

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-4277/20
Appellant: Sarojani Prasad
Respondent: State of New South Wales
Date of Decision: 5 January 2021
Citation No: [2021] NSWCCMA 5

Appeal Panel:
Arbitrator: Marshal Douglas
Approved Medical Specialist: Dr Drew Dixon
Approved Medical Specialist: Dr Mark Burns

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 13 November 2020, Sarojani Prasad (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 20 October 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 WorkCover Medical 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 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. The appellant commenced employment with the Department of Health in 1998, working as a ward clerk initially at Liverpool Hospital but since 2011 at the Bankstown Hospital.

7. On 10 September 2014, she suffered an injury to her right shoulder when another member of staff turned carelessly into her, resulting in her right shoulder being shoved into a wall. On 10 February 2016 a different member of staff rushed past her knocking her elbow and causing her entire right arm to jerk forward, with the result that she experienced an increase in pain in her right shoulder. The appellant claimed she has developed consequential conditions in her left shoulder and neck due to her right shoulder injuries.
8. On 16 January 2019, the appellant's solicitors wrote to the respondent's insurer notifying it that the appellant claimed compensation from the respondent under s 66 of the *Workers Compensation Act 1987* (the 1987 Act) in the amount of \$46,000 for 19% whole person impairment (WPI) she said had resulted from her injuries. The appellant's solicitors attached to its letter a report of Dr Kai Lee, an orthopaedic surgeon, dated 10 July 2018 to support of the appellant's claim. Dr Lee had examined the appellant and had assessed she had 19% WPI from her injuries.
9. On 15 May 2019, the respondent's insurer wrote to the appellant to notify her, pursuant to s 78 of the 1998 Act, that it denied the respondent was liable to pay her compensation. It explained to the appellant in its letter that it did so because it disputed she had suffered consequential conditions to her left shoulder and cervical spine and because the permanent impairment she had in her right shoulder was less than 11%, which consequently meant that she did not have an entitlement under s 66 of the 1987 Act. The respondent relied upon a report it obtained from Dr Stephen Quain, also an orthopaedic surgeon. Dr Quain's report was dated 27 March 2019.
10. The appellant thereupon registered with the Commission an Application to Resolve a Dispute, by which she sought the Commission determine her disputed claim against the respondent for compensation under s 66 of the 1987 Act. The matter was referred to arbitrator Mr Nicholas Read, who on 22 September 2020 made the following determination with the consent of the parties:
 - "1. The injury description in the Application to Resolve a Dispute (ARD) is amended to change the date of 10 October 2016 to 10 February 2016.
 2. The matter is remitted to the Registrar to be referred to an Approved Medical Specialist (AMS) to assess the degree of whole permanent impairment resulting from:
 - a. an injury to the right shoulder with a date of injury of 10 September 2014;
 - b. an injury to the right shoulder with a date of injury of 10 February 2016; and
 - c. consequential conditions to the left shoulder and cervical spine (neck) resulting from the above injuries.
 3. The documents referred to the AMS are:
 - a. the ARD, and attachments; and
 - b. the Reply, and attachments."
11. The Commission then duly issued a referral to the AMS in which the medical disputes that were referred to the AMS for assessment were described 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))

Injuries to be assessed:

- a. injury to the right shoulder with a date of injury of **10 September 2014**
- b. injury to the right shoulder with a date of injury of **10 February 2016**
- c. consequential conditions to the left shoulder and cervical spine (neck) resulting from the above injuries.

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

12. As mentioned earlier, the AMS issued a MAC in response to that referral on 20 October 2020.

PRELIMINARY REVIEW

13. 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.
14. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the appellant to undergo a further medical examination. This is because the material before the Appeal Panel is sufficient to determine the appeal.

EVIDENCE

15. 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

16. The AMS set out the history he obtained with respect to the appellant’s injury in Part 4 of the MAC. Within that, he noted that the appellant did not have a history of a painful or traumatic disorder affecting her right shoulder, left shoulder or cervical spine prior to 10 September 2014.
17. The AMS noted that the appellant reported her present symptoms to comprise pain over the pad and posterior aspect of both shoulders, but more significant on the right, and a separate discomfort low on the left side of the posterior cervical neck. The AMS noted that the appellant’s symptoms were accentuated with activity. The AMS noted that the appellant was able to drive a car short distance but could not work. The AMS noted that the appellant’s symptoms had not improved with the passage of time.
18. The AMS recorded in Part 5 of the MAC the following findings from his examination of the appellant:

“Ms Prasad is a woman of stated age, who stands 165 cm tall and weighs 52 kg. She walks without a limp and uses no appliances. She has a normal gait and has equal leg length on assessment. On standing erect, there is normal axial alignment of her entire cervicothoracic and thoracolumbar spine.

Cervical Spine:

On examination of the cervical spine one notes the transverse incision associated with the previous total thyroidectomy. She demonstrates three-quarters of active normal range of motion in all planes including flexion and extension and lateral flexion and rotation to the right and left with pain experienced on extension. There is no palpable evidence of paravertebral muscle spasm or guarding. There is also no asymmetrical wasting of the right and left shoulder girdle when viewed anteriorly and posteriorly.

The right arm and forearm at maximal circumference demonstrate a 0.5 cm circumferential increase consistent with her right-handedness. There is no abnormality of tone or sensation in the right or left upper extremities and there is no wasting of hand musculature. There is a full range of right and left wrist, elbow and all hand and finger movements symmetrically on the right and left side.

Active range of motion, when measured with the Goniometer reveals the following range of motion of the right and left shoulder with limitation by pain.

Shoulder Movements

Movement	Right	Left
Flexion	110 ^o	130 ^o
Extension	40 ^o	50 ^o
Abduction	80 ^o	110 ^o
Adduction	40 ^o	40 ^o
External rotation	50 ^o	70 ^o
Internal rotation	70 ^o	80 ^o

There were no other findings on examination.”
(bold as per original)

- 19. The AMS summarised within Part 6 of the MAC the radiological investigations that had been done of the appellant’s shoulders and cervical spine.
- 20. The AMS provided the following summary of the appellant’s injuries:

“Ms Prasad historically injured her right shoulder at work on 10 September 2014 and also on 10 February 2016 during the course of her working duties. There was blunt trauma to the right shoulder on both occasions with initial symptoms escalating at the time of the second incident. There was surgery performed post the second right shoulder injury, which has had no effect on current symptoms. She continues to demonstrate significant restriction of the right shoulder with pain, which is unaffected by the passage of time and current mild analgesia. As a result of over-use of her left arm but without a definite traumatic event, there has been the onset of similar discomfort but to a lesser extent in the left shoulder and also pain low in the posterior cervical neck. There is terminal range restriction of movement of the cervical spine but with no neurological impairment in the right or left upper extremity. The left shoulder continues to give discomfort to a lesser extent than the right side with some lesser restriction of terminal range of motion.

Ms Prasad states that, in her opinion, the two injuries to the right shoulder have resulted in the combined current status of her right shoulder.”

- 21. Based on the appellant’s restricted range of movement of her right shoulder the AMS assessed the appellant had 13% right upper extremity impairment which equates to 8% WPI. Based on the appellant’s restricted range of movement of her left shoulder, the AMS the appellant had 6% left upper extremity impairment which equates to 4% WPI.
- 22. The AMS assessed that the appellant’s clinical symptoms and signs of her cervical spine correlated with the criteria for DRE Cervical Category I, which attracts a rating 0% WPI. He provided the following explanation for that within Part 10b of the MAC:

“At the time of today’s assessment there is a symmetrical active loss of range of motion of the cervical spine in all planes with no evidence of palpable or paravertebral muscle spasm or guarding. There are no clinical symptoms or signs in the upper extremities that would satisfy the definition of radiculopathy as set out in Item 4.27 of the

Guidelines. There is no loss or asymmetry of reflexes or evidence of muscle weakness or reproducible sensory loss or muscle wasting that can be anatomically localised to appropriate spinal nerve root distribution or not explained by the Applicant's right-handedness. There is scan evidence of interdiscal degeneration in the mid to low cervical spine but with no significant central or peripheral stenosis. In my opinion the definition of radiculopathy as set out in the Guidelines is not met.

With reference therefore to Table 15.5 AMA 5, the Applicant demonstrates clinical symptoms and signs consistent with a DRE Cervical Category I impairment – **0% whole person impairment.**"
(bold as per original)

23. The AMS summarised the opinions and findings that other clinicians had reported. These other clinicians had either treated the appellant for her injuries or had examined her so as to provide forensic medical reports relating to her claim for compensation.
24. The AMS said that notwithstanding within the materials he had been provided there was reference to the appellant having had an ultrasound and a possible symptomatic shoulder prior to her injury in 2014 he "accepted that there was no pre-existing discomfort in the right shoulder just prior to the current injury". He indicated at Part 11 of the MAC that the appellant did not have any relevant previous injuries or pre-existing conditions or abnormalities.
25. In "Table 2" that was appended to the MAC, the AMS tabulated the assessments he had made of the appellant's impairment. He recorded that the appellant's total permanent impairment relating to her right shoulder injury on 10 February 2016 was 8% WPI, but he noted half of that was due to her injury on 10 September 2014 so consequently he assessed her permanent impairment from the injury to her right shoulder on 10 February 2016 as 4% WPI. He recorded that the appellant's permanent impairment from the injury to her right shoulder on 10 September 2014 was 4% WPI. He recorded that the appellant's permanent impairment due to "the consequential injury" to her left shoulder was 4% WPI and that her permanent impairment from the "consequential injury" to her cervical spine was 0% WPI.
26. The AMS consequently recorded in that table that the appellant's permanent impairment resulting from the injuries to her right shoulder on 10 September 2014 and 20 February 2016 including the consequential conditions resulting therefrom in her left shoulder and cervical spine was 12% WPI.

SUBMISSIONS

27. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
28. In summary, the appellant submitted that the AMS should have assessed her symptoms and signs with respect to her cervical spine as falling within DRE Cervical Category II because she exhibited "flinching" during the examination of her neck and because other clinicians who had examined her, namely Professor Mark Sheridan and Dr Jonathon Herald, had found she had neurological problems in her upper limbs due to her cervical spine. The appellant noted that Professor Sheridan had found she had pain radiating down her left arm and below her shoulder. The appellant noted that Dr Herald had reported she had complained of pain radiating down to her left elbow and that he had also reported that an MRI done on 25 July 2017 showed a disc bulge at C5/6 that potentially was the cause of her left upper limb neurological symptoms. The appellant submitted that the range of motion of her neck was more restricted on her left side than her right and that this was displayed during the AMS's examination of her.

29. The appellant submitted that, consistent with the decision of the *Department of Juvenile Justice v Edmed*¹, the AMS's assessment of her permanent impairment relating to her right shoulder from the injuries on 10 September 2014 and 10 February 2016 should have been aggregated on the basis that the pathology from each injurious event was identical.
30. In reply, the respondent submitted that the appellant's submission relating to how she exhibited herself during the AMS's examination of her was unsupported by any evidence. The respondent submitted that the AMS's assessment was based on clear and objective findings from his examination and was based on the presentation of the appellant at the time of his examination. The respondent submitted that was in accordance with [1.6] of the Guidelines. The respondent submitted that the AMS's findings from his examination of the appellant's cervical spine did not warrant an assessment under DRE Cervical Category II because the AMS's examination did not reveal any muscle guarding or spasm, or non-verifiable radicular complaints or asymmetrical loss of range of motion. The respondent submitted that an AMS's assessment should be based on the examination the AMS carried out on the day and the AMS was not obliged to accept the findings of other clinicians who may have made different findings.
31. The respondent submitted that the aggregation of the appellant's impairments relating to her right shoulder from the two different injuries was not a matter for an AMS but a matter for an arbitrator. The respondent submitted that the MAC the AMS issued accorded with the terms of the referral of the medical dispute.

FINDINGS AND REASONS

32. 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.
33. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons.
34. The Appeal Panel considers that the AMS's examination of the appellant was thorough. The AMS was entitled to rely upon his findings from his examination of the appellant to assess the appellant's permanent impairment. The AMS's examination of the appellant's cervical spine revealed that the appellant's range of motion of her cervical spine in all planes of movement was limited to three-quarters. Contrary to the appellant's submissions, the AMS did not find that the appellant's range of motion of her cervical spine was more restricted on the left than the right side. He did not find any asymmetry in her range of motion on any plane.
35. The AMS's examination of the appellant's cervical spine did not find any muscle spasm or muscle guarding.
36. The AMS did not find any asymmetrical wasting of the appellant's right or left shoulder girdle. He did not find any abnormality or tonal sensation in either right upper extremity.
37. Further, there is no evidence that the appellant flinched when the AMS examined her cervical spine. For argument's sake, even if the appellant did flinch, and to repeat there is simply no evidence that she did, that would not affect how the AMS assessed the appellant's impairment relating to her cervical spine because flinching only reveals tenderness. It is not spasm or muscle guarding.

¹ [2008] NSW WCC PD6 (*Edmed's case*).

38. In accordance with the instruction provided in [1.6] of the Guidelines, an AMS must clinically assess a worker based on how the worker presents on the day of assessment. Hence, if the worker's presentation is such that the AMS is able to conduct a clinical examination of the worker and make reliable findings from examination, which the Appeal Panel notes is almost invariably the situation, then the AMS can use his or her findings from that examination to assess the worker's impairment. There is no need, in such a circumstance, for an AMS to base his or her assessment on the findings of other clinicians from earlier examinations of the worker.
39. That, in the Appeal Panel's view, is what has occurred in this case. As mentioned, the Appeal Panel considers that the AMS's examination of the appellant was thorough and, consequently, his findings from his examination of the appellant are sound. There is nothing within the MAC to suggest that the appellant's presentation on the day the AMS examined her was such that the AMS could not conduct a clinical examination of her. The AMS was able to rely upon his findings from his examination of the appellant to assess the appellant's permanent impairment.
40. The AMS had regard to the histories that other examiners had obtained and their findings from their examination of the appellant and made comment upon that so as to distinguish how his assessment and his findings varied from their respective findings. The fact that the AMS's findings were different from the findings of others does not mean that the AMS's findings were wrong. It is simply explained by the fact that the examinations took place on different days when the appellant's condition and presentation was obviously different. As said above, there is nothing within the MAC to indicate that there was anything wrong with the AMS's examination of the appellant or to indicate that his findings from his examination of the appellant were other than sound.
41. The criteria specified in AMA5 for DRE Cervical Category I are as follows:
- "No significant clinical findings, no muscular guarding, no documentable neurologic impairment, no significant loss of motion segment integrity, and no other indication of impairment related to injury or illness; no fractures."
42. The criteria specified in AMA5 for DRE Cervical Category II are as follows:
- "Findings may include muscle guarding or spasm observed at the time of the examination by a physician, asymmetric loss of range of motion or non-verifiable radicular complaints, defined as complaints of radicular pain without objective findings; no alteration of the structural integrity
or
individual had clinically significant radiculopathy and an imaging study that demonstrated a herniated disk at the level and on the side that would be expected based on the radiculopathy, but has improved following nonoperative treatment
or
fractures: (1) less than 25% compression of one vertebral body; (2) posterior element fracture without dislocation that has healed without loss of structural integrity or radiculopathy; (3) a spinous or transverse process fracture with displacement."
43. The Appeal Panel considers that, based on the findings the AMS recorded in the MAC relating to his examination of the appellant's cervical spine, the AMS correctly correlated the appellant's signs and symptoms with DRE Cervical Category I. In short, the Appeal Panel considers that the AMS has applied the correct criteria, and has applied that criteria correctly, when assessing the appellant's permanent impairment relating to her cervical spine. The Appeal Panel finds no error with the AMS's assessment of the appellant's impairment relating to her cervical spine.

44. The Appeal Panel considers however, that the AMS has made an error with respect to the assessment of the appellant's impairment relating to her right shoulder in that in Table 2 he ought not to have recorded a single rating for the two incidents in which the appellant injured her right shoulder. That is to say, the AMS ought to have assessed the appellant's impairment relating to her right shoulder from the events on 10 September 2014 and 10 February 2016 together. He was required to do so by s 322(2) of the 1998 Act, which reads, "impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker". The reference to "the same injury" in s 322(2) is a reference to the pathology comprising the injury, rather than the injurious event from which a pathology arises. In other words, if separate injurious events give rise to a single pathology then, consistent with s 322(2), an AMS must assess the impairments from the separate injurious events together.²
45. The appellant has a single pathology in her right shoulder from the two events that occurred on 10 September 2014 and 10 February 2016. Essentially, what occurred on 10 February 2016 was a recurrence of the pathology precipitated by the event on 10 September 2014.
46. There has been no finding by the Commission that the two events resulted in separate pathologies. Nor is there anything within the material before the Commission that indicates that the parties have agreed that that was the case. Consequently, the matter as to whether there was a single pathology arising from the two injurious events was open for determination by the AMS. In the Appeal Panel's view it is implicit within the MAC that the AMS has found a single pathology from the two events. In any event, that is what the Appeal Panel finds. Given that, the AMS ought to have assessed the appellant's impairment of her right upper extremity with respect to the two events that occurred on 10 September 2014 and 10 February 2016 together.
47. For these reasons, the Appeal Panel has determined that the MAC issued on 20 October 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 MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar



² See *Edmod's case*; see also *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Barnes* [2015] NSWCCPD 35.

WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 4277/20
Applicant: Sarojani Prasad
Respondent: State of New South Wales

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 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. Right shoulder	10/9/14 & 10/2/16	Chapter 2, Pages 13-15	Figures 16.40 to 16.46, and Table 15.3	8%	-	8%
2. Left shoulder	10/9/14 & 10/2/16	Chapter 2, Pages 13-15	Figures 16.40 to 16.46, and Table 15.3	4%	-	4%
3. Cervical spine	10/9/14 & 10/2/16	Chapter 4 Pages 26-33	Table 15.5	0%	-	0%
Total % WPI (the Combined Table values of all sub-totals)					12%	

Marshal Douglas
Arbitrator

Dr Drew Dixon
Approved Medical Specialist

Dr Mark Burns
Approved Medical Specialist

5 January 2021

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 MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

