WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1769/19**
Appellant:	**Samedin Shakiri**
Respondent:	**Bluescope Steel Limited**
Date of Decision:	**18 December 2019**
Citation:	**[2019] NSWWCCMA 194**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Philippa Harvey-Sutton**
Approved Medical Specialist:	**Dr John Ashwell**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 12 August 2019, Samedin Shakiri (the appellant) 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 22 July 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 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 Guides) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). “Whole Person Impairment" is reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 20 June 2019, an amended referral was made by the delegate of the Registrar to the AMS for an assessment of whole person impairment caused to:

    - Cervical spine;
    - Lumbar spine;
    - Upper and lower gastrointestinal tract – as a consequential condition;
    - Caused by injury on 5 March 2012.

7. The referral was made pursuant to Consent Orders on 10 May 2019.

8. Mr Shakiri was employed as a mill operator by the respondent from 1979 to 2012. On 5 March 2012 he fell about half a metre onto a metal platform, landing on his back. He was taken by ambulance to Wollongong Hospital and allowed to go home the following day. He consulted his general practitioner a few days later with low back pain, neck pain and headaches. He was treated by a course of physiotherapy and hydrotherapy. He saw a number of specialists including Dr Bashford, Dr Cherukuri and Dr Assad. Dr Assad discussed the question of cervical spine surgery but Mr Shakiri declined surgical treatment.

9. Mr Shakiri has persevered with the treatment from the Pain Management Clinic. His medications including Mirtazapine, Palexia, Nexium, Collactulose, Propranolol and Avapro. Mr Shakiri has developed gastrointestinal symptoms.

10. The AMS certified 7% WPI for the lumbar spine, 5% WPI for the cervical spine, 1% for the upper gastrointestinal tract and 0% for the lower gastrointestinal tract, leaving an entitlement of 13% WPI.

PRELIMINARY REVIEW

11. 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.

12. The appellant did not seek to be re-examined by a Panel AMS. The Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination, as no demonstrable error was established.

EVIDENCE

Documentary evidence

13. 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

14. 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

15. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.

FINDINGS AND REASONS

16. 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.

17. 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.

18. The appellant raised two principal issues in furtherance of his challenge to the MAC.

19. Firstly, he asserted that the AMS should have found that he suffered from radiculopathy, and had fallen into error by not taking an accurate history of the site of Mr Shakiri's complaints of pins and needles on examination. Secondly, he contended that the AMS had made an error in the WPI he assessed for the upper gastro-intestinal tract.

Radiculopathy

20. The gravamen of the appellant's challenge to the AMS appears to be that he should have found in accordance with the Guides that Mr Shakiri was suffering from the effects of radiculopathy.

21. Mr Shakiri approached that submission by firstly criticising some aspects of the AMS's reasons, without relying on them as either the application of incorrect criteria or a demonstrable error.

22. The first of such errors occurred allegedly when the AMS said[1]:

> "The applicant attended by himself".

23. Mr Shakiri conceded that he was by himself in the examination room, but alleged that he attended with his wife.

24. The second error concerned an obvious slip by the AMS. At paragraph 10b of his reasons the AMS said[2]:

> "I have assessed 14% whole person impairment."

25. The AMS then explained his calculations and said:

> "The total impairment is therefore calculated at 13% WPI."

26. The formal certification was for 13% WPI[3].

27. The first substantive error alleged was that the AMS had not taken the correct history from Mr Shakiri.

28. The correct history was that Mr Shakiri had apparently indicated to the AMS that the pins and needles he was feeling were only in the first three fingers of his right hand.

29. However, under "Present Symptoms," the AMS had recorded:[4]

> "The neck discomfort is described as more noted on the right side and can pass into the upper extremities, more on the right side, and *there is a description of pins and needles on occasions, affecting all the fingers of both hands but more noted on the right side*. These pins and needles can be triggered by sudden movements and tend to last 5-10 minutes at a time." (Emphasis added).

30. On examination also, the AMS had noted:[5]

> "There was no deformity but there was a slight degree of tenderness over the lower spinal area. As concerns range of motion, flexion was reduced by approximately one-third and extension by approximately two-thirds. Left lateral flexion and rotation were reduced by approximately one third in comparison to the movements to the right side. The observed dysmetria was not accompanied by any evidence of spasm or guarding.

[1] Appeal papers page 20
[2] Appeal papers page 24
[3] Appeal papers page 27
[4] Appeal papers page 21
[5] Appeal papers page 22

Sensation was described as globally reduced *over the right upper extremity and involving all fingers,* but not in a dermatomal distribution. Mid-arm circumference was 34cm bilaterally and maximal forearm circumference was 30cm bilaterally. Muscle power, tone and reflexes were all normal in the upper extremities." (Emphasis added).

31. The AMS had accordingly failed to realise, it was argued, that Mr Shakiri's complaint was consistent with one of the criteria necessary to establish the presence of radiculopathy pursuant to Table 15.6 of AMA 5.[6]

32. Table 15.6 provides that one of the signs for a DRE category III rating is the presence of radiculopathy. The AMS had certified a DRE II cervical category, which permitted a base of 5%. Restrictions in the activities of daily living could be added to a maximum further 3%. The base rate however for a DRE cervical category III was 15% with the additional 3% available for the restrictions of the activities of daily living. To qualify for a DRE III finding, it was necessary for Mr Shakiri to comply with the relevant criteria.

33. We were referred to "Chapter 4.23" of the Guides. In fact, the relevant paragraph is Chapter 4.27.[7] It provides:

> "4.27 Radiculopathy is the impairment caused by malfunction of a spinal nerve root or nerve roots. In general, in order to conclude that radiculopathy is present, two or more of the following criteria should be found, one of which must be major (major criteria in bold):
>
> - **loss or asymmetry of reflexes**
> - **muscle weakness that is anatomically localised to an appropriate spinal nerve root distribution**
> - **reproducible impairment of sensation that is anatomically localised to an appropriate spinal nerve root distribution**
> - positive nerve root tension (AMA5 Box 15-1, p 382)
> - muscle wasting – atrophy (AMA5 Box 15-1, p 382)
> - findings on an imaging study consistent with the clinical signs (AMA5, p 382)."

34. The relevant criteria that applied to Mr Shakiri were said to be firstly, the major criterion of the presence of a reproducible impairment of sensation, anatomically localised to appropriate spinal nerve root distribution. Secondly, the minor criterion was said to be satisfied by imaging studies carried out on 27 March 2012 and 28 August 2016. They allegedly found pathology that was said to be relevant at C5/6 and C6/7.

35. A further relevant criterion had already been found in any event, Mr Shakiri submitted. A lessening of strength had occurred in the past, Mr Shakiri was recorded as telling the AMS. The AMS said:[8]

> "[Mr Shakiri] states he noted some lessening of strength in the right hand three years ago."

36. The AMS found on examination of the neck that muscle power, tone and reflexes were all normal in the upper extremities, which Mr Shakiri argued was an "incorrect observation." Lessening of the strength in the right hand should have resulted in the major criterion of muscle weakness being found in any event. It was argued further that the global reduction of sensation recorded by the AMS on examination was proof that Mr Shakiri was still suffering his lessening of strength.

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[6] AMA5 Page 392 Table 15-5
[7] Guides page 27
[8] Appeal papers 21

Discussion

37. These submissions must be rejected. Mr Shakiri relies upon allegations of fact in his submissions, but has not tendered evidence upon which those allegations were based. There was no evidence that Mr Shakiri did attend with his wife. There was no evidence that Mr Shakiri limited his complaints to a change in sensation in the first three fingers in his right hand only.

38. Mr Shakiri submitted that the statement by the AMS which recorded lessening of strength in the right hand some three years before was evidence that there was still a lessening of strength in the right hand on assessment. This is contradicted on the findings on examination, and again there is no evidence before us to sustain Mr Shakiri's speculative interpretation that the AMS meant when he recorded the lessening of strength, that it was still present at the assessment.

39. Mr Shakiri attempted to deal with that difficulty by simply describing the normal findings on examination on being contrary to the symptoms the AMS recorded. We reject that submission. In the first place, matters of history which are recorded by the AMS are not recorded as facts but rather as allegations made by a claimant. They are accordingly not "findings" or "observations." In any event the entry simply indicates that three years ago Mr Shakiri had lessening of strength in the right hand. That cannot be conflated into a statement that not only did he have lessening of his strength three years ago, but that it continued to the present day.

Gastrointestinal tract

40. The AMS said in explaining his calculation[9] at 10b of the MAC[10]:

> "The requirement for taking Nexium, as a consequence of the medication to control the discomfort after the fall, is 1% WPI from the WCC Guidelines."

41. In considering the WPI for the upper and lower gastrointestinal tracts, the AMS considered an opinion by Dr Anthony Greenberg, General Surgeon and Gastrointestinal surgeon, who had been retained by the appellant.

42. The AMS said:

> "While agreeing with the finding of impairment for the upper gastrointestinal tract, the simple constipation problems are well managed with laxatives and under the WCC Guidelines is assessed as 0% WPI."

43. Mr Shakiri submitted that the AMS had erred in finding 1% WPI for the upper gastrointestinal tract when he had already said that he agreed with the opinion of Dr Greenberg that 2% WPI was appropriate.

44. Mr Shakiri then submitted that the AMS had offered no reasoning at all why 0% was found for the lower gastrointestinal tract.

45. That submission must also be rejected. The AMS made it clear in discussing the report of Dr Greenberg that Mr Shakiri was simply suffering from constipation problems, which were well managed with laxatives. This did not entitle the appellant to any WPI in accordance with the Guidelines. Chapter 16.9 of the Guides provides[11]:

> "Effects of analgesics on the *lower* digestive tract:

[9] Appeal papers page 24
[10] Appeal papers page 25
[11] Guides page 78

- Constipation is a symptom, not a sign and is generally reversible. A WPI assessment of 0% applies to constipation". (Emphasis added)

46. It follows that the AMS was referring to the reason he gave 0% for the lower digestive tract. However Mr Shakiri has raised an inconsistency in the reasons given by the AMS that he found 1% for the upper gastrointestinal tract, when he had agreed with the 2% assessed by Dr Greenberg.

47. We find no such inconsistency. The AMS did not say he agreed with Dr Greenberg's assessment, he said he agreed with a finding of impairment for the upper gastrointestinal tract. He had already stated his reasons for finding a 1% (the requirement for Nexium) and his finding was separated from his précis of Dr Greenberg's opinion by a fresh paragraph.

Decision

48. We concur that it appears that there was a slip in the recording of the WPI where the AMS said at paragraph 10a[12] that there had been a 14% WPI when the certificate itself found that there was a combined value of 13%. The formal certificate is however correct, and there is no need to issue a fresh certificate. It follows from our findings that the reference by the AMS to "14%" at paragraph 10a was a slip that was not reproduced in the certificate itself.

49. Accordingly, the Appeal Panel has determined that the MAC issued on 22 July 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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

[12] Appeal papers page 24