WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3973/19**
Appellant:	**David Strain**
Respondent:	**ANT Building Pty Ltd**
Date of Decision:	**3 February 2020**
Citation:	**[2020] NSWWCCMA 16**

Appeal Panel:	
Arbitrator:	**Catherine McDonald**
Approved Medical Specialist:	**Dr Mark Burns**
Approved Medical Specialist:	**Dr Brian Stephenson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 22 October 2019, David Strain lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr David Crocker, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 25 September 2019.

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, being that in s 327(3)(d). The Appeal Panel has conducted a review of the original medical assessment but limited to the grounds 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).

RELEVANT FACTUAL BACKGROUND

6. Mr Strain was employed as a carpenter by ANT Building Pty Ltd (ANT). He was working on a house site on 20 June 2014 when he fell off the side of the building, falling about four metres. He suffered a right distal radius fracture and an L1 anterior wedge fracture. He underwent open reduction and internal fixation of the right distal radius fracture on 23 June 2014 and the metal plate was removed in October 2014. The L1 compression fracture was treated non-operatively.

7. Mr Strain continued to suffer significant back pain and in late 2015, he was referred to Dr Brian Hsu, neurosurgeon who considered that he would benefit from surgery described in his first report as both T12-L1 and T12-L1-2 stabilisation and fusion. The operation report dated 19 January 2018 indicates that Dr Hsu undertook a posterior T12-L1 decompression and fusion with instrumentation with Mazor robotic guidance.

8. The AMS assessed 26% whole person impairment (WPI) comprised of 3% in respect of the right upper extremity, 23% in respect of the thoracic spine, 0% in respect of the lumbar spine and 1% under the TEMSKI. Mr Strain's appeal relates only to the failure by the AMS to make an assessment in respect of his lumbar spine.

PRELIMINARY REVIEW

9. 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.

10. 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 because there is no error in the MAC and there is sufficient information in the file to determine the appeal.

EVIDENCE

11. 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.

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.

14. In summary, Mr McManamey of counsel submitted on behalf of Mr Strain that the AMS was in error not to assess Mr Strain's lumbar spine in DRE Lumbar Category IV. He said that paragraph 4.32 of the Guidelines, relied on by the AMS was only applicable where there were adjacent vertebral fractures in the transition zones of the spine, such as T12 and L1 and that it did not apply to any other criteria for assessing impairment of the thoracic or lumbar spine. If it did, it would have been simple to say so.

15. Mr McManamey said that the AMS did not assess the thoracic spine on the basis of the compression fracture but instead on the basis of the surgical intervention. He did not measure the fracture which is necessary to assess on the basis of the facture. If he had done so, the assessment would have been DRE III; DRE IV is only consistent with assessment based on loss of motion segment as a result of the fusion. Mr Strain has undergone an arthrodesis which involves L1, being an alteration of motion segment integrity involving the lumbar spine which should result in an assessment of DRE IV.

16. In the alternative, he submitted that Mr Strain was entitled to an assessment of DRE II on the basis that there was asymmetry of motion in the lumbar spine or because a x-ray dated 14 July 2014 showed a 25% loss of height at L2. That x-ray also showed that more than the transitional zone was injured so that paragraph 4.32 was not applicable.

17. In reply, ANT submitted, through its solicitor, Ms Tancred, that paragraph 4.32 provides that separate spinal impairments are not combined and that the highest value impairment within the spinal region is chosen. The AMS was correct to assess the thoracic and not the lumbar spine. ANT submitted that paragraph 4.32 applies to the spinal region as a whole and not only to assessment on the basis of the compression fracture.

18. ANT submitted that the AMS was not required to measure the compression fracture. Table 15-4 of AMA 5 provides alternative assessments and sets out the method of calculating each.

FINDINGS AND REASONS

19. 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.

20. 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.

The MAC

21. The AMS described Mr Strain's spinal injury:

> "A compression fracture had also been sustained of the body of the L1 vertebra. He has since undergone a T12/L1 spinal fusion procedure via a posterior approach."

22. The AMS set out his calculations:

> "In relation to the injury to the twelfth lumbar vertebra, it is apparent that Mr Strain proceeded to a spinal fusion intervention at the T12/L1 level. The NSW Workers' Compensation Guidelines indicate that when pathology arises at an intersecting region such as C7/T1 or T12/L1, the upper most spinal region should be taken into account. On this basis, it is considered that there is a DRE Category IV rating with respect to the region of the thoracic spine taking into account the surgical intervention. This equates with a 20-23% WPI. Given the negative impacts upon activities of daily living, I have determined a 23% WPI in this matter.
>
> I do not consider that there is any indication of a pre-existing injury or condition that needs to be taken into account by way of contributory impairment. ...
>
> Taking the above into account, I consider that a 0% WPI is applicable in relation to the region of the lumbar spine."

23. He set out his comments with respect to the reports of independent medical examiners relied on by the parties:

> "I have also noted multiple documentation (various dates) prepared by Dr Brian Hsu, Spinal Surgeon of Sydney. Similarly, these do not include an opinion with respect to whole person impairment.
>
> I have reviewed multiple documentation as prepared by Mr Strain's General Practitioner/s.
>
> I have also reviewed the medical report (25.9.14) prepared by Dr Peter van Gelderen, Neurosurgeon of Sydney. It is evident that that assessment was conducted prior to Mr Strain's surgical intervention in relation to the region of the lower thoracic/upper lumbar spine. The doctor has indicated a 1% Whole Person Impairment with respect to the right upper extremity and a 12% WPI with respect to the region of the lumbar spine. A 0% is documented with respect to scarring such that a final combined Whole Person Impairment of 13% is outlined.

I have also reviewed the medical report (31.8.18) prepared by Dr Mohammed Assem, Consultant Rehabilitation Physician of Parramatta. It is evident that a 22% Whole Person Impairment is documented with respect to the region of the thoracic spine. The doctor also indicates that a fusion procedure was attended pertaining to L1/2 and also outlines a 23% Whole Person Impairment in this regard. A 1% Whole Person Impairment is also documented in relation to scarring.

With respect, it is apparent that a second fusion procedure was not performed with respect to L1/2. The doctor also erroneously attributes an ADL rating with respect to two spinous regions which is also inappropriate.

I have noted that a medical assessment was also conducted by Dr Robert Breit, Consultant Orthopaedic Surgeon of Sydney with the report dated 28.11.18. It is apparent that the doctor had determined a 5% Whole Person Impairment with respect to the region of the cervical spine. A 22% Whole Person Impairment is documented in relation to the thoracolumbar spinal fusion. A 4% Whole Person Impairment is also documented with respect to the right wrist condition taking into account limitation with active range of motion. As such, a final combined Whole Person Impairment of 29% is documented.

In relation to the above, it is apparent that the region of the cervical spine has not been requested for assessment at this time."

Other medical evidence

24. Dr Assem set out his calculations in the following way:

> "With regards to his thoracic spine, he underwent a fusion from T12 to L1. According to the instructions in the WorkCover Guides, 4th Edition, paragraph 4.32, p 27, 'For fractures of T12 and L1, use the WPI rating for the thoracic spine (AMAS Chapter 15, Table 15-4, p 389)'. He was therefore awarded a DRE thoracic category IV or 20% whole person impairment. In addition, he is entitled to 2% whole person impairment for a moderate limitation in activities of daily living, giving 22% whole person impairment.
>
> He also underwent a fusion from L1 to L2, giving a DRE lumbar category IV or 20% whole person impairment. He has residual radiculopathy after surgery with numbness and atrophy of his left thigh, giving an additional 3% whole person impairment or 23% whole person impairment.
>
> The combined whole person impairment is therefore 23% (lumbar)+ 22% (thoracic)+ 3% (wrist)+ 1% (scarring) = 43% WPI."

25. Dr Assem misread Dr Hsu's reports. Dr Hsu originally proposed a fusion from T12 to L2 but the surgery carried out was at T12 to L1 only.

26. Dr Breit, qualified for ANT, made the following relevant calculations:

> Thoracolumbar spine - SIRA Guides Chapter 4, Paragraph 4.32 state that impairments in different spinal regions are combined using the Combined Values Chart, going on to say that if there are adjacent vertebral fractures at transition zone the methodology is that for fractures of T12 and L 1 one uses the WP! rating for the thoracic spine and by extension that should apply to a fusion.
> Therefore, for the thoracolumbar fusion he is assessed under DRE Category IV, which carries the same impairment for both the lumbar spine and the thoracic spine. For ease, I will refer to it as the lumbar spine according to Paragraph 15.4, Table 15.3. That is associated with baseline 20% WPI To which I would add 2% for ADLs, totalling 22% and there is no deductible quantum."

Consideration

27. The submissions filed for Mr Strain do not rely on the method of assessment used by Dr Assem, who assumed that Mr Strain had undergone a fusion at two levels, but seek to support a similar percentage assessment on a different basis. It is notable that Dr Assem considered that a fusion at T12 to L1 was assessed under paragraph 4.32. However Dr Assem misread Dr Hsu's reports and assumed that a two-level fusion had been undertaken.

28. The submission that Mr Strain suffered a compression fracture of L2 cannot be accepted. The x-ray report by Dr Z Gacs dated 14 July 2014 is said to be of the whole lumbo-sacral spine. The only fracture observed is a "compression fracture of the superior end plate of L2 vertebra with approximately 20% decrease in the vertebral body height anteriorly." No other compression fracture was noted. Correlation with the other radiology reports shows that the reference to L2 is a typographical error for L1, the only level at which a compression fracture was suffered.

29. The method adopted by the AMS was correct.

30. Both parties referred to paragraph 4.32 of the Guidelines. It must be read in context of the chapter on the spine and in accordance with the principles of assessment. Though not stated in chapter 4 of the Guidelines in as many words, the AMS needed to be careful to avoid double compensation.

31. Paragraph 1.9 says:

> "The Guidelines may specify more than one method that assessors can use to establish the degree of a claimant's permanent impairment. In that case, assessors should use the method that yields the highest degree of permanent impairment."

32. Paragraph 1.23 confirms the principle set out in AMA 5 that the AMS was able to use his judgement to assess conditions not covered by the Guidelines by analogy.

33. Paragraph 4.30 of the Guidelines, in the chapter dealing with the spine, deals with the measurement of vertebral body fractures. If the total loss was less than 25% as here, the appropriate category was DRE II. The AMS has correctly avoided that method of assessment in favour of a method that yields a higher degree of permanent impairment.

34. Paragraph 4.32 reads:

> "Within a spinal region, separate spinal impairments are not combined. The highest-value impairment within the region is chosen. Impairments in different spinal regions are combined using the combined values chart (AMA5, pp 604-06).
>
> If there are adjacent vertebral fractures at the transition zones (C7/T1, T12/L1), the methodology in paragraph 4.30 in the Guidelines is to be adopted. For fractures of C7 and T1, use the WPI ratings for the cervical spine (AMA5 Chapter 15, Table 15-5, p 392). For fractures of T12 and L1, use the WPI rating for the thoracic spine (AMA5 Chapter 15, Table 15-4, p 389)."

35. The Guidelines do not provide a method for assessing a fusion of the transition zone of the spine. By analogy, where a fusion involves the transition zone, the method of assessment for the higher region of the spine is adopted – in this case, the thoracic spine. Because fusion was undertaken, the appropriate category is DRE IV, resulting in 20% WPI. The AMS allowed 3% for the impact of the impairment on Mr Strain's activities of daily living.

36. The appropriateness of the analogy can be seen by considering the result if the fusion was wholly within the thoracic spine. If it was, an assessment in DRE category IV was appropriate and only an additional one per cent would be if a second level was involved. The opening words of paragraph 4.32 are apt because separate assessments are not made. Allowing an assessment for each of the thoracic and lumbar spines would compensate the same loss twice.

37. For these reasons, the Appeal Panel has determined that the MAC issued on 25 September 2019 should be 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*.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar