

# WORKERS COMPENSATION COMMISSION

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

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**Matter Number:** M1-4918/16  
**Appellant:** Maria Galea  
**Respondent:** Colourwise Nursery (NSW) Pty Limited  
**Date of Decision:** 13 January 2021  
**Date Amended:** 28 January 2021  
**Citation No:** [2021] NSWCCMA 12

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**Appeal Panel:**  
**Arbitrator:** R J Perrignon  
**Approved Medical Specialist:** Dr Mark Burns  
**Approved Medical Specialist:** Dr John Brian Stephenson

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### **GROUND OF APPEAL**

1. The appellant worker, Ms Galea, appeals from the Amended Medical Assessment Certificate of Approved Medical Specialist Dr Burrows dated 19 January 2017. She does not allege any error in the certificate. She says that her condition has deteriorated since Dr Burrows examined her, attracting a right of appeal under section 327(3)(a) of the *Workplace Injury Management and Workers Compensation Act 1998*.

### **PROCEDURAL BACKGROUND**

2. By an Application to Resolve a Dispute, Ms Galea claimed permanent impairment compensation as a result of injury to both shoulders, including post-surgical scarring of the right shoulder. She alleged that her permanent impairment resulted from the nature and conditions of her work as a nursery hand over 11 years. She specified 17 October 2014 (deemed date) as the date of injury.
3. The Registrar referred both shoulders and the skin (scarring - TEMSKI) for assessment to Approved Medical Specialist Dr Burrows, as a result of injury on 17 October 2014, which was the deemed date of injury as pleaded.
4. On 16 November 2016, Dr Burrows examined the worker, and assessed an 11% whole person impairment (0% scarring, 6% left upper extremity, 5% right upper extremity).
5. By a Certificate of Determination dated 25 January 2017, the Deputy Registrar made an award in favour of Ms Galea, pursuant to section 66 of the *Workers Compensation Act 1987*, in respect of an 11% whole person impairment, in accordance with the Amended Medical Assessment Certificate of Dr Burrows.
6. Prior to Dr Burrows' assessment, Ms Galea had come to right shoulder surgery at the hands of Dr Stening, orthopaedic surgeon. On 28 February 2017, a little more than three months after the assessment, she came to left shoulder surgery. In a statement dated 20 November 2018, she described the deterioration of her left shoulder condition and her pain generally since the assessment, notwithstanding the left shoulder surgery.

7. She applied to the Commission to set aside the Certificate of Determination dated 25 January 2017, so that she might appeal from Dr Burrows' assessment, and demonstrate that her condition had so deteriorated that she now met the following thresholds.
  - (a) 15% whole person impairment for work injury damages
  - (b) 21% for ongoing weekly compensation, which the insurer had advised her would cease on 9 June 2000.
8. In that application, Ms Galea alleged that she now suffered a consequential condition of the cervical spine. However, in Directions dated 16 September 2019, Arbitrator Harris noted that her application had been amended to delete any reference to the cervical spine.
9. On 12 November 2019, at Ms Galea's request and over the objection of the respondent, Arbitrator Harris rescinded the Certification of Determination dated 25 January 2017. A detailed history of the matter appears in his published reasons. He noted that on 30 April 2018 Dr New had assessed a 24% whole person impairment, and that on 15 May 2019 Dr Bosanquet had assessed a 12% whole person impairment after deducting one half for pre-existing conditions. He applied the reasoning of the Court of Appeal in *Riverina Wines Pty Limited v Workers Compensation Commission* [2007] NSWCA 147 at [94] to the effect that 'deterioration' as used in section 327(3)(a) means a deterioration from the degree of impairment certified by a Medical Assessment Certificate since the examination on which it was based: at [85]. He found at [89] that both Dr New and Dr Bosanquet had measured a 'significantly greater loss of function' than Dr Burrows – a finding with which we agree. He was satisfied that Ms Galea "has real prospects of establishing an impairment of at least 15% for the purposes of bringing a claim for common law damages and an arguable claim of attaining over 20%": at [94].
10. Reference to the cervical spine having already been deleted from the application, Arbitrator Harris expressed the view in his reasons at [70] that any deterioration of that body part could not found an appeal from Dr Burrows' assessment, because it had not been referred by the Registrar to Dr Burrows for assessment.
11. Arbitrator Harris set aside the Certificate of Determination expressly to permit Ms Galea to appeal from the assessment of Dr Burrows, for the purpose only of establishing that she met either of the two thresholds referred to above, and not for the purpose of re-agitating her claim for permanent impairment compensation: [109] to [115].
12. On 20 March 2020, Ms Galea lodged an application to appeal from the Medical Assessment Certificate of Dr Burrows dated 19 January 2017, on the basis that her condition had deteriorated since then.
13. On 9 April 2020, the Registrar by his delegate was satisfied that grounds of appeal under section 327(3)(a) and (b) were made out, and referred the matter to this Appeal Panel, for determination of the matter with respect only to the shoulders and scarring, excluding the neck.
14. On 1 May 2020, the Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (4th edition) (the Guidelines). Being satisfied that there was evidence to establish deterioration in the condition of both shoulders and skin, the Panel referred the worker for further examination by Approved Medical Specialist Dr Stephenson, whose report appears below.
15. Opportunity was also given to the parties to make submissions on whether there had been a deterioration in the scarring of each shoulder. Those submissions are considered below.

## Submissions and findings

16. The appellant worker submits that her condition has deteriorated since Dr Burrows' assessment. She seeks an assessment of the "injuries to both shoulders". We interpret that to mean that she seeks assessment of both shoulders, and of the skin of both shoulders, as a result of injury to both shoulders.
17. She also seeks leave to rely on fresh evidence to prove deterioration. As we understand it, this includes her statement of 20 November 2018 and the medical reports of Dr New and Dr Bosanquet, recording their updated assessments.
18. Though it has filed a Notice of Opposition, the respondent does not, in terms, object to the consideration of that fresh evidence or to the examination of the shoulders and skin, but objects to the assessment of scarring with respect to the skin on the left shoulder, because there is no evidence of deterioration in scarring in that part of the body, and because no claim was made for a deterioration in the skin of the left shoulder, capable of giving rise to a dispute justiciable by the Commission. It submits that any examination by the Panel should be confined to both shoulders and the skin of the right shoulder, and should exclude the neck and skin of the left shoulder.

## Fresh evidence

19. As the fresh evidence could not reasonably have been obtained prior to Dr Burrows' assessment, it is admissible on appeal, and we have regard to it.
20. Dr Deveridge examined the worker on 7 April 2016. He assessed a 14% whole person impairment (5% left shoulder, 7% right shoulder, 2% scarring). As the worker had not undergone left shoulder surgery at that stage, the scarring must have been assessed with respect to the right shoulder only. He noted: "The surgical scar on the front of the right shoulder is conspicuous, it measures 5cm in length and has some trophic and pigmentary changes."
21. Dr Bosanquet examined the worker on 21 October 2016. He assessed a 5% whole person impairment (2% left shoulder, 2% right shoulder, 1% scarring), from which he deducted 1/5<sup>th</sup> to take account of pre-existing pathology to yield a 4% whole person impairment. Of the right shoulder, he noted, "She had a 6cm obvious anterior scar". He assessed 1% (scarring) because, 'anatomic location of the scar is usually not visible with usual clothing". In his report of 27 October 2016, he explained the difference between his assessment of the skin and that of Dr Deveridge in the following way:

"[Dr Deveridge] also gives a 2% whole person impairment for the scarring, stating that the scar was visible with normal clothing. I would contest this, as the scar in her shoulder would normally be covered by her clothing, hence I gave only a 1% whole person impairment".
22. As indicated, Approved Medical Specialist Dr Burrows examined the worker on 16 November 2016, assessing an 11% whole person impairment (6% left shoulder, 5% right shoulder, 0% scarring).
23. Dr New examined the worker on 30 April 2018. He assessed a 24% whole person impairment (23% upper extremities, 2% scarring). He assessed an upper extremity impairment of 22 (left) and 17 (right), which equates to a whole person impairment of 13% (left) and 10% (right).
24. Dr Bosanquet re-examined the worker on 3 May 2019. He assessed a 10% whole person impairment in respect of the right shoulder, 13% whole person impairment in respect of the left shoulder, and 0% in respect of scarring. From these, he deducted one half to account for pre-existing pathology, yielding an 11% whole person impairment (5% right shoulder, 7% left shoulder, 0% scarring).

25. Putting to one side the section 323 deduction made by Dr Bosanquet, his assessment of both shoulders (22% whole person impairment, properly calculated) does not differ greatly from the 24% assessed by Dr New. Whether or not a deduction was appropriate, each of those assessments constitutes compelling evidence that there has been a marked deterioration of the impairment of the left and right shoulders since Dr Burrows' assessment.
26. With regard to the skin, Dr Bosanquet's assessment of 0% whole person impairment (scarring) is not evidence of a deterioration, as he makes the same assessment as Dr Burrows.
27. On the other hand, Dr New assessed a 2% whole person impairment (scarring), which is greater than the assessment of Dr Burrows. He does not specify whether he has assessed the skin of one shoulder or both, but in our view, it does not matter. The skin is a body system assessable under Chapter 14 of the Guidelines. That system was originally referred for assessment by the Registrar. Dr New's assessment of the skin constitutes evidence of a deterioration in that body system, viewed as a whole, as a result of injury since Dr Burrows' assessment.
28. We prefer the assessment of Dr New to that of Dr Bosanquet because in his report of 15 May 2019 Dr Bosanquet, despite noting anterior scars of 8 cm on the right shoulder and 4 cm on the left, the latter of which he notes was tender, gives no reasons for assessing a 0% whole person impairment (scarring), contrary to his earlier assessment. On the basis of Dr New's assessment, we are satisfied that there has been a deterioration of the skin system, viewed as a whole, since the assessment of Approved Medical Specialist Dr Borrows.
29. As indicated, Ms Galea had initially claimed compensation in respect of impairment of the whole person with respect to both shoulders and scarring. Her claim was disputed, she was referred to assessment to Approved Medical Specialist Dr Burrows, and a Certificate of Determination was issued giving effect that assessment. On 12 November 2019, Arbitrator Harris set aside the Certificate of Determination over the objection of the respondent, so that she could appeal from Dr Borrows' assessment. On 20 March 2020, Ms Galea lodged an application to appeal from that assessment, on the basis that her condition had since deteriorated.
30. She was entitled to lodge the appeal by operation of section 327(3) of the 1998 Act, which provides that the grounds of appeal include "deterioration of the worker's condition that results in an increase in the degree of permanent impairment". Among other things, she relied on a deterioration in the condition of her skin, as evidenced by the assessment of Dr New. The respondent has disputed her entitlement to any increase based on the condition of the skin of the left shoulder. No further dispute is necessary to render the issue justiciable by this Panel.
31. The Panel having been satisfied of a deterioration in the condition of the worker's skin and both shoulders, those body parts were referred for examination to Approved Medical Specialist Dr Stephenson, who is a member of the Panel. The cervical spine was not referred.
32. The report of Dr Stephenson appears below.

### **Report of Dr Stephenson**

#### **"1. The worker's medical history, where it differs from previous records**

There was no difference in that regard.

## **2. Additional history since the original medical assessment certificate was performed.**

There is no additional history of any further injury to bilateral shoulders. As recalled, Dr Michael Stening has operated on both shoulders and the records show his report of 13 July 2015, at review six weeks post open rotator cuff repair/acromioplasty and biceps tenotomy right shoulder.

A similar procedure was performed on the left shoulder and the open rotator cuff repair is relevant as this led to bilateral open rotator cuff scars rather than arthroscopy scars.

I reviewed relevant medical reports for the purpose of this assessment. The AMS Dr Burrow in MAC 6 December 2016, noted at Page 3. There is no colour mismatch, hypertrophic scar formation, adherence nor efficacy related to the scars. Dr Burrow stated 'further, Mrs Galea says that she is 'not fussed about what I look like'.

As indicated below I have found a different history and different clinical findings regarding scarring. Dr Charles New, Page 3, May 2018 found for skin scarring TEMSKI Table 2% WPI. Dr Richard Deveridge, 21 April 2016, found 2% WPI for scarring.

Ms Maria Galea presented as a pleasant lady. Date of birth 5 May 1956. Address: 7 Barina Place, Blaxland, NSW. Occupation at time of her accident: Nursery hand. Height 5 feet 4 inches, weight 78 kg, right handed.

## **3. Present complaints**

Ms Maria Galea is conscious of the bilateral shoulder scars which were quite visible with the clothing she was wearing, that is a singlet-type top. This light cotton top had 3.5 cm wide straps. The scars were fully visible. There was bilateral restriction of range of motion both shoulders.

Ms Maria Galea advised that she was very conscious of the scars, in fact when people see the scars when she is wearing a top in the summertime, they comment on the scars and ask her about what operation she has had. She therefore tries to cover up by wearing a cardigan, for example.

The reference in NSW Compensation Guidelines is the TEMSKI Table, Chapter 14, Table 14.1. For best fit there is 3% WPI as follows:

- The claimant is conscious of the scars
- There is easily identifiable colour contrast of the scars with the surrounding skin as a result of pigmentary or other change.
- Claimant able easily to locate scars.
- Trophic changes evident to touch.
- Anatomic location of the scars visible with usual clothing style.
- Chondral defect easily visible.
- Minor limitation in performance of few ADLs, exposure to chemical or physical agents, eg sunlight, where temporary increased limitation.
- No treatment or limited treatment only required.
- Some adherence.

Conversion with best fit is 3% WPI.

## **4. Findings on clinical examination.**

In keeping with the above, I noted both shoulders what would be termed open rotator cuff surgical scars. There are linear scars at the front of both shoulders clearly visible wearing a light summer top. Right scar: The linear scar had a longitudinal scar 5 cm in

length. There was slight irregularity of the scar, that is, it was not a straight line, and was up to 2 mm wide which may be associated with some sepsis before the wound healed. Both scars were a white colour contrasting with the surrounding brown suntanned skin and were quite visible. At the left shoulder there was a 5.5 cm tender irregular and vertical scar anterior to the left shoulder, white in colour and colour contrasting with the surrounding pigmented brown skin. Conclusion: The best fit is a 3% WPI.

Range of motion of the right and left shoulders was measured as follows, using a goniometer.

Right	Left
Abduction 60° = 6% UEI	Abduction 80° = 5% UEI
Adduction 20° = 1% UEI	Adduction 10° = 1% UEI
Flexion 80° = 7% UEI	Flexion 80° = 7% UEI
Extension 30° = 1% UEI	Extension 30° = 1% UEI
External Rotation 30° = 1% UEI	External Rotation 40° = 1% UEI
Internal Rotation 40° = 3% UEI	Internal Rotation 70° = 1% UEI

Right shoulder 19% UEI converts to 11% WPI.

Left shoulder 16% UEI converts to 10% WPI.

**5. Results of any additional investigations to original medical assessment certificate.**

There were no additional investigations.

**6. Opinion**

In my opinion, the best fit following TEMSKI Table, as I have endeavoured to carefully point out, is a 3% WPI rating for the scarring. Based on range on motion, I assess 11% whole person impairment (right upper extremity - shoulder) and 10 whole person impairment (left upper extremity - shoulder)."

33. The Panel adopts the report and assessment of Dr Stephenson.

**Conclusion**

34. For the reasons given, the appeal is allowed with respect to the assessment of the upper extremities and skin. The Amended Medical Assessment Certificate of Dr Burrows dated 19 January 2017 is set aside and replaced with 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*.

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:** 4918/16  
**Applicant:** Maria Galea  
**Respondent:** Colourwise Nursery (NSW) Pty Limited

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

Body Part or system	Date of Injury	Chapter, page and paragraph number in SIRA 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. Right upper extremity	17 October 2014	Chapter 2, page 10 to 12	Chapter 16, page 476 to 479, Figure 16-40 to Figure 16-46, page 439, Table 16-3	11%	0	11% WPI
2. Left upper extremity	17 October 2014	Chapter 2, page 10 to 12	Same as above	10%	0	10% WPI
3. Scarring	17 October 2014	Chapter 14, page 74, TEMSKI Table	Chapter 8	3%	Nil	3%
<b>Total % WPI (the Combined Table values of all sub-totals)</b>						<b>22%</b>

**R J Perrignon**  
Arbitrator

**Dr Mark Burns**  
Approved Medical Specialist

**Dr John Brian Stephenson**  
Approved Medical Specialist

13 January 2021

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**

