

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-2747/20
Appellant: Andrews Meat Industries Pty Ltd
Respondent: Nana Ama Agyapa
Date of Decision: 18 December 2020
Citation No: [2020] NSWCCMA 180

Appeal Panel:
Arbitrator: Marshal Douglas
Approved Medical Specialist: Dr Gregory McGroder
Approved Medical Specialist: Dr Drew Dixon

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 20 October 2020, Andrews Meat Industries Pty Ltd (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Neil Berry, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 24 September 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 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 WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s328 of *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act). An Appeal Panel determines its own procedures in accordance with the WorkCover Medical 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).

RELEVANT FACTUAL BACKGROUND

6. Nana Ama Agyapa (the respondent) commenced employment with the appellant as a process worker on 16 July 2013. She suffered an injury on 8 September 2017 whilst working for the respondent. That occurred when a box fell down and hit her head and right shoulder.

7. On 9 September 2017, the respondent's solicitors wrote to the appellant and its insurer advising them that the respondent claimed compensation from them for permanent impairment she said had resulted from her injury on 8 September 2017. Her solicitors attached to their letter, in support of the respondent's claim, copies of reports of Dr Peter Conrad, a general and trauma surgeon, dated 21 August 2019 and 13 November 2019. In his report of 21 August 2019, Dr Conrad expressed the view that the respondent's degree of permanent impairment from her injury on 8 September 2017 was 17% whole person impairment (WPI) comprising 8% WPI relating to the respondent's cervical spine, 7% WPI relating to her right shoulder and 4% WPI relating to her left shoulder.
8. On 12 December 2019, the appellant's insurer wrote to the respondent advising her that it denied it was liable to pay her compensation. It advised her its denial was on the bases that she had not injured her neck or left shoulder and that her injury to her right shoulder consisted of a minor muscololigamentous strain from which her WPI was less than 11%. It noted that she did not have an entitlement to compensation for permanent impairment pursuant to s 66(1) of the *Workers Compensation Act 1987* (the 1987 Act) unless her permanent impairment was greater than 10%.
9. The respondent then registered with the Commission, on 19 May 2020, an Application to Resolve a Dispute (ARD), by which she sought the Commission determine her disputed claim for compensation. The Commission referred the matter to arbitrator Ms Catherine McDonald, who on 14 August 2020 determined that the respondent suffered an injury to her cervical spine on 8 September 2017 and also suffered a consequential condition to her left shoulder as a result of the accepted right shoulder injury on 8 September 2017. Arbitrator McDonald also directed the matter be remitted to the Registrar so that it could be referred to an AMS to assess the medical dispute between the parties relating to the degree of permanent impairment the respondent had from her injury.
10. On 15 September 2020, a delegate of the Registrar issued to the AMS an "amended referral" for assessment of permanent impairment in which the medical disputes to be assessed by the AMS were defined in the following terms:

"MEDICAL DISPUTE REFERRED FOR ASSESSMENT (s319 1998 Act)

- the degree of permanent impairment of the worker as a result of an injury (s319(c))
- whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion (s319(d))
- whether impairment is permanent (s319(f))
- whether the degree of permanent impairment of the injured worker is fully ascertainable (s319(g))

Date of Injury: 8 September 2017

Body part/s referred: Injury to right shoulder and cervical spine.
Consequential condition in left shoulder

Method of assessment: Whole Person Impairment."
(Bold as per original)

11. The Appeal Panel notes that the original referral is not before the Appeal Panel, and hence what the amendment that was made to the referral is unknown. Given however, that the MAC the AMS issued, and against which the appeal is made, responded to the amended referral, whatever the amendment was is beside the point.

12. As mentioned above the AMS issued the MAC in response to the amended referral on 24 September 2020.
13. Relevant to the issues that the appellant has raised in its appeal against the MAC is that the respondent suffered an injury in a motor vehicle accident on 9 July 2015. It would seem from the material before the Appeal Panel that the respondent made a claim for damages against the driver of the other vehicle. It is apparent from the material before the Appeal Panel that the respondent and the compulsory third party insurer that was liable to indemnify the driver disagreed over whether the degree of the respondent's permanent impairment resulting from the injury she suffered in the motor vehicle accident exceeded 10%.
14. The respondent applied to the Motor Accident Authority for an assessment of her permanent impairment from that injury. The Authority referred that dispute to Dr James Bodel to assess. Dr Bodel assessed that dispute on 19 September 2016 and issued a certificate under Part 3.4 of the *Motor Accident Compensation Act 1999*. Within that certificate Dr Bodel said that the respondent had suffered soft tissue injuries to her neck, the right shoulder, back and right knee as a consequence of the motor vehicle accident. Dr Bodel considered there was clinical evidence that the respondent had ongoing permanent impairment in her neck, right shoulder and the interior aspect of the right knee as a consequent of the effects of the accident. Dr Bodel determined, in accordance with the Motor Accident Authority Guideline and AMA 4, that the respondent had 5% WPI of her cervicothoracic spine, 8% WPI of her right arm and shoulder and 0% WPI of her left shoulder as a consequence of the injury she suffered in the motor vehicle accident.
15. The Appeal Panel observes that on 3 February 2017, which is around seven months prior to the respondent's workplace injury, the respondent had signed a statement in which she indicated she had suffered several disabilities as a consequence of the injuries she suffered in the motor accident including pain, stiffness and restricted movement in her neck; pain, stiffness and restricted movement in her left shoulder; and pain, stiffness and restricted movement in her right shoulder.
16. The respondent said in that statement that the pain from her neck injury was constant and easily aggravated when she put any weight on it or when she kept it in a fixed position for prolonged periods. She said that her pain radiated into both of her shoulders and more into her right shoulder. She described that if she did not exert her neck the pain she experiences was, on an analogue scale, 7 out of 10, and on a bad day it would reach 10 out of 10.
17. With respect to her left shoulder, the respondent described that she experienced pain that came and went. She said that if she did not exert her left shoulder her pain would be 0 out of 10 but on a bad day it could be 5 out of 10.
18. With respect to the injury she suffered to her right shoulder in the motor vehicle accident, she said in her statement that the pain was constant and that she could not lift her right arm without pain. She described the pain she experienced as being 8 out of 10 when she had not exerted her shoulder but reaching 10 out of 10 on a bad day.
19. The respondent said in her statement that after the motor vehicle accident she was unable to return to work for 10 days but then returned on restricted duties working fewer hours and not doing packing or weighing duties and only having to place stickers on packed meat.

PRELIMINARY REVIEW

20. 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.

21. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the respondent to undergo a further medical examination because the material before the Appeal Panel is sufficient for the Appeal Panel to determine the appeal and assess the medical disputes.

EVIDENCE

22. 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

23. The history the AMS obtained dealt with the injuries the respondent suffered in the 2015 motor vehicle accident. The AMS noted the following with respect to those injuries:

“She recalls injuring her right knee and her back. She did not recall injuring her neck. She told me that she recovered after five days off work and then worked for two years without problems.”

24. The AMS noted that the respondent had not resumed any form of work since her workplace injury on 8 September 2017. He noted that the respondent complained of pain and stiffness in her neck that was eased by medications. He noted that the respondent could not lift her right arm above shoulder height. He noted that the respondent could move her left shoulder somewhat more freely but was unable to lift anything heavy with either arm. He noted that the respondent had difficulty doing housework and relied on her children for that.
25. The AMS provided brief summaries of the reports on the radiological investigations the respondent had, being a x-ray of her cervical spine on 17 November 2017, an MRI of her cervical spine on 17 November 2017, an MRI of her right shoulder on 4 October 2017, an MRI of her cervical spine on 22 May 2020, and MRIs of both shoulders done on 20 May 2020.
26. The AMS reported that his examination of the respondent’s cervical spine revealed that it was diffusely tender, but there was no muscle guarding or muscle spasm and no alternation of spinal contour. The AMS recorded that all movements of the respondent’s neck were reduced to less than one-third of normal range. He also noted, when explaining how he rated the respondent’s impairment of her cervical spine, that the respondent’s loss of range of motion of her cervical spine was asymmetrical.
27. With respect to the x-ray of the respondent’s cervical spine that was done on 17 November 2017, the AMS observed that it was reported as showing a 30% loss of interior vertebral body height at C5, but on his review of the film he considered the fracture was old and the loss of height was 15% and not 30%. He noted, when explaining how he had rated the respondent’s permanent impairment relating to her cervical spine, that the MRI scan of her cervical spine done in 2020 did not reveal any evidence of a compression fracture.
28. The AMS assessed that the respondent’s cervical spine was to be assessed correlating with DRE Cervical Category 2, for which the rating is 5% WPI. He did not consider that the respondent’s impairment of her cervical spine had an impact on her activities of daily living and accordingly the AMS did not add any percentage WPI pursuant to [4.33] of the Guidelines.
29. The AMS found that the respondent had a reduced range of movement in both of her shoulders and detailed the extent of that with worksheets he appended to the MAC. The AMS recorded that the respondent’s reflexes of her upper extremities were intact, that her sensation was normal and that there was no unilateral muscle wasting or no loss of movement of the elbows, wrists or hands.

30. Based on the restrictions he found the respondent had of the range of movement of her right shoulder the AMS assessed the respondent had 11% upper extremity impairment of her right upper extremity, which converts to 7% WPI.
31. Based on the restrictions the AMS found the respondent had of the range of movement of her left shoulder, the AMS assessed the respondent had 6% upper extremity impairment of her left shoulder, which converts to 4% WPI.
32. The AMS therefore assessed the respondent to have a total WPI of 16%.
33. At Part 8e of the MAC there is a standard question, "is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality?" to which the AMS answered "No". The AMS stated at Part 11a of the MAC that in his opinion the respondent did not have any "relevant previous injuries, pre-existing conditions or abnormalities".
34. Given those findings the AMS recorded in Parts 8e and 11a of the MAC, there was no basis upon which he could make a deduction under s 323(1) of the 1998 Act. He accordingly assessed that the degree of the respondent's permanent impairment resulting from her injury was 16% WPI.

SUBMISSIONS

35. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
36. In summary, the appellant submitted that the AMS did not have regard to the material that was before him when concluding that no proportion of the respondent's permanent impairment was due to her injury in the motor vehicle accident. The appellant submitted that the AMS's conclusion in that regard was contrary to the evidence before him.
37. The appellant referred to the assessments that Dr Bodel had made based on AMA 4 and the Motor Accident Authority Guide of the respondent's right shoulder and neck impairment and submitted that the indicia for assessing the respondent's impairment under that regime was "virtually identical" to what is required under the Guidelines by reference to which the AMS assessed the degree of the respondent's impairment resulting from the workplace injury. It is implicit from the appellant's submission that its position is that given Dr Bodel's assessment on 19 September 2016 of the respondent's impairment of her neck and right shoulder, the respondent's prior injury suffered in the motor vehicle accident contribute to her present permanent impairment and that consequently the AMS ought to have made a deduction under s 323(1) for the extent to which it did so.
38. The appellant submitted that that deduction "should be at least half, but potentially greater". The appellant submitted that the respondent could not "reasonably argue her mva injuries had improved between February 2017 and the date of injury".
39. The appellant noted that the respondent "might say" that in the motor vehicle accident she injured her right scapula, and not her shoulder, but the appellant submitted that the scapula is part of the shoulder and, in any event, the injury the respondent suffered in the motor vehicle accident resulted in restriction in the range of motion of her right shoulder and consequently the AMS ought to have made a deduction for the extent to which the restriction in the right shoulder from the injury she suffered in the motor vehicle accident contributes presently to impairment.

40. In reply, the respondent submitted that the AMS was provided with “adequate pertinent material required to assess the respondent”. The respondent submitted that she suffered soft tissue injuries to her cervical spine and left and right shoulders in the motor vehicle accident and that the AMS “could reasonably have concluded that they had long since resolved and did not impact upon his current assessment”. The respondent submitted that “soft tissue injuries generally resolve over time”. The respondent submitted that the AMS provided a comprehensive and correct MAC and there is nothing to suggest he “has not exercised his functions appropriately”.

FINDINGS AND REASONS

41. 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.
42. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons.
43. The Appeal Panel considers that the explanation the AMS provided for his finding that no proportion of the respondent’s impairment is due to the previous injury she suffered in the motor vehicle accident on 9 July 2015 is contrary to the evidence that was before him and wrong. The AMS did not in the history he obtained reveal that the respondent had previously suffered an injury to her neck and shoulders in the motor vehicle accident and consequently, the AMS did not have regard to those injuries when considering whether any proportion of the respondent’s impairment was due to those prior injuries.
44. In the Appeal Panel’s view, the respondent’s submission that the AMS could have reasonably concluded that her soft tissue injuries to her neck and her shoulders had resolved cannot be accepted. This is because, when the MAC is considered as a whole, the AMS simply did not have regard to those injuries and hence, not having had regard to them, could not have turned his mind as to whether they had resolved or not.
45. The evidence in the form of the respondent’s statement of 3 February 2017, which she made around 7 months before her workplace injury and around 20 months after she suffered injuries to her neck and shoulders in the motor vehicle accident, reveals that she was suffering significant and chronic symptoms from the soft tissue injuries she suffered in the motor vehicle accident. Further, it is apparent from Dr Bodel’s assessment on 19 September 2016 of her impairment from the injuries she suffered in the motor vehicle accident that she was then still suffering significant impairment in her neck and right shoulder as a consequence of the injuries. That assessment was done around 14 months after she suffered her injuries in the accident.
46. In the Appeal Panel’s view, the chronicity over a long period of her symptoms in her neck and shoulders from the soft tissue injuries she suffered to those body parts in the motor vehicle accident indicates that she did not recover from those injuries and that they would be contributing to her present impairment.
47. In other words, having regard to the nature of the symptoms she was experiencing from the injuries she suffered to her neck and shoulders in the motor vehicle accident, and the degree to which she was experiencing those symptoms some 20 months after the accident, it is unlikely that those injuries healed. Given the manner in which her injuries were affecting her function at the time she suffered her workplace injury, the Appeal Panel considers they would now be contributing to her present impairment.

48. Accordingly, the MAC contains a demonstrable error because, in the Appeal Panel's view, it is unlikely the AMS had regard to the evidence that established that the appellant had suffered injuries to her neck and shoulder before the workplace injury. He simply did not obtain a history regarding them and consequently did not consider them when assessing whether the respondent's prior injuries contributed to her present impairment.
49. The Appeal Panel considers that the nature of the injuries the respondent suffered in the workplace incident on 8 September 2017 to her cervical spine and shoulders is different from the nature of injuries she suffered in the motor vehicle accident. The injuries she suffered in the motor vehicle accident were soft tissue injuries whereas the injuries she suffered in the workplace incident consist of an aggravation of pre-existing pathologies that subsequent radiological investigations establish were likely present in her neck and shoulders at the time of the workplace incident. While the Appeal Panel is satisfied that the soft tissue injuries the respondent suffered in the motor vehicle accident contribute to her present impairment of her cervical spine and her upper extremities, it is near impossible, in the Appeal Panel's view, to determine, based on the medical evidence before the Appeal Panel, exactly what proportion of the respondent's present impairment is due to her prior injuries. The Appeal Panel notes that whilst Dr Bodel measured the range of the respondent's movements of her neck and shoulders, the task of determining to what extent her prior injuries to those body parts contribute to her present impairment cannot be done in a simple linear fashion by subtracting her range of movements as assessed by Dr Bodel from her range of movements assessed by the AMS. One reason for that is that the nature of her injuries suffered in each event is different. As said, in the Appeal Panel's view it is simply too difficult to determine to what extent exactly the respondent's prior injuries contribute to her present impairment and consequently, in accordance with s 323(2) of the 1998 Act, the Appeal Panel assumes it is 10%, which is not at odds with the evidence before the Appeal Panel.
50. The Appeal Panel adopts the findings from examination of the AMS for the purpose of reassessing the medical dispute. This is because there is nothing apparent from the MAC that there was anything amiss with the manner in which the AMS examined the respondent or his findings based upon his examination. Further, neither party took issue with that.
51. Based on the AMS's findings, the AMS correctly correlated the respondent's symptoms and signs from her cervical spine with DRE Category II. Hence the respondent is to be assessed as having a 5% WPI due to her cervical spine.
52. Based upon the AMS's measurement of the restricted range of motion of the respondent's right shoulder, the respondent's WPI due to her right shoulder is 7%. Further, based upon the AMS's measurements of the restricted range of the respondent's range of motion in her left upper extremity, the respondent's WPI due to her left shoulder is 4%. Hence, when a 1/10th deduction is made under s 323(1), the degree of the respondent's permanent impairment resulting from her injury is assessed by the Panel as 15% WPI.
53. For these reasons, the Appeal Panel has determined that the MAC issued on 24 September 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*.

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: 2747/20
Applicant: Nana Ama Agyapa
Respondent: Andrews Meat Industries 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 [insert name of Doctor] 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 WorkCover Guides	Chapter, page, paragraph, figure and table numbers in AMA5 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	8/9/17	Chapt 4	Chapt 15	5%	1/10	5%
2.Right upper extremity	8/9/17	Chapt 2	Chapt 16	7%	1/10	6%
3.Left upper extremity	8/9/17	Chapt 2	Chapt 16	4%	1/10	4%
Total % WPI (the Combined Table values of all sub-totals)					15%	

Marshal Douglas
Arbitrator

Dr Gregory McGroder
Approved Medical Specialist

Dr Drew Dixon
Approved Medical Specialist

18 December 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*

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar

