WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-226/19**
Appellant:	**Tjan MinMin**
Respondent:	**Cleaning Space (Aust) Pty Ltd**
Date of Decision:	**29 August 2019**
Citation:	**[2019] NSWWCCMA 125**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr James Bodel**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 9 May 2019 Tjan MinMin lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Jonathan Negus, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 11 April 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. 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 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).

PRELIMINARY REVIEW

6. 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.

7. 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. Although the appellant requested a re-examination, this was only if the Panel considered it necessary. We are satisfied that we have sufficient evidence before us to enable us to determine the appeal.

EVIDENCE

Documentary evidence

8. 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.

SUBMISSIONS

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

10. In summary, the appellant submits that the AMS failed to properly consider all of the evidence before him, failed to comply with the Guidelines in his assessment of impairment of the lumbar spine, and failed to consider ADL's.

11. In reply, the respondent submits that no errors were made, and the MAC should be confirmed.

FINDINGS AND REASONS

12. 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.

13. 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.

14. The appellant was referred to the AMS for assessment of whole person impairment (WPI) in respect of the lumbar spine, thoracic spine and scarring (TEMSKI) resulting from injuries sustained on 12 June 2015.

15. The appellant was employed by the respondent as a hotel housekeeper.

16. The AMS obtained the following history of the incident:

> "On 12/06/2015 [when she was] taking out some linen…she tripped over and hit her head against a fire door. She struck her head heavily, breaking her glasses and lacerating her forehead, requiring sutures. She noticed back pain that worsened over the next few days and has not gone away since.
>
> She described no loss of consciousness but feeling dizzy and having pain particularly in her head and eyes. She reported it to her Manager and attended Sydney Hospital by ambulance where the laceration was sutured. She felt very dizzy and that night felt nauseous and attended Bankstown Hospital who did a CT scan of her head and then sent her home as the results were unremarkable.

Over the next few days, she began to notice the pain in her neck, back, right shoulder and right arm as well as developing problems with her vision in particular with blurriness of the left eye.

She was diagnosed with a traumatic haemorrhage in the posterior vitreous and a retinal detachment at Concord Hospital for which she underwent laser surgery. She did undergo physiotherapy and acupuncture in order to help treat her injuries."

17. The AMS noted that the appellant was not currently having any treatment since she could not afford to do so.

18. Present symptoms were described as follows:

"She locates the pain to the thoracic spine in the centre with very little in the way of radiating pain. She describes no lumbar back pain and no cervical pain. She has thoracic back pain on a daily basis although the time of day at which the pain strikes can differ. She said that when she is pain free, her back feels completely normal but when it is bad, it is severe. It can get extremely severe. For example, 2 weeks ago she was in so much pain when from midday until the night time, that she almost called an ambulance."

19. As regards ADL's, the AMS said:

"She has become significantly limited in her ability to help around the house. She is able to look after her own personal care but she gets pain if she is washing or scrubbing the pans after cooking so now her children help with bringing her food and cooking. Her husband helps her to clean the house and she can go shopping but she cannot lift heavy bags. She describes 2 litres of milk is okay but 2 lots of 2 litres is too much for her. She has no garden as she lives in an apartment. She does not drive and has not since she has been in Australia. She did enjoy walking with her friends but now feels she cannot go."

20. Findings on physical examination were reported as follows:

"**Facial Scar**. She has a 2cm, linear, white and well healed scar above the medial left eyebrow. There was no erythema or symptoms of pain or itching. There was some contrast to the surrounding skin but there was no adherence, elevation, depression or ulceration. It could not be covered by usual clothing or hairstyle.

Lumbar Spine. She had no surgical scars. She had no lumbar guarding or tenderness. She was able to actively straight leg raise to 50° on each side before she described pain in her thoracic spine. She was somewhat restricted in her lumbar spine movements including flexion, extension and lateral bend. She had normal power throughout L2-S1 and was able to heel/toe walk. She described her sensation as being stronger on the right from L1 through to S1 but in no dermatomal pattern. She had equal and normal knee reflexes, absent ankle reflexes and down going plantar reflexes. Her calves did not demonstrate any asymmetrical atrophy.

Thoracic Spine. Her thoracic spine was tender in the midline as well as to a lesser extent on the paraspinal musculature between T6 and T8. She had a normal range of motion. There was no guarding or spasm."

21. The AMS was not provided with any special investigations, but he noted these as "taken directly from the report of Dr Mellick" as follows:

"MRI cervical spine dated 06 July 2015 reported to reveal left sided foraminal stenosis at C6/7 with impingement of the left C7 nerve root. Mild disc bulges were also referred to and a clinical correlation advised. MRI scans of thoracic spine dated 20 July 2015 reported as a subtle curve of the thoracic spine. No underlying bony abnormality. No evidence of fracture. MRI lumbar spine (not dated) foraminal stenosis at L5/S1 with partial impingement of the right L5 nerve root and Grade 1 spondylolisthesis of L4 on L5."

22. The AMS summarised the injuries as follows:

> "Mrs Tjan MinMin is a 67-year-old lady who was a housekeeper at The Metro Hotel when on 12/06/2015 she suffered an injury where she tripped over and hit her head against a fire door, lacerating her forehead and hurting her thoracic spine. She has been left with significant thoracic back pain limiting her movements, ability to lift and carry and therefore her ability to carry out her work. She also has a small facial scar."

23. Her presentation was noted as consistent throughout the examination.

24. The AMS assessed 0% WPI for the lumbar spine, 0% WPI for the thoracic spine, and 2% WPI for scarring.

25. He explained the reasons for his assessment as follows:

> "Mrs MinMin only complained of thoracic back pain to me. She described having no pain in her neck or lumbar spine. The thoracic back pain had no radicular components and there were no associated abnormal findings on examination. She has described lumbar back pain in the past and so have assessed both lumbar and thoracic spine as rateable injuries.
>
> **Lumbar spine**: AMA-5 Table 15-3, p384. DRE I. No significant clinical findings, no muscular guarding, no documentable neurological impairment, no significant loss of motion segment integrity and no other indication of impairment related to injury or illness, no fractures. 0%.
>
> **Thoracic spine**: AMA-5 Table 15-4, p389. DRE I. No significant clinical findings, no observed muscular guarding, no documentable neurological impairment, no documented changes in structural integrity and no other indication of impairment related to injury or illness, no fractures. 0%.
>
> **Scarring**: TEMSKI Table 14.1. She has a traumatic scar of which she is conscious and can locate easily. There is a noticeable contrast with surrounding skin and there are trophic changes evident to touch. The anatomic location is usually visible with usual clothing/hairstyle. All this is consistent with TEMSKI 3."

26. In commenting upon other medical opinions, the AMS said:

> "I have reviewed the report from Dr Bentivoglio dated 2 February 2017. He has attributed her thoracic back pain to an aggravation of her pre-existing degenerative spinal pathology. He rated her thoracic spine as DRE I due to a lack of neurological dysfunction and the intact structural integrity of the thoracic spine. He awarded the lumbar spine as DRE IV due to the L4/5 degenerative slip. He did not rate her for the facial scar in his initial report. In his subsequent report dated 23 August 2017 he rates the scar as 2% WPI. 29% WPI – 20% Lumbar spine, 0% thoracic and cervical spine, 2% scarring and 7% vision. *While I agree with the rating of the thoracic spine, I disagree with this opinion of the lumbar spine as Mrs MinMin did not describe any lumbar back pain (or cervical) to me even on my repeated questioning of the fact. She located all her pain to the thoracic spine.*
>
> I have reviewed the report of Dr Siddalingeswara Orekondy dated 29 March 2017. He was rating the ophthalmic injury but does rate the laceration as 5% WPI according to AMA-4 page 222. 12% WPI – 7% vision and 5% scarring. *I am unclear from the report how he arrived at the 5% figure.*
>
> I have reviewed the report of Dr Michael Delaney dated 11 January 2018. This was again an assessment of her ophthalmic injuries and does not include scarring. 6% WPI reduced to 4% for pre-existing conditions – 4% impairment visual system, 2% scarring."

27. The AMS concluded by stating that “There is no deductible proportion.”

28. The first submission made by the appellant relates to a claimed failure by the AMS to consider “all of the documents” before him, particularly in respect of his assessment of the lumbar spine, which, it is submitted, ought to have been “at least a DRE II category.”

29. This is principally in the context of what might be described as a ‘translation’ issue. The appellant points out that she is “not a native English-speaker” and that the AMS relied substantially on her own “self-report” which was inconsistent with complaints she made to other doctors.

30. For example, it is submitted that she complained of lumbar pain with symptoms in her legs to her IME, Dr Peter Bentivoglio, who made reference to an MRI of her lumbar spine and noted a restricted range of back movement on examination.

31. We should point out at this stage that the appellant refers to complaints made to Dr Giblin in this submission, but his reports were specifically excluded from the documents to be provided to the AMS by the arbitrator, and accordingly, we cannot accept any submissions relating to his reports.

32. The appellant adds that Dr Smith, in his report dated 20 August 2015, also states "she has varying levels of discomfort in the neck, thoracic spine and lumbosacral regions."

33. Dr Mellick in his report dated 17 November 2015, also states "the back pain is described to involve the whole of the back, from the cervical region down the whole length of the spine to the lower lumbar region, with a particular area of increased pain in the region of the thoracolumbar junction."

34. The summary of complaints made to the doctors referred to above is accurate.

35. There is very little medical evidence regarding treatment or investigations with respect to the injury to the thoracic and lumbar spines. The focus of the medical evidence provided by the appellant relates to her visual injury.

36. However, we note that Dr Ang, in his report dated 8 July 2015 confirmed that “Over the subsequent days, she experienced neck pain, back pain, right shoulder pain and right arm pain…” There are no further reports from Dr Ang or any other treatment notes in relation to the spine.

37. Of significance however are the findings on physical examination as reported by the AMS. He noted “She was somewhat restricted in her lumbar spine movements including flexion, extension and lateral bend…” and also that she had “absent ankle reflexes…”

38. In other words, she demonstrated some neurological abnormality in her legs, consistent in our view with a DRE II category, as submitted by the appellant.

39. This then brings us to the second issue raised by the appellant, namely the claimed failure by the AMS to assess the lumbar spine in accordance with the Guidelines.

40. The appellant submits that she should have been assessed as DRE II “as there has been findings of non-verifiable radicular pain, along with asymmetrical loss of motion.”

41. We agree.

42. Even accepting the AMS’ observation that the appellant did not complain of <u>pain</u> in her lumbar spine, that of itself does not mean that she does not meet the criteria for DRE II.

43. Chapter 4.18 of the Guidelines state:

> "Clinical features which are consistent with DRE II and which are present at the time of assessment include radicular symptoms in the absence of clinical signs (that is, non-verifiable radicular complaints), muscle guarding or spasm, or asymmetric loss of range of movement. Localised (not generalised) tenderness may be present. In the lumbar spine, additional features include a reversal of the lumbosacral rhythm when straightening from the flexed position and compensatory movement for an immobile spine, such as flexion from the hips…"

44. In our view, the appellant' presentation was consistent with a rating of DRE II. Impairment assessment under AMA5 provides a range from 5-8% WPI.

45. Given the appellant's complaints, restrictions and impact on ADL's, we consider that an assessment of 7% WPI for the lumbar spine is appropriate in this case.

46. The AMS did refer in some detail to the impact on ADL's. We accept his comments in this regard, and have taken them into account in arriving at our assessment.

47. We do not accept the assessment made by Dr Bentivoglio. There is simply no evidence to substantiate a DRE IV category <u>resulting from this injury</u>. We accept that the appellant has a degenerative slip at L4/5. Dr Bentivoglio stated that the MRI showed "degenerative changes, a slip at L4/5 and canal stenosis. She also had multiple Tarlov cysts in the sacrum." He also acknowledged that "this slip was caused by significant degenerative change."

48. It is clear to us that the appellant had a pre-existing condition or abnormality such that a deduction pursuant to s323 of the 1998 Act is appropriate. Consistent with the authorities, we are of the view that a one-tenth deduction is appropriate in the circumstances of this particular case.

49. The AMS assessed DRE I in respect of the thoracic spine. This is consistent with the opinion of Dr Bentivoglio and in our view consistent with the appellant's symptoms, signs and complaints, particularly since she demonstrated a "normal range of motion" with "no guarding or spasm."

50. We therefore accept the AMS' assessment in respect of the thoracic spine.

51. In summary then, we assess the appellant at 7% WPI in respect of the lumbar spine. Applying a 10% deduction for her pre-existing condition, this results in a WPI of 6% (rounded).

52. The other assessments made by the AMS are confirmed.

53. It is noted that the appellant has been assessed by Dr Wechsler in respect of her visual system, and this MAC is to be referred to him as Lead Assessor for issue of a consolidated Medical Assessment Certificate.

54. For these reasons, the Appeal Panel has determined that the MAC issued on 11 April 2019 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*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **226-19**
Applicant: **Tjan MinMin**
Respondent: **Cleaning Space (Aust) Pty Ltd**

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 Jonathan Negus 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 the Guidelines	Chapter, page, paragraph, figure and table numbers in AMA 5 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.Lumbar spine	12/6/2015		Table 15-3, p384	7%	1/10th	6%
2.Thoracic spine	12/6/2015	Paragraphs 4.33 – 4.35	Table 15-4, p389	0%	0%	0%
3.Scarring	12/6/2015		Table 14.1 TEMSKI	2%	0%	2%
4.						
5.						
6.						
Total % WPI (the Combined Table values of all sub-totals)					**8%**	

Ms Deborah Moore
Arbitrator

Dr James Bodel
Approved Medical Specialist

Dr Tommasino Mastroianni
Approved Medical Specialist

29 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

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Dispute Services Officer
As delegate of the Registrar