

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-5494/19
Appellant:	Linda Louise Allan
Respondent:	State of New South Wales
Date of Decision:	16 June 2020
Citation:	[2020] NSWCCMA 103

Appeal Panel:	
Arbitrator:	Catherine McDonald
Approved Medical Specialist:	Dr John Ashwell
Approved Medical Specialist:	Dr David Crocker

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 6 April 2020, Linda Louise Allan lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Rob Kuru, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 12 March 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, being that in s327(3)(d).
4. The Registrar also noted an obvious calculation error in the AMS's assessment.
5. 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 and the calculation performed by the AMS.
6. 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.
7. 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

8. Ms Allan was employed as a cleaner in the mental health ward of Maitland Hospital. She suffered an injury to her right shoulder on 6 May 2015 when she was cleaning ceiling vents using a microfibre cloth on a long pole. She suffered an aggravation of her shoulder injury on 21 August 2015 when she was pushing a heavy trolley.
9. Ms Allan was diagnosed with supraspinatus tendinopathy and subacromial bursitis with impingement. Dr D Osborne undertook an arthroscopic acromioplasty on 27 November 2015. Her shoulder failed to improve and Dr Osborne performed arthroscopic capsular release surgery on 31 August 2016. She continued to suffer pain and restricted movement and was referred to Dr Tame, a pain management specialist.
10. In late 2015, Ms Allan complained to her treating doctors of pain and restriction of movement in her neck. She was investigated with an MRI scan and nerve conduction studies.
11. On 20 December 2019, a Commission arbitrator determined that, in addition to the right shoulder injury, Ms Allan suffered an injury to her cervical spine being an aggravation, acceleration, exacerbation or deterioration of underlying cervical spine disease.
12. The AMS diagnosed subacromial bursitis in Ms Allan's right shoulder which was complicated by the development of frozen shoulder. He said that neither diagnosis explained her ongoing restriction of movement. He assessed 8% whole person impairment (WPI) as a result of the injury to her right shoulder. The AMS assessed Ms Allan in DRE Cervical Category I resulting in 0% WPI for her neck.

PRELIMINARY REVIEW

13. 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.
14. 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 there is sufficient information in the file to deal with the appeal.

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.
16. 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

17. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
18. In summary, Ms Allan, through her solicitor, Mr Bartley submitted that the AMS acted ultra vires in forming conclusions with respect to the causation of the cervical spine injury, contrary to the findings of the arbitrator, so that a re-examination is warranted.
19. Ms Allan also submitted that the AMS failed to make a diagnosis of either her right shoulder injury or cervical spine injury and that he therefore failed to comply with the Guidelines and failed to disclose the path of his reasoning.

20. In reply, the State did not concede that the statement by the AMS that Ms Allan suffered cervical symptoms “without specific injury” was an error and said that it reflects the arbitrator’s finding that Ms Allan had not suffered a frank injury. The State did not accept that the AMS acted ultra vires or contrary to s 325 of the 1998 Act.
21. The State said that Ms Allan should not criticise the AMS for forming a view about the causation of her cervical spine injury and then allege that he failed to make a diagnosis. The AMS noted that Ms Allan continued to suffer symptoms and restricted movement, entitling her to an assessment of permanent impairment.
22. The State also did not accept that the AMS erred in making conclusions inconsistent with the referral. The State noted that the findings of the AMS were clearly ascertainable from reading the MAC and that he had assessed Ms Allan as she presented on the day of the assessment.

FINDINGS AND REASONS

23. The procedures on appeal are set out in s 328 of the 1998 Act. The appeal is 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.
24. 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.

The MAC

25. The AMS said that he had received the documents set out in the referral from the Registrar. Those documents included the Arbitrator’s Certificate of Determination dated 20 December 2019. The AMS did not refer to the Certificate of Determination in the MAC.
26. The AMS set out a brief history and account of Ms Allan’s present symptoms. He did not mention her cervical spine in those sections of the MAC. He set out his findings on examination in respect of her shoulders and again did not mention her cervical spine.
27. The AMS reviewed imaging which did include an x-ray and MRI of her cervical spine taken in June 2018.
28. The AMS summarised the injuries and diagnoses:

“Ms Allan has had an injury to her right shoulder. Clinically, the diagnosis is that of subacromial bursitis, which was treated surgically and subsequently complicated by her developing a frozen shoulder. Neither of these diagnoses explain her ongoing restriction of movement in the right shoulder.

 - consistency of presentation

Ms Allan was cooperative with the assessment throughout, although above her restriction in range of motion is beyond that expected from the pathology seen on her imaging.”
29. The AMS assessed 0% WPI in respect of Ms Allan’s cervical spine and 8% WPI in respect of her right upper extremity (shoulder).

30. In explaining his calculations, the AMS said:

“Ms Allan has been reporting some neck pain and stiffness subsequent to her injury without specific injury. She does not describe radiculopathy or non-specific symptoms referring into her limb, consistent with cervical pathology. According to AMA page 392, Table 15-5, I assess her according to DRE Cervical Category I. With respect to the right shoulder, I have assessed the following impairments:

Flexion	6% UEI
Extension	1 % UEI (AMA 476, Table 16-40)
Abduction	80° 5%UEI
Adduction	30° 1% UEI (AMA 477, Table 16-43)
External rotation	1% UEI
Internal rotation	0% UEI (AMA 479, Table 16-46)

This gives a total of 15% upper extremity impairment for the right upper limb which, according to AMA page 439, Table 16.3 converts to an 8% whole person impairment.”

31. When commenting on the other medical opinions in the file the AMS said:

“Dr Hopcroft in his report dated 15 June 2018, supposes that Ms Allan may have developed the pathology in her cervical spine at the time of the work injury or placement of her head in ‘extreme left lateral position when she underwent her right shoulder procedure’. The symptoms she was reporting are non-specific and would not have been diagnosed on an MRI. An MRI has demonstrated age related change, unrelated to her injury. At my clinical assessment, I observed no guarding, spasm or loss of range of motion, nor non-verifiable radicular complaints in the limbs and hence, have assessed her as DRE Category I (0% WPI). A patient assessed as DRE Category I is then not assessable for further impairment for restrictions of ADL according to SIR Guidelines page 28, paragraph 4.34.

With respect to range of motion in the right shoulder, I found slightly increased range of motion on clinical assessment today which accounts for the difference here.

With respect to the report by Dr Harrington dated 1 August 2018, I have again found slightly increased range of motion on clinical assessment accounting for the difference in whole person impairment. With respect to her neck, I observed normal range of motion and an x-ray at the examination. Her imaging study does not demonstrate evidence of injury and I agree with Dr Harrington that no impairment is assessable in the cervical spine.”

32. The MAC was poorly proof read and many obvious errors were corrected in the material quoted above.

33. The AMS did not attach a worksheet setting out his findings as recommended in paragraph 2.6 of the Guidelines which provides:

“To achieve an accurate and comprehensive assessment of the upper extremity, findings should be documented on a standard form. AMA5 Figures 16-1a and 16-1b (pp 436–37) are extremely useful both to document findings and to guide the assessment process.”

34. The AMS also wrote that Ms Allan’s work history was “not applicable” which is both puzzling and inappropriate.

Consideration

Obvious error

35. The Registrar observed an obvious error in the assessment made by the AMS with respect to Ms Allan's right shoulder and referred it to the Panel for correction.
36. The AMS recorded that the range of internal rotation of Ms Allan's right shoulder was 60° but assessed 0% UEI (upper extremity impairment). Under Table 16-46 of AMA 5 the appropriate assessment was 2% UEI.
37. The assessment table should therefore read:

Flexion	6% UEI
Extension	1 % UEI (AMA 4 76, Table 16-40)
Abduction	5%UEI
Adduction	1% UEI (AMA 477, Table 16-43)
External rotation	1% UEI
Internal rotation	2% UEI (AMA 479, Table 16-46)
Total UEI	16%

38. A total UEI of 16% converts under Table 16-3 of AMA 5 to 10% WPI.

Cervical spine injury

39. Ms Allan's solicitor argued that the AMS erred in forming conclusions as to the causation of her cervical spine injury.
40. In *Jaffarie v Quality Castings Pty Limited*¹ (*Jaffarie*) in 2014, Roche DP considered the decision of the Court of Appeal in *Bindah v Carter Holt Harvey Woodproducts Australia Limited*² and said:

“Notwithstanding the different approach by Emmett JA and Meagher JA, it is my view that the following principles apply to proceedings in the Commission:

- (a) questions of causation are not foreign to medical disputes within the meaning of that term when used in the 1998 Act. Assessing the degree of permanent impairment ‘as a result of an injury’, and whether any proportion of permanent impairment is ‘due’ to any previous injury or pre-existing condition or abnormality, both call for a determination of a causal connection (*Bindah* at [110]);
- (b) it is for the Commission to determine whether a worker has received an injury within the meaning of s 4 of the 1987 Act and whether there are any disentitling provisions, such that compensation is not payable for that injury (*Bindah* at [111] and s 105 of the 1998 Act);...”

41. Those reasons were not the subject of adverse comment in either decision in *Jaffarie* in the Court of Appeal.³
42. The AMS was required to prepare his MAC on the basis of the findings made by the Arbitrator. It appears that he did not have regard to those findings.

¹ [2014] NSWCCPD 79.

² [2014] NSWCA 264.

³ [2014] NSWCA 335 and [2018] NSWCA 88.

43. The AMS said that Ms Allan had not suffered “specific injury.” As the State points out, the comment by the AMS can be read as reflecting the finding by the arbitrator that Ms Allan had suffered an aggravation of an underlying condition rather than a frank injury.
44. The words used by the AMS when comparing his assessment to that of Drs Hopcroft and Harrington could have been better chosen when he said that the imaging showed “age related change, unrelated to her injury” or did not show evidence of injury. He appeared to agree with Dr Harrington, whose report was prepared to defend Ms Allan’s claim, that there was no injury.
45. However, a reading of the MAC as a whole shows that the AMS understood the task he was required to undertake.
46. The AMS understood that he was required to assess Ms Allan’s cervical spine and he did so. The observations he made were consistent with assessment in DRE Cervical Category I:

“No significant clinical findings, no muscle guarding, no documentable neurologic impairment, no significant loss of motion segment integrity, and no other indication of impairment related to injury or illness.”
47. Dr Hopcroft assessed Ms Allan in DRE Cervical Category II. Dr Hopcroft’s reasoning is not explained in the report dated 27 June 2018 in which he assessed permanent impairment. In his first report, he observed an asymmetrical range of movement which appear to be the basis for that assessment.
48. The findings with respect to the AMS’s examination of Ms Allan’s cervical spine appear in his comments on Dr Hopcroft’s report. They would have been better placed in 10b of the MAC, explaining his calculations, rather than 10c where he is asked to comment on other reports.
49. However, those findings are consistent with DRE Cervical Category I, resulting in an assessment of 0% WPI and do not disclose an error. That assessment does not deny there was an injury. No re-examination is warranted.

Diagnosis

50. Ms Allan’s solicitor argued that the AMS failed to diagnose the conditions suffered by Ms Allan in her right shoulder and cervical spine.
51. That submission is incorrect in respect of her right shoulder. The AMS diagnosed subacromial bursitis and frozen shoulder. The AMS said that the restriction of movement was beyond that expected from the pathology seen on imaging. He was not required to make an additional diagnosis to explain the difference, as Ms Allan’s submissions suggest.
52. The AMS was required by paragraph 1.6(b) of the Guidelines to make a diagnosis when assessing permanent impairment. However that diagnosis is merely part of the assessment and is not binding under s 326 of the 1998 Act.
53. The task of the AMS was to assess Ms Allan’s condition in accordance with the Guidelines. In respect of her upper extremity, he was required to assess the range of motion using the method in paragraph 2.5 of the Guidelines and he did so. There is an obvious error in his calculation which is corrected above. There is nothing in the MAC to suggest that his comment that the restriction of movement was greater than expected had any bearing on the assessment he made.
54. The AMS compared his assessment to those made by Dr Hopcroft and Dr Harrington and said that he observed an increased range of motion. Dr Hopcroft assessed 16% upper extremity impairment (which converts to 10% WPI) in June 2018. Dr Harrington assessed 17% upper extremity impairment (which also converts to 10% WPI) in August 2018.

55. When the obvious error is corrected, there is no substantive difference to the assessments made by Drs Hopcroft and Harrington.
56. The AMS did fail to set out his diagnosis with respect to Ms Allan's cervical spine, as he should have done. He should have acknowledged the determination by the arbitrator that the injury was the aggravation of degenerative changes in Ms Allan's cervical spine.
57. However, the AMS set out his findings on examination. Those findings fall squarely within DRE Cervical Category I and there is no error in that assessment.

Path of reasoning

58. Section 325 of the 1998 Act provides that a MAC is to be in the form approved by the Registrar. The standard form provides a template for providing reasons in a way which clearly sets out the path of reasoning followed by the AMS. Unfortunately, the AMS failed to follow the form and the certificate needs to be read carefully to locate the relevant findings.
59. Despite that, the path of reasoning is disclosed. With respect to the right upper extremity, the AMS measured the range of movement and recorded his findings. He said that the loss was greater than he expected to find but he did not make any deduction from the assessment that he made.
60. With respect to Ms Allan's cervical spine, the AMS set out his findings (albeit in an inappropriate location) and on that basis, appropriately assessed Ms Allan in DRE Cervical Category I, without making any deduction under s 323 of the 1998 Act.
61. The AMS used the Guidelines to assess Ms Allan and set out his findings. A requirement to show a detailed path of reasoning is more relevant when explaining why, for example, a deduction was made under s 323 of the 1998 Act.
62. For these reasons, the Appeal Panel has determined that the MAC issued on 12 March 2020 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*.

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: 5494/19
Applicant: Lind Louise Allan
Respondent: State of New South Wales

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 Rob 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 the Guidelines	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)
Right upper extremity	6.5.2015 and 21.8.2015	Chapter 2	Table 16-40 (p 476), Table 16-43 (p 477), Table 16-46 (p 479) and Table 16-3 (p 439)	10%	Nil	10%
Cervical spine	6.5.2015 and 21.8.2015	Chapter 4	Table 15-5 (p 392)	0%	Nil	0%
Total % WPI (the Combined Table values of all sub-totals)					10%	

Catherine McDonald
Arbitrator

Dr John Ashwell
Approved Medical Specialist

Dr David Crocker
Approved Medical Specialist

16 June 2020

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

