

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-586/19
Appellant: Cathy Janine Hilder
Respondent: The Secretary, NSW Department of Family and
Community Services
Date of Decision: 30 July 2019
Citation: [2019] NSWWCCMA 102

Appeal Panel:
Arbitrator: Mr William Dalley
Approved Medical Specialist: Dr Margaret Gibson
Approved Medical Specialist: Dr John Ashwell

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 10 May 2019, Cathy Janine Hilder (Ms Hilder/the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Mohammed Assem, 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 grounds 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 Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. Ms Hilder was employed as a disability support worker by the Department of Ageing, Disability and Home Care for many years. Her employment commenced in either 1992 or 1994. On 20 May 2017 Ms Hilder noted the sudden onset of pain in the lower back while attending to a client. Ms Hilder had previously noted complaints of back pain from time to time.

7. A claim for workers compensation based on injury to the lumbar spine was accepted by the insurer.
8. On 26 June 2018, Ms Hilder was examined by Dr Guirgis, orthopaedic surgeon, at the request of Ms Hilder's solicitors for the purpose of assessing whole person impairment with a view to making a claim for lump-sum compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act).
9. Dr Guirgis assessed whole person impairment in respect of injury to the lumbar spine at 12%. He deducted one tenth to allow for a pre-existing condition pursuant to s 323 of the 1998 Act. Ms Hilder was examined by another orthopaedic surgeon, Dr Deshpande, at the request of the insurer's solicitors on 5 December 2018. Dr Deshpande assessed 6% whole person impairment in respect of injury to the lumbar spine. He deducted 1% "due to pre-existing degeneration of the lumbar spine" giving a total whole person impairment of 5%.
10. On 10 October 2018, Ms Hilder's solicitors wrote to the insurer making a claim for lump-sum compensation. The solicitors enclosed a permanent impairment claim form and the report of Dr Guirgis.
11. The insurer declined the claim on the basis that Dr Deshpande had certified whole person impairment in respect of the lumbar spine at less than 10%.
12. The solicitors then filed an Application to Resolve a Dispute in the Commission alleging "personal injury and aggravation, acceleration, exacerbation or deterioration of a disease". The date of injury is recorded as 20 May 2017.
13. The Reply filed on behalf of the respondent maintained denial of liability on the basis that whole person impairment fell below the threshold for entitlement to lump-sum compensation.
14. At a telephone conference on 7 March 2019 consent orders were made as follows:
 1. Remit the matter to the Registrar for referral to an Approved Medical Specialist for assessment of the whole person impairment of the applicant's lumbar spine due to injury sustained on 20 May 2017 (deemed).
 2. The documents to be reviewed by the Approved Medical Specialist are:
 - a) Application to Resolve a Dispute and attachments, and
 - b) Reply and attachments."
15. Ms Hilder was examined by the AMS who assessed Ms Hilder as having 12% whole person impairment as a result of injury to the lumbar spine on 20 May 2017. The AMS deducted one half of that impairment pursuant to section 323 of the 1998 Act in respect of a condition which he concluded pre-existed injury on 20 May 2017¹

PRELIMINARY REVIEW

16. 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.

¹ MAC page 8

17. 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 because adequate material is before the Panel to allow the Panel to determine the appeal and re-assessment. The appeal is confined to the nature of the injury referred and consequential reduction of assessment pursuant to s 323 of the 1998 Act. Re-examination will not assist in dealing with the issue in dispute.

EVIDENCE

Documentary evidence

18. 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

19. 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

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 subject injury referred for assessment by the AMS is a "disease injury" acquired over years of employment commencing in or before 1994 and there is no evidence of any condition or abnormality immediately prior to the commencement of employment and the work tasks that gave rise to the injury. The AMS had assessed the appellant on the basis of a personal injury which occurred on 20 May 2017.
22. The appellant submitted that the AMS has failed to assess Ms Hilder in accordance with the referral which, by its terms indicated a condition of gradual onset attributable to work tasks and consequently had failed to identify the correct date at which it was appropriate to consider whether there was a previous injury or pre-existing condition or abnormality which contributes to the assessed degree of impairment.
23. In reply, the respondent submits that the dispute referred for assessment was intended to be in relation to a frank injury and the AMS had correctly assessed the impairment as such and had appropriately made a deduction with respect to a condition or abnormality which was pre-existing as at 20 May 2017.

FINDINGS AND REASONS

24. 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.
25. 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.

26. Section 328 provides:

“328 PROCEDURE ON APPEAL

- (1) An appeal against a medical assessment is to be heard by an Appeal Panel constituted by 2 approved medical specialists and 1 Arbitrator, chosen by the Registrar.
- (2) 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. The Workers Compensation Guidelines can provide for the procedure on an appeal.
- (3) Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the medical assessment appealed against may not be given on an appeal by a party to the appeal unless the evidence was not available to the party before that medical assessment and could not reasonably have been obtained by the party before that medical assessment.
- (4) When attending an Appeal Panel for the purposes of an assessment, an injured worker is entitled to be accompanied by a person (whether or not a legal adviser or agent) to act as the injured worker's advocate and assist him or her to present his or her case to the Appeal Panel.
- (5) The Appeal Panel may confirm the certificate of assessment given in connection with the medical assessment appealed against, or may revoke that certificate and issue a new certificate as to the matters concerned. Section 326 applies to any such new certificate.
- (6) The decision of a majority of the members of an Appeal Panel is the decision of the Appeal Panel.”

27. The submissions filed on behalf of the respondent include a request for reconsideration of the Certificate of Determination issued on 7 March 2019 following the telephone conference conducted by a Senior Arbitrator in the Commission. The respondent submitted that the description of the date of injury as “(deemed)” was not appropriate and should not have been agreed to by the solicitor who participated in the telephone conference on behalf of the respondent.

28. It can be seen from the provisions of s 328 that the Panel does not have power to reconsider the Certificate of Determination or the referral. In *Siddik v WorkCover Authority of New South Wales*² McColl JA (Mason P and Giles JA agreeing) said:

“Although the appeal was ‘by way of review of the original medical assessment’, if the Appeal Panel did not confirm that MAC, its only power was to revoke it and ‘issue a new certificate as to the matters concerned’. ‘The matters concerned’ were not expressly identified, but contextually their apparent subject was the ‘matter’ the subject of the appeal identified by the appellant in accordance with s 327(1).”

29. The appellant submitted that the medical dispute referred “was not simply for a frank incident on 20 May 2017 but was for injury caused over a period of time by the nature and conditions of the appellant’s employment.”

² [2008] NSWCA 116 at 94

30. The Panel accepts that the appellant's submission, that the referral was made in respect of an injury caused by work tasks performed by Ms Hilder as an aged care worker throughout the period of her employment with the respondent, is correct.
31. The respondent submits that the referral should not have been made in those terms but rather should have been limited to personal injury on 20 May 2017. As noted above the Panel has no power to review the determination as to injury.
32. The report of Dr Guirgis relied on in support of Ms Hilder's claim asserted:

"The nature and conditions of her employment as a Disability Support Worker with the Department of Ageing since 1992 including the documented incidents in 2016 and 2017 resulted in chronic post-traumatic mechanical derangement of the lumbar area of the spine."
33. The allegation of injury in the Application to Resolve a Dispute filed on behalf of Ms Hilder clearly indicated that Ms Hilder relied on "personal injury and aggravation, acceleration, exacerbation or deterioration of a disease".
34. The dispute referred was the degree of whole person impairment of "the applicant's lumbar spine due to injury sustained on 20 May 2017 (deemed)". That referral was consistent with the consent orders made at the telephone conference on 7 March 2019.
35. Sections 15 of the 1987 Act provides for a deemed date of injury where the injury is a disease which is of such a nature as to be contracted by a gradual process and s 16 provides a deemed date of injury where the injury consists of the aggravation, acceleration, exacerbation or deterioration of a disease.
36. The AMS recorded that Ms Hilder commenced work with the respondent "in around 1994". He noted a history of low back symptoms going back approximately 24 years with "symptoms across her lower back that were aggravated by the nature and conditions of her employment." The AMS noted further injuries on 8 June 2006, in 2015 and again on 20 May 2017.
37. The AMS carried out an appropriate physical examination and reports of radiological investigations going back to February 2015 were noted. The AMS assessed the appellant as lumbar category DRE III so as to warrant an assessment of 10% whole person impairment. In addition, the AMS assessed a further 2% whole person impairment for limitation in activities of daily living giving a total 12% whole person impairment in respect of injury to the lumbar spine..
38. The AMS qualified the assessment of 12% whole person impairment explaining:

"Of this amount, there is a long history of chronic mechanical low back pain over a 24-year period. She underwent a CT scan of the lumbar spine on 21 June 2016 of the lower back pain with left sided sciatica. There was radiological evidence at that stage of disc pathology impinging the left S1 nerve root and moderate narrowing of the right L4 and bilateral L5 nerve root. She stated symptoms arising from the injury that occurred on 20 May 2017 was similar in character and location to what she had previously experienced but more intense. There was an aggravation of the lower back complaints with left sided sciatica. She was eventually able to resume her preinjury duties but now working at a regular hours. I have reached a conclusion that a one-half deduction for a pre-existing symptomatic impairment at the same level prior [to] the injury on 20 May 2017".

39. The AMS noted Dr Guirgis's opinion but said: "I would agree with his assessment if it was the injury due to the nature and conditions of her employment. On the basis of the specific incident documented on 20 May 2017 I considered a one-half deduction to be applicable."
40. It is evident from those statements by the AMS that the AMS misunderstood the extent of the injury to the lumbar spine that he was to assess. The injury referred was the pathology in the lumbar spine resulting from the work tasks performed by Ms Hilder in the course of her employment as an aged care worker going back to 1992 or 1994 which by operation of s 15 or s 16 of the 1987 Act were deemed to have occurred on 20 May 2017.
41. That error led the AMS to an incorrect conclusion as to the point in time at which the provisions of s 323 were to be applied.
42. Section 323 of the 1998 Act provides:

"323 Deduction for previous injury or pre-existing condition or abnormality

- (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.
- (2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.

Note. So, if the degree of permanent impairment is assessed as 30% and subsection (2) operates to require a 10% reduction in that impairment to be assumed, the degree of permanent impairment is reduced from 30% to 27% (a reduction of 10%).

- (3) The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter.
- (4) The Workers Compensation Guidelines may make provision for or with respect to the determination of the deduction required by this section."

43. As pointed out by Beech-Jones J in *Cullen v Woodbrae Holdings Pty Ltd*³ it is necessary for an AMS to consider the point in time at which the existence of a previous injury or pre-existing condition or abnormality which contributes to the overall level of impairment is to be considered.
44. Given the nature of the injury referred for assessment, the appropriate time to consider whether it was appropriate to make a deduction pursuant to s 323 of the 1998 Act was at the date of commencement of Ms Hilder's employment, prior to her embarking on the work tasks that contributed to the extent of the impairment assessed on examination by the AMS.
45. Review of the material establishes that the AMS fell into demonstrable error in confining causation of the impairment to the single incident on 20 May 2017. That error led to the further error in determining the date at which it was appropriate to consider whether a deduction was required pursuant to s 323 of the 1998 Act.

³ [2015] NSWSC 1416

46. Neither party has addressed submissions to the assessment by the AMS of lumbar spine impairment at the time of his examination. That assessment appears to be correct in the light of the radiological reports and findings of the AMS on examination.
47. The work tasks which gave rise to that level of impairment go back more than 20 years to the commencement of employment with the respondent. There is no evidence which suggests that there was any previous injury or condition or abnormality which pre-existed the commencement of employment and the performance of the relevant work tasks.
48. Accordingly, there is no basis upon which it can be said that there was any previous injury or pre-existing condition or abnormality which contributed to the extent of impairment of the lumbar spine assessed by the AMS, accepted by the parties and confirmed by the Panel upon review.
49. For these reasons, the Appeal Panel has determined that the MAC issued on 17 April 2019 should be revoked, and a new MAC should be 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*.

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Ann MacLeod
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 586/19
Applicant: Cathy Janine Hilder
Respondent: The Secretary, NSW Department of Family and Community Services

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 [insert name of Doctor] 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 WorkCover Guides	Chapter, page, paragraph, figure and table numbers in AMA 5 Guides	% WPI	Proportion of permanent impairment due to pre-existing injury, abnormality or condition	Sub-total/s % WPI (after any deductions in column 6)
1. Lumbar spine	20/05/17 (deemed)	paragraph 4.27: p.27 paragraph 4.35, p. 27	table 15-3 page 384	12%	Nil	12%
Total % WPI (the Combined Table values of all sub-totals)						12%

Mr William Dalley
Arbitrator

Dr Margaret Gibson
Approved Medical Specialist

Dr John Ashwell
Approved Medical Specialist

30 July 2019

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

