WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-5005/19**
Appellant:	**ABB Australia Pty Limited**
Respondent:	**Renato Starcic**
Date of Decision:	**11 March 2020**
Citation:	**[2020] NSWWCCMA 49**

Appeal Panel:	
Arbitrator:	**Jane Peacock**
Approved Medical Specialist:	**Dr John Ashwell**
Approved Medical Specialist:	**Dr Margaret Gibson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 13 December 2019 ABB Australia Pty limited (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tommasino Mastroianni, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 15 November 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 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:

> "The following matters have been referred for assessment (s 319 of the 1998 Act):
>
> - **Date of injury:** **19 September 2005**
> - **Body parts/systems referred:** **Lumbar spine**
Right upper extremity (right shoulder)
Scarring
> - **Method of assessment:** **Whole person impairment"**

14. The AMS assessed as follows:

Body Part or system	Date of Injury	Chapter, page and paragraph number in WorkCover Guides	Chapter, page, paragraph, figure and table numbers in AMA5 Guides	% WPI	% WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality	Sub-total/s % WPI (after any deductions in column 6)
Lumbar spine	19/09/05	Chapter 4 Page 24-29	Chapter 15 Page 384 Table 15-3	17%	1/4	(12.75) 13%

Right upper extremity	19/09/05	Chapter 2 Pages 10-12	Chapter 16 Pages 433 to 521	12%	1/3	8%
Scarring (TEMSKI)	19/09/05	Chapter 14 Pages 73-74		1%	Nil	1%
Total % WPI (the Combined Table values of all sub-totals)					**21%**	

15. The employer appealed. The complaint on appeal relates to the assessments in respect of the right upper extremity and scarring. There is no complaint in respect of the lumbar spine.

16. In summary, the appellant submitted on appeal as follows:

    - the AMS failed to assess the uninjured left upper extremity as a baseline, and

    - the AMS failed to give appropriate consideration to the pre-existing shoulder injury and subsequent injury.

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

18. 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.

19. Here the AMS took a history as follows:

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:
>
> Mr Starcic states that on 19 September 2005 he was starting his shift and he checked the crane before he started working. As he came down off the crane and stepped onto the ground he put his foot on a rock, lost his footing and fell backwards onto a concrete slab.
>
> In the fall he injured his right shoulder and lower back.
>
> He consulted a local doctor and x-rays were arranged. He was prescribed medication followed by physiotherapy and hydrotherapy.
>
> Mr Starcic states he had a previous injury and previous back surgery. He was left with back pain and right leg pain. As a result of the fall the back pain was worse.
>
> With time both the shoulder and back pain deteriorated.
>
> In 2014 he rushed to the toilet as he suffers with colitis and has urgency. As he got to the toilet he slumped on the seat and in doing so did not sit properly on the toilet seat and his body twisted and hit his right shoulder against the wall.

As a result, his back and shoulder pain got worse.

He stopped work and consulted the doctor. He was referred to Dr Winder, neurosurgeon for his back and Dr Tan, orthopaedic consultant for the shoulder. Dr Winder recommended surgery and in December 2014 he had a two level lumbar fusion.

In May 2017 he had right rotator cuff repair.

After convalescing from the surgeries, he continued to take medication and had intermittent physiotherapy for flare-ups of shoulder pain and also neck pain.

- Present treatment:

Physiotherapy, Neurofen plus, Voltaren and Panadol.

- Present symptoms:

He complains of constant back pain and states that his back is restricted. He complains of pins and needles in his right leg affecting the lateral foot and medial right lower leg.

He says his foot sometimes goes numb. He complains of cramps affecting the medial thighs and the right foot.

He complains of constant shoulder pain and restricted shoulder movements.

- Details of any previous or subsequent accidents, injuries or condition:

In 1992 he injured his right shoulder and low back. He had a discectomy following which he improved but was left with chronic back pain and right leg pain.

The right shoulder was treated with cortisone injection. He said that the shoulder continued to ache.

He said that he could not throw a ball properly.

- General health:

He suffers with colitis.

- Work history including previous work history if relevant:

He stopped work after the incident in 2014 and has not worked since. He is a self-funded retiree.

- Social activities/ADL:

He is married and his family are grown up.

He has difficulty with house chores and gardening. He has difficulty dressing and undressing, particularly when taking his trousers off. He has difficulty putting his socks on. He cannot cut his toenails and his wife has been doing this since he has had surgery."

20. The AMS conducted a thorough physical examination. His findings are not the subject of complaint on appeal. The relevant findings in respect of the upper extremities and scarring are as follows:

> "He is a man of stated age of slim build. He walks with a normal gait. He sat comfortably whilst relaying the history. He relays the history in a straightforward manner. There is consistency in the history and examination.
>
> He has difficulty dressing and undressing when taking his jeans off and putting them back on. He was wearing sandals and no socks.
> …
> There is a surgical scar in the abdomen extending from the umbilicus distally measuring 9cm. On close inspection suture marks are evident. The scar is paler than the surrounding skin.
>
> Inspection of the right shoulder reveals arthroscopic stab wounds measuring 2cm. The scars are paler than the surrounding skin and there was minor contour defect.
> …
> The right shoulder is tender anteriorly whilst the left shoulder is not tender.
>
> Both shoulders were restricted. Neurology of the upper limbs was normal. He has normal sensation, normal reflexes (biceps, triceps and supinator jerks – right equals left).
>
> Shoulder Movements

Movement	Right	% Upper Extremity Impairment	Left	% Upper Extremity Impairment
Flexion	80°	7	140°	3
Extension	30°	1	50°	0
Abduction	40°	6	120°	3
Adduction	0	2	40°	0
Internal rotation	40°	3	70°	1
External rotation	30°	1	90°	0
	Total	20%	**Total**	7%

21. The AMS reviewed the special investigations relevant to the right shoulder as follows:

> "I reviewed **ultrasounds of the right shoulder dated 16/11/05 reported by Dr Li.** He reports full thickness tear of the supraspinatus tendon with muscle retraction.
>
> An ultrasound dated 18/11/14 was reported by the radiologist as showing a full thickness tear of the supraspinatus tendon.

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

> "As a result of the incident in 2005 Mr Starcic sustained a lumbar disc lesion and aggravated pre-existing disc disease for which he had had surgery. In the fall he also aggravated his right shoulder which he had injured previously and sustained a rotator cuff tear.
>
> In the 2014 incident he aggravated his back and exacerbated the right shoulder.
>
> My clinical diagnosis is lumbar disc lesion for which he had spinal fusion.
>
> Right rotator cuff disruption for which he had surgery."

23. The AMS explained his assessment of impairment in respect of the right upper extremity and scarring as follows:

> "I assess 20% right upper extremity impairment and 7% left upper extremity impairment…, which equates to 12% and 4% whole person impairment respectively.
>
> The 2014 incident caused symptom exacerbation only and in my opinion no impairment.
>
> Although there is a history of previous injury to the shoulder, being guided by the history of the incident and continuing problem, it is difficult and costly to assess that impairment, and under normal circumstances I would have deducted one-tenth for pre-existing condition applying the provision of section 323.
>
> Mr Starcic has a non-injured contralateral joint where he has 4% whole person impairment. According to the Guidelines of joint motion[3] (see 10b) I have deducted the contralateral non-injured joint impairment as a baseline, and subtracted it from the calculated impairment of the involved joint, as in my opinion if he had not had the injuries to the right shoulder, he would in all probability have the same constitutional impairment as he has in the left shoulder. As the contralateral joint impairment is more accurate than the probable impairment from the previous injury of the right shoulder, I have deducted this rather than applying the provisions of s323(2).
>
> There is scarring which under the best-fit principle of the TEMSKI classification is rateable. In my opinion he best fits the descriptors for 1% WPI. He is conscious of the scars, the scars are easily located and seen with normal summer clothing. There is colour contrast and some contour defect."

24. The AMS made comment on the other evidence before him as relevant to the right upper extremity and scarring as follows:

> "I have deducted impairment from the non-injured contralateral joint as Dr Bodel, however I deducted WPI and not upper extremity impairment. He uses the wrong methodology in deducting upper extremity impairment for each shoulder and then converting it to WPI, where the correct methodology is to calculate the WPI and then make the deduction.
>
> I assess the same impairment for scarring as Dr Bodel. He then combines all the impairments and makes deduction for pre-existing condition and for subsequent injuries. I cannot follow his methodology here, and the correct way of making the deduction for the body parts injured is to do each separately and not combine them as Dr Bodel did. Each body part would have been affected differently.
>
> I assess the same Category as Dr Powell but found a greater impairment as the Claimant is not independent in self-care.
>
> …
>
> I assess a similar impairment of the right upper extremity to Dr Powell, and he attributes one-third to multiple contributing factors. The methodology is incorrect. For the shoulder one deducts either pre-existing condition or impairment for the non-injured contralateral joint. In my opinion the 2014 incident did not cause any impairment see 10a."

25. In respect of the pre-existing condition and subsequent injury the AMS had identified the following:

> "Is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality? **Yes**
>
> f so, please indicate which body part/system is affected by the previous injury, pre-existing condition or abnormality. **Right shoulder and lumbar spine.**
> **Indicate whether there has been any further injury subsequent to the subject work injury. If this injury has caused any additional impairment this should not be included with the assessment of impairment due to the subject work injury.** In 2014 he aggravated his back and exacerbated the right shoulder as he hurriedly sat on a toilet seat, twisting his back and hitting his right shoulder against the wall."

26. The AMS explained his approach to the question of a deduction in respect of the right upper extremity under s 323 as follows:

> "There is also a history of injury to the right shoulder for which he had treatment.
>
> ….
> For the right shoulder, although there is a pre-existing condition, I have elected to use the contralateral joint for deduction purposes (see 10a). I have not used both the pre-existing condition and the contralateral joint as this would constitute double-dipping. I have also addressed the subsequent injury (see 10a)."

27. The Guides provide at paragraph 2.20 as follows:

> "2.20 When calculating impairment for loss of range of movement, it is most important to always compare measurements of the relevant joint(s) in both extremities. If a contralateral 'normal/uninjured' joint has less than average mobility, the impairment value(s) corresponding to the uninvolved joint serves as a baseline and is subtracted from the calculated impairment for the involved joint. The rationale for this decision should be explained in the assessor's report (see AMA5 Section 16.4c, p 543)."

28. The AMS explained that his approach to using the uninjured joint as a baseline for the calculation of impairment as follows:

> "I have deducted impairment from the non-injured contralateral joint as Dr Bodel, however I deducted WPI and not upper extremity impairment."

29. The panel considers that the AMS erred in this approach. The correct approach is as follows, using the AMS's ROM calculations (which are not complained about on appeal);

> 20% right upper extremity impairment less the 7% left upper extremity impairment leaves 13% RUE impairment which equates to 8% WPI for the right upper extremity.

30. This represents the overall level of impairment for the right shoulder. The question of a deduction under s 323 then needs to be addressed. Here the worker had a prior injury to the right shoulder in 1996 which resulted in a full thickness tear. He was able to work on and whilst operative intervention was recommended, this was not undertaken and he was able to work on. He ultimately came to surgery at the hands of Dr Tan as a result of the subject injury in 2005 and the prior injury to the right shoulder. Dr Tan noted that the tear had progressed to a "massive irreparable cuff tear" mostly as a result of the 2005 injury.

31. On the available evidence, the contribution of the prior injury, condition or abnormality in the right shoulder to the overall level of permanent impairment assessed needs to be taken into account by making a deduction under s-323. As the extent of the deduction would be difficult or costly to determine, the deduction will be one-tenth. This results in the following calculation:

    8% WPI less 0.8 equates to 7% WPI as a result of the injury on 9 September 2005.

32. The panel can discern no error in the AMS's conclusion that the 2014 incident resulted in an aggravation of symptoms but no impairment. This conclusion was available to him on the evidence and in accordance with the exercise of his clinical judgment. The panel will not disturb this finding.

33. The Panel can discern no error in the assessment of 1% WPI assessed for scarring, the multiple scars with colour contrast and defects which result from operations that have occurred as a result of the injury.

34. Accordingly, the calculation of the total impairment is as follows:

    13% WPI for the lumbar spine plus 7% WPI for the right upper extremity and 1% for scarring gives 20% WPI under the combined values table.

35. For these reasons, the Appeal Panel has determined that the MAC issued on 15 November 2019 should be revoked and a new Medical Assessment issued. A new Medical Assessment 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 5005/19
Applicant Renato Starcic
Respondent: ABB Australia Pty Limited

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 Tomassino Mastroianni 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 WorkCover Guides	Chapter, page, paragraph, figure and table numbers in AMA5 Guides	% WPI	% WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality	Sub-total/s % WPI (after any deductions in column 6)
Lumbar spine	19/09/05	Chapter 4 Page 24-29	Chapter 15 Page 384 Table 15-3	17%	1/4	(12.75) 13%
Right upper extremity	19/09/05	Chapter 2 Pages 10-12	Chapter 16 Pages 433 to 521	8%	1/10	7%
Scarring (TEMSKI)	19/09/05	Chapter 14 Pages 73-74		1%	Nil	1%
Total % WPI (the Combined Table values of all sub-totals)						**20%**

Jane Peacock

Arbitrator

Dr John Ashwell
Approved Medical Specialist

Dr Margaret Gibson
Approved Medical Specialist

11 March 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar