the weight but he is sure he will need to have a surgical procedure carried out to enable this to occur, and he will be asking his general practitioner to arrange for an appointment with an appropriate bariatric surgeon as soon as possible."

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<sup>1</sup> see also *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792

19. The AMS considered that the respondent had not obtained maximum medical improvement. He expected the respondent would do so once the respondent had surgery to repair the hernia following successful bariatric surgery to enable the respondent to lose weight. The AMS considered that because the respondent had not achieved “maximal” medical improvement he could not assess the respondent’s whole person impairment. He expressed these reasons:

“The hernia is not assessable for whole person impairment at the present time, as maximal medical improvement has not occurred. The applicant will be seeking advice as soon as possible to be referred to a bariatric surgeon for an appropriate surgical procedure to allow his weight to reach a more acceptable level for surgical repair of the recurrent para-umbilical hernia.”

## **SUBMISSIONS**

20. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
21. In summary, the appellant submits that the respondent has made no effort for several years to reduce his weight or to cease his smoking and has not sought a referral for bariatric surgery. The appellant submits that the evidence does not support that further surgery is probable and the evidence does not reveal how the surgery would be organised or arranged. The evidence establishes there is uncertainty as to whether and when future surgery will occur and because of that the respondent’s impairment is presently fully ascertainable.
22. In the alternative, the appellant submits that the respondent’s inaction over several years to lose weight and cease smoking, so as to enable further surgery to repair his hernia, amounts to a refusal of treatment on the respondent’s part and, in accordance with [1.34] of the Guidelines, the AMS ought to have assessed the respondent’s impairment without consideration of potential changes associated with further surgery.
23. The appellant submits that the AMS has based his assessment on incorrect criteria in that the AMS did not properly apply [1.15], [1.16] and [1.34] of the Guidelines.
24. In reply, the respondent submits that the AMS came to the view that he required further surgical repair of his hernia. The respondent intends to have further surgery to repair his hernia. There is a need for bariatric surgery to assist the respondent to lose weight such that he can have surgery to repair his hernia.

## **FINDINGS AND REASONS**

25. 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.
26. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons.
27. All surgeons whom the respondent has consulted, either for the purpose of treatment or to provide evidence to support his claims for compensation, have essentially come to the view that surgical repair of the respondent’s hernia is desirable and should, if possible, be done. However, all those surgeons are also of the view that surgical repair of the respondent’s hernia ought not presently be done because of the respondent’s present condition in terms of his obesity and smoking.

28. That also is the opinion of the members of the Appeal Panel who are specialist medical practitioners. The opinion of those members of the Appeal Panel is that unless the respondent reduces his weight significantly, it is likely that his hernia would recur following any surgery to repair his hernia. In other words, in the absence of his losing weight, it would really be futile, and therefore not appropriate, for the respondent to have surgery to repair his hernia.
29. The Appeal Panel considers, based on its reading of the MAC, that the AMS was of the view that further medical treatment in the form of a referral to and a consultation with a bariatric surgeon and then bariatric surgery was appropriate for the respondent so as to enable him to lose sufficient weight which would thereby make him an appropriate candidate for further surgery to repair his hernia.
30. The evidence before the Appeal Panel does not reveal that this form of treatment has yet been offered to the respondent. It is nowhere indicated in the evidence that the respondent has either discussed this treatment option with either his general practitioner or any of the surgeons whom he has consulted for treatment. The Appeal Panel infers that this mode of treatment has not yet been offered to the respondent. Accordingly, [1.34] does not apply in the circumstances of this matter.
31. Those members of the Appeal Panel who have expertise as specialist doctors also consider that bariatric surgery is likely to lead to a weight loss of around 30 kg for the respondent which would then make him an appropriate candidate for surgery to repair his hernia, which the respondent requires.
32. The Appeal Panel considers that the AMS did not err by concluding that further medical treatment for the respondent in the form of a referral to and a consultation with a bariatric surgeon and then bariatric surgery was appropriate for the respondent. It was open to the AMS to come to this conclusion, and indeed, as was just indicated, it is a conclusion to which the Appeal Panel also comes, given that this treatment will result in the respondent being able to have surgery to repair his hernia.
33. For completeness, and as an aside, the Appeal Panel notes that it is not necessary for it to consider, and indeed it is not within its province to consider whether further treatment in the form of a referral to and consultation with a bariatric surgeon is *reasonably necessary* as a result of the respondent's injury. What is germane in terms of considering whether the respondent's permanent impairment is fully ascertainable is whether there is further treatment available to the respondent that will affect the state of the permanent impairment he has from his injury, in the sense of improving his state of permanent impairment. As has been indicated above, the AMS concluded there was, and the Appeal Panel considers there is, and that this further treatment is likely to result in a significant weight reduction for the respondent that will enable hernia surgery to be done. If that occurs, there is likely to be improvement in his permanent impairment from his injury.
34. In short, and to adopt the terminology of the Guidelines, the Appeal Panel considers, as did the AMS, that the respondent's treatment has been inadequate to date, in the sense that there is a further form of treatment that is available, being referral to and consultation with a bariatric surgeon and thereupon bariatric surgery, that will thereupon allow the respondent to have surgery to repair his hernia, of which he is in desperate need. In those circumstances, the Appeal Panel considers that the AMS was correct to conclude, consistent with paragraphs [1.15] and [1.16] of the Guidelines, that the respondent has not achieved maximum medical improvement.

35. In other words, the further treatment that the AMS has suggested, being referral to and consultation with a bariatric surgeon and bariatric surgery, is likely to have an impact on the respondent's state of permanent impairment in that it is likely to ultimately result in the respondent's hernia being repaired, which will lessen his permanent impairment due to his hernia. The Appeal Panel therefore considers that the AMS did not make an error in reaching that conclusion and the AMS did not make an error in exercising his discretion under s 322(4) to decline to assess the degree of the respondent's permanent impairment. Further, the Appeal Panel considers that the AMS has applied the correct criteria when considering whether the respondent's permanent impairment is fully ascertainable and applied that criteria correctly.
36. For these reasons, the Appeal Panel has determined that the MAC issued on 17 April 2019 should be confirmed.

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 Golic*

Lucy Golic  
Dispute Services Officer  
**As delegate of the Registrar**

