WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1280/20**
Appellant:	**Svetn Mlacic**
Respondent:	**Premier Motor Service Pty Ltd**
Date of Decision:	**17 December 2020**
Citation No:	**[2020] NSWWCCMA 179**

Appeal Panel:	
Arbitrator:	**Carolyn Rimmer**
Approved Medical Specialist:	**Dr James Bodel**
Approved Medical Specialist:	**Dr Ross Mellick**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 18 September 2020 Svetn Mlacic (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Yiu-Key Ho, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 5 August 2020.

2. The respondent to the appeal is Premier Motor Service Pty Ltd. The respondent was insured at the relevant time by Employers Mutual NSW Limited (the insurer).

3. 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.

4. 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.

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 procedures 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. In earlier proceedings in the Commission in Matter No 5522/17 the applicant made a claim for medical expenses including the cost of proposed lumbar fusion surgery, Arbitrator Dalley determined the following:

> "1. The applicant suffered injury as defined in section 4 (a) of the *Workers Compensation Act* 1987 to his neck and low back in the course of his employment on 29 January 2015.
> 2. Employment was a substantial contributing factor to that injury.
> 3. The applicant suffered injury as defined in section 4 (b)(ii) of the *Workers Compensation Act* 1987 to his neck and low back by way of aggravation acceleration of pre-existing degenerative changes deemed to have occurred on 29 January 2015."

8. At paragraph [111] of the Statement of Reasons, the Arbitrator stated:

> "I am therefore satisfied on the balance of probabilities that Mr Mlacic suffered a disease injury within section 4(b)(ii) of the 1987 Act by way of aggravation acceleration of degenerative changes in the lumbar spine and aggravation of degenerative changes in the cervical spine and personal injury within section 4(a) of the 1987 Act. That injury also aggravated and accelerated pre-existing degenerative changes in the cervical and lumbar spine."

9. At [139] and [140] of the Statement of reasons, the arbitrator stated:

> "139. I am satisfied that Mr Mlacic suffered injury to his neck and low back by way of disease injury deemed to have occurred on 29 January 2015.
> 140. I am satisfied that Mr Mlacic also suffered injury to his neck and low back by way of personal injury on 29 January 2015 and that employment was a substantial contributing factor to that injury."

10. In these proceedings, the appellant is claiming lump sum compensation in respect of (i) an injury to the lumbar spine and cervical spine on 29 January 2015, and (ii) an injury to the lumbar spine and cervical spine deemed to have occurred on 29 January 2015 in the course of his employment as bus driver with the respondent.

11. On 12 May 2020 in a Certificate of Determination - Consent Orders, Arbitrator Harris remitted the matter to the Registrar to be held in the medical assessment pending list.

12. The matter was referred to the AMS, Dr Yiu-Key Ho, in the Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 2 July 2020 for assessment of whole person impairment (WPI) of the lumbar spine and the cervical spine as a result of the injury on "29 January 2015 and 29 January 2015 – deemed".

13. The AMS examined the appellant on 30 July 2020. He assessed 21% WPI of the lumbar spine and deducted one tenth for pre-existing injury, condition or abnormality which resulted in an assessment of 19% WPI of the lumbar spine. He assessed 0% WPI of the cervical spine. Therefore, the total assessment was 19% WPI in respect of the injury on 29 January 2015.

PRELIMINARY REVIEW

14. 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.

15. The Appeal Panel noted that the decision of the delegate of the Registrar dated 13 October 2020 referred to the respondent seeking to rely on additional evidence attached to the Opposition. However, the Appeal Panel was satisfied that the only documents attached to the Notice of Opposition was the respondent's submissions and no additional evidence had been filed by the respondent.

16. The appellant requested that he be re-examined by an AMS, who is a member of the Appeal Panel.

17. As a result of that preliminary review, the Appeal Panel determined that there was a demonstrable error in the MAC and it was necessary for the appellant to undergo a further medical examination because there was insufficient evidence by way of medical reports and clinical investigations in relation to assessment of the cervical spine on which to make a determination.

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.

Further medical examination

19. Dr James Bodel of the Appeal Panel conducted an examination of the worker on 2 December 2020 and reported to the Appeal Panel.

Medical Assessment Certificate

20. 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

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

22. The appellant's submissions include the following:

    (a) The AMS failed to make an assessment of impairment in respect of the appellant's cervical spine.

    (b) The AMS's assessment involved:

    • a failure to have regard to the plethora of evidence of cervical pathology;

    • a failure to consider the findings and detail recorded in any of the reports of the treating specialists, Dr Al-Khawaja and Dr Bentivoglio;

    • a failure to explain why he did not accept the findings recorded by the treating specialist, Dr Bentivoglio;

    • a failure to appreciate that the worker's injury involved gradual process, and

    • a failure to have regard to, and apply, the criteria of DRE Lumbar Category II of AMA 5.

(c) The AMS did not understand that the worker's injury was suffered over a protracted period from 2001.

(d) This error was apparent from the AMS's statement at 10(a) that "when we [sic] compared the investigations, there was no obvious deterioration in the MRI scan when we compared to the one before [sic] the injury to all those subsequent MRI scans". The only way one can make sense of what the AMS is saying in this sentence is that he considered the injury to have been a frank incident on 29 January 2015, as distinct from the Arbitrator's finding that the worker suffered both a personal injury on 29 January 2015, and a disease injury that he is deemed to have received on that date (but which was suffered by reason of a gradual process over many years).

(e) That understanding of the AMS was an obvious error, and the MAC therefore contained that error.

(f) The appellant referred to [111], [139] and [140] of the Statement of Reasons of the Arbitrator.

(g) The Arbitrator rejected Dr Casikar's opinion that the condition of the appellant's cervical spine was constitutional in origin.

(h) Given the Arbitrator's finding of injury, the AMS was bound to attend to an assessment of whole person impairment, and then consider, having regard to section 323 of the 1998 Act, the extent to which any impairment was attributable to a pre-existing condition.

(i) The AMS erroneously adopted at 10(a) Dr Casikar's approach that the "pictures in his cervical spine is [sic] probably all related to normal wear and tear or what we call constitutional factor". That is contrary to the Arbitrator's finding that the appellant suffered an injury, and that he aggravated the condition of his cervical spine. It also failed to acknowledge that "wear and tear" as part of the work-related disease process caused a compensable injury.

(j) The AMS acted in error in failing to conduct an assessment of the condition of the appellant's cervical spine, and to then have regard to the provisions of section 323 of the 1998 Act. He, in effect, purported to reject the Arbitrator's finding of injury.

(k) The AMS, having noted the worker's account that "20% of the pain is in the neck", and that the "neck pain stayed in the neck area radiating to both shoulders", failed to take that evidence into account when considering the extent to which impairment had resulted from the injury.

(l) The appellant's complaints had been noted by Dr Patrick in November 2019: "He is DRE II at both cervical spine and thoracic spine with complaint of ongoing symptoms at both spinal regions over a considerable period of time post-injury, and this attracts DRE II for both spinal regions."

(m) There was a substantial contemporaneous body of evidence which records the worker's complaints of symptoms in and referred from the neck:

X-Ray Cervical - 19 January 2010
Dr Al-Khawaja - 12 April 2010
Dr Al-Khawaja – 12 July 2010

Dr Al-Khawaja - 28 January 2011
Dr Al-Khawaja - 11 February 2014
MRI Cervical Spine – 31 October 2014
Dr Bentivoglio - 24 February 2015
MRI - 4 March 2015
Dr Bentivoglio - 5 March 2015
Dr Bernard Lee – 28 October 2015
Dr Bentivoglio - 08 March 2018

(n) The AMS failed to consider the detail recorded by the treating specialists and proceeded as if it were not in evidence before him.

(o) There was, as noted above, also his misdirection in failing to understand that the pathology prior to 29 January 2015 is work-related.

(p) DRE Lumbar [sic] Category II provides that “non-verifiable radicular complaints, defined as complaints of radicular pain without objective findings” qualify for assessment. The treating material noted above, and ignored by the AMS, record radicular complaints.

(q) The appellant at paragraph 27 of his statement dated 6 July 2017 said that he continued to have “pain radiating down both arms with the left worse than the right”. The AMS himself noted the worker’s account of pain in the “neck area radiating to both shoulders” but failed to consider that evidence when addressing the question of impairment. That failure is probably explained by the AMS’s misunderstanding of the long-term process of injury, and his erroneous approach in treating the condition as “constitutional” – an error which led him to make no assessment.

(r) It follows that the AMS has failed to conduct a proper assessment.

(s) it is appropriate in the circumstances that the matter be referred to a Medical Appeal Panel for assessment of the WPI which has resulted from the subject injuries, and for the MAC be revoked and substituted with a Certificate pursuant to assessment of impairment by a Medical Appeal Panel.

23. The respondent’s submissions include the following:

(a) There was no objection to the Referral which confirmed the date of injury as being “29 January 2015 and 29 January 2015 – deemed.” This accords with the date of injury recorded by the AMS on page 1 of the MAC.

(b) In respect to the submission that there was a failure to have regard to the plethora of evidence of cervical pathology, the AMS referred to the relevant investigations relating to the cervical spine as set out under paragraph 6 of the MAC, the opinions of the treating doctors within the body of the MAC and the qualified opinions of Drs Patrick and Casikar.

(c) In paragraph 9 of the MAC the AMS confirmed: "I have based my assessment of Whole Person Impairment on detailed history taking, careful physical examination and review of all the medical reports and radiological investigations and medical reports in the file".

(d) There was no evidence to support this ground and the submission was without basis and was mere conjecture. There was no error disclosed. This ground was not made out. Should it be found that there was an error, the respondent submits that the error had no material impact on the outcome of the assessment of the WPI by the AMS.

(e) In respect of the submission that there was a failure to consider the findings and detail recorded in any of the reports of the treating specialists, Dr Al-Khawaja and Dr Bentivoglio, the AMS referred to the opinions of the treating doctors in the MAC. At paragraph 9 pf the MAC, the AMS confirmed that he had based his assessment on detailed history taking, careful physical examination and review of all the medical reports and radiological investigations and medical reports in the file.

(f) There was no evidence to support this ground and the submission was without basis and is mere conjecture. There was no error disclosed. This ground was not made out. Should it be found that there was an error, the respondent submits that the error had no material impact on the outcome of the assessment of the WPI by the AMS.

(g) In respect of the submission that there was a failure to explain why he did not accept the findings recorded by Dr Bentivoglio, it was unclear what findings were referred to and how these findings would impact the assessment of whole person impairment. There was no error disclosed. This ground was not made out. Should it be found that there was an error, the respondent submits that the error had no material impact on the outcome of the assessment of the WPI by the AMS.

(h) In respect of the submission that the AMS failed to appreciate that the appellant's injury involved gradual process, the referral confirmed that the date of injury was "29 January 2015 and 29 January 2015 – deemed." The AMS recorded this date on page 1 of the MAC.

(i) The AMS obtained a detailed history and analysed the evidence submitted by both parties to the dispute. There was no evidence that the AMS had failed in his assessment of the appellant and in his understanding of the appellant's injury. The appellant's submission was without basis and was mere conjecture. There was no error disclosed. The ground was not made out.

(j) In respect of the submission that there was a failure to have regard to, and apply, the criteria of DRE Lumbar Category II of AMA 5, the appellant was in fact assessed under DRE Lumbar Category IV of AMA 5.

(k) In respect of the submission that the AMS did not understand that the worker's injury was suffered over a protracted period from 2001, the appellant misconstrued the sentence "when we [sic] compare the investigations, there was no obvious deterioration in the MRI scan when we compared to the once before [sic] the injury to all those subsequent MRI scans". The statement was not incorrect. The worker had not made at the time of those scans notified that he had sustained an injury. The injury dates are noted as 29 January 2015 and 29 January 2015 - deemed. It was accepted that the appellant had pre-existing conditions. These issues were previously ventilated. The above sentence did not suggest that the AMS did not understand the worker's injury.

(l) The AMS obtained a detailed history and analysed the evidence submitted by both parties to the dispute. There was no evidence which showed that the AMS had failed in his assessment of the appellant and in understanding of the appellant's injury. No error was disclosed.

(m) In respect of the submission that “the AMS was bound to attend to an assessment of whole person impairment, and then consider, having regard to section 323 of the 1998 Act, the extent to which any impairment was attributable to a pre-existing condition" this was without basis. The AMS accepted that the appellant sustained injury to his cervical spine in accordance with the Arbitrator's findings. The AMS assessed the appellant as having 0% WPI of the cervical spine. There was no deduction pursuant to s323 as there was no impairment arising out of the appellant's injury in the first instance.

(n) In respect of the submission headed “Criteria DRE Cervical category II” the AMS ‘s findings on physical examination on page 3 of the MAC noted: “For the cervical spine, I cannot find any focal tenderness. There is no obvious muscle spasm. He still demonstrated quite good range of movement in every direction and neurological examination remained normal.”

(o) The AMS’s findings on assessment were consistent with the DRE Cervical Category I. The AMS confirmed there was no obvious permanent impairment, whether in the cervical spine or thoracic spine. The appellant submitted that because there was an injury, and there was pathology and because the appellant suffers pain, that there must be a resultant impairment. This was not the case.

(p) It remains that the appellant's presentation at the time of the assessment failed to satisfy the DRE Cervical Category II criterion. As noted above, the finding is consistent with that of Dr Casikar who found there to be no impairment. The weight of evidence supported findings of the AMS.

(q) In respect of the submission that “The AMS failed to conduct a proper assessment” there was no evidence that the AMS had failed in his assessment of the appellant. The submissions were without basis and mere conjecture. No error was disclosed.

(r) The AMS carried out a full examination of the appellant in accordance with the Guidelines. The AMS is a qualified and experienced AMS. There was no indication that the AMS did not carry out the examination in accordance with the Guidelines. There was no evidence to support the appellant's submissions that the MAC was made on the incorrect criteria. Further the AMS gave his reasons for his findings on pages 3 to 6 of the MAC, which was a matter of clinical judgment and not an error.

(s) In response to the appellant's submission that the AMS should have assessed the appellant under DRE cervical category II, it was noted that the determination was made by the AMS based upon his clinical findings at the time of the assessment, the evidence and history provided as well as his clinical judgment. Further, Hoeben J in *Merza v Registrar of the Workers Compensation Commission and Anor* [2006] NSWSC 939 said that the fact that most medical evidence supported a particular conclusion but that the AMS reached a different conclusion does not constitute a demonstrable error.

(t) Hoeben J also stated that "An AMS is at liberty to balance all the medical evidence, together with his own clinical findings and history and could reasonably come to a different medical conclusion, notwithstanding acceptance of some findings made by other specialists".

(u) The AMS has not assessed this matter on the basis of incorrect criteria the MAC did not contain a demonstrable error. The AMS reviewed all relevant material, undertook a detailed examination, obtained both general and clinical histories and applied the relevant guides in his assessment. The fact that an alternative interpretation is available does not provide a ground for appeal under section 327.

(v) The AMS did not assess this matter on the basis of incorrect criteria and the MAC does not contain a demonstrable error.

(w) The appeal should be dismissed and the MAC confirmed.

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. 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 (*Siddik*). The Court held that while prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gateway, it can consider other grounds capable of coming within one or other of the s 327(3) heads, if it gives the parties an opportunity to be heard. 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.

27. Section 327(2) was amended with the effect that while the appeal was to be by way of review, all appeals as at 1 February 2011 were limited to the ground(s) upon which the appeal was made. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 Davies J considered that the form of the words used in s 328(2) of the 1998 Act being, ‘the grounds of appeal on which the appeal is made’ was intended to mean that the appeal is confined to those particular demonstrable errors identified by a party in its submissions.

28. In this matter, the Registrar has determined that he is satisfied that a ground of appeal under s 327(3 (d) is made out in relation to the AMS’s assessment of the appellant’s permanent impairment.

29. The Appeal Panel reviewed the history recorded by the AMS, his findings on examination, and the reasons for his conclusions as well as the evidence referred to above.

Assessment of the cervical spine

30. Under “Present symptoms” the AMS wrote:

> “He mainly complained of low back pain. Pain in the low back and sometimes it radiates to the right thigh. He said 80% of the pain is in the low back and about 20% of the pain is in the neck. The neck pain stayed in the neck area radiating to both shoulders. There is no obvious neurological symptoms of both upper limbs. No surgery was recommended for the cervical spine problems as he has been revealed by the two neurosurgeons for this neck pain as well.”

31. Under “Findings on physical examination” the AMS wrote:

> “For the cervical spine, I cannot find any focal tenderness. There is no obvious muscle spasm. He still demonstrated quite good range of movement in every direction and neurological examination remained normal.”

32. Under “Summary of injuries and diagnoses” the AMS wrote:

> “Mr Mlacic had pre-existing problems in relation to neck pain and low back pain and then it was aggravated by the work injury in 29 January 2015. He ended up with L5/S1 fusion done for the back problem, which he probably did not think the overall picture has been improved. He was left with residual problems, namely cervical and lumbar spondylosis without evidence of radiculopathy.”

33. Under “Reasons for Assessment”, the AMS wrote:

> “I believe Mr Mlacic has permanent impairment in relation to the lumbar spine. He has pre-existing degenerative changes before the work injury but it was aggravated by the injury and he ended up with L5/S1 fusion but still have inferior function and residual pain. He has reached maximum medical improvement for the assessment. However, in relation to the cervical spine, I really do not think he had any permanent impairment. When we compared the investigations, there was no obvious deterioration in the MRI scan when we compared to the one before the injury to all those subsequent MRI scans. The pictures he has in the cervical spine is probably all related to normal wear and tear or what we call constitutional factor. I certainly do not think he has any problems in the thoracic spine.
> In relation to the cervical spine using AMA Guide 5th Edition, Table 15-5. I think this will be case of DRE cervical category 1. There is no obvious neurology. No obvious muscle GUARDING. No obvious clinical finding. No significant loss of movement despite patient complain.”

34. In commenting on other medical opinions, the AMS wrote;

> “I more or less concur with the opinion of Dr Casikar. We both agree there is no obvious permanent impairment, whether in the cervical spine or the thoracic spine. We more or less came to the same assessment for the lumbar spine except I gave 1% more for activities of daily living impairment.
>
> I cannot agree with Dr Patrick. In his report dated 29 May 2017, he gave impairment to thoracic spine but so far patient did not complain of thoracic spine and no investigation and treatment for that. I cannot agree with the cervical spine impairment assessment as well, because patient seems to have very good functional status in the cervical spine and similarly for the investigations. There was minor discrepancy between my assessments with Dr Patrick in relation to the activities of daily living impairment. He allocated 2% and I put only 1%. So, that is the difference in the final outcome.”

35. The Appeal Panel reviewed the evidence in this matter.

36. An x-ray study of the cervical spine was reported on 19 January 2010 with a history of "neck discomfort". The comment on the report is "Narrowed disc spaces suggestive of degenerated discs with neural foraminal encroachment is seen suggestive of spondylotic changes".

37. Dr Al Khawaja, treating neurosurgeon, in a report dated 12 April 2010, noted that Mr Mlacic presented with complaint of neck pain and lower back pain. He reported that the problem started years ago with neck pain which came in episodes and lasted a few days. Dr Al Khawaja noted that Mr Mlacic did not have arm pain. He said that Mr Mlacic was not too worried about his neck but he started complaining of lower back pain about 12 months ago and felt that it was getting slightly worse. On examination of the neck and lower back Mr Mlacic had a full range of neck and lumbar movement. Dr Al Khawaja noted the cervical spine and lumbar spine CT scans which he said showed "mild degenerative changes". He recommended an MRI scan of both the cervical and lumbar spine.

38. In a report to the general practitioner dated 12 July 2010, Dr Al Khawaja noted that he had reviewed Mr Mlacic with the results of the MRI scan of the cervical and lumbar spine. He noted significant discogenic disease in the cervical spine.

39. In a report to the general practitioner dated 28 January 2011, Dr Al Khawaja noted that Mr Mlacic had been complaining of "arms pain" recently.

40. In a report dated 11 February 2015, Dr Al Khawaja noted that Mr Mlacic described left arm pain and neck pain as well. Dr Al Khawaja noted the new MRI scans of the cervical spine showed multilateral disc injuries and this is causing foraminal narrowing and this may explain his pain but this is not as bad as his back pain. Dr Al Khawaja expressed the opinion that driving a bus was a major contributing factor to Mr Mlacic's symptoms because this was known to cause stress on his lumbar spine and cervical spine.

41. A CT scan of the cervical spine and lumbar spine was carried out on 1 March 2012. The comment on the report for the cervical spine is: "There is generalised disc degeneration noted from C3 to C7 and there is left foraminal narrowing at C3/4 and the right foraminal narrowing at C4/5 due to osteophytes projecting into the foramina."

42. A report of a bone scan ordered by the neurosurgeon, Dr Day, dated 29 June 2012 concluded: "There is mild facet joint arthropathy at the left C2/3 level. There is discovertebral degenerative change at the C3/4 and C4/5 level."

43. An MRI scan of the cervical spine carried out on 29 October 2014 noted disc degeneration at C4/5, C5/6 and C6/7. The comment on the report states: "There is prominent osteophytosis of the vertebral body endplates right paracentral at C4/5 and osteophytes project into the right lateral recess with impingement of the right ventral nerve root. There is the possibility of idiopathic transverse myelitis with a slightly expanded cord behind the C5/6 disc space."

44. An x-ray of the spine and pelvis was carried out on 31 October 2014 and showed that multilevel disc degeneration with facet joint degenerative arthrosis was present in the cervical spine.

45. In a report dated 24 February 2015, Dr Bentivoglio, treating neurosurgeon, noted that Mr Mlacic had a fairly long history of low back pain and had exacerbated that "some three or four weeks" ago when lifting someone who had fallen over in his bus. Dr Bentivoglio reported that this incident caused neck pain and low back pain and wrote: "The neck pain seems to be resolving". Dr Bentivoglio wrote:

> "From the point of view of his neck, he has a disc injury at the C4-5 level, but more importantly he seems to have a distended cord at C5 - C6, the cause of which is not a transverse myelitis. He needs to have an MRI scan with contrast to see if there is any intramedullary lesion which could be causing that distension of his cord. From the point of view of his neck we need to look into it further with an MRI scan with contrast".

46. An MRI scan of the cervical spine requested by Dr Bentivoglio was carried out on 4 March 2015. The report notes multilevel degenerative spondylosis and high-grade left C5/6 foraminal stenosis with the left C6 nerve root sandwiched between the uncovertebral joint osteophyte anteriorly and the facet joint osteophyte posteriorly. There was also moderate to high-grade left C6/7 foraminal stenosis without definite impingement of the left C7 nerve root.

47. In a report dated 5 March 2015, Dr Bentivoglio noted that he had seen Mr Mlacic the previous day after an MRI scan of the cervical spine had been performed. Dr Bentivoglio noted pathology in the cervical spine. He described Mr Mlacic as having two problems:

> "He has a very degenerative disc at the lumbar sacral level which is causing mechanical back pain, and early brachialgia on the left side secondary to foraminal stenosis at the C5C6 and C6C7 levels. All of these situations are secondary to degenerative change but this degenerative change has been exacerbated by the work injury he sustained when he had to lift a heavy passenger who had fallen over in his bus."

48. Dr Bentivoglio wrote:

> "From the point of view of his neck, we are going to try some physiotherapy in the form of neck strengthening exercises, gentle mobilising exercises to his neck and gentle cervical traction. If could organise this with a local physiotherapist for me I would be most appreciative. If the physiotherapy to his neck doesn't work we can try periradicular nerve blocks on the left side around the C6 and C7 nerves."

49. In a report dated 8 March 2018, Dr Bentivoglio wrote:

> "At this stage, I believe the first thing we need to do is a repeat MRI scan of his lumbar spine and I will seek approval from the worker's compensation people to do the MRI scan of his lumbar spine and his cervical spine, because this is an issue as well at the C5-C6 level."

50. Dr Bernard Lee, general practitioner, in a clinical note dated 28 October 2015 reported:

> "Neck pain and pin and needles arms comes and goes – for obsr gentle mobilization, nil exertion." The Appeal Panel noted that Dr Lee's next reference to the neck was on 26 July 2017 when he wrote: "Still pain and stiffness neck and back more lower back obsr."

51. Dr Patrick, consultant surgeon, in a report dated 2 November 2019, noted on examination that "There is marked muscle guarding paravertebrally at all three spinal regions at cervical spine, thoracic spine and lumbar spine. At the cervical spine flexion is to 90% of expected, extension 70%, and lateral rotation to the right 60% and to the left 70% of expected." Dr Patrick assessed Mr Mlacic as DRE II for the cervical spine.

52. Dr Casikar, consultant neurosurgeon, in a report dated 8 November 2017 noted on examination of the cervical spine that the movements of the neck were within normal limits. The neurological examination of the upper limbs did not indicate any dermatomal hypoaesthesia or motor weakness. The deep tendon reflexes were normal.

53. Dr Casikar, in a report dated 10 December 2019, expressed the opinion that there was no impairment as a result of the workplace injury to the cervical spine.

54. AMA 5 in Table 15-5 (page 302) provides that DRE cervical category I applies when there are "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; no fractures". DRE II requires either "clinical history and examination findings compatible with a specific injury; findings may include muscle guarding or spasm observed at the time of the examination by a physician, asymmetric loss of range of motion or non-verifiable radicular complaints, defined as complaints of radicular pain without objective findings; no alteration of the structural integrity" or "individual had a clinically significant radiculopathy and has an imaging study that demonstrates a herniated disc at the level and on the side that would be expected based on the radiculopathy, but has improved following non operative treatment" or "fractures:…"

55. Paragraph 4.18 of the Guidelines provides that "DRE II is a clinical diagnosis based upon the features of the history of the injury and clinical features. Clinical features which are consistent with DRE II and which are present at the time of assessment include radicular symptoms in the absence of clinical signs (that is, non-verifiable radicular complaints), muscle guarding or spasm, or asymmetric loss of range of movement. Localised (not generalised) tenderness may be present…"

56. The appellant's submissions include the following:

> The AMS failed to make an assessment of impairment in respect of the appellant's cervical spine. The AMS's assessment involved:
>
> • a failure to have regard to the "plethora" of evidence of cervical pathology;
> • a failure to consider the findings and detail recorded in any of the reports of the treating specialists, Dr Al-Khawaja and Dr Bentivoglio;
> • a failure to explain why he did not accept the findings recorded by the treating specialist, Dr Bentivoglio;
> • a failure to appreciate that the worker's injury involved gradual process, and
> • a failure to have regard to, and apply, the criteria of DRE Lumbar (sic) Category II of AMA 5."

57. The appellant submitted that the AMS failed to make an assessment of impairment in respect of the appellant's cervical spine and also failed to have regard to and apply the criteria of DRE Lumbar Category II. The Appeal Panel has assumed that the appellant meant to refer to the criteria of DRE Cervical Category II.

58. The Appeal Panel noted that the AMS in classifying the appellant as DRE Cervical Category II simply said "There is no obvious neurology. No obvious muscle GUARDING. No obvious clinical finding. No significant loss of movement despite patient complain [sic]." The AMS did not provide details of his neurological examination.

59. The Appeal Panel considered that it was not clear from the MAC whether the AMS did consider all of the factors in both DRE I and DRE II. The Appeal Panel was satisfied that the AMS failed to provide adequate reasons for assessing the appellant as DRE I in circumstances where there had been a past history of pins and needles in the arm and complaints of pain in the arm. The failure to provide adequate reasons was a demonstrable error.

60. The Appeal Panel considered that re-examination was necessary as there was insufficient information on which to make a determination.

61. As noted above, Dr Bodel re-examined the appellant on 2 December 2020. Dr Bodel provided the following report:

> "**1. The workers medical history, where it differs from previous records**
>
> The Medical Assessment Certificate prepared by Dr Yiu-Key Ho following medical examination on 30 July 2020 was issued on 05 August 2020. He takes a history of an injury to the neck and the back in an incident that occurred at work on 29 January 2015.
>
> It is important to clarify the history. Mr Mlacic was the bus driver of the Premier Motor Service Bus in Wollongong at the time of the injury. He states that the lady was injured on the bus as he was pulling up to a bus stop to let her off. He states that the injury would not have occurred had she not been standing when the bus was still moving. As he brought the bus to a stop, the passenger fell over.
>
> I note that Dr Ho describes her as a "*fat and relatively short lady*". After the fall, Mr Mlacic confirms that he came to her aid and tried to lift her up but could not do so as he did not have sufficient strength to do so and as he tried lifting her, he developed a sudden pain in the neck, both shoulders, back and both legs. Eventually he was able to get her to her feet with the assistance of other passengers and she was then helped off the bus.
>
> He cannot recall if he was replaced at that time as it is now nearly six years since the injury occurred. He seems to recall that he did probably finish most of the shift that day although with increasing pain.
>
> He subsequently sought treatment from his doctors. He had various investigations and treatment. He initially saw Dr Al-Khawaja, a Neurosurgeon in Wollongong, who discussed surgery primarily for the lower part of the back, which was the main area of focus at that time. He had neck and shoulder girdle pain but the main concern was the lower part of the back for which a spinal fusion was offered.
>
> He then consulted other friends who had had spinal problems in the past and he was recommended to seek a second opinion from Dr Peter Bentivoglio which he did. Dr Bentivoglio confirmed that an L5/S1 posterior pedicle screw rod and fixation fusion was appropriate which was done on 05 June 2018.
>
> At this stage, two and a half years later, he is disappointed with the outcome. He states that overall the back and leg pain has not altered greatly.
>
> From the very beginning, he had the neck pain and shoulder girdle pain. Various treatments have been undertaken with some benefit, including block injections done by Dr Manohar and radiofrequency neurotomies. He states that the radiofrequency neurotomies help, they last for two or three months at a time and he has continued to manage that complaint with those treatments.
>
> Dr Bentivoglio discussed surgery on the neck as a possible treatment option but left it up to Mr Mlacic to determine if and when he would have that done. At the moment, he can tolerate the pain and manage it with the injections.
>
> **2. Additional history since the original Medical Assessment Certificate was performed**
>
> There has been no additional accident or injury involving the neck or the shoulders since the original assessment by Dr Ho on 30 July 2020.

3. Findings on clinical examination

Mr Mlacic is a man of 61 years who is comfortable throughout the interview. He is very disappointed about the whole saga associated with his injury, the involvement with the insurance company, the repeated visits to the Workers Compensation Commission for arbitration and the poor outcome from his surgery on the back.

He is still concerned about the neck but is tolerating the time to time level of pain which is being managed with the radiofrequency neurotomies from to time. It is about a year since he last had one. He has not been able to present for any further treatment because of the Covid-19 restrictions.

Today he has tenderness in the trapezius muscles at the base of the neck on the left hand side and a reduced range of neck flexion, extension and rotation throughout all ranges of movement but it is quite clear and reproducible that today he has a restricted range of rotation to the left. This asymmetry of movement is clearly evident each time that I have observed his range of movement. There is a generalised stiffness of neck movement, particularly on extension, but mostly on rotation to the left. He also has a restricted range of lateral tilting to the left.

He has full shoulder abduction and rotation and no impingement or instability in the shoulders. He does have discomfort at the extreme of this movement on both sides. There is no objective evidence of median or ulnar nerve pathology in either upper limb. The reflexes are present and equal and there is no clinical sign of radiculopathy in the upper limbs. He has non-verifiable radicular complaints with some referred pain mainly to the radial side of the hand on the left hand side. There is no reflex abnormality or objective sign of sensory loss in a dermatomal distribution.

The clinical findings therefore confirm the presence of asymmetry of neck movement.

4. Results of any additional investigations since the original Medical Assessment Certificate

I have had the opportunity to view this gentleman's investigations today. In regard to the cervical spine, I note an MRI scan of the cervical spine dated 16 April 2015 showing some degenerative disc disease at multiple levels throughout the cervical spine with bulging at C5/6 and C6/7 in particular.

I also note that there was a CT scan done on 29 October 2014, which is in fact two months prior to the injury that occurred at work. Mr Mlacic indicates that he had some soreness in the neck and had a scan at that time but no treatment. He continued with normal duties.

The pain that he now has come on after the lifting incident that occurred on 29 January 2015.

5. Comment

On clinical testing here today, this gentleman gives a positive history that there was an injury to the neck and shoulders at the time of the original incident. This is recorded in the documentation that I have reviewed which was done at the time.

I am aware that he had some pain in the neck, two months prior to the episode of injury but he states that it did not require specific treatment and he was coping quite well with work until the episode of injury that he has described.

On clinical testing, he has quite definite asymmetry of neck movement which justifies a DRE Cervicothoracic Category II level of assessable impairment with a 5% Whole Person Impairment.

He has already had a loading for the level of Whole Person Impairment in the lower part of the back. No additional loading for interference in activities of daily living applies to this separate spinal segment therefore for the same date of injury.

He therefore has a 5% Whole Person Impairment for the DRE Cervical Category II level of assessable impairment based on his clinical presentation here today."

62. The Appeal Panel has adopted the report and findings of Dr Bodel. The Appeal Panel agreed with the assessment made by Dr Bodel in this matter.

63. The Appeal Panel, therefore, rated the appellant as DRE Cervical Category II and assessed 5% WPI for the cervical spine.

64. In conclusion, the Appeal Panel considered that there has been a demonstrable error in the AMS's assessment of the cervical spine. The Appeal Panel agreed with the assessment of 19% WPI made in respect of the lumbar spine. This results in a total assessment of 23% WPI as a result of the injury on 29 January 2015.

65. For these reasons, the Appeal Panel has determined that the MAC issued on 10 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*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION
APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **1280/20**
Applicant: **Svetn Mlacic**
Respondent: **Premier Motor Service Pty Ltd**

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 Yiu-Key Ho 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)**
Cervical spine	29/01/15	Chap 4 P 27-29 Paras 4.27, 4.33-4.35	P392 Table 15-05	5%	0	5%
Lumbar spine	29/01/15	Page 28, Para 4.34	P384 Table 15-03	21%	1/10	19%
Total % WPI (the Combined Table values of all sub-totals)					**23%**	

Carolyn Rimmer
Arbitrator

Dr James Bodel
Approved Medical Specialist

Dr Ross Mellick

Approved Medical Specialist

17 December 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*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar