WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1- 3386/19**
Appellant:	**Esto Pty Ltd**
Respondent:	**Kimba Stanaway**
Date of Decision:	**17 March 2020**
Citation:	**[2020] NSWWCCMA 53**

Appeal Panel:	
Arbitrator:	**Marshal Douglas**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**
Approved Medical Specialist:	**Dr John Ashwell**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 18 December 2019, Esto Pty Ltd (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The decision to which the appeal relates is the assessment by Dr Tim Anderson, an Approved Medical Specialist (AMS), of both a medical dispute, within the meaning of that term in s 319 of the an *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act), and an impairment dispute, within the meaning of that term in clause 4(4) of Part 18C of schedule 6 of the *Workers Compensation Act 1987* (the 1987 Act). The assessment is recorded in a Medical Assessment Certificate (MAC) that the AMS issued on 3 December 2019. The Panel sets out below what the medical and impairment disputes are.

2. The appellant relies on the following ground for appeal under s 327(3) of the 1998 Act:

    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, the ground for appeal has been made out. 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. Those grounds of appeal are set out in the parties' respective submissions, which the Appeal Panel has summarised below.

4. The WorkCover Medical 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 WorkCover Medical Assessment Guidelines.

5. The assessment of a medical dispute involving the degree of permanent impairment of a worker 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). By virtue of clause 3(1) of Part 18C of schedule 6 of the 1987 Act, the assessment of an impairment dispute is done by reference to ss66, 68, 68A and 73 of the 1987 Act, in the form in which those provisions were enacted prior to the lump sum compensation amendments.

RELEVANT FACTUAL BACKGROUND

6. Kimba Stanaway (the respondent) worked until 1990 with the appellant in an abattoir on a process line. On 19 July 2019, she registered an Application to Resolve a Dispute (ARD) with the Commission, seeking a determination by the Commission of a claim she made against the appellant for the appellant to pay her compensation under s 66 of the 1987 Act, as enacted prior to the commencement of the lump sum compensation amendments. The proceedings that were initiated in the Commission by the respondent filing the ARD bear matter number 3386/19.

7. The respondent described her injury in Part 4 of the ARD as an "injury and/or disease including aggravation, acceleration, exacerbation or deterioration of a disease to both upper extremities including hands, shoulders, wrists and arms including tendinosis, and cervical spine". She described the circumstances in which her injury occurred in this way:

> "nature and conditions of employment including repetitive and prolonged cutting, pulling and pushing and the overuse of both hands. Her employment also required her to work in a position with her neck craned forwarded constantly turning her neck from side to side."

8. So as to comprehend the medical and impairment disputes that were referred to the AMS to assess, it is necessary to set out in some detail part of the history relating to the progress of the claim the respondent made against the appellant, preceding her filing the ARD with the Commission.

9. In earlier proceedings between the parties in the Compensation Court of New South Wales, Duck CCJ awarded the respondent weekly payments of compensation at the rate of $105 a week from 10 August 1991 to 31 December 1993 and then at the rate of $85 a week from 1 January 1994. His Honour also ordered the appellant to pay the respondent compensation of $11,287.50 under s 66 for loss of the respondent's left arm below the elbow equivalent to one-sixth total loss thereof and $12,093.75 for loss of use of the respondent's right arm below the elbow being the equivalent of one-sixth of the total loss thereof.

10. The respondent's claim for compensation the subject of the present proceedings in the Commission was made following the respondent being assessed, at the request of her solicitors, by surgeon Dr W G D Patrick. Dr Patrick provided reports to the respondent's solicitors on 28 September and 13 October 2016. In the earliest of those reports, Dr Patrick said that the respondent:

> "has developed a significant bilateral tendinosis/tenosynovitis at the wrist and also likely posttraumatic cuff tendinosis at the shoulders, initially worse on the right and there has been likely significant neck strain with ligamentous injuries and probably some degree of zygapophyseal joint injuries and acceleration of discal degeneration particularly at C4/5 and C5/6".

11. The respondent's solicitors then wrote on 27 October 2016 to the appellant's insurer notifying the insurer that the respondent was making a claim for lump sum compensation arising from injuries she suffered on 4 December 1990. The respondent's solicitors advised in that letter that the injuries the respondent sustained were "occupational overuse injuries affecting initially her hands and wrists with development of severe tendinosis, in addition to shoulder and neck injuries". The reports of Dr Patrick were made available to the insurer under cover of that letter.

12. Following this, the appellant's insurer had the respondent examined by Dr Roger Pillemer, an orthopaedic surgeon. He provided a report on 8 March 2017 to the insurer in which he expressed an opinion that the respondent had not "reached maximal medical improvement". On that basis, the insurer declined the respondent's claim for compensation under s 66.

13. On 13 November 2017, the respondent registered with the Commission an "Application for an Assessment by an Approved Medical Specialist", which initiated proceedings 5829/17 in the Commission. In her application the respondent specified that she sought the Commission refer a medical dispute to an AMS for assessment, that medical dispute being "whether the degree of permanent impairment is fully ascertainable". She described her injury in similar terms to those she used in the ARD. She described in that application the circumstances which her injury occurred in identical terms to those she used in the ARD.

14. That medical dispute was referred to the AMS to assess, and in a Medical Assessment Certificate dated 21 December 2017, the AMS certified that at that stage "it is not possible for her degree of impairment to be fully ascertained".

15. It would seem that at some stage in 2019 that same medical dispute regarding whether the degree of permanent impairment is fully ascertainable, was referred again to the AMS who issued a further Medical Assessment Certificate in which he certified that maximum medical improvement had been reached.

16. The respondent on 17 April 2019, again by means of her solicitors posting a letter to the insurer, notified the insurer that the respondent was claiming "lump sum compensation arising from injury to the cervical spine and both upper extremities during her employment with the [appellant]". The respondent relied on a further report she had obtained from Dr Patrick dated 8 April 2019, which followed his further examination of the respondent on 5 April 2019. That report was sent to the insurer under cover of the letter of 17 April 2019. In that report Dr Patrick referred to his earlier report of 28 September 2016 and said,

> "diagnoses now remain unchanged except that she now does satisfy criteria for a radiculopathy arising at cervical spine (particularly C6, C7 nerve root distributions affecting left upper extremity more so than right)... There has also been a very significant deterioration with her hands since last seen by me with some limitation in ranges of active motion at digits particularly index finger left hand and to some extent other digits".

17. Dr Patrick noted that the respondent had consulted specialist rheumatologist Dr John Van der Kallen who thought the respondent had a "work related bilateral carpal tunnel syndrome and also unrelated poly-articular osteoarthritis". Dr Patrick considered that the respondent should be seen again by another specialist rheumatologist for further opinion. Dr Patrick said that the respondent's

> "hands to me appear to be becoming more dysfunctional and she certainly does have relatively advanced poly-articular osteoarthritic change in the digits of both hands, but further investigation should be carried out in the area of possible rheumatoid arthritis or co-negative arthritis. There may be some assessable component here in regard to CMC joints and digits of both hands bearing in mind that she has been carrying out very repetitive knife work at the Blayney Abattoirs since about 1982 over some eight years or more".

18. The respondent's solicitors in their letter also asked the insurer to concede that the respondent is a worker with high needs.

19. The insurer on 17 July 2019 then issued a notice to the respondent under s 78 of the 1998 Act. The substance of that notice was that the insurer advised the respondent that it disputed she had suffered an injury to her cervical spine and shoulders. It did not in that notice dispute that the respondent had suffered the injury to her hands and wrists that her solicitors' had notified in their letter of 17 April 2019. As mentioned, the respondent relied upon the report of Dr Patrick of 8 April 2019 who described in his report that the respondent had suffered an injury to her hands and wrists that may include an "assessable component" with respect to the respondent's "CMC joints and digits of both hands".

20. Following the respondent initiating the present proceedings in the Commission the matter was referred to arbitrator Mr Cameron Burge to determine the following issues in dispute between the parties:

    a. Whether the appellant is estopped from denying liability with respect to the cervical spine and shoulders;

    b. Whether the respondent suffered "injury to her cervical spine and shoulders as a result of the nature and conditions of her employment".[1]

21. The Appeal Panel observes that notwithstanding the respondent had claimed compensation for an injury relating to her hands and wrists, the parties did not identify to the arbitrator any issue with respect to the occurrence of that injury hence, there was no issue relating to that injury that the arbitrator was called upon to determine.

22. The arbitrator found that the respondent suffered injury to her neck and both arms above the elbows in the course of her employment with the appellant "by way of an acceleration, exacerbation, deterioration or acceleration of a disease process as a result of the nature and conditions of her employment with a deemed date of injury of 5 December 1990".[2] The arbitrator directed that the

    "matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for determination of the permanent impairment arising from the following:

    Date of injury: 4 December 1990 (deemed).

    Body systems referred: neck, right arm at or above the elbow, left arm at or above the elbow.

    Method of assessment: Table of Disabilities and Whole Person Impairment."

23. A delegate of the Registrar thereupon on 14 November 2019 referred a "medical dispute" to the AMS described in these terms:

    "MEDICAL DISPUTE REFERRED FOR ASSESSMENT (s319 1998 Act)

    □ the degree of permanent impairment of the worker as a result of an injury (s319(c))
    □ whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion (s319(d))
    □ whether impairment is permanent (s319(f))
    □ whether the degree of permanent impairment of the injured worker is fully ascertainable (s319(g))

    Date of Injury: 4 December 1990 - deemed

    Body part/s referred: Neck
    Right arm at or above the elbow
    Left arm at or above the elbow
    Method of assessment: Table of disabilities"

[1] Page 4 of the transcript of the arbitration in proceedings 3386/19 (the transcript).
[2] Page 22 of the transcript.

24. The Appeal Panel notes that it is the practice of the Commission to provide the parties with a draft of the referral, prior to issuing the referral to an AMS, and this is done with a view to ensuring that the terms of the referral are correct. Notwithstanding that there were obvious problems with the terms in which the referral in this matter was expressed, neither party, it seems, notified the Commission of that.

25. As just said, arbitrator Mr Burge was required to, and did, determine a dispute between the parties regarding whether the respondent suffered an injury to her neck and shoulders. He was not required to determine any other dispute, and that was because, other than the medical dispute and impairment dispute, which it is was intended an AMS would assess, there was no other dispute between the parties to be determined.

26. The medical dispute, as defined in s 319 of the 1998 Act, that existed between the parties, and which it was intended an AMS would assess, related to the degree of permanent impairment of the respondent from the injury to her cervical spine, shoulders and hands and wrists from the injury deemed to have happened on 4 December 1990. The impairment dispute that it was intended an AMS would assess related to the respondent's permanent impairment of the neck and the loss of right arm and of her left arm at or above the elbows from that injury. These impairment and medical disputes were not expressly or clearly identified in the referral that was issued to the AMS.

27. The documents sent to the AMS with the referral comprised the ARD and all attached documents, the appellant's reply and all attached documents, and the Certificate of Determination in which the arbitrator's determination and direction were recorded.

28. The impairment and medical disputes that were referred to the AMS to assess must be considered and understood, in the Appeal Panel's view, within the context just set out and by reference to all of the documents sent to the AMS. So done, the referral insofar as it related to the medical dispute required the AMS to assess the degree of the respondent's permanent impairment from the injury to the respondent's cervical spine and both her upper extremities (that is her shoulders and her wrists and hands), and insofar as it related to the impairment dispute it required the AMS to assess the permanent impairment of the respondent's neck and the losses of both arms at or above her elbows (consequent upon the injury to her neck, shoulders and hands and wrists).

29. The Appeal Panel notes that the AMS provided a MAC with respect to those impairment and medical disputes. Neither party has taken issue with the AMS dealing with these impairment and medical disputes, notwithstanding they were not clearly articulated in the form of referral. In other words, the AMS provided a MAC that responded to those disputes and neither party has challenged that, although as will be detailed below, there is a challenge with respect to whether the AMS made an error and consequently whether the MAC contains a demonstrable error, with respect to how he assessed the disputes.

MEDICAL ASSESSMENT CERTIFICATE

30. The AMS set out in Part 4 of the MAC the following history that he obtained with respect to the occurrence of the respondent's injuries:

> "Ms Stanaway had been working for about 8 years as a 'Knife Hand' working on the beef chain in an abattoir. Leading up to this time, both of her hands started swelling. At one time, she was unable to get her hands inside her protective mesh gloves due to the swelling. There seems to have been relatively little in the way of clinical management at that time. In 1991, she ceased work.
>
> Effectively, she was unable to find further work since anything she did seemed to result in swelling of her hands.

Many years later, she was seen by Specialist Rheumatologist, Dr Van Der Kallen. A diagnosis of poly-articular osteoarthritis was made and also chronic Carpal Tunnel Syndrome.

She was also seen by Specialist Hand Surgeon, Dr Andrew Myers, and in early November 2017 carpal tunnel decompression was conducted on each wrist.

Throughout the file, there is a history of swelling, discoloration and blotchiness of the hands. Nevertheless, after the surgical procedure, although it took quite a long time for her condition to settle down, there was obvious improvement. It was identified in late July 2019 that her condition had stabilised to a sufficient level that she was fully assessable for impairment."

31. The AMS summarised the respondent's injuries in the following way in Part 7 of the MAC and provided the following diagnoses of her injuries:

> "Ms Stanaway has a long history of dysfunction of her upper extremities and to a lesser extent her neck. This situation dates back to her time working in the Abattoir at Blayney leading up to late 1990. It has been identified that she also has poly-articular osteoarthritis in many of the small joints of the digits on each side. It has also been identified that her occupation as a Knife Hand has resulted in chronic bilateral Carpal Tunnel Syndrome. The poly-articular osteoarthritis of the small joints of the hands has also been aggravated quite badly by the same phenomenon. Large components of this aggravation continue.
>
> Earlier on, dysfunction of her shoulders and her neck associated with her occupation were also described. This also appears to be a substantial work-related phenomenon."

32. When discussing an opinion of orthopaedic surgeon Dr Chris Harrington, whom the appellant had qualified to provide a forensic medical report, and who considered that the respondent's cervical spine and shoulder impairment were not causally related to the respondent's work, the AMS said, "there is sufficient evidence to include these elements as having a substantial work-related influence in their pathological development".

33. With respect to the impairment dispute, the AMS assessed that the respondent had 25% permanent impairment of her neck, and 25% permanent loss of each arm at or above the elbow. With respect to the medical dispute, the AMS assessed the respondent had 7% whole person impairment (WPI) in regards to her cervical spine and 25% WPI in regards to each upper extremity.

34. The AMS noted there was extensive evidence that respondent had pre-existing degenerative change. The AMS said in Part 11 of the MAC that, "under the circumstances of this case and with relatively limited information of the extent of this degenerative change, there is no realistic alternative other than a deduction of one tenth from the assessment of the neck (cervical spine) and each arm (upper extremity)".

35. Accordingly, with respect to the impairment dispute, the AMS assessed, and certified, that as a result of the respondent's injury the respondent had 22.5% permanent impairment of her neck and 22.5% permanent loss of each arm at or above the elbow. With respect to the medical dispute, the AMS assessed, and certified that the degree of the respondent's permanent impairment as a result of her injury was 45% WPI (6% for the neck and 23% for each upper extremity).

EVIDENCE

36. 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

37. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel. By way of providing a summary of them, the Appeal Panel has paraphrased them immediately below.

38. In summary, the appellant submits that the AMS failed to explain his reasoning in sufficient detail with respect to how the respondent's impairment of her cervical spine and shoulders results from her injury and failed to address evidence that she had returned to a pain free state and demonstrated full range of movement by 24 September 1993. The appellant submits the AMS failed to consider the absence of clinical evidence with respect to complaints between 14 September 1994 and 2011. The appellant submits that the AMS also failed to explain his reasoning in sufficient detail with respect to the relationship between the respondent's employment duties prior to 4 December 1990 and aggravating poly-arthritis in the small joints of her hands. The appellant submits that the connection between the respondent's duties and her present symptoms from all injuries more than two decades after having worked for the appellant is tenuous.

39. The appellant further submits that the AMS did not consider or overlooked reports of Dr Geoffrey Mutton and Dr Ellis and the respondent's statements of 14 July 2015, 22 June 2017 and 22 June 2019.

40. The appellant also submits that the AMS applied the incorrect test for making a deduction under s 323 of the 1998 Act and that there is ample medical evidence with respect to the arthritis in the respondent's hands such that the deduction the AMS made is at odds with the evidence.

41. In reply, the respondent submits that there is evidence that she had ongoing complaints of pain and restriction in the neck and shoulders, that evidence being within her statements of 14 July 2015, 22 June 2017 and 26 February 2019 and the reports of Dr Jones dated 24 December 1990, Dr Morgan dated 14 September 1994, and Professor Ghabrial dated 2 December 2009, 3 August 2010 and 15 February 2011. The respondent submits that the AMS had regard to all the evidence and set out explicitly within the MAC those parts of the evidence he considered particularly relevant. The respondent submits that the AMS considered that her poly-arthritis had been aggravated quite badly by her occupational activities as a knife hand and that large components of the aggravation continued, which opinion accorded with the opinion of Dr Patrick. The respondent submits that the AMS adopted the appropriate test when making a deduction for pre-existing degeneration. The deduction the AMS made was not at odds with the evidence because there was no evidence as to the extent of her pre-existing condition at the time of injury.

PRELIMINARY REVIEW

42. 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.

43. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the respondent to undergo a further medical examination. This is because the Appeal Panel, for reasons explained below, concluded that the MAC does not contain a demonstrable error. The Appeal Panel therefore would not be re-assessing the impairment dispute and the medical dispute and hence had no need, and indeed no power[3], to examine the respondent.

[3] *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792.

FINDINGS AND REASONS

44. 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.

45. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons.

46. The detail to which an AMS must explain his or her opinion for an assessment of a worker's impairment will depend on the particular case. The AMS's reasons need not be extensive but must be sufficient such that the actual path by which an AMS has arrived at his or her opinion is apparent.[4]

47. With respect to the AMS's reasons for his assessment of the degree of permanent impairment of the respondent with respect to her cervical spine and shoulders and her permanent impairment of her neck and loss of use of arms at or above the elbows resulting from her injury, the Appeal Panel considers that the AMS's reasons sufficiently reveal the path by which he formed his opinion. The AMS noted and took account of the work that the respondent did in her employment with the appellant. The AMS noted and took account of the respondent's present symptoms. The AMS examined the appellant's cervical spine and shoulders and had regard to his findings. The AMS said that the respondent "has a long history of dysfunction of her upper extremities and to a lesser extent her neck", dating "back to a time working in the abattoir at Blayney leading up to late 1990". The AMS said that there was "sufficient evidence" with respect to the respondent's work influencing the "pathological development of her cervical spine and shoulders".

48. True it is that the respondent was examined by orthopaedic surgeon Dr Geoffrey Mutton on 17 December 1990 and again on 22 February 1991, and on those occasions the respondent was reported by the doctor as having full range of movements of her shoulder joints, although the doctor did find the respondent was tender to palpate over the right supraspinatus tendon region. Also, it is the case that when the respondent was examined by surgeon Dr Max Ellis on 24 September 1993, when Dr Ellis found that the respondent then had full and pain free movements of her neck and shoulders. However, when examined on 8 September 1994, by Dr Morgan, a consultant in rehabilitation medicine, the respondent was found to have pain on abduction of her left shoulder and pain on forward flexion of her cervical spine. Orthopaedic and spinal surgeon Professor Ghabrial when he examined the respondent on 22 December 2009 found the respondent had moderate restriction of movement within her neck and restriction with her shoulders and also experienced tenderness within her right shoulder and discomfort with her left shoulder. The respondent described in her statement of 14 July 2015 having pain in her neck that had become worse over the last few years resulting in her seeking medical treatment.

49. The AMS said that he had studied "in detail" all the documents that had been referred to him by the Commission. The AMS therefore had considered the reports and findings of Drs Mutton and Ellis. In order for the AMS to explain his assessment it was not necessary for him to have expressly addressed every piece of evidence that was referred to him, but rather, as already indicated, the requirement was for the AMS to have explained his opinion in sufficient such that the path by which he reached his assessment is apparent and understood. In other words, the fact the AMS did not in the MAC expressly address every piece of evidence does not mean the AMS did not adequately explain his or her opinion for an assessment.

[4] See *Ivaneza v Dalsil Constructions Pty Ltd* [2017] NSWSC 218 at 33, applying *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA43; see also *Vitaz v Westform [NSW] Pty Ltd* [2011] NSWCA 254 at [32]-[34].

50. Given what the Appeal Panel has detailed in [47] above, the Appeal Panel considers the AMS provided a sufficient explanation for his conclusion that the respondent's permanent impairment insofar as it related to her cervical spine and shoulders and his assessment of the respondent's permanent impairment of her neck and each of her arms at or above the elbows, insofar as it related to her shoulders, was sufficiently explained albeit brief.

51. In the Appeal Panel's view, the evidence outlined in [48] above supports, on balance, the AMS's assessment. Different examiners and assessors might have weighed specific items of that evidence differently and attached different weight to various items of the evidence than the AMS and formed different conclusions than the AMS based on how they weighed it, but the potential that other examiners and assessors may have done so does not mean that the AMS did not adequately explain his assessment.

52. The Appeal Panel rejects the appellant's submission to the effect that the AMS has failed to adequately explain his assessment because the AMS failed "to consider the absence of clinical evidence of ongoing complaints or attendances between" 1994 and 2011. As mentioned the AMS had regard to all of the documents that were referred to him, and hence the AMS was aware that neither party had filed with the Commission any clinical record relating to a consultation by the respondent with a clinician between 1994 and 2009 regarding her symptoms. However, there was evidence of the respondent's experience of symptoms after 1990 with respect to all injured body parts and that evidence was from her, both in terms of her written statements and her reports of symptoms to the AMS. The AMS took account of that evidence. Essentially, it seems to the Appeal Panel that the appellant's submission on this issue is really to the effect that the AMS ought to have inferred from there being no clinical records in evidence detailing any symptoms the respondent suffered for many years after 1994 that the respondent had recovered from her injuries around 1994. Given the history the AMS obtained regarding the respondent's injury and subsequent symptoms, there was no error on the part of the AMS for failing to draw that inference. The AMS has concluded that the respondent's presentation at the time of assessment related to her injury, and that conclusion was open to him.

53. The Appeal Panel rejects the appellant's submissions that the AMS did not consider or that he overlooked the reports of Dr Martin and Dr Ellis and the respondent's statements. As mentioned, the AMS was not required to discuss every piece of evidence, but rather only the evidence that he considered relevant. The AMS has said in the MAC that he studied all the documents "in detail" that the Commission referred to him. He set out the pieces of evidence that he considered particularly germane to his task in assessing the appellant's impairment. The inference to be drawn from that, in the Appeal Panel's view, is that the AMS considered that the reports of Drs Martin and Ellis were not of particular relevance to his assessment of the respondent's impairment.

54. With respect to the appellant's submission that the AMS did not provide adequate reason to support his conclusion of there being a causal relationship between the respondent's employment and her aggravation of poly-arthritis of the small joints of her hands, the Appeal Panel notes that the AMS had regard to the work the respondent did as a knife hand for the appellant and that she had experienced swelling of her hands prior to ceasing her work with the respondent. The AMS noted that the respondent, subsequent to her ceasing work, experienced swelling of her hands with anything she did. The AMS noted that it was not until many years after the respondent ceased her work that Dr Van der Kallen made a diagnosis of poly-articular osteoarthritis. The AMS had regard to his findings from his examination of the respondent's hands which included there being extensive osteoarthritic changes in the small joints of her hands. The AMS expressed the view, based on those factors, that the respondent's occupation as a knife hand, "aggravated quite badly" poly-articular osteoarthritis in the respondent's small joints of her hands. The AMS expressed the view that large components of the aggravation continue.

55. In the Appeal Panel's view those reasons of the AMS sufficiently expose the path by which he came to the view that the respondent's employment with the appellant aggravated the poly-articular osteoarthritic changes in her hands.

56. Turning now to the appellant's submission regarding the approach the AMS adopted in making a deduction under s 323(1) of the 1998 Act, the Appeal Panel notes that the authorities are clear and consistent with respect to what s 323(1) of the 1998 Act requires. That is, that the level of a worker's post-injury impairment as at the time of assessment must firstly be determined. Secondly, a prior injury or pre-existing condition or abnormality must be identified. Thirdly, it must be determined whether a proportion of the worker's post-injury impairment is due to that prior injury or pre-existing condition. If so, then lastly, the extent to which the worker's post-injury impairment is due to the prior injury or pre-existing condition or abnormality must be determined.[5] With respect to the final step, s 323(2) stipulates that if a deduction will be difficult or costly to determine because for example of the absence of medical evidence, the deduction is to be assumed to be 10% of the impairment unless that assumption is at odds with the available evidence.

57. The Appeal Panel observes that s 68A of the 1987 Act applies by force of clause 3(1) of Part 18C of Schedule 6 of the 1987 Act with respect to the deduction to be made when assessing the permanent impairment of the respondent's neck and the permanent loss of her arms at or above the elbows, the deduction is made under. The steps outlined with respect to a deduction to be made under s 323 of the 1998 Act similarly apply for the deduction to be made under s 68A of the 1987 Act.

58. As the Appeal Panel understands the appellant's submission, the appellant does not take issue with the first three steps that must be followed when making a deduction under s 323/s68A, but rather it is the last step in the process that the appellant has challenged. In any event, the Appeal Panel considers that the AMS followed all steps correctly to determine the deduction to be made.

59. The AMS determined with respect to the medical dispute the respondent's overall permanent impairment as at the time the AMS assessed the respondent. With respect to the impairment dispute, the AMS determined the respondent's permanent impairment of her neck and loss of use of her arms at or above the elbows.

60. The AMS identified the pre-existing conditions the respondent had, being degenerative changes in her cervical spine and shoulders and poly-articular arthritis in her hands. The AMS determined that a proportion of the respondent's post injury impairment and losses is due to those pre-existing conditions.

61. The Appeal Panel considers that there is no error in the AMS assuming, in accordance with s 323(2)/s 68(6), the deduction to be made is 10%. There is simply no evidence, other than the respondent's subjective description of symptoms, to reveal to what extent the degenerative changes in the respondent's cervical spine and shoulders were present as at 4 December 1990 or to what extent the poly-articular arthritis was present in her hands at that time. It would now be too difficult, if not impossible, to determine the extent to which those pre-existing conditions were then present and now contribute to her impairment. It is apparent from what the AMS said in Part 11 of the MAC that he considered the extent of the deduction to be made under s 323(1)/s68A(1) was too difficult to determine. Having regard to the work that the respondent did for the appellant, and absent there being any clinical or objective evidence from that time, such as radiological investigations, the Appeal Panel considers that the AMS was correct to assume the deduction under s 323(1)/s 68(6) was to be 10%. That assumption was not at odds with the evidence. There was simply no evidence, other than the subjective description of symptoms at that time, relating to this matter. The deduction the AMS therefore made under s323)1)/s68A(1) accorded with what s323(2)/ s68A(6) required. The MAC does not contain a demonstrable error as a consequence of the deduction the AMS made.

62. For these reasons, the Appeal Panel has determined that the MAC issued on 3 September 2019 should be confirmed.

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[5] See for example *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 and *Ryder v Sundance Bakehouse* [2015] NSWSC 526.

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