WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-5597/19**
Appellant:	**MSA (Aust) Pty Limited**
Respondent:	**Rosemarie Paglinawan**
Date of Decision:	**23 March 2020**
Citation:	**[2020] NSWWCCMA 61**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr Margaret Gibson**
Approved Medical Specialist:	**Dr Brian Noll**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 23 January 2020, MSA (Aust) Pty Limited lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Christopher Oates, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 6 January 2020.

2. The appellant relies on the ground of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act), the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, the ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground of appeal on which the appeal is made.

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 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. Rosemarie Paglinawan (Mrs Paglinawan/the respondent) suffered injury by way of disease a gradual onset to her shoulders and wrists as a result of work tasks performed in the course of her employment as a process worker by the appellant. Mrs Paglinawan commenced that employment in March 2004 using both arms and hands to operate industrial sewing machines. Prior to commencing her employment with the appellant Mrs Paglinawan had undergone a right carpal tunnel release in 2004.

7. Mrs Paglinawan developed painful symptoms in her shoulders and wrists which ultimately led to the termination of her employment in December 2010. She underwent left carpal tunnel release in September 2009. The shoulders were treated with ultrasound guided cortisone injections with temporary benefit.

8. In October 2011, Mrs Paglinawan was examined by an orthopaedic surgeon, Dr Medhat Guirgis, for the assessment of impairment arising from work injuries to the bilateral upper extremities. Dr Guirgis assessed Mrs Paglinawan as having 13% whole person impairment (WPI). He assessed 10% upper extremity impairment for the right arm resulting from the carpal tunnel condition and 10% upper extremity impairment in respect of the right shoulder. Dr Guirgis reduced the assessment of upper extremity impairment resulting from the right carpal tunnel conditions by half to 5% upper extremity impairment "due to possible pre-existing predisposition". Combined with the upper extremity impairment assessed in respect of the right shoulder Dr Guirgis assessed 9% WPI in respect of the right upper extremity.

9. In the left upper extremity, Dr Guirgis assessed 13% upper extremity impairment resulting from what he described as "the chronic median neuropathy in the left carpal tunnel". That impairment was converted on the Tables to 8% WPI. Dr Guirgis then reduced that assessment by one half "due to possible pre-existing predisposition" so as to yield a final assessment of 4% WPI in respect of the left upper extremity.

10. The assessments were combined to yield 13% WPI. Dr Guirgis did not assess the left shoulder.

11. That assessment was accepted by the workers compensation insurer and the parties entered into a Complying Agreement pursuant to s 66A of the *Workers Compensation Act 1987* (the 1987 Act). The agreement records "regional injury impairment percentage" of 13% WPI in respect of "right shoulder/wrist, left shoulder/wrist" although no impairment had been assessed by Dr Guirgis in respect of the left shoulder.

12. Mrs Paglinawan continued to experience painful symptoms and was examined for the purposes of a further claim for lump-sum compensation pursuant to s 66 of the 1987 Act by an orthopaedic surgeon, Dr Bodel, in December 2018. Dr Bodel assessed 12% upper extremity impairment in each shoulder and 10% upper extremity impairment from the left median nerve (after rounding). Dr Bodel accordingly assessed 7% WPI in respect of the right upper extremity (shoulder) and 13% WPI in respect of the left upper extremity (shoulder and left median nerve).

13. A further claim for lump-sum compensation was made on Mrs Paglinawan's behalf and the parties entered into consent orders on 27 November 2019 providing for referral to an AMS of injury to the "shoulders and wrists" deemed have occurred on 4 February 2008.

14. The terms of the referral were recorded as: "for assessment of further deterioration arising from the accepted injury with the respondent (and not subsequent employment noting that the applicant ceased work with the respondent in 2009)" and the dispute was subsequently referred for assessment to the AMS in those terms.

15. The AMS assessed 13% WPI in respect of the left upper extremity. That assessment was based on assessment of 12% upper extremity impairment shoulder and 10% upper extremity impairment with respect to the left median nerve. Those impairments were combined to give 21% left upper extremity impairment converted on the Tables to 13% WPI.

16. The AMS assessed 12% right upper extremity impairment in respect of the right shoulder and "no additional impairment for the right upper extremity at the elbow, wrist or hand." Accordingly the AMS assessed 6% WPI in respect of the right upper extremity.

17. The combined value of the assessed impairments in the left and right upper extremities was 18% WPI. The AMS made no deduction pursuant to s 323 of the 1998 Act.

PRELIMINARY REVIEW

18. 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.

19. 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 the appeal was confined to the issue of whether the AMS had erred by not making a deduction pursuant to s 323 of the 1998 Act.

20. The appellant requested the Mrs Paglinawan be re-examined; however the appellant did not explain how examination could assist in the determination of whether a deduction pursuant to s 323 was appropriate. The deemed injury was agreed to have been incurred as a result of a gradual process commencing in 2004 and terminating in 2008. Re-examination carried out 16 years after the commencement of the gradual process leading to the condition in the affected parts would not assist in determining the extent of impairment attributable to any previous injury and/or pre-existing condition or abnormality as at March 2004.

EVIDENCE

Documentary evidence

21. 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

22. 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

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

24. In summary, the appellant submits that, in the circumstances, “a failure to provide a deduction pursuant to section 323 of the act” constituted demonstrable error. The appellant noted the deduction made by Dr Guirgis in his assessment which had formed the basis of the Complying Agreement pursuant to s 66 of the 1987 Act. The AMS agreed that a proportion of impairment was due to a previous injury, pre-existing condition or abnormality but had not given effect to this conclusion by making the appropriate deduction. The AMS had stated “the left carpal tunnel syndrome syndrome [sic] is in part a pre-existing constitutional condition, and the rotator cuff’s of both shoulders are in part affected by pre-existing degenerative changes.” This opinion was inconsistent with the absence of a deduction pursuant to s 323.

25. In reply, the respondent submits that the AMS should be asked to clarify what was meant by the phrase “factored in”, in saying “allowance for constitutional contribution to carpal tunnel syndrome and degenerative changes contribution to bilateral shoulder conditions has been factored in”. The respondent submitted further that the Panel should consider the whole of the evidence when deciding whether there was a pre-existing condition or abnormality and, if the Panel accepts that there was such a pre-existing condition or abnormality in the appropriate deduction would be 1/10.

FINDINGS AND REASONS

26. 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.

27. 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.

28. It is convenient to deal firstly with the submission of the respondent that: "an explanation by Dr Oates [the AMS] should be given so as not to prejudice the respondent worker. Clarity should be obtained by the Approved Medical Specialist, Dr Oates, what is meant by "factored in".

29. It is not the task of the medical panel upon referral under s 327 of the 1998 Act to seek such clarification. Section 328 (2) provides that the appeal is by way of review of the original medical assessment limited to the grounds of appeal on which the appeal is made. Pursuant to s 329, a matter can be referred again to the AMS as an alternative to an appeal pursuant to s 327 but that does not form part of the role of the Panel.

30. The Panel accepts that the AMS was of the opinion that a proportion of the WPI was due to a previous injury, pre-existing condition or abnormality as set out in his answer to paragraph 8(e) of the reasons. The AMS concluded that "an allowance for constitutional contribution to carpal tunnel syndrome and degenerative changes contribution to bilateral shoulder conditions has been factored in".

31. Section 323 of the 1998 Act provides.

> **"323 DEDUCTION FOR PREVIOUS INJURY OR PRE-EXISTING CONDITION OR ABNORMALITY**
>
> (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.
>
> (2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.
>
> Note : So if the degree of permanent impairment is assessed as 30% and subsection (2) operates to require a 10% reduction in that impairment to be assumed, the degree of permanent impairment is reduced from 30% to 27% (a reduction of 10%).
>
> (3) The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter.
>
> (4) The Workers Compensation Guidelines may make provision for or with respect to the determination of the deduction required by this section."

32. In *Cole v Wenaline Pty Limited*[1] (*Cole*), Schmidt J said:

> "What section 323 required, however, was that the evidence be considered, so that it could be determined firstly, what the level of impairment after the second injury was. Secondly whether a proportion of that impairment was due to the first injury.

[1] [2010] NSWSC 78 at [38].

Thirdly, what that proportion was. Undoubtedly in undertaking this exercise, the medical members of an Appeal Panel must utilise their medical judgement, knowledge and experience. Nevertheless, all stages of the statutory exercise must be undertaken in the light of the evidence and without the making of assumptions not provided for by this section."

33. In *Vitaz v Westform (NSW) Pty Ltd*[2] (*Vitaz*) the Court of Appeal noted the decisions in *D'Aleo v Ambulance Service of New South Wales*[3], *Matthew Hall Pty Ltd v Smart*[4] (*Smart*) and *Cole* and said: "The resulting principle is that if a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury."

34. The referral to the AMS was made in the following terms:

> "1. **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 February 2008 (deemed)****
>
> **Body part/s referred:** **Left Upper Extremity (left shoulder and wrist)**
>
> **Right Upper Extremity (right shoulder and wrist)**
>
> **Method of assessment:** **Whole Person Impairment**
>
> ** as noted in the arbitrator's certificate of determination – consent order:
>
> The matter is remitted to the Registrar to be referred to an AMS for assessment of further deterioration arising from the accepted injury with the respondent (and not subsequent employment noting that the applicant ceased work with the respondent in 2009)."

35. The terms of the referral were unsatisfactory. Section 319(c) required the AMS to assess the degree of permanent impairment of the worker as a result of the specified injury. The request to address "assessment of further deterioration" was not a task authorised by the statute.

36. The referral also required compliance with s 319(d) in determining whether any proportion of the impairment is due to any previous injury or pre-existing condition or abnormality and the extent of that proportion.

37. Having concluded that there was a pre-existing condition or abnormality the AMS was then required to assess whether that condition or abnormality contributed to the impairment assessed and, if so, to determine the extent of that contribution[5].

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[2] [2011] NSWCA 254 at [43].
[3] NSWCA 12 December 1996, unreported.
[4] [2000] NSWCA 284.
[5] *Vitaz* at [43].

38. The Panel accepts the submission of the appellant that, having determined that a proportion of the impairment was attributable to a pre-existing condition, the AMS fell into demonstrable error in failing to assess the extent of that proportion and making a deduction accordingly.

39. The Panel is satisfied that demonstrable error has been established and the Panel is required to review the whole of the evidence to determine the issues referred pursuant to s 319.

40. No submissions have been addressed to the assessment of the degree of permanent impairment of Mrs Paglinawan as a result of the injury by the AMS. The AMS conducted the relevant examinations in accordance with the Guidelines and his conclusions are unchallenged as to the extent of upper extremity impairment and the resulting WPI.

41. Mrs Paglinawan did not engage in work activities likely to contribute to impairment after ceasing to perform the heavier tasks which she performed with the appellant.

42. The Panel accepts that Mrs Paglinawan, as a result of injury to the left upper extremity (left shoulder and wrist) suffered 13% WPI and, as a result of injury to the right upper extremity (right shoulder) suffered 6% WPI in accordance with the findings on examination and the whole of the evidence available to the AMS. There is no assessable impairment found as a result of injury to the right wrist.

43. The impairments found are, on the balance of probabilities, permanent.

44. The Panel has concluded that there is no basis for a deduction pursuant to s 323 based on the history recorded in the respondent's statement, the results of investigations and the report of Dr Bodel. The Panel notes that Dr Guirgis made a deduction of one half in his assessment of impairment resulting from the median nerve (wrist) assessments. Dr Guirgis, in his report dated 4 June 2012 said:

> "According to AMA5 section 1-6, p11 & the 3rd Edition of the WorkCover Guides for the Evaluation of Permanent Impairment, page 10, point 1.52 'the deductible proportion' due to pre-existing possible predisposition is 50% of the impairment which in this case is 5% netting 5%."

45. In the opinion of the Panel, that was not an appropriate approach to s 323 or the Guidelines then in force (the third edition). Paragraph 1.52 provided: "for the injury being assessed, the deduction is 1/10 of the assessed impairment, unless this is at odds with the available evidence."

46. The Guidelines then in force relevantly also provided:

> "1.50. The degree of permanent impairment resulting from pre-existing impairments should not be included within the degree of permanent impairment determined by an assessor if those impairments are unrelated or not relevant to the impairment arising from the relevant work injury.
>
> 1.51 In assessing the degree of permanent impairment resulting from the work injury, the assessor is to indicate the degree of impairment due to any previous injury, pre-existing condition or abnormality. This proportion is known as 'the deductible proportion'. The deductible portion should be deducted from the degree of permanent impairment determined by the assessor."

47. Dr Guirgis's assessment of a "possible pre-existing predisposition" was not, in the opinion of the Panel, sufficient to support a finding of a pre-existing condition or abnormality which contributed to the level of impairment assessed. A predisposition is not of itself sufficient to establish contribution. As Giles JA described in *Smart*, it is first necessary to determine if there is a condition pre-existing the relevant injury.

48. Where there is a predisposition, His Honour said that there were three possibilities. The first was that, although a worker might have a predisposition to a particular condition the worker did not have the condition itself. No deduction would then be required. The second was that the worker might have a pre-existing condition but this may not contribute to the impairment. In the third case, if the worker had a pre-existing condition, although asymptomatic, and this contributed to the impairment, then a deduction was warranted[6].

49. Determining whether there is a pre-existing condition it is necessary to first determine the date to which that consideration should be directed.[7] The injury in the present case is one of gradual onset. The conditions which led to that onset were the arduous manual tasks involved in the use of the industrial sewing machine. The evidence of previous employment does not suggest any activity likely to give rise to the condition in either the shoulders or the wrists.

50. The appropriate date then for consideration of whether there is a pre-existing condition is at the commencement of employment with the respondent in March 2004. Evidence available to the AMS and reviewed by the Panel does not establish the existence of any such condition at that time.

51. The respondent first reported injury in 2008 and the first investigations appear to have been carried out at that time. Mrs Paglinawan had previously had problems in the right wrist which had led to surgery prior to her employment. There was clearly a pre-existing condition in the right wrist but, since no impairment was assessed in respect of that wrist, that finding is not relevant.

52. Having regard to the statement of the respondent, the investigations and the opinion of Dr Bodel, there is no evidence which could establish the existence of such condition or abnormality. There is no suggestion of a previous injury. The opinion of Dr Powell does not assist as he does not regard any part of the conditions in the wrists or shoulders to be work related.

53. The Panel is satisfied that, notwithstanding that Mrs Paglinawan may have had a predisposition to the development of impairment in the left wrist, she had not developed any condition or abnormality in that wrist prior to March 2004 which contributes to the overall level of impairment assessed by the AMS and accepted by the Panel.

54. There is no evidence of any pre-existing condition or abnormality in either shoulder and there is no suggestion of any injury prior to March 2004. Accordingly there is no basis for a deduction pursuant to s 323 of the 1998 Act in respect of either shoulder.

55. The Panel accepts that the appellant has established demonstrable error in respect of the reasoning with respect to s 323 set out in the MAC. However, upon review the Panel has reached the same overall conclusion as the AMS although for the reasons set out above.

56. Pursuant to s 328(5) the Panel "may confirm the certificate of assessment given in connection with the medical assessment appealed against, or may revoke that certificate and issue a new certificate as to the matters concerned."

57. It appears to the Panel upon review that, although the reasons contained in the MAC demonstrate error, the certificate of assessment appropriately records the degree of permanent impairment of Mrs Paglinawan as a result of the injury and the finding that no proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality. For the reasons given by the Panel, the certificate of assessment is confirmed.

[6] At [33] (the decision deals with an earlier provision but similar to section 323).
[7] See *Cullen v Woodbrae Holdings Pty Ltd* [2015] NSWSC 1416 at [57].

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*.

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar