

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-6729/19
Appellant: Lee Angelo
Respondent: G James Extrusion Co Pty Ltd
Date of Decision: 15 July 2020
Citation: [2020] NSWWCCMA 126

Appeal Panel:
Arbitrator: Ross Bell
Approved Medical Specialist: Dr James Bodel
Approved Medical Specialist: Dr Philippa Harvey-Sutton

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 22 April 2020, Lee Angelo, the appellant, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Roger Pillemer, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 25 March 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 (SIRA Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. It is convenient to extract the history reported by the AMS at Part 2 of the MAC,

“Please note that I originally assessed Mr Angelo on 14 May 2018 being a Medical Assessment Certificate for Assessment of a General Medical Dispute. Today’s consultation needs to be read in conjunction with the original report.

By way of summary, I noted that Mr Angelo had sustained his injury on 28 November 2008 while working on a conveyor belt and losing his balance. He had fallen with his right leg in a forward flexed position with his left hip in hyperextension and had also developed discomfort in his low back at the time.

He had been treated conservatively with tablets and physiotherapy and hydrotherapy and also injections and he had eventually come to surgery on 7 November 2011 being an arthroscopic repair of a labral tear of his right hip as well as a resection of the acetabular rim and a femoral osteotomy and psoas tendon tenotomy.

His treating specialist had recommended surgery on his left hip for a labral repair, and it was noted that an injection in his left hip in March 2018 had led to complete relief of his symptoms for some 4 to 5 days.

The conclusion of my MAC was that the arthroscopic repair of the labral tear was an appropriate way forward.

As far as his work history is concerned, following his injury, Mr Angelo went onto restricted duties, teaching people to use the Turla machine. He was eventually terminated in 2011.”

PRELIMINARY REVIEW

7. 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.
8. 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 for the reasons given below.

EVIDENCE

Documentary evidence

9. 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

10. The parts of the medical certificate given by the AMS are set out, where relevant, in the body of this decision.

SUBMISSIONS

11. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel. In summary the parties submit,

Appellant

12. The AMS has erred in making findings on examination different to those of Dr Patrick. The AMS erred in making extremely limited findings on examination. The finding of the AMS that there is no muscle wasting is unsatisfactory because it lacks specific reporting of measurements.
13. The AMS did not take sufficient note of the opinions of Dr Trease referring to an MRI report of L5/S1 pathology with abutment of the left S1 nerve root.

14. The findings of the AMS as to the range of motion in the hips is deficient as it is unlikely that the range of motion in each hip would be so similar.
15. The MAC should be revoked and the worker's lumbar spine and hips re-examined by a member of the Panel.

Respondent

16. The AMS was correct and the reasons were adequate. A difference of opinion between the AMS and Dr Patrick is of no moment. The appellant points to findings of Dr Patrick that differed from those of the AMS but does not refer to the findings of Dr Panjraton which matched those of the AMS. The AMS must rely on his own findings on physical examination.
17. The findings on examination reported by the AMS are not extremely limited, as submitted for the appellant. The AMS states that he did measure to check for muscle wasting in the lower limbs.
18. The AMS set out the findings on examination for the hips in the table at page four of the MAC.
19. The appellant points to the MRI of 9 August 2018 to which Dr Trease referred, but the clinical findings are paramount as stipulated in the SIRA Guidelines.
20. The MAC should be confirmed.

FINDINGS AND REASONS

21. 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.
22. 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.

Ground of appeal – Differences between the findings of the AMS and those of Dr Patrick and other assessors regarding the assessment of the lumbar spine and the hips

Lumbar spine

23. The appellant submits that the differences in the findings of Dr Patrick compared with those of the AMS as to the presence of radiculopathy are such that Mr Angelo should be re-examined by a member of the Panel.
24. In *Marina Pitsonis v Registrar Workers Compensation Commission & Anor* [2008] NSW CA 88 the Court said,

“Those dependent on the applicant showing that the doctor failed to record or to record correctly things she had told him face a double difficulty. They are not demonstrable on the face of the Certificate. And they seek, in effect to cavil at matters of clinical judgment in that matters unrecorded are likely to be matters on which the specialist placed no weight. The same can be said about factual matters recorded in one part of the Certificate that did not translate into the decision favourable to the applicant now contended for.”

25. The Panel is of the view that the AMS has properly reported his findings on examination, including the lack of muscle wasting in the lower limbs. Having measured the limbs and found no muscle wasting and then reporting that finding, the AMS was not obliged to take it further. There is a presumption of regularity for assessments by an AMS which is not rebutted by the evidence.¹
26. The AMS had the information from his examination upon which to base his findings. That Dr Patrick's findings or opinion may be different is of no significance. An AMS is required to exercise their own clinical judgement, and a difference of opinion does not constitute a demonstrable error. In *Mahenthirarasa v State Rail Authority of New South Wales & Ors* [2007] NSWSC 22 Malpass AJ considered the Second Reading speech referring to s 327 of the 1998 Act, and made the comment that, "A demonstrable error would essentially be an error for which there is no information or material to support the finding made – rather than a difference of opinion."
27. The appellant submits that the AMS did not take sufficient notice of the report of Dr Trease and the MRI of August 2018. The Panel notes that, as the respondent submits, imaging is not the basis for assessment by the diagnosis-related estimates (DRE) method, but the clinical examination and symptoms and signs are pivotal. As paragraph 4.20 of the SIRA Guidelines provides,
- "4.20 While imaging and other studies may assist medical assessors in making a diagnosis, the presence of a morphological variation from 'normal' in an imaging study does not confirm the diagnosis. To be of diagnostic value, imaging studies must be concordant with clinical symptoms and signs. In other words, an imaging test is useful to confirm a diagnosis, but an imaging study alone is insufficient to qualify for a DRE category (excepting spinal fractures)."
28. The appellant submits that the AMS should have called for the radiological evidence referred to by Dr Trease. The Panel does not accept this submission. The appellant could have sought and relied on any imaging study referred to in the medical reports. The AMS was able to conduct the assessment by the DRE method without calling for any further materials.
29. The Panel also notes that Dr Trease in the report of 9 August 2019 refers to a then "recent" MRI reported as showing "abutment" of the nerve root at L5/S1. This term is used to identify a disc that is touching a nerve root, without compression of the nerve. Had Mr Angelo been suffering compression of the nerve root; that is, beyond abutment, it is likely that by the time of the AMS's examination there would have been muscle wasting on the affected side. That there was no wasting found is consistent with abutment of the nerve root without compression/displacement. The materials referred to by the appellant therefore do not indicate error on the face of the Certificate, and re-examination of the lumbar spine is therefore not indicated.
30. The finding that there were no signs of radiculopathy present was open to the AMS, who has reported his findings on examination of the lumbar spine. He also refers to Dr W G D Patrick's findings as well as those of Dr V Panjatan, Dr T Davis, and Dr A Burns, and the AMS explains that, contrary to Dr Patrick's findings, he did not find any signs suggestive of radiculopathy. The AMS summarises at Part 7,
- "As far as diagnosis is concerned, in my opinion the most likely explanation is that he does have a mechanical problem in the lower lumbar region with referred pain down both lower limbs, but with no evidence of any neurological involvement (that is, no radiculopathy)."

¹ *Vegan, Bjkov v ICM Property Services Pty Limited* [2009] NSWCA 175; and *Jones v The Registrar WCC* [2010] NSWSC 481

Hips

31. The appellant submits that the ROM found by the AMS ought to be re-tested because the findings of the AMS were “very unlikely” because the findings were of “identical” ROM except for flexion. Dr Davis found at surgery in July 2018 that there were restrictions in active motion of the right hip at that time, which were similar to the findings of Dr Patrick some five months prior to the examination by the AMS. It is submitted by the appellant that because the findings of the AMS “are so at odds with the other available evidence” that they represent a demonstrable error on the face of the Certificate and the worker’s hips should be re-examined by a member of the Panel.
32. The examination of the hips is reported by the AMS at Part 5, and he explains in detail his findings and provides a table of the relevant ROM elements. The AMS also refers to the assessment of Dr Davis in 2017 before the left hip surgery of June 2018 and also Dr Patrick’s assessment of the hips and notes that his own findings regarding the hips were different. The AMS also refers to Dr Panjratana’s findings including slight restriction of the right hip with 0% WPI. At Part 7 the AMS summarises,
- “As far as his hips are concerned, as noted he has had surgery carried out for both hips and although he does have ongoing symptoms, he has a very satisfactory range of hip movements bilaterally, but with slight restriction of flexion on the right side.”
33. As the Supreme Court noted in *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140,
- “In *Ferguson v State of New South Wales* [2017] NSWSC 887 at [23], Campbell J cited with approval *NSW Police Force v Daniel Wark* [2012] NSWCCMA 36 (“*Wark*”), where it is stated at [33]:
- “...the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face. ...”
34. The appellant’s submissions cavil with the findings of the AMS but there is no error discernible on the face of the Certificate, and the correct assessment criteria are addressed. There is nothing to rebut the presumption of regularity. There is therefore no basis for re-examination of the hips.

Findings

35. The grounds of appeal are not made out. The Panel discerns no demonstrable error on the face of the Certificate. The assessment was not based on incorrect criteria.
36. For these reasons, the Appeal Panel has determined that the MAC issued on 25 March 2020 is confirmed.

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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar

