WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-427/20 & M2-427/20**
Appellant:	**Sonia Manoukian**
Respondent:	**Catholic HealthCare Limited**
Appellant:	**Catholic HealthCare Limited**
Respondent:	**Sonia Manoukian**
Date of Decision:	**17 June 2020**
Citation:	**[2020] NSWWCCMA 106**

Appeal Panel:	
Arbitrator:	**Paul Sweeney**
Approved Medical Specialist:	**Dr Drew Dixon**
Approved Medical Specialist:	**Dr David Crocker**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 24 March 2020, Sonia Manoukian (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Cyril Wong, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 18 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. On 9 April 2020, Catholic HealthCare Limited (the respondent) also lodged an Application to Appeal Against the Decision of Approved Medical Specialist on the grounds that the MAC contained a demonstrable error.

4. The Registrar is satisfied that, on the face of each Application, at least, one ground of appeal has been made out. The appeals have been heard together. For convenience, Ms Manoukian is referred to as the appellant and Catholic Healthcare Limited as the respondent throughout these reasons. The appeal panel has conducted a review of the original medical assessment but limited to the grounds of appeal on which the appeals are made.

5. 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 process in accordance with the Workers compensation medical dispute assessment guidelines.

6. 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

7. The appellant worker was employed by the respondent as a Community Services Worker. In that role, she provided care and domestic assistance to clients of the respondent.

8. On 23 May 2014, she suffered an injury to her right shoulder when a client, who she was assisting, lost her balance and fell. After an unsuccessful trial of conservative treatment, the appellant came under the care of Dr David Duckworth, an orthopaedic surgeon, who performed right shoulder surgery on 30 April 2015.

9. The appellant returned to work in June 2015, on suitable duties. In September 2015, she returned to her pre-injury duties on a full-time basis.

10. On 27 June 2016, the appellant suffered a further injury to her right shoulder when a client, who she was transferring to a shower collapsed. She also injured her neck. It is these injuries that ground the present claim.

11. Following her injury, the appellant was treated by Dr Peter Yu, an occupational physician. In August 2016, the appellant came under the care of Dr Harper, an orthopaedic surgeon who initially recommended that she persevere with conservative treatment. Ultimately, he recommended further surgery

12. Following the injury, the appellant returned to work on suitable duties. However, these duties were withdrawn by the respondent on 17 November 2016. Her employment was terminated on 27 April 2017. After retraining, the appellant found further employment as a local area coordinator at St Vincent de Paul for the National Disability Insurance Scheme (NDIS), working 30 hours per week, on 25 September 2017. She continues to experience pain and discomfort in her right shoulder and neck. However, she has chosen not to undergo the surgery recommended by Dr Harper in 2018.

13. In matter 427/20, the appellant made a claim for permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (1987 Act). Her claim for compensation was based upon the opinion of Dr Endrey-Walder, a general surgeon, in a report dated 26 June 2019. Dr Endrey-Walder opined that the appellant suffered 7% whole person impairment (WPI) of the cervical spine and 5% WPI of the right upper extremity, which on the combined values chart gave rise to a total impairment of 11% WPI.

14. Conversely, Dr Paul Miniter, an orthopaedic surgeon, who provided a report to the respondent on 19 September 2019, expressed the opinion that the appellant had no impairment at either the shoulder or the cervical spine. These conflicting opinions gave rise to a medical dispute in accordance with Part 7 of Chapter 5 of the 1998 Act. Accordingly, the Registrar referred it to an AMS, Dr Wong.

15. By the MAC, Dr Wong certified that the appellant suffered 10% WPI. It is from this finding that both the appellant and the respondent have appealed.

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 Workers compensation medical dispute assessment guidelines. It determined that it was unnecessary for the worker to be re-examined by a member of the panel. Neither party sought such a re-examination and the panel concluded that a further examination would not illuminate the issues raised by the respective appeals.

EVIDENCE

Documentary evidence

17. The appeal panel has before it all the documents which were sent to the AMS for the original medical assessment and has taken these into account in making this determination.

Medical Assessment Certificate

18. The parts of the MAC given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

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19. Both parties made written submissions. They are not repeated in full but have been considered by the appeal panel. In summary, the appellant submitted that the AMS erred in stating that she "did not have a new injury on 26 June 2016". The statement was allegedly inconsistent with the terms of the Referral and, implicitly, with an earlier determination of an arbitrator. This error may underlie the second error allegedly made by the AMS.

20. Secondly, the AMS erred by making a 1% deduction for the activities of daily living (ADL) "in respect of any pre-existing effect" of the right shoulder. The submission continued:

> "It is submitted that the assessor has incorrectly deducted 1% of the ADL for a prior right shoulder injury. It is submitted that Dr Wong by expressing an opinion of the incident of a prior incident in 2014 has fallen into error. It is also submitted that the Applicant Worker has clearly returned to work on normal duties after the 2014 incident and relies on a clinical report of Dr Duckworth, page 38 of the ARD that accepts recovery. It is therefore submitted that any deduction of 1% ADL due to right shoulder injury is incorrect."

21. The appellant submitted that the correct outcome should be 11% WPI as assessed by Dr Endrey-Walder in his report dated 26 June 2019. It pressed for the acceptance of Dr Endrey-Walder's opinion that the appellant's ADL should be assessed at 2% WPI and not the 1% allowed by the AMS.

22. By its submissions in reply, the respondent asserted that the appeal should be dismissed. It conceded that the AMS may have erred in concluding that the appellant "did not have a new injury on 27 June 2016". It argued, however, that the appellant had not suffered any "disadvantage as a result of that erroneous conclusion." The submission continued:

> "What is apparent is that, aside from making the erroneous statement, the AMS has assessed the impairment suffered by the worker of the right shoulder and neck and ascribed that impairment of the injury on 27 June 2016 as required.
>
> The only party disadvantaged by the above error is the respondent, as the AMS has determined to make no deduction under s 323 WIM Act 1998 for the effects of the previous right shoulder injury in 2014, based on his erroneous understanding as to the nature of the injury referred."

23. The respondent then submitted that the AMS's reduction of the ADL from 2% to 1% was best explained by the statement of the AMS that the ADL loading was "reduced to 1% WPI after attributing 1% WPI to the right shoulder injury". The submission continues:

> "What is clear from the above unambiguous statement, is that the decision to reduce the 2% ADL loading to 1% WPI was not due to the effects of the prior injury or condition as the worker now submits. Rather, it was because the AMS was of the view that the effects of the right shoulder injury had contributed to the 2% ADL loading."

24. The respondent submitted that the AMS had determined that the cervical spine injury "only warrants a 1% loading for ADL".

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25. By its appeal, the respondent invited the panel to find two errors allegedly made by the AMS:

> "i. The AMS fell into error in determining that there was no 'new injury on 27 June 2016' and in approaching the matter on the basis that the injury could be assessed by him included the earlier injury occurring on 23 May 2014.
> ii. The AMS fell into error in failing to make a deduction under section 323 WIM Act 1998 to account to the effects of the right shoulder injury sustained on 23 May 2014."

The respondent submitted that the evidence in the case warranted a deduction of between 20% and 50% for the effects of the 2014 injury.

26. By its submissions in response, the appellant argued that it was inappropriate to make a deduction pursuant to s 323. The assessor had not done so after considering the evidence. Dr Miniter, the orthopaedic surgeon retained by the respondent, had not suggested that there was any pre-existing condition. In those circumstances, the employer had not established demonstrable error on the part of the AMS.

FINDINGS AND REASONS

27. 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.

28. 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.

29. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation. However, in *Versace v Australia Best Tyres & Auto Pty Limited* [2016] NSWSC 1540 (2 November 2016) Schmidt J, held that the section did not permit the panel to review the determination of the AMS without first identifying error.

30. In considering the submissions of the parties, it is necessary to bear in mind the nature of the statutory obligation of the AMS to provide reasons. It is evident from reasoning of the High Court of Australia, in *Wingfoot Australia Partners Pty Limited v Kocak 88 ALJR 52*, that it is only necessary for the MAC to explain the actual path of reasoning of the AMS in sufficient detail to enable a court or an appeal panel to determine whether there is error in its findings. In *Wingfoot* it was said that:

> "The function of a medical panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise."

31. The reasoning in *Wingfoot* has been applied to medical assessments under the NSW Workers Compensation legislation: see, for example *El Masri v Woolworths Ltd* [2014] NSWSC 1344 (26 September 2014).

32. In his summary, the AMS dealt with both the 2014 and 2016 injuries. Relevantly, he said this:

> "Mrs Manoukian is a 52-year old woman who injured her right shoulder at work in 2014. She had an arthroscopy of the right shoulder in March 2015. After surgery, her shoulder did not recover completely with persistent right shoulder symptoms. On 27 June 2016, she sustained soft tissue injury to the cervical spine at work and she also aggravated her right shoulder with increased symptoms of pain and stiffness.
>
> There are no significant inconsistencies identified at the time of my assessment. However, it should be noted that in my opinion, the right shoulder did not have a new injury on 27 June 2016. The pre-existing right shoulder injury was aggravated on that day. Therefore, it was not appropriate for me to make an apportionment for the so-called pre-existing injury at the right shoulder."

33. The appellant contends and the respondent concedes that the AMS fell into error in stating that the appellant did not suffer "a new injury" on 27 June 2016. On a close reading of the reasons of the AMS, however, the panel is not persuaded that he made an error of substance or, if he did, that it materially affected his determination of WPI. The AMS did not deny that the appellant suffered an injury on 27 June 2016. Plainly, he accepted that her "pre-existing right shoulder injury was aggravated on that day".

34. Of course, an aggravation of a previous condition or injury will constitute an injury either because it falls within s4(a) or s4(b)(ii) of the 1987 Act. That is because there is a further physiological or pathological change or, possibly, an aggravation or exacerbation of a pre-existing disease. The definition of injury does not contain the word "new". The use of it by the AMS in the MAC, however, is not inconsistent with the agreement between the parties that the appellant suffered injury. It was open to him to characterise the injury as an aggravation of a previous injury or pre-existing condition.

35. While the language employed the AMS is not entirely consistent with the definition of injury in the Workers Compensation Acts, his meaning is crystal clear. The appellant had suffered a previous injury to her right shoulder in 2014 and, on his history and findings, had persisting shoulder symptoms. This condition was aggravated on 27 June 2016. Aspects of the pathology and/or symptoms experienced by the appellant following the aggravation were not "new". The AMS did not use the word in a technical legal sense but to describe this process.

36. There is compelling evidence that the appellant had continuing problems after the surgery performed by Dr Duckworth. The AMS records that following this surgery she "continued to have symptoms of pain and stiffness" and "the symptoms got worse after three months." The AMS also refers to the letter from Dr Harper, the orthopaedic surgeon, to Dr Yu where he records that the appellant was "never completely pain free" following the 2015 surgery.

37. The medical opinion evidence also suggests that the 2014 injury played a continuing role in the appellant's condition. Dr Miniter, who expressed the opinion that the effects of the 2016 injury were short lived, refers to significant pre-existing degeneration in the appellant's shoulder. Dr Endrey-Walder, upon whom the appellant relies, obviously formed the view that there was some pre-existing injury, condition or abnormality, as he made a deduction pursuant to s 323.

38. Against that background, it is difficult to quibble with the opinion of the AMS that the 2016 injury was an aggravation of a previous condition. There is nothing in the Referral or in the previous COD that is inconsistent with his findings: see *Merza v Registrar of the Workers Compensation Commission & Anor* [2006] NSWSC 939. An arbitrator had not previously determined the nature of the injury so that it was impermissible for the AMS to determine that the injury was an aggravation of a previous injury: see *Jaffarie v Quality Castings Pty Ltd* [2014] NSWWCCPD 79 at [250 to 251].

39. Further, as the respondent argues, the appellant has not suffered disadvantage by reason of this finding. Having found that the condition was not a "new injury", the AMS has not made a deduction for a pre-existing condition pursuant to section 323. The panel will address this issue further below when considering the respondent's appeal.

40. The next error raised by the appellant is that the AMS "incorrectly deducted 1% of the ADL for a prior right shoulder injury". The AMS dealt with ADLs as follows:

> "The cervical spine was assessed as DRE II at 5% WPI. Additional 2% WPI was rated for ADL restriction for performance of domestic activities as described (SIRA 4 S4.35). This was reduced to 1% WPI after attributing 1% WPI to the right shoulder injury."

41. In paragraph 4 of the MAC, the doctor recorded that:

> "She has stopped walking her dog and stopped gardening after the first injury in 2014. She is restricted in walking to about 30 minutes from neck pain. After the second injury, she has trouble with her domestic duties such as vacuuming and bedding. She shops for small items only. Ms Manoukian manages her self-care activities without help."

42. Additional WPI for restrictions of the ADL are only awarded in respect of the spine. On the panel's understanding of the methodology adopted by the AMS, he concluded that the restrictions on the appellant's ADL would justify a finding of 2% WPI. However, he accepted that half of this related to functional restrictions flowing from the appellant's right shoulder injury. Plainly, the opinion was partly based upon the history he recorded that following her initial right shoulder injury the appellant gave up gardening and other ADL and partly based on his findings.

43. Obviously, the preferable approach to ADLs is to enquire which of the ADL set out in AMA 5 Table 1-2 (P 4) result from the injured spinal segment, rather than assessing ADL resulting from multiple injuries and then apportioning prior of the ADLs to the spine. While the AMS has not followed this approach, the outcome he has reached is identical.

44. The panel accepts that it is difficult to tease out restrictions on activities relating to the cervical spine when there are shoulder injuries. The restrictions on the appellant's ADL by reason of her neck and shoulder injuries is 2%. But the evidence unequivocally establishes that a significant part of these restrictions relate to the shoulder injury.

45. While the matter is not beyond argument, the panel has concluded that the appellant has not established error on the part of the AMS in his award of WPI for the ADL. Assuming the existence of error, the panel concluded that an allowance of 1% is appropriate on the history and findings of the AMS. The restrictions on gardening predated the injury. The appellant would be precluded from carrying out many of the domestic activities described in the MAC by reason of her shoulder injury. It follows that the appeal brought by the appellant must fail.

THE RESPONDENT'S APPEAL

46. By its appeal in matter number M1-427/20 the respondent employer submitted that the AMS erred in not making a deduction pursuant to s 323 in the circumstances of this case. The panel is of the opinion that there is error by the AMS in this respect. It is true, as the appellant contents, that the appellant says in her statement that she made a substantial recovery following the surgery in September 2015. She states:

> "I had minimal complaints as the right shoulder pain and stiffness resolved. I returned full-time and pre-injury duties I completed all duties without restriction. I was free from restrictions and resumed all the physical demands of the job until 27 June 2016."

47. As the AMS and other medical practitioners record, however, there are medical histories which suggest the appellant did have some residual symptomology following the surgery. On 18 August 2016, Dr Harper recorded that "after the surgery she was improved but never completely pain free". The AMS specifically recorded that she had "pain and stiffness after the surgery" in 2015.

48. By his report of 18 August 2016, Dr Harper characterised the injury of 27 June 2016 as an "exacerbation" of that pain. Dr Endrey-Walder, upon whom the appellant worker relies, made a 1/10th deduction, obviously pursuant to s 323 of the 1998 Act for the "previous injury". Dr Miniter, whose opinion the AMS rightly rejected, appears to argue that the entirety of the appellant's condition can be explained by pre-existing osteoarthritis. As recorded above, the AMS accepted that the injury in this case was an aggravation of a prior injury or pre-existing condition.

49. In those circumstances, the panel is persuaded that a deduction should have been made pursuant to s 323(1), as it seems highly probable that the 2014 injury and the consequential surgery contributed to the shoulder impairment found by the AMS on his examination. The radiological evidence also points to the conclusion that the appellant's pre-existing injury or condition contributed to the impairment.

50. While the panel accepts that the AMS, who examined the appellant, has an advantage in respect of many aspects of the assessment, the evidence suggesting demonstrable error in this case is strong. The quantum of a deduction is equivocal. Only Dr Endrey-Walder quantifies the appropriate deduction; he deducted 10%.

51. The respondent employer argues that there should be a greater deduction than that made by Dr Endrey-Walder. The panel is not persuaded, however, that there should be a larger deduction. By and large, the evidence establishes that the appellant had a reasonable outcome from her previous injury. She describes far more severe symptoms and a significant decrease in the functional use of the arm following the subject injury. It is always difficult to disentangle the various causal strands which contribute to an impairment. In the circumstances of this case, however, the evidence does not prove that the contribution was more than 10%.

52. The AMS determined that the appropriate WPI of the right shoulder was 4%. Deducting 1/10th from 4% for the purposes of s 323 produces a figure of 3.6% WPI. After rounding up, however, the figure is 4% WPI. Thus, the final WPI in respect of the right shoulder remains 4%. While the panel has arrived at this conclusion by a different path to the AMS, there is no utility in revoking his MAC.

53. In these circumstances, the panel intends to confirm the determination of the AMS.

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 Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar