

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-6687/18
Appellant: State of New South Wales – South East Sydney
Area Local Health District
Respondent: Susan Elizabeth Burke
Date of Decision: 30 August 2019
Citation: [2019] NSWCCMA 127

Appeal Panel:
Arbitrator: R J Perrignon
Approved Medical Specialist: Dr Mark Burns
Approved Medical Specialist: Dr Roger Pillemer

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 25 April 2010, the respondent worker, Ms Burke, suffered injury when preventing a heavy patient from falling out of bed, in the course of her duties as a registered nurse.
2. In 2012 she received lump sum compensation for the injuries to her left shoulder and cervical spine as a result of injury on 25 April 2010. In these proceedings at first instance, she sought further lump sum compensation for a deterioration in the conditions of her left shoulder and cervical spine. She also sought lump sum compensation for injury to her lumbar spine on 25 April 2010, and for consequential hearing loss – namely left sensorineural hearing loss resulting from the use of codeine to treat her left shoulder injury.
3. Pursuant to consent orders dated 15 April 2018, the Registrar referred the following body parts to Approved Medical Specialist Dr Anderson as lead assessor, and to Dr Niall as non-lead assessor (whose role was confined to the assessment of hearing loss), for assessment of whole person impairment as a result of injury on 25 April 2010:
 - (a) lumbar spine,
 - (b) left upper extremity (shoulder),
 - (c) cervical spine, and
 - (d) hearing loss (consequential).
4. By a consolidated Medical Assessment Certificate dated 5 June 2019, Dr Anderson as lead assessor assessed a 38% whole person impairment (0% lumbar spine, 25% left upper extremity – shoulder, 7% cervical spine, 10% hearing loss) as a result of injury on 25 April 2010.
5. In assessing the left shoulder, Dr Anderson calculated a 35% upper extremity impairment (UEI) in respect of the left shoulder, and a 10% UEI in respect of the left elbow. He combined these to produce a 41% UEI (left upper extremity) which converts to 25% whole person impairment.

Grounds for appeal

6. The appellant employer appeals from this assessment on the basis that the inclusion of an assessment of the left elbow demonstrates error on the face of the certificate. In the alternative, it argues:
 - (a) that Dr Anderson did not give reasons for assessing the left shoulder by reference (in part) to the left elbow, and
 - (b) that in assessing the left shoulder he applied incorrect criteria.
7. By email communication from her solicitor dated 18 July 2019, the respondent worker quite properly conceded the correctness of the employer's grounds for appeal, and withdrew her Notice of Opposition to the appeal. For that reason, it is unnecessary to detail here the written submissions of the parties.

Preliminary review

8. On 19 August 2019, 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*.

Finding

9. As the Registrar had not referred the left elbow for assessment, it was beyond the power of the Approved Medical Specialist to assess it, and to include it in his assessment of the left upper extremity, as only the left shoulder had been referred for assessment. In the circumstances, the assessment of the left upper extremity by reference to impairment of the left elbow was not in accordance with the *WorkCover Medical Assessment Guidelines*. All this demonstrates error on the face of the certificate. It is unnecessary to consider the alternative grounds of appeal.

Conclusion

10. For those reasons, the appeal is allowed, and the Medical Assessment Certificate of Dr Anderson is revoked.
11. Dr Anderson was not persuaded that any condition of the lumbar spine resulted from injury on 25 April 2010. He assessed a 0% whole person impairment (lumbar spine). No appeal is brought from that part of his assessment. However, having identified error in his assessment of the left shoulder and revoked the Medical Assessment Certificate, the Appeal Panel is obliged to issue its assessment in accordance with the *WorkCover Medical Assessment Guidelines: sections 322, 331 Workplace Injury Management and Workers Compensation Act 1998*. In respect of the lumbar spine, where as here no causal connection is found between its condition and injury, the appropriate course is to assess a 0% whole person impairment (lumbar spine), rather than to assess a 5% whole person impairment and reduce it to 0% by a deduction pursuant to section 323, as Dr Anderson did.
12. We have adopted the former method. Dr Anderson's ultimate assessment of 0% whole person impairment (lumbar spine) is undisturbed.
13. The Medical Assessment Certificate dated 5 June 2019 is replaced by the attached Medical Assessment Certificate.

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 Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 6687/18
Applicant: Susan Elizabeth Burke
Respondent: State of New South Wales – South East Sydney Area Health Service

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 Anderson and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - Whole Person Impairment (WPI)

Name of Approved Medical Specialist	Body Part or System	Date of Injury	Chapter, Page and Paragraph number in NSW workers compensation guidelines	Chapter, Page, Paragraph Figure and Table numbers in AMA5 Guides	% WPI	%WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality	Sub-total/s % WPI (after any deductions in column 7)
Dr Tim Anderson	Lumbar spine	25/04/10	Chap 4 P 24	P 384 T 15-3	0	0	0
	Left upper extremity (shoulder)		Chap 2 P 10	P 476 F 16-40 P 477 F 16-43 P 479 F 16-46 P 472 F 16-34 P 474 F 16-37 P 439 T 16-03	21	0	21
	Cervical spine		Chap 4 P 24	P 392 T 15-5	7	0	7
Dr Paul Niall	Hearing Loss		Chap 9 P 43	NAL 1988 Tables	10	0	10
Total % WPI (the Combined Table values of all sub – totals)							34

R J Perrignon
Arbitrator

Dr Mark Burns
Approved Medical Specialist

Dr Roger Pillemer
Approved Medical Specialist

30 August 2019

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar

