

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-3429/19
Appellant:	Steven Rhodes
Respondent:	Taree Truck Centre Pty Ltd
Date of Decision:	11 March 2020
Citation:	[2020] NSWCCMA 48

Appeal Panel:	
Arbitrator:	Catherine McDonald
Approved Medical Specialist:	Dr Gregory McGroder
Approved Medical Specialist:	Dr Roger Pillemer

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 December 2019, Steven Rhodes lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Rob Kuru, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 19 September 2019.
2. Mr Rhodes relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):
 - availability of additional relevant information (being additional information that was not available to, and that could not reasonably have been obtained by, the appellant before the medical assessment appealed against), and
 - 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, being that in s 327(3)(d). 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.
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).

RELEVANT FACTUAL BACKGROUND

6. Mr Rhodes is a motor mechanic. On 8 December 2016 he attended a call out to repair a refrigerated van. He climbed up the van to assess the fuel tank and missed the top step on the way down, landing on his feet and jarring his body. He claimed compensation for injuries to his cervical, lumbar and thoracic spine.
7. The claim with respect to the cervical spine was discontinued when the matter was listed before an arbitrator on 8 August 2019. The AMS was asked to assess the permanent impairment arising from injuries to Mr Rhodes' thoracic and lumbar spines.
8. The AMS found Mr Rhodes difficult to examine and terminated his examination, providing his assessment on the basis of the radiology. His diagnosis was non-specific thoracic pain and he assessed 7% whole person impairment (WPI) as a result of the thoracic spine injury and 0% in respect of the lumbar spine because he did not consider that Mr Rhodes had suffered an injury.

PRELIMINARY REVIEW

9. 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.
10. The Appeal Panel notes that the Registrar's delegate has permitted the appeal to proceed even though it was filed out of time.
11. As a result of that preliminary review, the Appeal Panel determined that the worker should undergo a further medical examination because the AMS had failed to conduct a detailed examination and did not examine his lumbar spine at all.
12. Dr Roger Pillemer of the Appeal Panel conducted an examination of the worker on 20 February 2020 and reported to the Appeal Panel.

Fresh evidence

13. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.
14. Mr Rhodes seeks to admit the following evidence:
 - (a) MRI referral by Dr Katie Gordon dated 26 September 2019, and
 - (b) MRI of lumbar spine by Dr Mark Fiorentino dated 4 October 2019.
15. Mr Rhodes submitted that the evidence is relevant because it shows up to date information about the condition of his lumbar spine and because the AMS said that the imaging in respect of his lumbar spine was unremarkable. He submits that the evidence was not available and could not reasonably have been obtained because he was dependent on his treating doctors to obtain the referral.
16. Taree Truck Centre, through its insurer, submitted that Mr Rhodes had failed to show why there was a need for a further MRI scan after the unfavourable MAC.

17. The Appeal Panel determines that the additional evidence should be received on the appeal. Mr Rhodes was referred for the scan by his general practitioner after the date of the MAC. It is relevant because the last scan undertaken was in 2017 and is relevant to the assessment of Mr Rhodes' lumbar spine.

EVIDENCE

18. 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.
19. Dr Pillemer's report of his examination is attached to these reasons.
20. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

21. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
22. In summary, Mr Rhodes submitted, through his barrister, Mr McManamey that the Certificate of Determination dated 8 August 2019 required the AMS to accept that Mr Rhodes suffered injury to his thoracic and lumbar spines. The failure to examine his lumbar spine was an error. The AMS said that the imaging of the lumbar spine which he saw was unremarkable. Mr Rhodes submitted that the recent MRI scan provided evidence of injury at L5/S1.
23. In reply, Taree Truck Centre submitted, through its insurer that the new evidence should not be submitted. It submitted that the AMS had not made a determination about liability for the lumbar spine injury but merely expressed a view as to the extent of the WPI on the basis of the radiology and his physical examination.

FINDINGS AND REASONS

The MAC

24. Rather than calling for the radiological imaging as provided by s 324 (1)(b) of the 1998 Act, the AMS sought access to the images which Mr Rhodes did not take to the examination. He said:

"Mr Rhodes arrived without relevant imaging of his cervical, thoracic and lumbar spine. Given I thought it was important for the conduction of the assessment, I accessed the relevant imaging on the PACS system. The reports for the studies are included with the documentation from the Registrar."

25. The AMS took a history of the injury:

"On the night of Mr Rhodes' injury, he attended a truck breakdown at the service centre at Taree. He climbed on to the trailer of a truck to access the fridge motor, hoping to get a code to assist with the repair. Once climbing off the rig, he missed a step on the edge on the diesel tank and landed heavily on his feet and then fell onto his buttocks. He had immediate severe pain in his chest, such that he was unable to catch his breath.

Since that time, he has had a constant feeling that he has been short of breath, with pain centering [sic] on his thoracolumbar junction radiating up to the mid-thoracic spine and then in a triangle out towards the shoulders and the base of his neck. The pain then hits inferiorly down to the gluteal cleft. He feels as though he has pain radiating around and through to the front of his abdomen, at the inferior portion of his chest wall and specifically indicates as above his umbilicus."

26. The AMS obtained details of Mr Rhodes' present symptoms:

"Mr Rhodes reports pain, as described above, radiating along his back. The pain radiates through and around the lower chest wall and above the umbilicus. He denies any pain in his buttocks or in his thighs. He does report numbness and tingling in the toes of his right foot and noticed that his right foot points out towards the right hand side. He notes that his hip throws out to the side when he walks."

27. With respect to the activities of daily living the AMS noted:

"Mr Rhodes reports that he is greatly incapacitated with his activities of daily living. He has had to return to live with his mother to help with all aspects of care. He reports he is unable to sustain a relationship. He is unable to travel to see his children or pick up his youngest child. He is unable to pursue any of his previous recreational activities, such as fixing cars, doing jobs around the house, fishing, motor cycle riding or playing tennis."

28. With respect to his physical examination, the AMS recorded:

"Mr Rhodes presents as a highly anxious man. He is quite florid and his speech jumping from topic to topic. I felt very uncomfortable in his presence consequent to his mental state although Mr Rhodes did nothing specifically threatening towards me .

He walks with his right leg extended and maintains this in extension in a sitting position. He also walks with his right leg externally rotated to a variable degree. Romberg's test was negative. Trendelenburg's test and heel toe stance ultimately demonstrated normal power but were associated with a number of irregular movements and behaviours. At this stage, I came to the conclusion that further musculoskeletal examination was not going to be helpful."

29. The AMS reviewed the radiology and said that the imaging of Mr Rhodes' lumbar spine showed no significant abnormality and that imaging of his thoracic spine was consistent with Scheuermann's disease.

30. The AMS's only diagnosis was non-specific thoracic pain as a result of the fall and that the striking feature of his presentation was his significantly impaired mental state. He assessed 5% WPI as a result of the thoracic spine injury, adding 2% for the impact of the injury on Mr Rhodes' activities of daily living.

31. The AMS agreed with Dr Hopcroft, qualified by Mr Rhodes' solicitors, that a deduction of one-tenth from his assessment with respect to the thoracic spine was appropriate to reflect Scheuermann's disease.

32. The AMS said:

"Whilst Mr Rhodes has pain referring into the lumbar spine, I am not of the opinion that he has had a primary injury here and the lumbar imaging is unremarkable. Consequently I have assessed 0% WPI for the lumbar spine."

33. Notably, the AMS did so without stating that he had assessed Mr Rhodes in DRE lumbar category I.

Consideration

34. 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.

35. 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.
36. The referral to the AMS required him to assess impairment resulting from accepted injuries to Mr Rhodes' thoracic and lumbar spines, as set out in the Certificate of Determination. His role was not to determine whether or not Mr Rhodes suffered an injury.
37. The Guidelines provide in paragraph 4.1 that "[e]valuation of impairment of the spine is only to be done using diagnosis-related estimates (DREs)". The AMS was required to consider which of the DRE categories was appropriate for Mr Rhodes' lumbar and thoracic spines. He did not do so with respect to the lumbar spine. Table 4.1 of the Guidelines directs the AMS to do so.
38. The DRE categories require the AMS to consider asymmetry of movement, muscle guarding, muscle spasm, non-verifiable radiculopathy and actual radiculopathy. The AMS will not be able to determine the appropriate category without a clinical history, consideration of investigations and the findings on clinical examination.
39. Dr Pillemer obtained a clinical history which is set out in his attached report. He confirmed the history that Mr Rhodes suffers:
- "paraesthesiae (pins and needles) in the toes of his right foot, and on very specific questioning this involves the middle three toes of the right foot and in fact he is aware of numbness and pins and needles extending all the way down his back into his foot."
40. Dr Pillemer noted:
- "Mr Rhodes feels he is very restricted at the present time and his maximum walking distance would be about 40 metres and he would then need to rest, and he can still drive but has to stop repeatedly. He manages stairs one at a time and has to use a rail and he has gone back to live with his brother, who often has to help him with undressing and dressing.
- On specific questioning, Mr Rhodes denies any problems with his thoracic or lumbar spines prior to his injury on 8 December 2016."
41. He agreed that Mr Rhodes was difficult to examine. However, he observed that Mr Rhodes' movements indicate that he is constantly taking the weight off his low back. Dr Pillemer was unable to elicit the right medial hamstring reflex, which is indicative of L5 nerve root involvement.
42. Dr Pillemer noted that Mr Rhodes had hypoaesthesia to pinprick over the dorsum of his right foot which was consistent with repeated testing. This is also consistent with L5 nerve root involvement.
43. The Appeal Panel adopts Dr Pillemer's findings.
44. The Guidelines provide in paragraph 4.7:
- "If an assessor is unable to distinguish between two DRE categories, then the higher of those two categories should apply. The reasons for the inability to differentiate should be noted in the assessor's report."

45. The AMS placed significant emphasis on the radiological findings without considering the implications of Mr Rhodes' complaints of numbness and tingling in the toes of his right foot.
46. Dr Pillemer's examination shows that Mr Rhodes has clear evidence of L5 nerve root involvement on the right side (i.e. radiculopathy) as evidenced by the absent medial hamstring reflex and the sensory loss in a distinct L5 distribution. This would place Mr Rhodes in DRE Category III of his lumbar spine with 10% WPI. The recent MRI scan provides an additional basis for the clinical findings.
47. Mr Rhodes needs assistance with undressing and dressing and that he would result in an additional 3% for interference with activities of daily living and a total of 13% WPI in respect of his thoracic spine. Those difficulties are as a result of the pain in his lumbar spine.
48. Mr Rhodes did not raise any issue with respect to the AMS's assessment of his thoracic spine. The AMS assessed 2% for the impact of the injury on the activities of daily living. Paragraph 4.36 of the Guidelines provides that the impact on activities of daily living is assessed once where more than one region of the spine has been injured. As the impact of the lumbar spine injury is substantial, it is appropriate to delete the modifier in respect of the thoracic spine.
49. The appropriate assessment in respect of Mr Rhodes' thoracic spine is DRE II resulting in impairment of 4.5%, reduced as the AMS did in respect of pre-existing Scheuermann's disease, but rounded to 5% in accordance with paragraph 1.26 of the Guidelines. When combined with 13% in respect of the lumbar spine, Mr Rhodes' total WPI is 17%.
50. For these reasons, the Appeal Panel has determined that the MAC issued on 19 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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 3429/19
Applicant: Steven Rhodes
Respondent: Taree Truck Centre 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 Rob Kuru 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.Thoracic spine	8 December 2016	Chapter 4 pages 24-29	Chapter 15 Page 389 Table 15-4	5%	One-tenth	5% (after rounding)
2.Lumbar spine	8 December 2016	Chapter 4 pages 24-29	Chapter 15 Page 389 Table 15-3	13%	0	13%
Total % WPI (the Combined Table values of all sub-totals)					17%	

Catherine McDonald
Arbitrator

Dr Gregory McGroder
Approved Medical Specialist

Dr Roger Pillemer
Approved Medical Specialist

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 Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar

