WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4772/19**
Appellant:	**Majad Bayad**
Respondent:	**Qantas Airways Limited**
Date of Decision:	**30 April 2020**
Citation:	**[2020] NSWWCCMA 80**

Appeal Panel:	
Arbitrator:	**Jane Peacock**
Approved Medical Specialist:	**Dr Brian Stephenson**
Approved Medical Specialist:	**Dr Richard Crane**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 5 February 2020, Mr Majad Bayad (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Damodaran Prem Kumar, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 9 January 2020.

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 the Appeal Panel's preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination.

EVIDENCE

Documentary evidence

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

Medical Assessment Certificate

9. 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

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

FINDINGS AND REASONS

11. 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.

12. 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.

13. The matter was referred by the Registrar to the AMS as follows:

14. The following matters have been referred for assessment (s 319 of the 1998 Act):

" Date of injury:	**12 February 2007, 13 April 2007, 3 March 2009**
Body parts/systems referred:	**Cervical Spine, Lumbar Spine, Digestive System**
Method of assessment:	**Whole Person Impairment"**

15. The AMS assessed as follows:

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in NSW workers compensation guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality** (expressed as a fraction)	**Sub-total/s % WPI** (after any deductions in column 6)
1. **Cervical Spine**	**21/2/07 13/4/07 3/3/09**	**Chapter 4 Pages 24-30**	**Chapter 15.6 Table 15-5 Page 392**	**0**	0	**0**

2. **Lumbar Spine**	**21/2/07 13/4/07 3/3/09**	**Chapter 4 Pages 24-30**	**Chapter 15.4 Table 15-3 Page 384**	**12**	0	**12**
3. **Upper Digestive System**	**21/2/07 13/4/07 3/3/09**	**Chapter 16 Item 16-9 Pages 78-79**	**Chapter 6.2 Table 6-3 Page 121**	**0**	0	**0**
4. **Lower Digestive System Colorect al**	**21/2/07 13/4/07 3/3/09**	**Chapter 16 Item 16-9 Pages 78-79**	**Chapter 6.3 Table 6-4 Page 128**	**0**	0	**0**
5. **Lower Digestive System Anus**	**21/2/07 13/4/07 3/3/09**	**Chapter 6.2 Table 6-3 Page 121**	**Chapter 6.3b Table 6-5 Page 1231**	**2**	0	**2**
Total % WPI (the Combined Table values of all sub-totals)					**14**	

16. The worker appealed. The complaint on appeal relates to the assessment in respect of the cervical spine. There is no complaint in respect of the lumbar spine, upper digestive system, or lower digestive system.

17. In summary, the appellant submitted that the AMS erred in assessing DRE I and he should have found DRE II in circumstances which included that he took a history of non-verifiable radicular complaints and found asymmetrical loss of range of motion.

18. In summary, the respondent submitted that the AMS has not erred and that the MAC should be confirmed.

19. The role of the AMS is to conduct an independent assessment on the day of examination. The AMS is required to take a history, conduct a physical examination, review the special investigations, make a diagnosis and have due regard to other evidence and other medical opinion that is before the AMS. The AMS must bring his clinical expertise to bear and exercise his clinical judgement when making an assessment of impairment and make such assessment in accordance with the criteria in the Guides.

20. Here the AMS took a history of injury to the neck consistent with the other evidence that was before him as follows:

> "Mr Bayad has a history of multiple injuries sustained whilst at work:
>
> - On 21/2/07 Mr Bayad hit his head and fell backwards while in a plane. In this accident he sustained a laceration to his scalp and injured his neck and back. He was taken to St George Hospital where the laceration was closed using glue and he was then sent home.
> - On 13/4/07, while walking down a flight of stairs carrying garbage bags, his back gave way and he aggravated his neck and back.
> - On 3/3/09, whilst walking down from the smoking area, he fell backwards and hit the front of a pillar. In this accident he hit his head and lost consciousness, twisted his ankle, and injured/aggravated his back and neck. He was taken to St George Hospital where imaging studies were done. He was discharged after 3-4 hours."

21. The AMS recorded present symptoms in respect of the cervical spine as reported by the appellant as follows:

> "He also complains of pain in his neck which is constant which will often radiate down to the shoulders and the top of the trapezius. Occasionally he will experience numbness and when this occurs it affects all digits of the hand. He wakes up with a stiff neck daily. The severe pain in the neck will resolve if he lies down."

22. The AMS conducted a physical examination the relevant findings of which he recorded as follows:

> "He presented as a pleasant and cooperative man. He was able to remove his outer garments, including his trousers, without any problems.
>
> He had a height of 169cm with a weight of 74kg.
>
> He walked with a very slight limp favouring the left side. Visual examination showed a symmetrical body with no muscle wastage and no asymmetry on either side. He was able to stand on either foot with good balance. He was able to stand on tip toes and on his heels and walk on the same without restriction or discomfort. He was able to squat fully showing full range of movement of both knees. He was able to sit on his buttocks and get up unassisted. He was able to sit on the edge of the bed and extend both legs fully. He was able to sit on the bed and was able to reach the ankles with both hands.
>
> **Cervical Spine**
>
> In movements of the neck he showed a 20% reduction uniformly in flexion, extension, rotation and lateral flexion. He complained of pain in the back of the neck. Palpation of the back of the neck revealed some tenderness of the lower cervical spine, however, the cervicothoracic muscles of both sides did not show any guarding or rigidity.
>
> ….
> Both shoulders examined normally with full movement on both sides."

23. The Panel notes that the appellant complained that the AMS did not examine the shoulders relevant to the radiculopathy complaints. It is clear, however, that the AMS did examine the shoulders and found them to be normal on examination with full movement on both sides.

24. The AMS reviewed the special investigations relevant to the cervical spine as follows:

> "CERVICAL SPINE X-RAY dated 18/05/2012
>
> The spinal alignment appears normal with no subluxation or fracture. There is moderate to severe spondylosis at the C4/5, C5/6 and C6/7 discs. There is moderate to severe narrowing of the C4/5 and C6/7 neural exit foramina bilaterally due to uncovertebral osteophytes. There is mild to moderate narrowing of the C5/6 neural exit foramen due to uncovertebral and facet joint osteophytes. The prevertebral soft tissues and odontoid peg appear normal. No cervical ribs noted.
>
> MRI CERVICAL SPINE dated 17/03/2018
>
> Multilevel degenerative disc and uncovertebral joint changes, with multilevel moderate neural foraminal narrowing but no central canal stenosis.
>
> BONE SCAN dated 8/10/2018

Multilevel degenerative spondylosis with moderate degenerative disc and end plate disease at L4/5 and L5/S1 levels with mild arthritic changes in the facet joints at these levels.
Moderate arthritic changes are noted in both knee joints, ankle joints and first MTP joints. Mild arthritic changes are noted in the first CMC joints of both wrists and the sternoclavicular and AC joints.

EOS SPINE dated 9/10/2018

There is tilting of the upper cervical spine to the right. The cervical spine is held in flexion. The upper thoracic spine is held in flexion with tilting of the upper thoracic spine to the right. Some mid and lower lumbar scoliosis convex to the left. The upper lumbar spine is held in extension.
There is spondylosis at the L4/5 and L5/S1 discovertebral articulations. There is degenerative change at the hip joints. The SI joints and symphisis pubis are unremarkable."

25. The AMS summarised the injury and diagnosis as follows:

"He has had well documented accidents on 21/2/07, 13/4/07 and 3/3/09, with all occurring in his employment with Qantas. All the accidents involved injuries to his neck and his back. From the first accident his neck and back have progressively become worse with the subsequent injuries."

26. The AMS explained his assessment of impairment in respect of the cervical spine as follows:

"I consider the original injury of 21/2/07 to have been the cause of his neck and back problems. The accidents of 3/4/07 and 3/3/09 were aggravations of the injuries sustained in the primary injury of 2007. I consider the exacerbations to be temporary and these would have resolved and he would have been left with the original impairments of the neck and back. As such I consider his impairments of the neck and back to be related to the accident of 21/2/07.

In examining the cervical spine he has shown a 20% symmetrical restriction in movement. There is no evidence of any dysmetria. Palpation of the back of the neck has not shown any guarding or spasm of the cervicothoracic muscles. There is no evidence of any non-verifiable radicular complaints. There is no clinical evidence of radiculopathy. There is no evidence of any loss of structural integrity. Using Workcover Guidelines and AMA5 he will fall into DRE Category 1 which carries a 0% whole person impairment."

27. The AMS specifically noted that his opinion differed from that of Dr Khan in respect of the assessment of the cervical spine noting:

"I feel he has no evidence of any radiculopathy in the cervical spine and have assessed him as having a DRE Category 1 impairment."

28. 4.18 of the Guidelines provides as follows:

"DRE II is a clinical diagnosis based upon the features of the history of the injury and clinical features. Clinical features which are consistent with DRE II and which are present at the time of assessment include radicular symptoms in the absence of clinical signs (that is, non-verifiable radicular complaints), muscle guarding or spasm, or asymmetric loss of range of movement."

29. The AMS is entitled to rely on his clinical findings on the day of examination. The AMS has conducted a thorough examination of both the cervical spine and both shoulders. The loss of range of movement on the AMS' clinical findings is symmetrical and not asymmetrical. He finds no evidence of any non-verifiable radicular complaints. He finds no clinical evidence of radiculopathy. He finds no guarding or spasm. In view of the clinical findings on the day of examination, the Panel can discern no error or application of incorrect criteria in the assessment by the AMS of the cervical spine at DRE 1.

30. For these reasons, the Appeal Panel has determined that the Medical Assessment Certificate issued on 7 February 2020 should be confirmed.

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