WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3728/20**
Appellant:	**Debbie Roberts**
Respondent:	**Constructive Workforce Pty Limited**
Date of Decision:	**29 January 2021**
Citation No:	**[2021] NSWWCCMA 16**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**
Approved Medical Specialist:	**Dr John Ashwell**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 20 November 2020, Debbie Roberts lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tim Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 22 October 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. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The 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.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

PRELIMINARY REVIEW

6. 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.

7. 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 none was requested, and we consider that we have sufficient evidence before us to enable us to determine this appeal.

EVIDENCE

Documentary evidence

8. 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.

SUBMISSIONS

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

10. In summary, the appellant submits that the AMS erred in a number of respects as follows:

    (a) Failing to make an assessment in compliance with the referral;

    (b) Failing to assess the left shoulder in respect of the consequential condition;

    (c) Finding that the incident in March 2018 was a separate injury to the left shoulder, and was not causally related to the injury to the right shoulder on 3 November 2017; and

    (d) Purporting to make a liability finding beyond his jurisdiction.

11. In reply, the respondent submits that no errors were made.

FINDINGS AND REASONS

12. 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.

13. 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.

14. The appellant was referred to the AMS for assessment of whole person impairment (WPI) in respect of the cervical spine, the right upper extremity (shoulder), the left upper extremity (shoulder) and scarring resulting from an injury on 3 November 2017.

15. The AMS obtained the following history:

> "Ms Roberts advised that she had been working as a labourer for the Constructive Work Force group. She and other work colleagues had been working at Parklea Jail…she was involved in the casting of concrete slabs which were being used for part of a wall structure…
>
> She described that on 03/11/17 she was lifting a component which seems to have been one of these sheets of steel formwork.

In the history which is recorded in the file and also from the way she described events, this component is elsewhere described as a 'metal slab', 'steel shutter' and 'concrete slab.' All of these other descriptions are quite confusing and suggest that this component was excessively heavy. My understanding is that it probably weighed somewhere around 20kg. Therefore, with one person at each end it should have been a relatively manageable weight.

She described that there was a lot of cleaning up to do. She also advised that she experienced a pulling sensation on her right shoulder. She explained that at that time she was working under a lot of pressure in order to get the job done quickly.

She reported the situation and saw her doctor. Radiological investigations were taken. It was identified that there was internal dysfunction of the right shoulder. She came under the care of Specialist Orthopaedic Surgeon, Dr Pavitar Sunner, who carried out an arthroscopic procedure on 24/05/18. According to Dr Sunner's records, this was a subacromial decompression and bicipital tenodesis. She seems to have achieved a reasonable recovery, and again, according to Dr Sunner's records, when reviewed in mid-February 2019 there was a full range of movement and power of the right upper extremity.

Ms Roberts history continued that in March 2018 she injured her left shoulder. It looks as though she was similarly carrying a piece of steel formwork. This was mostly with her left arm. Another worker was carrying the other end. Unfortunately, the other worker dropped her end which hit the ground. Ms Roberts described that she experienced a severe juddering sensation which jarred her left shoulder…

She also described that her neck was painful. She ultimately came under the care of Specialist Neuro-surgeon, Dr Matthew Tait. An MRI scan demonstrated discogenic pathology at the C5/6 level. The possibility of a surgical procedure apparently existed, although no further surgery has been conducted."

16. The appellant's present symptoms were described as follows:

> "Soreness in her right shoulder. When she lies on her right side it wakes her from sleep. The right shoulder is more severely affected than the left. She has pain in her neck on the right side, which radiates down towards the shoulder. The neck pain is worse when she is leaning forward. She also experiences headaches."

17. Findings on physical examination were reported as follows:

> "Ms Roberts was of average stature and build…She was in some discomfort, although this did not appear to be particularly severe.
>
> **Cervical Spine**. There was ache in her neck radiating down between the shoulder blades with associated mild to moderate tenderness. Forward flexion was normal. Extension was reduced to half the range. Lateral flexion and rotation to each side were reduced to two thirds of the range. The tenderness in her neck radiated into the para-cervical musculature and from there, out into the trapezius on each side. Each side was just about the same as the other.
>
> **Upper Limbs.** There was a full range of movement of the elbows, wrists, hands and all digits. Sensation was rather patchy but I was unable to unequivocally identify either peripheral or dermatomal dysfunction.
>
> **Shoulder Movements.** These were absolutely symmetrical…Reflexes were present and equivalent, although the C5 reflex at the elbow was quite difficult to demonstrate on each side. The arthroscopic scarring over the right shoulder had healed well."

18. After setting out details of the various “special investigations” he had before him, the AMS then summarised the injuries as follows:

> “It was difficult to obtain a clear, concise and accurate history on exactly what has happened to Ms Roberts, when it has happened, precisely what has been done about it and the subsequent results. Nevertheless, from the history given by Ms Roberts and in detailed review of the Commission file, it appears that while she was working in a labouring capacity associated with the construction of concrete slabs, part of her occupation necessitated the movement of steel formwork sheets. In November 2017, she described a pulling sensation in her right shoulder. This was subsequently identified as a SLAP lesion and was managed by an arthroscopy with subacromial decompression and a tenodesis of the long head of biceps tendon. From the accounts of the treating surgeon, Dr Pavitar Sunner, she experienced a fairly good result.
>
> There is a claim of ‘overuse’ of the left shoulder complex due to incapacity of the right side. Nevertheless, further research in the Commission file identifies that a separate injury occurred in March 2018 to account for the condition of the left shoulder. Again, she appears to have been carrying a sheet of steel formwork with another worker at the other end. The other worker apparently let that end go and it looks as though stumbling or tripping was the reason for this. There were then two versions of what happened. The vibration from the other end hitting the ground reverberated up and hurt Ms Roberts’ left shoulder. Another version is that as a result of either her or her work colleague stumbling or tripping, she fell against a concrete slab. Either way, it looks as though there was a completely separate incident at the workplace which resulted in the left shoulder injury. The letter from the case manager of EML suggests that there is a need for a separate claim. So far as I can establish, this was never conducted.
>
> There does not appear to have been a specific injury to the cervical spine although she did start experiencing aches and pains in her neck which do appear to be associated with either or both of these events.
>
> At this assessment, the range of movement of each shoulder was completely symmetrical. I was also rather surprised that the movement in flexion was only to 100° yet in abduction, it was to 120°. With most shoulder conditions, I would have anticipated the reverse of this.”

19. The AMS added:

> “I have no doubt that Ms Roberts was doing her best to be helpful and cooperative and seemed to be a very pleasant person. It is, however, particularly unfortunate that it was so difficult to achieve accurate details of these quite complex circumstances.”

20. The AMS made the following assessments:

    (a) Cervical spine 7%;

    (b) Right upper extremity 7%;

    (c) Left upper extremity 7%;

    (d) Scarring 0%.

21. The AMS then summarised the other medical opinions as follows:

> "Dr Eugene Gehr in his report of 25/07/19 calculates a whole person impairment of the right shoulder of 10% and the left shoulder of 11%, which are greater than my assessments. He also calculates 1% for scarring, with which I do not agree, as advised. For the cervical spine he assesses DRE III. I was unable to demonstrate radiculopathy. At the other extreme, Specialist Orthopaedic Surgeon, Dr John Bentivoglio in his report of 02/10/19 assesses whole person impairments of each shoulder of 4%. My assessment was somewhat greater on each side. He also has DRE I for the cervical spine with 0% WPI. With great respect, I believe that there is a diagnosable condition of the cervical spine and that Cervical Category DRE II is more appropriate.

22. Turning then to the question as to whether any deduction was warranted, the AMS said:

> "Although there is no pre-existing condition which would necessitate a deduction, from the available evidence, I would conclude that the condition in the left shoulder is not a 'consequential' injury but has resulted from a completely separate event which occurred in March 2018 and is therefore excluded from this assessment, and as such, has a 10/10ths deduction."

23. The resultant WPI was thus 14%.

24. The referral from the Arbitrator was as set out in paragraph 14 above.

25. In short, we agree with the appellant that it was not the task of the AMS to address issues of causation which he clearly did.

26. The application of conventional principles of causation was considered by the Court of Appeal in *Secretary, New South Wales Department of Education v Johnson* [2019] NSWCA 321 (*Johnson*) where it was stated at [70]:

> "There are three possible categories where an earlier injury is followed by a later injury, as follows:
> • Where the later injury results from a subsequent accident that would not have occurred had the victim not been in the physical condition caused by the earlier accident, the second injury should be treated as having a causal connection with the earlier accident.
> • Where an earlier injury is exacerbated by a subsequent injury, there will be a causal connection between the original injury and the subsequent damage unless it can be shown that some part of the subsequent damage would have been occasioned even if the original injury had not occurred.
> • Where a victim, who had previously suffered an injury, suffers a subsequent injury and the subsequent injury would have occurred whether or not the victim had suffered the original injury and the damage sustained by reason of the subsequent injury includes no element of aggravation of the earlier injury, there will be no causal connection between the original injury and the damage subsequently sustained."

27. This case falls into the first category.

28. Consent Orders were entered by the Arbitrator on 7 August 2020. Relevant to the issue in dispute, the Orders included: "The claim for permanent impairment is remitted to the Registrar for referral to an [AMS] for assessment of the cervical spine, both upper extremities (shoulders) and skin with the date of injury nominated as 3 November 2017."

29. It is worth noting that the claim was pleaded as follows:

> "On or about 3 November 2017, the claimant was in the process of moving a large steel shutter when she experienced a severe pain in her right shoulder. As a result of the injury, she sustained right shoulder and cervical spine injuries which are accepted by the insurer. As a result of the severe injury to her right shoulder, the applicant started to overcompensate with her left shoulder…As a result of this over-reliance, she sustained a further injury on or about 26 March 2018 when she was carrying a metal [sic] with her left arm and it fell and vibrated her left shoulder. The only reason she was carrying this object with her left arm was because she did not want to use her right arm as she feared aggravation. The applicant has subsequently developed a consequential left shoulder injury as a result of her workplace incident on 3 November 2017…"

30. The Consent Orders reflect this pleaded claim.

31. It is quite clear that the task of the AMS was to assess the appellant in accordance with the terms of the referral which not only reflected the pleaded claim but more importantly, the Consent Orders.

32. For these reasons, the Appeal Panel has determined that the MAC issued on 22 October 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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **3728/20**
Applicant: **Debbie Roberts**
Respondent: **Constructive Workforce Pty Limited**

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 Tim Anderson 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)
1. Cervical spine	03/11/17	Chap 4 P 24	P 392 T 15-05	7%	Nil	7%
2. Right upper extremity	03/11/17	Chap 2 P 10	P 476 F 16-40 P 477 F 16-43 P 479 F 16-46 P 439 T 16-03	7%	Nil	7%

3. Left upper extremity	03/11/17	Chap 2 P 10	P 476 F 16-40 P 477 F 16-43 P 479 F 16-46 P 439 T 16-03	7%	Nil	7%
4. Scarring	03/11/17	P 74 T 14.1		0%	Nil	0%
5.						
6.						
Total % WPI (the Combined Table values of all sub-totals)					**20%**	

Deborah Moore
Arbitrator

Dr Tommasino Mastroianni
Approved Medical Specialist

Dr John Ashwell
Approved Medical Specialist

29 January 2021

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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar