WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-4250/20**
Appellant	**Damien Windley**
Respondent:	**Athena Bakehouse Pty Ltd**
Date of Decision:	**4 February 2021**
Citation No:	**[2021] NSWWCCMA 22**

Appeal Panel:	
Arbitrator:	**Mr John Harris**
Approved Medical Specialist:	**Dr Mark Burns**
Approved Medical Specialist:	**Dr Brian Noll**

BACKGROUND TO THE APPLICATION TO APPEAL

1. Mr Damien Windley (the appellant) suffered injury in the course of employment with Athena Bakehouse Pty Ltd (the respondent) on 27 March 2015. The injury occurred in circumstances where the appellant was trying to support a heavy tray and sustained a hyperextension injury to the right wrist.

2. A claim for compensation pursuant to s 66 *Workers Compensation Act 1987* (the 1987 Act) was made by letter dated 20 February 2020.[1] The s 66 claim was based on the report of Dr Min Lai dated 11 February 2020.[2]

3. Dr Lai assessed the appellant at 56% whole person impairment (WPI) for complex regional pain syndrome type 1 (CRPS) and impairment of the right upper extremity.

4. The assessment of WPI is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines). The fourth edition guidelines are issued pursuant to s 376 of the *Workplace Injury Management & Workers Compensation Act*, 1998 (the 1998 Act).

5. The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth guidelines prevail.[3]

6. The respondent qualified Dr Reiter to assess the appellant. Dr Reiter opined that the appellant did not meet the diagnostic criteria for CRPS as the appellant did not satisfy the sudomotor/oedema criteria at the time of the first examination[4] and did not satisfy the criteria for vasomotor and sudomotor/oedema at the second examination in early 2020[5]. The doctor opined that the appellant had a 18% WPI referable to loss of movement of the right wrist.[6]

[1] Application to Resolve a Dispute (Application) p 53.
[2] Application, p 4.
[3] Clause 1.1 of the fourth edition guidelines.
[4] Reply, p 8.
[5] Reply, p 15.
[6] Reply, p 20.

7. The appellant then commenced proceedings in the Commission seeking permanent impairment compensation. The assessment of WPI was then referred to Dr Yiu-Key Ho, an AMS, who examined the respondent and provided the Medical Assessment Certificate dated 23 October 2020 (the MAC).

8. The relevant findings made by the AMS pertinent to the various grounds of appeal are set out later in these Reasons.

9. The respondent was assessed by the AMS as having 10% WPI of the right upper extremity for loss of range of movement of the wrist and made a deduction pursuant to s 323 of 50%. The AMS found that the appellant did not qualify as suffering from CRPS in accordance with Table 17.1 of the fourth edition guidelines.

CRPS

10. The diagnostic criteria for CRPS are contained in Table 17.1 of the fourth edition guidelines which contains four sections, all of which must be satisfied. The table contains the following criteria:

    1. Continuing pain, which is disproportionate to any causal event.

    2. Must report at least one symptom in each of the four following categories:

        - Sensory: Reports of hyperaesthesiae and/or allodynia.

        - Vasomotor: Reports of temperature asymmetry and/or skin colour changes and/or skin colour asymmetry.

        - Sudomotor/oedema: Reports of oedema and/or sweating increase or decrease and/or sweating asymmetry.

        - Motor/trophic: Reports of decreased range of joint motion and/or motor dysfunction (tremor, dystonia) and/or trophic changes (hair, nail, skin).

    3. Must display at least one sign* at time of evaluation in all of the following four categories:

        - Sensory: Evidence of hyperalgesia (to pin prick) and/or allodynia (to light touch and/or deep somatic pressure and/or joint movement).

        - Vasomotor: Evidence of temperature asymmetry and/or asymmetric skin colour changes.

        - Sudomotor/oedema: Evidence of oedema and/or sweating asymmetry.

        - Motor/trophic: Evidence of decreased active joint range of motion and/or motor dysfunction (tremor, dystonia) and/or trophic changes (hair, nail, skin).

    4. There is no other diagnosis that better explains the signs and symptoms.

    *A sign is included only if it is observed and documented at time of the impairment evaluation.

11. The criteria in Table 17.1 of the fourth edition guidelines differ from the criteria for a clinical diagnosis used by the medical profession for diagnosing CRPS. A clinical diagnosis for CRPS is based upon the "Budapest criteria". That standard differs from Table 17.1 of the fourth edition guidelines in several respects, but most importantly in respect of current signs found on examination. The Budapest criteria only requires at least one sign in at least two of the four categories in section 3 of Table 17.1. Table 17.1 requires at least one sign in all four categories to be satisfied. Dr Reiter referred to this when she opined that the appellant met the clinical diagnosis using the Budapest criteria but did not meet the requirements set out in Table 17.1.[7]

THE APPEAL

12. On 23 October 2020, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).

13. The WorkCover Medical Assessment Guidelines (the Guidelines) set out the practice and procedure in relation to appeals to Medical Appeal Panels under s 327 of the 1998 Act.

14. The appellant claims that the medical assessment should be reviewed on the ground that the MAC contains a demonstrable error and/or the assessment was made on the basis of incorrect criteria within the meaning of s 327(3) of the 1998 Act. The appellant also sought to rely on further evidence.

15. The Appeal was filed within 28 days of the date of the MAC. The submissions in support of the grounds of appeal are referred to later in these Reasons.

PRELIMINARY REVIEW

16. The Appeal Panel (AP) conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Guidelines. As a result of that preliminary review, the AP determined, for the reasons provided subsequently, that a ground of appeal had been established.

17. The appellant requested a re-examination by an AMS who is a member of the AP. It was submitted that a re-examination is necessary due to the issues identified in the examination conducted by the AMS of "differences in CRPS criteria observed by the AMS in comparison to those observed by Dr Min Lai and Dr Reiter."[8]

18. The respondent submitted that a re-examination should not take place.[9]

19. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales & Ors*[10] (*Police Force*) Davies J stated:[11]

> "32. The Appeal Panel's function was either to confirm the MAC or to revoke it and issue a new certificate - s 328(5). On one view, that subsection read together with s 329 might be thought to preclude the Panel making a referral at any stage for further assessment even from one of its own members. That would be an unfortunate result and would not sit easily with s 324(3) which appears to contemplate an assessment 'in the

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[7] Reply, p 15.
[8] Appellant's submissions, p 4.
[9] Respondent's submissions, [3.2].
[10] [2013] NSWSC 1792
[11] At [32]-[33].

course of an appeal'. The Guidelines issued pursuant to s 376 of the 1998 Act would also appear to authorise such a further assessment (assuming paragraph 45 thereof is within power).

33. However, if an assessment can be carried out in the course of an appeal that assessment cannot take place before the Appeal Panel has determined that there is an error in the certificate leading to the need for a further assessment. Such an assessment may be needed because the Panel, although in a position to revoke a certificate for error, is not in a position to issue a new one without such an assessment."

20. In applying these principles, the Court in *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Dickinson*[12] held that the Appeal Panel had erred by ordering an assessment of the worker on an incorrect basis in circumstances where there was otherwise no proper basis to undertake a further assessment.

21. The AP is not empowered to undertake a further assessment unless it has determined that there is an error. For the Reasons subsequently provided, the only error is the application of s 323 which can be undertaken without a need for a re-examination. The AP has not found error on the grounds on which the appellant has based this application.

22. In these circumstances the application to re-examine the appellant by the AP is declined.

APPLICATION TO ADDUCE FRESH EVIDENCE

23. The appellant sought to rely on a statement dated 19 November 2020 which discussed the examination conducted by the AMS and two-coloured photographs "provided by Dr Lai".

24. The appellant submitted:[13]

> "The appellant seeks leave to rely on statement of the appellant dated 19 November 2020 which is the appellant's account of the examination conducted by the AMS and deals with significant discrepancies between findings in the Medical Assessment Certificate and the Appellant's account of the examination conducted by the AMS. The Appellant's statement is central to the issues to be determined in the appeal."

25. The appellant also submitted that the colour photographs "are objective evidence in support of demonstrable error in assessment by the AMS, or at least raise a proper basis for a re-examination by an Appeal Panel member to remove the inference of demonstrable error."[14]

26. The respondent submitted that the appellant has not provided reasons why the further evidence should be admitted.

27. It submitted that the evidence is not admissible under s 328(3) in accordance with the reasoning in *Ross v Zurich Workers Compensation Insurance*[15] (*Ross*). It also referred to the observations of Hodgson JA in *Lukacevic v Coates Hire Operations Ltd*[16] (*Lukacevic*).

[12] [2016] NSWSC 101.
[13] Appellant's submissions, p 4.
[14] Appellant's submissions, [14].
[15] [2002] NSWWCCPD 7.
[16] [2011] NSWCA 1123 at [98]-[99].

28. The respondent also submitted that it was not the intention of the medical appeal system to allow additional evidence to challenge an assessment "due to a disagreement on findings".[17] The respondent referred to the decision of *Petrovic v BC Serv No 14 Pty Ltd*[18] (*Petrovic*) where the Court held that the "additional relevant information … does not include matters going to the process whereby the AMS makes his or her assessment." The statement was not "additional relevant information" for the purposes of s 327(3)(b) of the 1998 Act.

Reasons

29. It is noted that the AMS does not respond to any complaints or suggestions that he was wrong or in how the examination was conducted.[19]

30. Section 327(3)(b) of the 1998 Act provides that the material must be "additional relevant information" which was not available to and could not have been obtained prior to the examination.

31. Section 328(3) of the 1998 Act provides that the Appeal Panel is not to receive evidence that is fresh evidence, or evidence in addition to, or in substitution for, the evidence received in relation to the medical assessment appealed against, unless the evidence was not available to the appellant before the medical assessment and could not reasonably have been obtained by the appellant before the medical assessment.

32. In *Lukacevic,* Hodgson JA stated:[20]

> "Having regard to the matters I have set out, in my opinion it would be reasonable for an AP not to admit evidence raising such a dispute unless that evidence had substantial *prima facie* probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, simply by raising such a dispute, going to a matter relevant to the correctness of the certificate, a worker could put the AP in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of the WIM Act."

33. In *Lukacevic,* Handley AJA considered evidence pertaining to the examination process as "fresh evidence" within the meaning of s 328(3).[21] His Honour also considered that the Panel could exercise its discretion in deciding whether to admit the evidence.[22]

34. The appellant failed to articulate whether the application was made under s 327(3)(b) and/or s 328(3) of the 1998 Act.

35. As the respondent correctly submitted, the decision of *Petrovic* does not support the appellant's submission that the report is admissible pursuant to s 327(3)(b). This is because his Honour held that the provision "does not include matters goings to the process whereby the AMS makes his or her assessment".

36. Based on the decision of *Petrovic*, we do not accept that the report is admissible pursuant to s 327(3)(b) of the 1998 Act.

37. Given that the Court of Appeal held in *Lukacevic* that the AP has a discretion to accept or reject the statement pursuant to s 328(3), we are of the view that it should be rejected.

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[17] Respondent's submissions, [2.18].
[18] [2007] NSWSC 1156 at [31]-[34].
[19] See the discussion by Hodgson JA in *Lukacevic v Coates Hire Operation Pty Ltd* [2011] NSWCA 112 (*Lukacevic*) at [78].
[20] At [76].
[21] *Lukacevic* at [100].
[22] *Lukacevic* at [103].

38. The appellant's statement dated 19 November 2020 raises a number of concerns regarding the examination process. He referred to a pre-screening process the day before relating to COVID-19 requirements which lasted 3 to 4 minutes and the face to face assessment which was "a reasonably short assessment".

39. The appellant asserted that he was misquoted by the AMS when it was reported that the appellant stated that he could not use his right upper limb. He also stated that he never claimed that he "cannot move his fingers".

40. The appellant states that he was not asked if he had any complaints in relation to "colour, temperature and sweating". He states that his previous statement refers to increased sweating in the right hand.

41. The appellant states that he did not hold any documents in his right hand and was specifically advised by his solicitor 3 September 2020 in a letter dated "not to take any documents or reports with me to the appointment".

42. The letter dated 3 September 2020 states:

> "The worker should take to the AMS assessment all radiological films and radiological reports relating to the claim (including x-rays, scans, MRI's). No other documents or reports can be given to the AMS."

43. The letter from the solicitor to the appellant does not state that he cannot take any documents or reports into the examination. In fact, the letter states the opposite, that is the appellant "should take … all radiological films and reports relating to the claim".

44. The appellant stated that his arm was not measured with a tape measure. This is inconsistent with what is recorded in the MAC. The movement of his shoulders, elbows and wrist were not measured with any measurable instrument and the right shoulder was not assessed at all. The wrist and forearms were examined although the brace was never removed during the examination process.

45. The appellant stated that the AMS "put purple dots on my right and left arms during the assessment" but did not use any measuring assessment.

46. The appellant failed to address why the statement is admissible which essentially criticises the process of the examination. The complaints are readily raised and at least in one respect, the purported explanation by the appellant that he did not have documents because his solicitor wrote to him and said they could not be brought to the examination, that explanation was wrong.

47. The AMS is not able to respond to the statement and we can only refer to the contents of the MAC in discussing the appellant's allegations. In that respect we observe that the measurements of loss of movement of the various joints in the upper extremity are precise and inconsistent with the appellant's allegations.

48. For these reasons we reject the statement.

49. The photographs of the hand were attained prior to the medical assessment. Black and white photographs were attached to the report of Dr Lai and included in the Application.[23] The colour photographs are otherwise not admissible pursuant to either s 327(3)(b) or s 328 of the 1998 Act.

[23] Application, pp 15-16.

50. The appellant did not otherwise submit how the coloured photographs are "objective evidence" or how they are different form the black and white photographs. The photographs show a clear tan line which presumably arises from the fact that the appellant wears a brace. Dr Reiter also observed the tan mark on physical examination.[24] The photographs also appear to depict that some of the right fingers are swollen.

51. The photographs were probably taken in February 2020. It is difficult in these circumstances to accept how the photographs are objective evidence of the presence of symptoms before the AMS in October 2020. The AP returns to this issue latter in these Reasons when discussing the requirement that the appellant must establish each of the four elements in point 3 of Table 17.1 at the time of examination.

52. The AP does not accept that the colour photographs contribute anything further than what is shown in the black and white photographs that were included in the Application and were before the AMS and the AP. For these further reasons, the colour photographs are rejected.

EVIDENCE

53. The AP has before it all the documents that were sent to the AMS for the original assessment and has referred to portions of the evidence and taken them into account in making this determination.

GROUND OF APPEAL – INSUFFICIENT/INADEQUATE REASONS/PRIOR MEDICAL OPINION

Submissions

Appellant's submissions

54. The appellant referred to the opinion of Dr Lai who diagnosed CRPS and assessed 56% WPI. That report referred to the opinion of the treating specialist, Dr Khor, who also diagnosed CRPS. It was submitted that the reasoning provided by Dr Lai "was extensive and related to" chapter 17 of the fourth edition guidelines.

55. The appellant submitted that insufficient reasons were given "particularly for declining to assess WPI as a case of chronic regional pain syndrome".[25] The AMS has taken "a much more general approach" when he decided he could not find "any" symptoms. This contrasted with the opinions of Dr Lai and Dr Reiter.

56. The appellant submitted that the AMS did not undertake a pinprick test perhaps for COVID-19 reasons.

57. The AMS recorded under the heading "present symptoms" that the appellant did not complain of any differences in colour, temperature and sweating. This clearly was an error because the appellant complained of sweating in his witness statement and Dr Lai's report had two photographs which accorded with the comments under "Current status" in that report which showed temperature and colour changes, and which were observed by Dr Lai.

58. It was submitted that given the large difference in WPI resulting from a finding of CRPS, it was incumbent on the AMS to address the symptoms noted by Dr Lai and Dr Reiter and that were applicable to Table 17-1. Instead, the AMS "has taken a very general approach to documenting his findings on examination"[26] and it is unknown whether the AMS properly and fairly conducted the examination. The comment by the AMS that the appellant did not try his best "indicates some problematic aspect to the examination".

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[24] Reply, p 6.
[25] Appellant's submissions, [7].
[26] Appellant's submissions, [11].

Respondent's submissions

59. The respondent referred to the obligation to provide reasons as enunciated by the High Court in *Wingfoot Australia Partners Pty Ltd v Kocak*[27] (*Wingfoot*) which was discussed by Campbell J in *State of New South Wales v Kaur*[28] (*Kaur*).

60. It was submitted that the reasons provided by the AMS showed that the appellant did not have signs of vasomotor and sudomotor changes on examination. In these circumstances the AMS could not be satisfied that the diagnostic criteria for a finding of CRPS pursuant to Table 17.1 of the fourth edition guidelines had been met.[29] The findings by the AMS were sufficient to explain the path of reasoning in accordance with the test articulated in *Wingfoot*.

61. The respondent further submitted that the appellant essentially questions the clinical judgement of the AMS which is not an appealable error. It is not the function of the Medical Appeal Panel [sic AMS] to decide between competing medical opinions. The very nature of the diagnosis made under Table 17.1 requires a contemporaneous examination and the AMS cannot simply rely on the clinical observations of other doctors. Previous decisions have referred to the pre-eminence of clinical observations by the AMS: *Parker v Select Civil Pty Ltd*.[30]

62. The observation by the AMS that the appellant may have presented with sub-optimal performance is a further reason why less weight would be given to the opinion of Dr Lai.

Reasons

63. The AMS recorded the following findings on physical examination:[31]

> "When observing him, I can certainly see he can use the right hand to hold the documents and the letters for me to see. I cannot see any features to support the diagnosis of chronic regional pain syndromes. The two hands are the same colour, same temperature and no differences in sweating. I cannot see any difference in the growth of nail and hair. There is no soft tissue atrophic change. Most importantly on tape measurement, the right arm and the right forearm, they were both respectively half a centimetre bigger than the left side, which fits into the picture of right hand dominant but cannot fit into the picture that he claimed to be totally useless in the right upper limbs and cannot actively move it without the use and support of the other arm in all the joint."

64. Later in his Reasons the AMS stated:[32]

> "I believe Mr Damien Windley have reached maximum medical improvement.
> It is already five years since the injury. He has suffering problems, mainly in the right wrist, but I do not think he tried his best to do the physical examinations even in the normal left upper limbs. He has a lot of stiffness in all the joints, which cannot be explained, and failure of improvement with all sort of pain management does not make sense either. He is not qualify as a case of chronic regional pain syndrome according to the criteria because there is no features suggestive of vasomotor changes in terms of skin colour, skin temperature, oedema, no differences in sweating and no atrophic changes in the soft tissues. There certainly is no x-ray and bone scan to support either, but definitely he is not a case of chronic regional pain syndrome."

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[27] [2013] HCA 43.
[28] [2016] NSWSC 346 at [26].
[29] Respondent's submissions, [2.13].
[30] [2018] NSWSC 140 (*Parker*) – see [76] below.
[31] MAC, p 3.
[32] MAC, p 5.

65. The AMS has a statutory obligation to provide reasons pursuant to s 325 of the 1998 Act. These principles were discussed in *El Masri v Woolworths Ltd*[33] (*El Masri*) a decision involving judicial review of a decision of an Appeal Panel, when Campbell J stated:[34]

> "As I have said, and at the risk of repeating myself unduly, the process is one of expert evaluation. Often when judgment of any type is called for, there will be a gap between expression of reasons and articulation of decision which cannot itself be fully articulated. That gap constitutes what might be called judgment. Although, as Ms Allars reminded me, *Wingfoot* does not necessarily apply to this case because it was a case where there was a statutory obligation to give reasons, and in this case the obligation to give reasons is implied by the general law as explained in *Campbelltown City Council v Vegan* [2006] NSWCA 284; (2006) 67 NSWLR 372, what their Honours said at [55] of *Wingfoot* must be applicable. Basically, the statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law. Applying that standard, it is clear what was decided and why, as is the reasoning process that led to the decision, especially if one has regard to what was said by the Panel at paragraph 18 which I will not further set out."

66. As the respondent correctly submitted, Campbell J expressed similar reasons in *Kaur*.

67. The reasons of the AMS are not general as was submitted by the appellant. It is clear from the above passages set out at [63] and [64], that the AMS was not satisfied at the time of assessment that the appellant had either a vasomotor sign or a sudomotor/oedema sign. It is an essential requirement of Table 17.1 that the worker display these symptoms at the time of the examination. The AMS clearly reported that he did not. For that reason alone, the reasoning process is clear and explains why the appellant failed in establishing CRPS.

68. The appellant referred to the opinions expressed by Dr Lai, Dr Reiter and, in part, to the opinion expressed by the treating pain specialist, Dr Khor.

69. Symptoms and signs of CRPS may and do fluctuate over time. They may improve with or without treatment and they may subsequently reappear. That Dr Lai reported that all four clinical signs in section 3 of Table 17.1 were present in February 2020 does not mean that they were present in October 2020.

70. Contrary to its submissions, the appellant's case on this issue is not categorially supported by the examinations undertaken by Dr Reiter. In March 2019 Dr Reiter did not find vasomotor changes on examination.[35] In April 2020 Dr Reiter did not observe vasomotor changes or pseudomotor/oedema changes.[36] Accordingly, whilst Dr Reiter observed at the last examination that the appellant still met the Budapest criteria for diagnosing CRPS, she also explained why the appellant did not then meet the more stringent criteria contained in Table 17.1 on the day of that examination.

71. The appellant referred briefly to the opinion expressed by Dr Khor, Pain Management Specialist. It is correct that Dr Khor examined the appellant over an extensive period, provided several reports and diagnosed the appellant with CRPS[37]. However, several matters are noted about Dr Khor's opinion.

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[33] [2014] NSWSC 1344.
[34] *El Masri* at [50].
[35] Reply, p 8.
[36] Reply, p 15.
[37] See Application, pp 38-54.

72. First, Dr Khor did not refer to the diagnosis of CRPS as being based on Table 17.1. The various reports refer to some of the signs required but not all the signs specified in section 3 of Table 17.1. For example, there is a constant reference to intractable pain and a reference to swelling.[38] It may be that Dr Khor based the diagnosis of CRPS on the Budapest criteria, which, as the AP has earlier noted, is a less stringent test. Indeed, the doctor may have applied, in accordance with standard medical practice, the Budapest criteria in diagnosing the appellant with CRPS. That diagnosis does not necessarily mean that even in accordance with the opinion of the treating specialist, the appellant satisfied the diagnosis of CRPS under Table 17.1.

73. Further, the symptoms and signs observed by Dr Khor in 2018 and 2019 do not necessarily accord with those present in October 2020.

74. The AMS is not obliged to accept the opinion of any doctor and is obliged to independently assess the appellant and determine the matter as at the day of presentation. Further, it is not a demonstrable error that the AMS has reached a conclusion different from that expressed by another doctor qualified by one of the parties: *Merza v Registrar of the Workers Compensation Commission*[39].

75. That observation is not dissimilar to the comments made by Campbell J in *Kaur* when his Honour noted that the AMS does not sit as a decision maker choosing between conflicting opinions but to "form and give his or her own medical opinion on the medical question referred by applying his or her own medical experience".[40]

76. Finally, as the respondent correctly submitted, the "pre-eminence of the clinical observations" was emphasised in *Ferguson v State of New South Wales*[41] when Campbell J referred with approval to *NSW Police Force v Daniel Wark*[42]. Harrison AsJ applied these observations in *Parker*.

77. Whilst the appellant correctly submitted that he had previously reported symptoms to satisfy Section 2 Table 17.1, the diagnosis of CRPS was not justified based on present symptomatology. This is the explanation provided by the AMS and set out at [64] herein. The AMS made clear findings that the appellant did not present with colour, temperature or sweating signs and did not present with differences in the growth of nails and hair. That is a clear finding that the appellant did not present with at least vasomotor changes on the day of the examination.

78. This ground of appeal is rejected.

GROUND OF APPEAL – THE EXAMINATION PROCESS

79. The appellant sought a re-examination based on the faults articulated in the appellant's statement.

80. For the reasons expressed earlier we have rejected the statement.

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[38] Application, p 52.
[39] [2006] NSWSC 939 at [51].
[40] *Kaur* at [25].
[41] [2017] NSWSC 887 at [23].
[42] [2012] NSWWCCMA 36 at [33].

81. There is a presumption of regularity that the AMS has performed such tests as might be required: *Jones v Registrar of the Workers Compensation Commission* (*Jones*)[43]. A similar presumption arises with respect to regularity which affects administrative action: *Bojko v ICM Property Services Pty Ltd*[44] and *Jones*[45].

82. The appellant also submitted that the stark difference between the assessment of range of motion between what was observed by the AMS and what was recorded by Dr Reiter "is indicative of a demonstrative error".[46]

83. As mentioned earlier, a difference in an opinion between an AMS and a prior qualified doctor is not in itself a demonstrable error. The Supreme Court decisions of both *Merza* and *Kaur* support the fundamental proposition that the AMS is required to make his or her own findings and does not choose between competing medical opinions.

84. Furthermore, the AMS assessed 10% WPI for loss of motion of the right wrist, not 5% as the appellant submitted. The differences in the assessments of 10% and 5% was due to the discount made by the AMS to the overall loss.

85. The AMS also expressed the opinion about the appellant's presentation and demeanour. That comment did not, as the appellant submitted, suggest a "problematic aspect to the examination". Rather, the comment reflected the AMS's view he was dissatisfied with what he observed and was told by the appellant during the examination.

86. This ground is rejected.

GROUND OF APPEAL – S 323 DEDUCTION

Submissions

87. The appellant submitted that it was unclear why the AMS made a s 323 deduction as no pre-existing condition or abnormality was identified by the AMS.

88. The respondent submitted that this was a typographical error as in the body of the MAC the AMS clearly stated that there was an adjustment for the left wrist impairment. This assessment was consistent with clause 2.20 of the fourth edition guidelines.

Reasons

89. The AMS provided the following reasons concerning the difference in the movement of the injured right wrist and uninjured left wrist. The AMS stated:[47]

> "Looking at the right wrist, using AMA Guide 5th Edition, figure 16-28, 20˚ of flexion is 7%, 20˚ of extension is 7%, so that will give rise to 14%, but we have to consider the left side, which has 20˚ of flexion, also 7% and 50˚ of extension is 2%, that will give rise to 9%. The difference in performance between the two wrists only give rise to 5% upper limb impairment. Using figure 16-31, in the radial deviation, the right side is 2%, ulnar deviation is 3%, that will give rise to 5% on the right side, but then the left side also have 1% for radial deviation and 1% for ulnar deviation. So the difference is 3%. When they are combined together, that will give rise to an 8% upper limb impairment and taking into the consideration of the poor function of the left as well. That means there is only a 5% whole person impairment due to the injury."

[43] [2010] NSWSC 481 at [50].
[44] [2009] NSWCA 175 at [36] per Handley JA, with whom Allsop and Giles JJA agreed.
[45] At [36].
[46] Appellant's submissions, [15].
[47] MAC, p 5.

90. Later in the MAC the AMS stated “N/A”[48] in relation to the question to whether the body part was “affected by the previous injury, pre-existing condition or abnormality”. However, in the Table (see [92] below) at the conclusion of the MAC the AMS assessed 10% WPI and deducted one-half due to the operation of s 323.

91. The reasoning process by the AMS is an application of clause 2.20 of the fourth edition guidelines. That provision requires a comparison between the injured joint and the uninjured joint in the contralateral joint.

92. There is a gross inconsistency between the reasons provided in the MAC and the s 323 deduction made in the Table. The error is more than typographical and reflects a misunderstanding that clause 2.20 is a s 323 deduction. The AP agrees that the purported s 323 deduction is incorrect and amounts to a demonstrable error as articulated by the Court of Appeal in *Vannini v Worldwide Demolitions Pty Ltd* (*Vannini*),[49] where Gleeson JA observed that, consistent with the observations of Basten JA in *Mahenthirarasa v State Rail Authority of New South Wales*[50] a “demonstrable error must be apparent in findings of fact or reasoning contained in the medical assessment certificate, although the error may be established in part by reference to materials that were before the approved medical specialist”.[51]

93. This ground of appeal is upheld.

REASSESSMENT

94. Having found error, the AP is required to reassess according to law: *Drosd v Nominal Insurer.*[52]

95. For the reason set out herein, the only error is the misapplication of clause 2.20 of the fourth edition guidelines and the methodology of treating this as a s 323 deduction. Having rejected the other grounds of appeal, the AP is in a position to reassess in the absence of examination.

96. The AP adopts the precise assessments of the left and right wrist which are repeated latter in the MAC and set out at [89] herein. The variance between the upper extremity impairment (UEI) of the right wrist (19%) and the UEI of the left wrist (11%) totals 8% UEI which equates to 5% WPI.

97. The AP applies clause 2.20 of the fourth edition guidelines and deducts the impairment resulting from the loss of motion of the uninjured left wrist from impairment resulting from the loss of motion of the injured right wrist.

98. Given the duration of the symptoms, the AP is satisfied that the appellant has attained maximum medical improvement. There is no basis to make any deduction pursuant to s 323 of the 1998 Act.

DECISION

99. For these reasons, the MAC is revoked, and a new Medical Assessment Certificate is issued. The new Medical Assessment Certificate is attached to this statement of reasons.

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[48] MAC, p 4.
[49] [2018] NSWCA 324 (*Vannini*) at [90].
[50] [2008] NSWCA 101.
[51] *Vannini* at [86].
[52] [2016] NSWSC 1053.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE MEDICAL 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

WORKERS COMPENSATION COMMISSION

APPEAL PANEL

MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter No: **4250/20**
Applicant: **Damien Windley**
Respondent: **Athena Bakehouse Pty Ltd**

This Certificate is issued pursuant to section 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998.*

The Appeal Panel revokes the Medical Assessment Certificate of Dr Ho 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 fourth edition guidelines	Chapter, page, paragraph, figure and table numbers in AMA 5	% WPI	WPI deductions pursuant to s 323 for pre-existing injury, condition or abnormality (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
Right upper extremity (wrist)	27 March 2015		Figure 16-28, 31	5%	N/A	5%
Total % WPI (the Combined Table values of all sub-totals)					**5%**	

John Harris
Arbitrator

Dr Mark Burns
Approved Medical Specialist

Dr Brian Noll
Approved Medical Specialist

4 February 2021

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE MEDICAL 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