WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3834/19**
Appellant:	**Australia Training & Job Solutions Pty Ltd**
Respondent:	**Emilia Kozlowska**
Date of Decision:	**27 February 2020**
Citation:	**[2020] NSWWCCMA 32**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr David Crocker**
Approved Medical Specialist:	**Dr J Brian Stephenson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 25 October 2019, Australia Training & Job Solutions Pty Ltd, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Farhan Shahzad, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 30 September 2019.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - the assessment was made on the basis of incorrect criteria,
    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. 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 because we consider that we have sufficient evidence before us to determine the appeal.

8. Although the appellant requested a re-examination, we do not consider that it is necessary given the nature of the issues in dispute to which we will refer later.

EVIDENCE

Documentary evidence

9. 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

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

11. In summary, the appellant submits that the AMS erred in a number of respects, in particular, the application of section 323 of the 1998 Act, and his assessment of the weight of evidence relied upon by the employer.

12. In reply, the respondent submits that no errors were made.

FINDINGS AND REASONS

13. 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.

14. 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.

15. The respondent was referred to the AMS for assessment in respect of the right upper extremity (right shoulder), the cervical spine, and scarring (TEMSKI) resulting from an injury on 25 August 2014.

16. The AMS obtained the following history:

> "Ms Kozlowska reported that on 25 August 2014, she was working for the Australian Business Academy. Her role involved carpet cleaning, lifting big chairs and commercial typing. The area where she worked had recently had carpet laid. She was required to clean the furniture after the carpets had been laid. She was also required to clean desks. The desks had chairs on them which she reported were quite heavy and weighed around 20 kg. Ms Kozlowska reported that she was attempting to lift the sixth chair when she felt sudden onset of pain in her right shoulder, dropping the chair to the ground…She also experienced pain in her right arm, elbow, hand and in her neck.
>
> Ms Kozlowska was referred by her GP to Dr Brimage (neurologist). An MRI scan identified a cervical disc injury. Dr Brimage later identified that she had issues at C5/6. She was also diagnosed with a shoulder injury and referred to Dr Jonathan Herald.

Ms Kozlowska reported that she was recommended to have spinal surgery because she had a disc problem. She was also recommended to have surgery by Dr Jonathan Herald for her shoulder… Ms Kozlowska underwent right shoulder arthroscopy on 15 October 2018.

She reported that she was also subsequently involved in a bus crash in 2015. She reported that the bus accident did not aggravate her symptoms and the surgery to her neck and shoulder had already been recommended before the bus crash occurred. Ms Kozlowska underwent neck surgery by Dr Andrew Kam on 27 July 2018 which involved anterior cervical discectomy and fusion procedure from C4 to C7 levels which was a three -level procedure. She later underwent an arthroscopy and right shoulder rotator cuff repair by Dr Herald on 15 October 2018."

17. Present symptoms were described as follows:

"Ms Kozlowska reported that she currently has pain in the right side of her neck with intensity 9/10 (visual analogue scale). She reports that there is radiation to her right hand onto the base of her 3rd and 4th fingers in the palm, associated with intermittent pins and needles. She reported this to be a sharp pain from a mild to moderate nature. She reported intermittent shooting pain from her shoulder. She reported that she tends to avoid lifting more than 2 kg. She reported that her shoulder pain is different to her neck pain. She reported that currently her neck pain intensity is at 4/10. She also reported some pain down her right lower limb. She reports numbness in the region of her anterior cervical scar from the surgery last year which is intermittent in nature."

18. Details of any previous or subsequent accidents, injuries or conditions were described as follows:

"She reported that on 4 June 2007 she was crossing a road as a pedestrian when she was hit by a car and was taken by ambulance to hospital. She sustained a left forehead injury and also injured her ribs. She fully recovered from this incident and returned to work.

In 2010, she had a heart problem with chest pains and was noted to be short of breath and felt quite weak. She sought medical retirement and was medically retired at the age of 56.

She subsequently underwent catheter ablation for irregular arrhythmia in 2014. This was followed by a good recovery and she then began working in the Australian Business Academy in Bankstown in March 2014 where she was working part-time doing light duties on a permanent basis in a cleaning and administrative role…

Ms Kozlowska reported that on 1 June 2015, she was involved in a bus crash while seated in the front seat position on a public bus. The bus she was on had a head-on collision with another vehicle. This is a current CTP claim. She has subsequently suffered from a sacral injury and tinnitus but does not report of aggravation related to her neck or shoulder issues."

19. The AMS noted ADL's as follows:

"Ms Kozlowska reported that she is currently independent with personal care activities. She tends to wear cloths which do not have zippers or buttons and are generally loose. She does not wear a bra. She reports that she is unable to cope with cooking, cleaning and washing and is dependent on her daughter for these activities. She reported that she is supported by her daughter with domestic chores and reported that her daughter is quite supportive. She is unable to drive. She reported that she tends to do at-home exercises on a machine. She has a stationary exercise bicycle at home.

She has trouble with heavy lifting. She tends to favour her left hand for activities. She reported no social activities or hobbies. She reported that she has ongoing back issues which are unrelated to this but are related to the bus accident she was involved in. She lives at home with her 38-year-old daughter in a rental property."

20. Findings on physical examination were noted as follows:

> "Ms Kozlowska presented as a straightforward and consistent historian. She stood 161 cm tall and weighed 87.4 kg. She walked slowly without a significant limp. A 6 cm scar was noted in the anterior cervical region on the left side which was well healed and was not noted to have any trophic changes, hypersensitivity or any atrophic changes. However, it was easily identifiable. There was an expected post- surgical scar and decreased sensation.
>
> There was no muscle guarding, swelling or spasms noted. There was no tenderness noted over the supraspinatus. There was no tenderness noted over the spine or the paraspinal region. There was restriction on the cervical spine on range of movement assessment…
>
> There was no wasting of the shoulder girdle or cervical musculature noted with normal girth measurements. There was no significant dermatomal deficit noted in C5, C6 and C7 dermatomes on the right side.
>
> A full range of movement was possible of the left shoulder. However, on the right side there was significant restriction…
>
> There was tenderness in the right supraclavicular fossa.
>
> There were five arthroscopic scars 1 cm in length noted over the right shoulder which were all well healed and did not have any surrounding atrophic changes."

21. The AMS referred to the following radiological material:

> "8 May 2018 – Right shoulder MRI: This reports bursitis, acromioclavicular joint arthritis and supraspinatus tendinosis with partial thickness cuff tears, which essentially look full thickness in some areas.
>
> 23 August 2018 – Cervical X-ray: This reports anterior fusion with plates from C4 to C7.
>
> 28 September 2018 – Cervical MRI: This reports there is post-fusion surgery. At C3/4 there is some foraminal narrowing.
>
> 9 January 2019 – Right Shoulder Ultrasound: This reports evidence of previous surgery, suture anchors and a small insertional tear of infraspinatus."

22. The AMS then summarised the injuries as follows:

> "Ms Kozlowska is a 63-year-old right hand dominant lady who sustained injuries to her right shoulder and neck following a workplace incident on 25 August 2014, subsequently requiring surgery. She has subsequently undergone a rotator cuff repair on the right shoulder and an anterior cervical discectomy and fusion at three levels."

23. He added: "Ms Kozlowska presented as a consistent historian based on her objective and subjective presentation."

24. When asked the question: "Is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality?" the AMS replied "No."

25. When asked to "indicate whether there has been any further injury subsequent to the subject work injury" the AMS said:

> "There is a subsequent bus accident reported in 2015 which is currently under a CTP claim. She reported that she sustained a back injury, especially of the sacrum, and has undergone surgery for that. However no aggravation has been reported regarding her shoulder and neck condition.

Evidently, it caused her an increased level of symptomatology. However the decision for surgery to her shoulder and neck was made prior to the bus incident. In my opinion, it is reasonable to apply a 10% reduction to her cervical spine and to her right shoulder as a result of the second injury.".

26. The AMS assessed 34% WPI, made up of 11% WPI for the right upper extremity, 28% WPI for the cervical spine (both reduced by 10%) and 2% for scarring.

27. The AMS added:

> "My opinion of the whole person impairment is more consistent with the opinion by Dr Graeme Mendelsohn (General Surgeon) dated 29 April 2019. However, I do not agree with the report by Dr Robert Breit that there was no frank incident initially and that lifting commercial typist chairs would not have resulted in a traumatic injury to the right shoulder and neck.
>
> Even prior to the bus accident, there was recommendation for surgery. It is unlikely that her symptoms had subsided prior to the bus accident. I generally found her as a consistent historian…
>
> I assess the deductible proportion as one tenth…
>
> In my opinion, due to the bus incident and her further degeneration, a 10% deduction is applicable to the cervical spine and the right shoulder…"

28. The appellant has listed the following grounds of appeal:

"a. The AMS has failed to address and consider the significant medical and other evidence relied upon by the appellant/employer;

b. If the AMS has considered the significant medical and other evidence before him, he has failed to provide any or any adequate reasons as to his decision to ignore or dismiss that evidence;

c. The AMS has failed to address, consider and give any weight to the impact of the significant medical and other evidence relied upon by the appellant/employer in addressing the assessment of whole person impairment and degree of pre-existing condition;

d. The AMS failed to take into account the credit issues raised by the evidence in making his assessment of whole person impairment and degree of pre-existing condition;

e. The AMS has erred by failing to consider and to make a deduction pursuant to s323 of the Act in light of the worker's prior history of symptoms and recommended surgery to the right shoulder prior the work injury;

f. The AMS has erred in applying a standard 10% deduction as a result of impairment sustained in a motor vehicle accident of 1 June 2015, which was subsequent to the work injury and not a pre-existing impairment."

29. By way of "background" the appellant states:

> "The worker sustained an injury to her neck and right shoulder when she lifted a chair from a table during the course of her employment on 25 August 2014.
>
> At teleconference on 28 August 2019, the appellant/employer by consent accepted the worker likely sustained an aggravation of the cervical spine spondylosis and right shoulder as a result of the subject work incident.

> The worker was referred for assessment by the AMS for 'WPI assessment of an aggravation type injury and/or further injury to the right shoulder, cervical spine and scarring'. (COD – Consent Orders 28 August 2019)
>
> The worker's claim for impairment is complicated by a number of significant injuries sustained by the worker both prior to and following the work injury.
>
> The worker has a previous history of a motor vehicle accident in 2007, a right shoulder injury in 2009 and an aggravation of that condition in 2010. Furthermore, the worker suffered further injuries as a result of a motor vehicle accident whilst travelling on a bus on 1 June 2015, subsequent to the work incident.
>
> The worker underwent an anterior cervical discectomy and fusion surgery from C4 to C7 on 27 July 2018, performed by Dr Kam. The former worker's compensation insurer, CGU issued a dispute notice on 19 December 2016, declining liability for injury to the cervical spine. It appears this surgery was also declined by the motor accident insurer in respect of the non-work-related incident on 1 June 2015 and the surgery was funded through the public system.
>
> There has been no admission by the appellant/employer that the anterior cervical discectomy and fusion surgery undertaken by the worker on 27 July 2018 was a result of the subject work incident involved in these proceedings. There has been no decision or finding of the Commission that such surgery was the result of the subject work incident.
>
> Dr Herald performed a right shoulder arthroscopy and rotator cuff repair on 11 October 2018. The workers compensation insurer accepted liability and paid for that surgery in respect of the subject work incident."

30. This "background" summary is broadly correct, but we make the following observations.

31. We do not understand the submission as regards liability for the cervical spine surgery. The matter was referred to the AMS with the consent of the parties. If liability had remained an issue, then that should have been determined prior to the referral.

32. Equally, if the terms of the referral were incorrect, the appellant had an opportunity to correct that prior to the referral.

33. We note that the terms of the Consent Orders were as follows:

> "[The] injury description is amended to read: "The applicant claims that she significantly aggravated her right shoulder and cervical spine conditions in this event."
>
> The matter is remitted to the Registrar to be referred to an AMS for WPI assessment of an aggravation type injury and/or further injury to the right shoulder, cervical spine and scarring."

34. We are unable to determine issues of liability in these circumstances. Our task is to identify if any errors were made by the AMS in his assessment of impairment of the body parts referred for his assessment.

35. We fully agree with the appellant that the AMS erred in effectively 'including' the subsequent bus accident injury in his assessment, and erred in his application of the terms of section 323. (We will deal with the substance of the 'deduction' issue in due course). As the appellant correctly points out, "Section 323 is only relevant in relation to pre-existing or previous injury and is therefore not relevant to the subsequent injures arising from the bus accident." (See *Secretary, New South Wales Department of Education v Johnson* [2019] NSWCA 321.)

36. Turning now to the substance of the grounds of appeal, the appellant makes the following general submissions:

> "a. The worker's evidence provided to the AMS is grossly inconsistent with the evidence before him, particularly in respect to her allegation that the cervical spine surgery was recommended prior to the MVA on 1 June 2015.
>
> b. The worker incorrectly advised the AMS that she did not sustain any injury to her cervical spine in the subsequent MVA on 1 June 2015. This is inaccurate and inconsistent with the medical evidence before the AMS.
>
> c. The AMS has failed to appropriately identify the evidence as to the worker's pre-existing right shoulder injury sustained prior to the subject work incident, which included a recommendation for right shoulder surgery prior to the work incident.
>
> d. The AMS has inaccurately considered the worker as a 'consistent historian'.
>
> e. The AMS failed to appropriately apply s323 of the 1998 Act in respect of the deduction to be applied relating to the previous injury and pre-existing condition suffered to the worker's neck and right shoulder prior to the subject work incident.
>
> f. The AMS failed to appropriately consider the impairment suffered by the worker that results from a subsequent injury on 1 June 2015.
>
> g. The AMS inappropriately applied a standard 10% deduction under s323 of the 1998 Act to the subsequent incident, being the MVA on 1 June 2015, (rather than appropriately applying the s323 deduction to pre-existing injuries and conditions)."

37. The appellant's submissions on the issues noted above are detailed and thorough, and we do not propose to set out more detail than necessary.

38. In summary however, we do agree that the deduction of 10% pursuant to section 323 in respect of both the cervical spine and the right upper extremity was inappropriate having regard to the extensive evidence of pre-existing injuries and conditions.

39. It is quite clear that the respondent had significant pre-existing conditions in both her cervical spine and right shoulder.

40. Dealing firstly with the cervical spine, the appellant draws attention to the following evidence:

    a. the AMS did not refer to and has failed to consider the radiological investigations prior to 2018 in order to appropriately consider the deduction under s323 of the 1998 Act;

    b. The AMS only referred to investigations extending between 8 May 2018 and 9 January 2019;

    c. A cervical spine x-ray dated 11 July 2012 which recorded disc space narrowing at C4/5, C5/6 and C6/7 (Reply pg. 159);

    d. An MRI scan of the cervical spine dated 13 July 2012 which indicated loss of disc height and a broad-based disc bulge at C5/6 with bilateral foraminal narrowing. At C6/7 there was also degenerative change (Reply pg. 163);

    e. A cervical spine x-ray dated 3 August 2012 which recorded degenerative disc disease at C6/7 with disc narrowing and bony reaction. Retrolisthesis was also noted at C5/6 and C6/7 (Reply pg 155);

    f. An MRI of the cervical spine dated 12 August 2012 which recorded mild generalised spondylitis changes, a small central disc protrusion at C4/5 and mild narrowing of left sided C3/4, C4/5 and C5/6 intervertebral foramina (Reply pg. 160);

41. We accept the appellant's summary of this evidence as accurate.

42. The radiological material post-dating the work injury and pre-dating the bus accident, namely an MRI scan of the cervical spine dated 20 March 2015, showed "a right C5/6-disc protrusion causing nerve root attenuation and intervertebral foraminal stenosis. There was evidence of degenerative disease, most marked extending from C4/5 to C6/7 inclusive. Bilateral foraminal narrowing was noted from C4/5 to C6/7 inclusive, most marked on the left at C6/7, C5/6 and C4/5, and most marked on the right at C5/6."

43. An MRI of the whole spine dated 19 June 2015 (post-dating the bus accident) noted images of the cervical spine with spondylosis and posterior annular bulges at the C3/4, C4/5 and C5/6 levels and to a lesser at C6/7. The C5/6-disc protrusion was noted to be large to the right of the midline than shown on previous examination of October 2011. There was no evidence of spinal cord compression at any level. There was foraminal narrowing on the right side at C5/6 due to uncovertebral osteophyte potentially compressing the emerging right C6 nerve root.

44. These findings are similar to those in the MRI scan of 20 March 2015.

45. It does appear to us that the work injury seems to have caused further damage, particularly to the C5/6 disc.

46. We note that a whole body bone scan with SPECT CT dated 8 June 2016 noted mild to moderately increased tracer accumulation in the lower cervical spine (maximal at the C6/C7 level) in keeping with discovertebral arthritic change. The scan concluded arthritic changes, slightly more prominent at the C6/C7 level and a mild to moderate left rotator cuff/supraspinatus injury.

47. Other evidence identified by the appellant as to the extent of the pre-existing condition in the cervical spine includes the following:

> "a. A referral letter from Dr Micallef to Jo Hadley dated 14 September 2009 refers to multiple injuries relating to a car accident in 2007. A further referral letter from Dr Micallef to 13 April 2010 notes the worker had neck pain following an MVA some years ago and had recently noted an increase in her right shoulder and neck pain. Doctor noted a CT showed a quite damaged C6/7 disc and a tear in the right supraspinatus with some bursal bunching (Reply pg 118);
>
> b. The worker was referred by Dr Micallef to Dr Nazih Assaad on 13 July 2010 with 'chronic neck, shoulder and arm pain' (Reply pg. 117);
>
> c. Dr Herald reviewed the worker on 10 July 2012 and noted she also had neck pain. Doctor diagnosed impingement syndrome with possible SLAP lesion and possible cervical spondylosis (Reply pg. 95);
>
> d. Dr Herald reported on 21 August 2012 the worker's right upper limb pain was possibly secondary to cervical spondylosis. The worker reported her neck symptoms may have been the result of a whiplash type injury sustained following a car accident on 4 June 2007;
>
> e. On 21 November 2012, Dr Randa Selim certified the worker as permanently unfit for work, including in his diagnosis reference to right shoulder, pain in the neck and C6/7 disc disease (Reply pg. 134);
>
> f. The report from Dr Brimage dated 4 December 2013 contains an extensive chronology of the worker's injuries since 2009. Doctor referred to a letter from Dr Micallef which mentioned the worker suffering from neck pain following the motor vehicle accident in 2007."

48. The appellant has made detailed submissions regarding the medical evidence after the bus accident. They include the following:

> "Dr Michael Donnellan, neurosurgeon initially examined the worker on 22 February 2016 in respect to the worker's 'neck pain and right sided arm pain since a motor vehicle accident on 1 June 2015.' The worker reported she was in hospital for 2 days in Campbelltown Hospital following the motor vehicle accident. She suffered documented compression fractures to T11 and T12, as well as a fracture to the lower sacrum. She had a laceration of her forehead and associated mild head injury. She also suffered a right shoulder and chest wall injury. She also had neck pain and exacerbation of lower back pain. The worker reported that since the MVA accident she has had much more significant neck pain…She also suffers burning in the posterior aspect of her neck and has pain going down the lateral aspect of her arm and into her forearm and also gets pins and needles and numbness in her third and fourth finger (ARD pg. 47).
>
> On 23 March 2016, Dr Donnellan confirmed the worker had ongoing neck pain, right sided brachialgia and right sided sciatica since the MVA on 1 June 2015 and was unlikely to ever return to work. Doctor concluded…a significant component was likely coming from the C5/6 disc level. Doctor recommended and subsequently performed a right C5/6 and C6/7 transforaminal steroid injection on 8 April 2016 (ARD pg. 50).
>
> Dr Donnellan sought approval for a C5/6 & C6/7 anterior cervical discectomy and fusion surgery on 4 July 2016. Doctor did not comment on the cause of that recommended surgery (ARD pg. 52)."

49. The appellant adds: "the cervical fusion surgery had not been proposed prior to the bus accident on 1 June 2015, as reported by the worker to the AMS."

50. The appellant submits the respondent has given an inconsistent history to the independent doctors who have all examined her, and similarly, that inconsistent history has been provided to the AMS.

51. For example, the appellant notes:

> "Jawad Azzi, physiotherapist in a report of 28 February 2019 noted that the worker advised she had no significant past medical or surgical history prior to the subject work incident however, 'reported sustaining a cervical spine injury around the same time as her workplace injury where she was Involved In a bus incident, sustaining a whiplash injury. Due to the injury she later required surgery, she has not returned to work since' (ARD pg. 63)."

52. Other examples include the history given to Dr Mendelsohn, including a denial of previous neck problems.

53. The appellant also points out, correctly in our view, that the AMS "has based his conclusions on the worker's self-reporting of proposed neck surgery in 2014, which is not confirmed in any contemporaneous medical evidence….the assumption by the AMS that 'even prior to the bus accident, there was recommendation for surgery' is false."

54. In addition, the appellant notes that the respondent's history to various doctors was inaccurate. For example:

> "Dr Michael Fearnside, neurological surgeon examined the worker at the request of her solicitors on 7 March 2017. The worker reported that the first occasion she experienced any pain in her arm or neck was in the subject work incident. Dr Fearnside noted from the records on file there was a prior history of a number of other injuries however, the worker 'was emphatic that there was no prior history of any injury or disorder affecting her neck predating the incident on 25 August 2014'. (ARD pg. 56)

Dr Graeme Mendelsohn provided a report dated 29 April 2019. The worker denied any previous neck problems. The worker reported she left prior employment after developing a heart problem and requiring heart surgery in 2014. Dr Mendelsohn noted the unrelated MVA incident on 1 June 2015 in which the worker reported aggravated her neck and injury her mid to low back region. The worker also reported to Dr Mendelsohn that neck surgery had been recommended prior to the MVA, although no evidence is indicated in the evidence to support that position."

55. In summary, the appellant suggests that the pre-existing condition was significant, and that the impact of the bus accident on the respondent's neck condition was also significant such that the AMS should have addressed the portion of impairment that relates to the supervening motor vehicle accident on 1June 2015 when assessing impairment resulting from the work accident.

56. We agree.

57. In our view, a deduction of one-half is appropriate and consistent with the weight of all the evidence.

58. Turning now to the right shoulder injury,

59. Again, the appellant's submissions are extremely detailed as regards the extent of the evidence of pre-existing injuries and conditions.

60. The appellant/employer submits the AMS did not refer to and has failed to consider earlier radiological evidence such as the following:

"An ultrasound of the right shoulder dated 28 May 2009 which recorded a tear of the supraspinatus. (Reply pg. 175);

An ultrasound of the right shoulder dated 31 March 2010 which recorded subacromial bursitis and a linear intrasubstance tear of supraspinatus tendon. (Reply pg. 174);

An ultrasound of the right shoulder dated 31 March 2010 which recorded a laminar tear of supraspinatus. (Reply pg. 173);

An MRI of the right shoulder dated 10 April 2012 which recorded diffuse supraspinatus tendinosis, subacromial bursitis and mild subscapularis tendinosis. (Reply pg. 168);

A right shoulder ultrasound dated 22 August 2012 which recorded a laminar tear within the supraspinatus and bursal distortion on abduction. (Reply pg.133);

A right shoulder ultrasound dated 9 September 2013 which recorded limitation of rotation and abduction with laminar tear of anterior supraspinatus and suspected adhesive capsulitis. (Reply pg. 143)."

61. Other evidence of the pre-existing right shoulder condition included:

"A referral letter from Dr Micallef to Dr Jonathan Herald dated 25 May 2012 refers to pain and weakness in the right shoulder that 'relates back to an MVA in 2007'.

Dr Jonathan Herald, orthopaedic surgeon initially examined the worker on 29 May 2012 in respect to long standing problems with her right shoulder and elbow, initially injured in prior employment as a librarian in March 2009. Doctor noted MRI scans showed a partial thickness intrasubstance tear of the supraspinatus tendon with associated subacromial bursitis. (Reply pg. 96)

A referral letter to Prof Arun Aggarwal from Dr Micallef dated 22 March 2013 indicates the worker had seen Dr Herald who "intends to go ahead with a right shoulder arthroscopy and rotator cuff repair". (Reply pg 113).

A report of Dr Nigel Luis, chiropractor dated 7 March 2014 notes the worker was suffering degenerative changes to C4/5/, C5/6 and C6/7 as well as right shoulder pain and was due to have repair surgery to her right rotator cuff to improve stability. (Reply pg. 127)

Dr Herald reported on 10 June 2014 the worker continued to have pain in her shoulder and was on the Bankstown Hospital waiting list for a rotator cuff repair (Reply pg. 86)

The worker was removed from the Bankstown Hospital surgery waiting list on 22 August 2014 (3 days prior to the work injury) (our comment) for a planned right shoulder arthroscopy, rotator cuff repair and acromioplasty that was scheduled on 3 September 2014. (Reply pg 126). It appears this decision was made due to the worker's need to undergo heart surgery given that on 1 December 2014, Dr Herald placed the worker back on the waiting list for a rotator cuff repair after she had recovered from heart surgery. (ARD pg. 107)

Dr Peter Brimmage, neurologist examined the worker on a referral from Dr Micallef and provided a report dated 4 December 2013. Doctor recorded the worker suffered from right shoulder pain on 13 May 2009 after moving heavy boxes at work. The report from Dr Brimmage contains an extensive chronology of the worker's injuries since 2009. Dr Brimmage recorded the worker had difficulty writing or doing anything with her right arm and he recommended various kinds of physical therapy. (Reply pg. 128)

An earlier report of Dr Brimmage dated 30 October 2013 advises the worker has ongoing injuries related to an accident at work on 13 May 2009 when lifting books resulted in a right shoulder capsule injury. (Reply pg. 137)

An entry in the clinical notes of Dr Micallef on 3 July 2014 noted the worker was still awaiting right shoulder surgery and was using a lot of pain medication."

62. The appellant added: "Dr Mendelsohn incorrectly concluded there was no evidence of pre-existing injury to the right shoulder nor is there any evidence of further aggravation by the motor vehicle accident."

63. In summary, the appellant submits:

"The evidence referred to above in our submissions above indicate that in the years leading up to her employment with the respondent, the worker had sustained significant injuries to her right shoulder and cervical spine. 40. The failure of the worker to disclose her prior conditions to the AMS and her failure to disclose this information to other independent doctors demonstrates a substantial issue impacting the worker's credibility.

The AMS advised he "generally found (the worker) as a consistent historian". (MAC part 10, pg. 7). The appellant submits this conclusion could not have been made had the AMS appropriately reviewed all the evidence.

In this case the worker's right shoulder injury was symptomatic prior to the work injury. There was extensive medical evidence before the AMS that indicated the worker had a pre-existing right shoulder condition that was contributing to the worker's current permanent impairment. The worker was recommended and scheduled to undergo right shoulder surgery prior to the work injury. That evidence indicated a deduction should be applied to an impairment greater than the assumed 10%."

64. Again, we agree with the appellant's submissions.

65. Given the extent of the respondent's right shoulder condition prior to the work accident where surgery was not just contemplated but proposed, suggests to us that a significant deduction ought be made.

66. Again, we consider that one-half is appropriate.

67. The respondent's submissions are fairly broad, and do not fully address the extensive evidence documented by the appellant.

68. For example, the respondent submits:

> "The AMS is not required to, nor is it possible to, make exhaustive reference in specific detail to all the matters he has considered. He has, however, stated that he has considered in detail all of the material presented to him.
>
> There is, in the circumstances, no basis in the suggestion that the AMS has 'failed to address and consider significant and other evidence' relied upon by the Appellant / employer…
>
> In the circumstances there is no support for the proposition that the AMS ignored or failed to consider any specific information presented to him. He asserts – and should be believed in the assertion - that he had regard for all of the material presented to him."

69. We do not accept this submission, since it is clear to us that the AMS did not adequately consider all of the evidence before him, in particular the evidence of the nature and extent of the respondent's pre-existing conditions.

70. The respondent then said:

> "In 2013 Dr Herald recommend surgery to her right shoulder and placed her on the waiting list. At this time there was no urgency for the surgery to the shoulder. The surgery to the right shoulder was not performed. The worker says: 'After a long time off work, I felt my symptoms were not as painful as it was whilst I was doing duties.' Accordingly, the pain in the Claimant's right shoulder had settled with conservative management, and with no need for surgery."

71. This submission is not accurate: the surgery was postponed due to the respondent's heart condition.

72. The respondent added:

> "As regards surgery to her cervical spine, it is quite clear that the need for surgery has already [been] contemplated by her neurosurgeon. Dr Brimage's report concludes with these remarks: "She has confidence in the neurosurgeon, who wants to wait. A CT Guided Injection may be necessary." Clearly, then the neurosurgeon has raised the need for surgery, (as at 3 February 2015) but prefers to wait."

73. That statement in our view is again not entirely accurate. Other treatment options were contemplated: the need for surgery was not specified.

74. In summary, for the reasons stated, we accept by and large the appellant's submissions such that a significant deduction pursuant to section 323 is warranted.

75. For these reasons, the Appeal Panel has determined that the MAC issued on 30 September 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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **3834-19**
Applicant: **Emilia Kozlowska**
Respondent: **Australia Training & Job Solutions 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 Farhan Shahzad,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. Right upper extremity	25 August 2014	Chapter 2, Page 10	Chapter 16, Figure 16-40, Figure 16-43, Figure 16-46	11%	1/2	5%
2. 2. Cervical spine	25 August 2014	Chapter 4, Page 24 to 29	Chapter 15, Page 392 Table 15-5	28%	1/2	14%
3. 3. Scarring	25 August 2014		TEMSKI Chapter 14, Table 14.1, Page 74	2%	N/A	2%
4.						
5.						
6.						
Total % WPI (the Combined Table values of all sub-totals)					**21%**	

Deborah Moore
Arbitrator

Dr David Crocker
Approved Medical Specialist

Dr J Brian Stephenson
Approved Medical Specialist

27 February 2020

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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar