

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-1873/19
Appellant: Sheila Whyte
Respondent: Winifred West Schools Limited
Date of Decision: 18 September 2019
Citation: [2019] NSWCCMA 136

Appeal Panel:
Arbitrator: R J Perrignon
Approved Medical Specialist: Dr Margaret Gibson
Approved Medical Specialist: Dr John Brian Stephenson

BACKGROUND TO THE APPLICATION TO APPEAL

1. The respondent worker, Ms Whyte, suffered injury on 18 May 2011, when she fell forward while walking to the library at the school where she worked as a house mistress.
2. By a Medical Assessment Certificate dated 4 June 2019, approved medical specialist Dr Rosenthal assessed a 10% whole person impairment (cervical spine 6%, right upper extremity 2%, left upper extremity 2%, scarring 0%) as a result of injury on 18 May 2011. The assessment for scarring has been left out of the table, apparently by oversight, but appears in the body of the Medical Assessment Certificate.
3. The appellant worker appeals from the assessment of her upper extremities and scarring only.
4. On 31 July 2019, the Registrar by his delegate was satisfied that the ground of demonstrable error was made out, and referred the matter to this Appeal for determination.
5. On 13 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*.

Submissions

6. The Appeal Panel has had regard to the written submissions filed by both parties. It is unnecessary to set them out here in full, but appropriate to summarise them as follows.
7. The appellant worker submits that the Medical Assessment Certificate demonstrates error, and seeks re-assessment by a member of the Panel. Due to the discursive nature of the submissions filed on her behalf, it is difficult to discern precisely the alleged errors relied on. Doing our best, the submissions are as follows:
 - (a) The approved medical specialist failed to have regard to relevant evidence with respect to the shoulders - namely, rehabilitation reports dated 5 August 2014 and 18 August 2014, a bone scan dated 4 July 2012, and ultrasounds of the right shoulder dated 7 August 2012 and 16 November 2012.

- (b) The approved medical specialist failed to measure shoulder movements with a goniometer.
- (c) The approved medical specialist failed to have adequate regard to evidence of the effects of injury on daily living contained in the applicant's statement, Dr Patrick's report of 1 February 2018 or the rehabilitation reports above.
- (d) The approved medical specialist's assessment of 0% (scarring) is inconsistent with the assessments by Dr Patrick and Dr Powell of 1%. As the appellant is conscious of the scar, it is "rateable for WPI assessment".

8. The respondent submits in summary as follows.

- (a) The approved medical specialist was unable to rely on range of movement measurements of the shoulders, because there was inconsistency and lack of effort on the part of the appellant. In the absence of evidence of any significant neuralgia, he diagnosed bilateral impingement and assessed 2% whole person impairment for each shoulder on that basis. 2% was prescribed by clause 2.16 of the Guidelines.
- (b) The appellant does not indicate what part of the rehabilitation or other reports is relevant to this assessment. For instance, rehabilitation reports are functional assessments directed to the worker's ability to return to work. The bone scan of 2012 was in respect of the right hip. The right shoulder ultrasounds of 2012 are seven years old, and show no evidence of a tear or impingement (7 August 2012) and degenerative changes without evidence of a full thickness tear (16 November 2012).
- (c) Dr Patrick assessed on the basis of nerve damage. The approved medical specialist was not satisfied that the diagnosis was correct, and did not assess on that basis.
- (d) The assessment of 0% (scarring) is within the range of 0-4% prescribed by clause 14-7 of the Guidelines and the Table 14.1. The approved medical specialist was entitled to select within this range, based on his clinical judgment, and gave reasons for doing so.

Findings

A. Whether approved medical specialist failed to have regard to relevant evidence

- 9. The two rehabilitation reports, bone scan of 4 July 2012 and two right shoulder ultrasounds of 2012 relied on by the appellant were provided to the approved medical specialist for the purpose of his assessment, with other documentation. There is no evidence that he failed to have regard to them. The appellant points to no passages in either of the rehabilitation reports which contradict the findings of the approved medical specialist. It is difficult to see how a bone scan of the right hip could contradict assessments of the shoulders and scarring. The ultrasounds of the shoulders are seven years old, and can have little relevance in determining the current level of impairment, which is the task of the approved medical specialist. Even so, we are not satisfied that the approved medical specialist failed to have regard to them.
- 10. Even if there was material in these documents which contradicted the assessment, the approved medical specialist was not compelled to accept it as correct. He measured the range of movement of the appellant's shoulders, and was unable to rely on his measurements because of inconsistencies and lack of effort on the part of the appellant. He was obliged to choose an alternative method of assessment. It was open to him to choose bilateral impingement as the basis for assessment, and he did so. We can identify no error, or failure to take into account relevant material.

B. Whether failed to use a goniometer

11. There is no evidence that the approved medical specialist failed to use a goniometer in taking his measurements. Even if he did, he ultimately did not rely, and could not rely, on the measurements because of the inconsistencies and lack of effort on the part of the appellant. We can identify no error.

C. Whether failed to have regard to evidence of effects on daily living

12. The report of Dr Patrick was the subject of specific comment by the approved medical specialist. We are comfortably satisfied that the approved medical specialist had detailed regard to that report, including any evidence of effects of injury on daily living.
13. There is no evidence that the approved medical specialist failed to have regard to the rehabilitation reports, or to the appellant's statement, both of which were supplied to him for the purposes of his assessment. He is not required to refer to every item of evidence to which he has had regard in making his assessment, and there is no available presumption that he has failed to have such regard if he does not mention every item of evidence.
14. Though the approved medical specialist did not specifically refer to the effects of injury on daily living, he was not required to do so in circumstances where he had elected to assess on the basis of bilateral impingement.
15. We can identify no error in this regard.

D. Scarring

16. As the respondent submits, clause 14-7 of the Guidelines and the Table 14.1 prescribe a range of 0-4% for a Class 1 impairment. The descriptors for 0% in the Table are:

“Claimant is not conscious or is barely conscious of the scar(s)
Good colour match with surrounding skin, and the scar(s) ... is barely distinguishable.
Claimant is unable to easily locate the scar(s)
No trophic changes.
Any staple or suture marks are barely visible.”

17. The approved medical specialist noted the scar was barely perceptible, the appellant was 'barely conscious' of it, colour change was 'slight', and there was no effect on ADL's, no contour defect and no suture marks (par 10a). These provide an approximate, if not exact, fit for the descriptors for 0% in the Table 14.1. That selection was reasonably open to him on the evidence, and we can identify no error.

Conclusion

18. For those reasons, the appeal is dismissed, and the Medical Assessment Certificate of Dr Rosenthal dated 4 June 2019 is confirmed.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

