

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-2889/19
Appellant: Shereen Abdelmalek
Respondent: Australian Unity Home Care Service Pty Ltd
Date of Decision: 5 May 2020
Citation: [2020] NSWCCMA 85

Appeal Panel:
Arbitrator: Jane Peacock
Approved Medical Specialist: Dr Roger Pillemer
Approved Medical Specialist: Dr Gregory McGroder

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 14 March 2020, Ms Shereen Abdelmalek (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Ian Meakin, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 5 February 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):
 - deterioration of the worker's condition that results in an increase in the degree of permanent impairment;
 - availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against) (s 327(3)(b))
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 the Appeal Panel's preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination.

Fresh evidence

8. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in additional to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.
9. The appellant seeks to admit the following evidence:
 - (a) MRI right shoulder 14 February 2014 reported by Dr Younis;
 - (b) MRI left shoulder 20 February 2020 reported by Dr Abdelraham;
 - (c) report of Dr Guirgis dated 13 February 2020, and
 - (d) report of Dr Guirgis dated 28 February 2020.
10. The Appeal Panel determines that the following evidence should be received on the appeal:
 - (a) MRI right shoulder 14 February 2020 reported by Dr Younis;
 - (b) MRI left shoulder 20 February 2020 reported by Dr Abdelraham;
 - (c) report of Dr Guirgis dated 13 February 2020, and
 - (d) report of Dr Guirgis dated 28 February 2020.

EVIDENCE

Documentary evidence

11. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment as well as the additional evidence admitted above and has taken them into account in making this determination.

Medical Assessment Certificate

12. 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

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

FINDINGS AND REASONS

14. 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.

15. 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.
16. The matter was referred by the Registrar to the AMS as follows:

“The following matters have been referred for assessment (s 319 of the 1998 Act):

Date of injury: 15 February 2018 (deemed)

Body parts/systems referred: Thoracic spine
Lumbar spine
Left upper extremity (shoulder)
Right upper extremity (shoulder)

Method of assessment: Whole Person Impairment”

17. The AMS assessed as follows:

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 (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
1. Thoracic Spine	15 February 2018 (deemed)	Chapter 4, Pages 26 - 33	Table 15.4 AMA 5	0%	N/A	0%
2. Lumbar Spine	15 February 2018 (deemed)	Chapter 4, Pages 26 - 33	Table 15.3 AMA 5,	0%	N/A	0%
3. Left Upper Extremity (shoulder)	15 February 2018 (deemed)	Chapter 2, Pages 13 - 15	Figures 16.40 to 16.46, AMA 5	4%	N/A	4%
4. Right Upper Extremity (shoulder)	15 February 2018 (deemed)	Chapter 2, Pages 13 - 15	Figures 16.40 to 16.46, AMA 5	1%	N/A	1%
Total % WPI (the Combined Table values of all sub-totals)					5%	

18. The appellant appealed. The complaint on appeal relates to the assessment in respect of the left and right upper extremities on the basis there has been a deterioration since the medical assessment. There is no complaint in respect of the thoracic or lumbar spine.

19. The respondent employer opposes the appeal and submits that the medical assessment by the AMS should be confirmed.
20. The AMS assessed 4% WPI in relation to the left upper extremity (shoulder), and 1% WPI in relation to the right upper extremity (shoulder), both of these impairments being based on restricted range of movement of the appellant's shoulders.
21. The appellant presents evidence of an acute exacerbation since the medical assessment that took place on 16 December 2019 and was the subject of a Medical Assessment Certificate that was issued on 5 February 2020.
22. From a medical point of view, the appellant notes that she suffered a severe exacerbation of the symptoms in both shoulders particularly the right side, and was assessed by orthopaedic surgeon, Dr M Guirgis on 13 February 2020 as an emergency. He found a significant decrease in the range of right shoulder movement as noted, and whereas Dr Meakin has suggested 1% WPI for the restricted range of right shoulder movement, it is noted that Dr Guirgis has suggested 9% WPI for the right shoulder.
23. Accepting the medical evidence presented by the appellant that she has suffered 'a severe exacerbation of her right and left shoulders...', as reported by Dr Guirgis, the appellant could not be considered as having reached maximal medical improvement (MMI). She would then need to be reassessed once the acute symptoms had settled down. This should take place in 9 to 12 months.
24. For these reasons, the Appeal Panel has determined that the Medical Assessment Certificate issued on 5 February 2020 should be revoked in respect of the assessment of the left and right upper extremities as the Appellant has not reached MMI in respect of the left and right upper extremities. A new Medical Assessment 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 2889/19
Applicant Shereen Abdelmalek
Respondent: Australian Unity Home Care 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 Ian Meakin 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 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 (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
1. Thoracic Spine	15 February 2018 (deemed)	Chapter 4, Pages 26 - 33	Table 15.4 AMA 5	0%	N/A	0%
2. Lumbar Spine	15 February 2018 (deemed)	Chapter 4, Pages 26 - 33	Table 15.3 AMA 5,	0%	N/A	0%
3. Left Upper Extremity (shoulder)	15 February 2018 (deemed)	Chapter 2, Pages 13 - 15	Figures 16.40 to 16.46, AMA 5	NOT MMI	N/A	NOT MMI
4. Right Upper Extremity (shoulder)	15 February 2018 (deemed)	Chapter 2, Pages 13 - 15	Figures 16.40 to 16.46, AMA 5	NOT MMI	N/A	NOT MMI
Total % WPI (the Combined Table values of all sub-totals)					NOT MMI	

Jane Peacock
Arbitrator

Dr Roger Pillemer
Approved Medical Specialist

Dr Gregory McGroder
Approved Medical Specialist

5 May 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar

