WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4041/18**
Appellant:	**Seton Villa**
Respondent:	**Mele Fotu**
Date of Decision:	**12 August 2019**
Citation:	**[2019] NSWWCCMA 110**

Appeal Panel:	
Arbitrator:	**R J Perrignon**
Approved Medical Specialist:	**Dr Mark Burns**
Approved Medical Specialist:	**Dr Roger Pillemer**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 8 September 2015, the respondent worker, Ms Fotu, injured her neck and both shoulders while pushing a client in a wheelchair in the course of her duties as a community support worker. In these proceedings, she sought compensation for impairment of the whole person with respect to her neck and both shoulders. Injury to the shoulders was disputed.

2. By a Certificate of Determination dated 9 October 2018, Arbitrator Isaksen found that there had been soft tissue injury to both shoulders, and aggravation of degenerative changes in the cervical spine. The shoulders and cervical spine were referred for assessment to Approved Medical Specialist Dr Long.

3. On 14 January 2019, Dr Long assessed 18% whole person impairment (6% cervical spine; 5% right upper extremity – shoulder; 8% left upper extremity – shoulder) as a result of injury on 8 September 2015.

4. The employer appeals against this assessment. It takes no issue with the assessment of the cervical spine, but says that a 0% whole person impairment should have been assessed in respect of both shoulders, because the Approved Medical Specialist found that the only impairment in respect of the shoulders resulted from injury to the neck, rather than from injury to the shoulders. As no claim was made in these proceedings in respect of a condition of the shoulders consequent upon neck injury, and no referral was made for assessment of any such condition, the employer submits that the Approved Medical Specialist lacked power to assess impairment resulting from a consequential condition of the shoulders.

5. On 15 March 2019, the Registrar by his delegate was satisfied that, on the face of the application, the ground of demonstrable error was made out, and referred the matter to this Appeal Panel for determination.

6. 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.

PRELIMINARY REVIEW

7. On 24 April 2019, 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*. Being satisfied that there was error on the face of the certificate, the Panel referred the worker for examination by Approved Medical Specialist Dr Burns. His report is extracted below.

EVIDENCE

Documentary evidence

8. The Appeal Panel has before it all the documents that were sent to the Approved Medical Specialist for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

9. The effect of the assessment is set out above. Those parts of the medical certificate that are relevant to the appeal are set out in the body of this decision.

SUBMISSIONS

10. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.

11. The submissions of the appellant employer, though lengthy, may be distilled into seven propositions:

    (a) In her Application to Resolve a Dispute, the worker alleged that she had suffered frank injuries to her neck and both shoulders on 8 September 2015. She did not allege that the conditions of her shoulders resulted from injury to the neck on that date.

    (b) On 9 October 2018, the Arbitrator found that there had been frank injuries to the neck and both shoulders on 8 September 2015. He made no finding to the effect that any condition of the shoulders resulted from injury to the neck.

    (c) In accordance with the Arbitrator's findings, the Registrar referred the neck and both shoulders to Approved Medical Specialist Dr Long for assessment of whole person impairment as a result of injury on 8 September 2018. No referral was made for assessment of any condition of the shoulders resulting from injury to the neck.

    (d) The Approved Medical Specialist found that the assessed impairment of the shoulders resulted from injury to the neck. That implied a finding that no impairment resulted from injury to the shoulders.

    (e) His assessment of impairment flowing from a condition of the shoulders consequent upon neck injury exceeded his power, because no referral for such an assessment was made.

    (f) He should have assessed a 0% whole person impairment in respect of each shoulder, because he had found that no impairment resulted from injury to either shoulder on 8 September 2015.

(g) If the Panel on re-examination determines that there is assessable impairment resulting from injury to either shoulder, it should exclude from the assessment any impairment of either shoulder resulting from injury to the neck. That should be at least 50% of total impairment referable to either shoulder.

12. The respondent worker submits, in summary, as follows:

(a) The Approved Medical Specialist accepted the Arbitrator's finding that there had been a soft tissue injury to both shoulders on 8 September 2015. He took a history of pain in the shoulders on the day of injury. He quotes the arbitrator's findings on injury (page 7, Medical Assessment Certificate). He notes ultrasound results describing thickening of both subacromial bursas, which cannot result from a condition of the neck and is consistent with soft tissue injury to the shoulders.

(b) The radicular symptoms described by the Approved Medical Specialist (page 3) are confined to the arms and hands. It is these symptoms, not the shoulder symptoms, which result from the neck injury.

(c) The Approved Medical Specialist has assessed whole person impairment, not by reference to radicular symptoms referred from the neck, but by reference to restrictions in the range of motion, as appropriate. Such restrictions are not caused by radiculopathy, but by impingement due to the observed bilateral thickening of the bursas. Restricted range of motion is not among the criteria for radiculopathy: par 2.17 of the *Guidelines*.

(d) Having assessed whole person impairment on a range of motion basis, an assessment of 0% urged by the appellant would be inappropriate.

(e) The arbitrator's function is to determine whether there has been an injury as claimed. The function of the Approved Medical Specialist is to determine whether injury, so determined, gives rise to permanent impairment: *Wikaira v Registrar of the Workers Compensation Commission* [2005] NSWSC 954. In this case, the Approved Medical Specialist has assessed impairment resulting from the injury to the shoulders which the arbitrator found to have occurred.

(f) To the extent that it contradicted the Arbitrator's finding as to injury, the Approved Medical Specialist's observation (at page 7) that there was no specific injury to the shoulders apart from bursitis, was beyond power.

(g) If the Appeal Panel identifies error, the worker should be referred for further assessment by a member of the Panel.

FINDINGS AND REASONS

Reasons of the Approved Medical Specialist

13. The Approved Medical Specialist took a detailed history of the mechanism of injury on 8 September 2015. He noted:

> "Immediately, she noted pain in the superior right and left shoulder and in the upper thoracic back".

14. By the next day, he noted "particularly severe pain" in those body parts, with tingling in the hands and elsewhere.

15. Dr Long recorded the following present symptoms in the shoulders (par 4):

> **"Right and Left Shoulders:** Ongoing pain seeming radiating from her neck, associated with painful restriction of movement of both the right and left shoulders. The shoulder and neck pain are greatly aggravated when she attempts to drive with her hands placed on the steering wheel. Because of her ongoing symptoms, driving is very restricted."

16. He measured restrictions in the range of motion of both upper extremities and recorded them in a table.

17. He noted the report of a bilateral shoulder ultrasound dated 16 October 2017, which recorded a normal examination but for "minor thickening of both subacromial bursas and minor bunching".

18. Under the heading, "Summary of injuries and diagnoses", he recorded (par 7, emphasis added):

> "The claimant, who is now 41 years of age, provided a clear history of sustaining an injury to her neck with initial pain in the superior right and left shoulders, at work on 8 September 2015. There was no history of pre-existing injury or symptoms related to her neck or right or left shoulders. She has not sustained any further injury since the initial injury of 8 September 2015. She has ongoing pain and restriction of movement of her head and neck, with dysmetria and paravertebral muscular guarding. She has ongoing non-verifiable radicular complaints affecting the left arm.
>
> **She has ongoing pain and painful restriction of movement of the right and left shoulders, but there is no record of her having sustained a specific injury to her right or left shoulders, apart from the initial pain noted on the superior aspect of the right and left shoulders. Ultrasound of the right and left shoulders on 16 October 2017 failed to reveal any specific abnormality in the right or left shoulders, apart from mild changes consistent with right and left subacromial bursitis.**
>
> **It is considered that the ongoing symptoms in her right and left shoulders is [sic] secondary to the pain occurring in her head and neck.**
>
> The Arbitrator, in a determination of 9 October 2018, indicated:
>
> > *'The applicant sustained a soft tissue injury to both left and right shoulders in the course of her employment with the respondent on 8 September 2015.*

> *The applicant sustained an injury by way of an aggravation of degenerative changes in her cervical spine in the course of her employment with the respondent on 8 September 2015…'*
>
> It is considered that the injury caused aggravation of pre-existing asymptomatic degenerative changes of the worker's spine."

19. Under the heading, "Consistency of presentation", he said:

> "There were no inconsistencies found during the consultation, excepting that the secondary changes in her shoulder following injury to her neck result in a greater impairment than would be determined from the injury to her cervical spine alone."

20. He indicated (par 10a) that in making his assessment he had taken account of radicular complaints in the left arm, and painful restriction of movement in both shoulders, among other things.

Consideration and findings

21. The distinction between the functions of an arbitrator and an Approved Medical Specialist on assessment of whole person impairment were described in *Toll Pty Limited v Ballantyne* [2008] NSWWCCPD 46:

> "Once injury is determined by the arbitrator, … it is for an AMS to then assess the degree of permanent impairment as a result of that injury and whether any proportion of that impairment is due to any previous injury …".

22. As indicated, Arbitrator Isaksen found that there was soft tissue injury to both shoulders. The shoulders and neck were referred for assessment to the Approved Medical Specialist. Leaving the neck aside for present purposes, it was his task to assess whole person impairment with respect to the shoulders, and to determine whether and to what extent that impairment resulted from the soft tissue injury to the shoulders found by the Arbitrator.

23. The Approved Medical Specialist was aware that the Arbitrator had found there was a soft tissue injury to the shoulders on 8 September 2015. He quoted that finding at par 7 of his reasons (extracted above). In the same numbered paragraph, he observed that the symptoms in the worker's shoulders were "secondary to the pain occurring in her head and neck".

24. The symptoms to which he was referring cannot have been radicular symptoms. As indicated, radicular symptoms were identified not in the shoulders, but in the arms. The only symptoms recorded in the shoulders on examination were the "painful restriction of movement in both shoulders" (at par 10a), which he measured in his table.

25. It follows that the Approved Medical Specialist considered the permanent impairment of the shoulders, which he assessed by reference to restrictions in their range of motion, resulted from injury to the neck.

26. As we understand it, the worker submits that, because restrictions of movement in the shoulders cannot have been due to radiculopathy, but rather to bursitis secondary to soft tissue injury to the shoulders, the Approved Medical Specialist's assessment should be interpreted as an assessment of whole person impairment as a result of injury to the shoulders. That submission contradicts the express finding of the Approved Medical Specialist that shoulder symptoms resulted from injury to the neck. His assessment can only be interpreted by reference to his express reasons.

27. The worker also relies on the decision of the Commission in *Carmody v Merriman and Sons Pty Limited* [2003] NSWWCCPD 27 (*Carmody*). In that case, a worker had been referred to an Approved Medical Specialist for assessment of permanent impairment of the back as a result of injury in 2001. The Approved Medical Specialist assessed not only permanent impairment of the back, but also loss of efficient use of the left leg, due to radiculopathy caused by injury to the back. Flemming DP found that the Approved Medical Specialist was entitled to do so.

28. This decision does not assist the respondent, because it relates to an injury suffered prior to 1 January 2002. Injuries under the Table of Disabilities were subject to a very different assessment regime. Under that regime, radiculopathy in a lower extremity caused by a spinal condition was assessable as a loss of the relevant extremity, and was assessed by reference to a percentage of a worst case. Under the regime which applies to injuries on or after 1 January 2002, such radiculopathy is taken into account in the assessment of loss of spinal function. The task of the assessor is not to assess the loss of use of a limb as a percentage of the worst case, but to assess loss of function of a body system as part of an assessment of impairment of the whole person. Contrary to the respondent's submissions, *Carmody* is not authority for the proposition that, under the current regime, an Approved Medical Specialist is entitled to assess permanent impairment of the shoulders due to a condition of the neck, where the only relevant findings have been injury to the neck and injury to the shoulders.

29. In the case of Ms Fotu, the assessment of whole person impairment, by reference to restriction of movement resulting from injury to her neck, did not comply with the Registrar's referral, or with the findings of the Arbitrator on which the referral was based. In accordance with that finding, the referral had required an assessment of whole person impairment as a result of injury to the shoulders.

30. The assessment which occurred – that is, an assessment of impairment of the shoulders resulting from injury to the neck - was beyond power, and amounted to demonstrable error. For that reason, the certificate must be set aside.

31. In their submissions, both parties acknowledged the possibility that the Panel might refer the worker for examination by one of its members. It has done so. The report of Approved Medical Specialist Dr Burns follows.

Report of Approved Medical Specialist Dr Burns

> **"1. The workers medical history, where it differs from previous records**
>
> Ms Fotu confirmed the medical history recorded by Dr Long. She also confirmed that the only investigations of her shoulders were a bilateral shoulder ultrasound carried out on 16 October 2017. This revealed minor bilateral subacromial bursitis and minor bunching of the supraspinatus tendons only. No shoulder treatment and no specialist referral were carried out after this investigation.
>
> **2. Additional history since the original Medical Assessment Certificate was performed**
>
> She reported that since her assessment by Dr Long that she has had no change in her symptoms or treatment.
>
> <u>Current Symptoms:</u>
>
> She reported constant neck pain to the left and right of the midline. She stated that this was associated with a constant headache. She reported that this pain radiates to the top of both shoulders, down through the scapula region and around into her pectoral region. She stated that this radiation is also constant.

On more detailed questioning, she stated that the neck pain and the shoulder pain are the same pain and not different. When the neck pain is more severe, then the shoulder pain is also more severe. She never has one without the other and they never vary from one to the other in nature or severity.

Current Treatment:

Ms Fotu continues to see Dr Hossain, her GP as required. She currently only takes occasional Panadol for pain relief as she continues to breast feed her 14-month-old child.

3. Findings on clinical examination

Ms Fotu was 170cm tall and weighed 90kgs. She was noted to walk with a normal gait and appeared in no distress at rest. She was able to sit comfortably for 30 minutes whilst the history was taken.

Cervical spine:

Examination revealed localised tenderness bilaterally in the paravertebral muscles and the trapezius muscles. There was no evidence of muscle spasm or muscle guarding. Active range of movement was limited in all directions by reported pain. Flexion was 75% of predicted but extension only 50% of predicted. Rotation and lateral bending to the left and right was symmetrical but restricted to only 25% of predicted. All movements were accompanied by facial grimacing and reports of pain.

Neurological examination of both upper limbs revealed normal tone, sensation and reflexes. Power was noted to be significantly globally decreased to direct testing, but this appeared inconsistent with her ability to lift her bag and take off her shoes. The circumference of her right upper arm was 32cm compared to 31.5cm on the left. The circumference of her right forearm was 28.5cm compared to 28cm on the left. This was consistent with her being right hand dominant.

Grip strength was measured using a Jamar dynamometer. On the left, it was 0kgs and on the right 1kg. It remained the same on repeated testing. It was obvious that she was giving sub-maximal effort as she was obviously using her arms and stated that she was caring for her young children.

Upper extremities:

Examination of both shoulders revealed no tenderness over either AC joint, glenohumeral joint, subacromial space or biceps tendon. She did report significant tenderness over the trapezius muscles on both sides.

Active range of movement on both sides was measured using a goniometer. All movements were accompanied by facial grimacing and reports of pain in the region of the trapezius muscles bilaterally and to a lesser extent toward the deltoid insertion. There were no reports of discrete shoulder pain in either shoulder joint of the rotator cuff or biceps tendons.

Shoulder Movements	**Active ROM Measured RIGHT**	**Active ROM Measured LEFT**
Flexion	120°	80°
Extension	40°	40°
Adduction	20°	20°
Abduction	90°	80°

Internal Rotation	70°	70°
External Rotation	50°	50°

On repeat testing there was no change in range of movement on either side. It was noted that on abduction there was no scapula-thoracic rotation at end of range on either side. This was consistent with sub-maximal effort.

For completeness passive range of movement was examined in each shoulder. I was able to flex and abduct both shoulders to > 140° with no report of pain.

4. Results of any additional investigations since the original Medical Assessment Certificate

No further investigations have been carried out.

5. Conclusion

When I re-examined Ms Fotu I was careful to look for symptoms related to the bilateral bursitis demonstrated on ultrasound, such as subacromial space tenderness or signs of impingement. I was also careful to note whether she complained of pain in each shoulder separate to her neck pain. She did not. The only possible referred symptom from the shoulder was mild reports of pain in the upper arms at the deltoid insertion. This could be consistent with either referred pain from the neck or the glenohumeral joint. In the absence of other symptoms from the glenohumeral joint or localised tenderness in either shoulder it is considered to be referred pain from the neck.

On examination, I could find no clinical or other evidence of impairment resulting from pathology in either shoulder. I am not satisfied that any impairment results from injury to either shoulder. I consider that the reduction in shoulder movement is partially associated with referred pain from the cervical spine injury and also a sub-maximal effort in shoulder movement."

Conclusion

32. The Panel adopts the findings and assessment of Approved Medical Specialist Dr Burns, and assesses 0% whole person impairment in respect of the right and left upper extremities. As no challenge was made to Dr Long's assessment of 7% whole person impairment (cervical spine), that assessment is undisturbed.

33. The appeal is allowed. The Medical Assessment Certificate dated 14 January 2019 is set aside, and replaced by the certificate attached.

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*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received before 1 January 2002 (calculation of whole person impairment for the purposes of a threshold dispute)

Matter Number: **4041/18**
Applicant: **Mele Fotu**
Respondent: **Seton Villa**

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 Anderson 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 NSW workers compensation 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)
Cervical spine	08.09.2015	Chapter 4: pp 24-30	Table 15-5; Page 392 Cervicothoracic Category II	**7%**	**1/10**	**6%**
Right Upper Extremity (right shoulder)	08.09.2015	Chapter 2: pp 10-12	Page 476, 479: Figures 16-40, 16-43, 16-46	**0%**	**Nil**	**0%**
Left Upper Extremity (left shoulder)	08.09.2015	Chapter 2: pp 10-12	Page 476, 479: Figures 16-40, 16-43, 16-46	**0%**	**Nil**	**0%**
Total % WPI (the Combined Table values of all sub-totals)					**6%**	

R J Perrignon
Arbitrator

Dr Mark Burns
Approved Medical Specialist

Dr Roger Pillemer
Approved Medical Specialist

12 August 2019

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*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar