

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-2619/20
Appellant:	Brooke Raymond
Respondent:	Embassy of the United States of America
Date of Decision:	4 January 2021
Citation No:	[2021] NSWCCMA 2

Appeal Panel:	
Arbitrator:	Mr William Dalley
Approved Medical Specialist:	Dr Roger Pillemer
Approved Medical Specialist:	Dr Brian Stephenson

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 15 September 2020 the appellant, Brooke Raymond, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr James Bodel, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 8 September 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 respondent to the appeal, the Embassy of the United States of America filed a Notice of Opposition to Appeal against Decision of AMS, noting that the assessment by the AMS pursuant to section 323 of the 1998 Act was disputed, but not opposing the relief sought by the appellant, that the MAC be revoked and that the Panel should find that Ms Raymond had not reached maximum medical improvement.
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 grounds of appeal on which the appeal is made.
5. The WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under section 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the WorkCover Medical 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, Ms Raymond, suffered an injury to her cervical spine, lumbar spine, left hip and left knee on 31 January 2011 when she fell in the cargo bay of a C130 aircraft which she was servicing in the course of her employment (the subject injury). Left knee arthroscopy in May 2011 showed a torn medial meniscus. Ms Raymond also underwent surgery to the left hip. She was able to return to her pre-injury employment and attempted to continue working but by September 2015 she was unable to continue in her role due to symptoms arising from the subject injury.
8. In May 2020 Ms Raymond's solicitors filed an Application for Assessment by an Approved Medical Specialist in the Commission seeking assessment as to whether the degree of permanent impairment arising from the subject injury is more than 20% for the purposes of section 39 of the *Workers Compensation Act 1987*.
9. The respondent accepted it was appropriate that the issue of extent of impairment arising from injury to the cervical spine, lumbar spine, left hip and left knee should be referred to an AMS for determination.
10. On 8 September 2020 the AMS issued a MAC in which he noted that "the injury to the left knee and the injury to the left hip and not yet stabilised. The neck and back have stabilised." The AMS assessed Ms Raymond as having 5% whole person impairment (WPI) as a result of injury to the cervical spine, 7% WPI as result of injury to the lumbar spine, and 4% WPI in respect of injury to the left lower extremity, wholly attributable to injury to the left knee, giving a total of 16% WPI. The AMS assessed 0% WPI in respect of the left hip.

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. 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 sufficient material was available to the Panel to determine the appeal.

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 AMS noted the history of injury and the subsequent course of treatment. He noted that Ms Raymond had been advised that she would need a knee replacement and a hip replacement. He recorded ongoing painful symptoms. The AMS noted "She will require a total knee replacement within the next 6 to 12 months and a total hip replacement within the next five years."
15. The AMS noted the report of Dr Hopper dated 18 March 2020 which was in evidence. He noted that the report was "consistent with the history of injury and the treatment protocol that has been undertaken in the proposition of further treatment, which includes a total hip replacement and a total knee replacement."
16. In answer to the questions contained in paragraph 8 of the MAC under the heading "Evaluation of Permanent Impairment" the AMS reported:

“b. Have all body parts/systems stabilised/reached Maximum Medical Improvement?”

‘This lady is waiting treatment in the form of a total knee replacement on the left-hand side and later she will require a hip replacement. Her clinical condition therefore has probably not yet stabilised to reach the level of Maximum Medical Improvement.’

c. If not, please list those injuries not yet stable/at maximum medical improvement:

The injury to the left knee and the injury to the left hip and not yet stabilised. The neck and back have stabilised.

d. If stabilisation/maximum medical improvement, of any or all injuries has not been reached, when, in your opinion, will this occur?

The knee will have stabilised within 12 months of a total knee replacement and the hip also within 12 months of the total hip replacement.”

17. The AMS reviewed the reports of investigations, the reports of treating doctors and the reports of independent medical experts. His comments with regard to the reports of Dr Hopper are noted above. The AMS noted that Dr Breit was examined Ms Raymond at the request of the insurer had noted the ongoing complaints but had made no recommendation for intervention.
18. The AMS recorded that Ms Raymond also been examined by Dr Jon Stephen who noted the symptoms which he confirmed had deteriorated over time. The AMS also noted the report of Dr Neil Ferguson, treating orthopaedic surgeon, who had recommended left total knee replacement.
19. At paragraph 10 a. the AMS reported “For the purpose of calculating whole person impairment, Ms Raymond’s condition has stabilised.”
20. At paragraph 10 d. of the MAC the AMS reported: “I certify that the impairment is permanent and that the degree of permanent impairment is not fully ascertainable at this time as this lady is about to consider a total knee replacement.”
21. As noted above the AMS nevertheless assessed Ms Raymond as suffering 5% WPI in respect of the cervical spine, 7% WPI in respect of the lumbar spine and 4% in respect of the left lower extremity (left knee) with 0% WPI in respect of the left lower extremity (hip).

SUBMISSIONS

22. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
23. In summary, the appellant submits that, given the accepted fact that Ms Raymond would in the future be undergoing total left knee and left hip replacement, the AMS should not have assessed the current degree of whole person impairment.
24. In reply, the respondent agreed that the WPI assessment should have been deferred in accordance with the Guidelines. The respondent further submitted that there was evidence of pre-existing injury which would, if assessment was appropriate, have constituted grounds for a deduction pursuant to section 323 of the 1998 Act.

FINDINGS AND REASONS

25. The procedures on appeal are contained in section 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.
26. 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.
27. The Panel accepts the appellant's submissions which are supported by the respondent (and by the evidence). The Guidelines provide:
- "Maximum medical improvement.
- 1.15 Assessments are only to be conducted when the medical assessor considers that the degree of permanent impairment of the claimant is unlikely to improve further and has attained maximum medical improvement."
28. Although the Referral for Assessment of Permanent Impairment to Approved Medical Specialist did include assessment of "the degree of permanent impairment of the worker as a result of an injury", that assessment is to be conducted pursuant to the Guidelines.
29. The Panel is satisfied that, in assessing WPI at a time when the impairment had not reached maximum medical improvement due to the proposal for surgery, the AMS fell into error in failing to apply paragraph 1.10 of the Guidelines and that error is reflected in the MAC.
30. Accordingly, it is unnecessary to consider the respondent's submissions with regard to the application of section 323 of the 1998 Act.
31. For this reason, the Appeal Panel has determined that the MAC issued on 8 September 2020 should be revoked. The Panel finds that Ms Raymond has not attained maximum medical improvement and assessment is deferred pending the attainment of maximum medical improvement.

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 MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

