WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-5078/19**
Appellant:	**Kylie Ross**
Respondent:	**Pet Medical Upper Hunter Pty Limited**
Date of Decision:	**20 March 2020**
Citation:	**[2020] NSWWCCMA 59**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr Paul Curtin**
Approved Medical Specialist:	**Dr Mark Burns**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 23 December 2019, the appellant lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Robin "Sid" O'Toole, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 3 December 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).

RELEVANT FACTUAL BACKGROUND

6. It is convenient to extract the following background from that recorded by the AMS at Part 4 of the MAC,

    > "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:

Ms Ross stated that on 12/01/2018 she was working in her role as a veterinary nurse. She was preparing a German Shepherd to be X-rayed. The dog was quite boisterous, and as a result the lead she was using for the dog had wrapped around her left thumb. As the dog darted forward the lead pulled on her thumb.

She was advised to attend the Muswellbrook Hospital and was attended to by Dr Narayana Swamy. She was X-rayed and recalls being advised that here was a 'chipped bone' and potentially ligament damage.

She was advised to return over the few next days for review and referral to a surgeon. She was placed in volar slab half cast.

She attended Dr Swamy the next day and was referred to Maitland Hospital Orthopaedic Unit. She cannot recall who she saw, but does recall that she was advised that it could be managed with a new cast for six weeks.

She was not making good progress and was suffering from shooting pain in the base of the thumb with movement. She was then referred to Dr Bryce Mead, Orthopaedic Surgeon.

She was initially managed with a different cast and referred for hand therapy.

By the middle of the year she began to develop issues with a constant sensation of cold in the hand and the hand changing to a blue colour. She also developed swelling in her left index finger. The diagnosis of Complex Regional Pain Syndrome (CRPS) was raised, and she was referred to Dr Willem Volschenk, Pain Specialist. The diagnosis of CRPS was confirmed.

She was also referred for nerve conduction studies after review of Dr Michael Katekar, Neurologist. The nerve conduction studies were normal.

Dr Volschenk commenced stellate ganglion nerve blocks, with six injections over the course of nine weeks. She stated that the blocks did improve the discolouration in her limb, but not much else.

She returned to Dr Mead as she was suffering from constant stabbing pain over the radial border.

She was diagnosed with de Quervain's tenosynovitis and was recommended to undergo both carpal tunnel release and de Quervain's release. This was approved and then performed on 20/12/2018."

PRELIMINARY REVIEW

7. 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.

8. 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 for the reasons given below.

EVIDENCE

Documentary evidence

9. 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

10. The parts of the medical certificate given by the AMS are set out, where relevant, in the body of this decision.

SUBMISSIONS

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

12. The appeal concerns the assessment of the left upper extremity; and scarring.

Appellant

13. In summary, the appellant worker submits that the AMS has erred in:

    (a) making an incorrect calculation when converting the hand and upper extremity impairments;

    (b) failing to rate the range of motion found for IP joint extension;

    (c) failing to consider the sensory loss in the arm and to consider evidence in the appellant's statement as to sensory loss;

    (d) failing to properly assess scarring, and

    (e) lacking suitable qualifications.

14. The appellant should be re-examined by another AMS.

Respondent

15. The respondent submits that:

    (a) the AMS has not erred in converting the hand and upper extremity impairment;

    (b) it is conceded that the 0 degrees extension found at the IP joint of the thumb attracts 1% digit impairment;

    (c) the AMS did consider and correctly assess sensory loss;

    (d) the AMS correctly assessed the scarring in accordance with the Guidelines, and

    (e) the qualifications of the AMS are not a proper submission or ground of appeal.

FINDINGS AND REASONS

16. 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.

17. 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.

Discussion

Ground of appeal (a) impairment assessment and conversion of hand and upper extremity impairment (UEI)

18. The Panel discerns no error in the conversion of hand impairment to UEI and then to whole person impairment (WPI) . The AMS has correctly followed the steps at Figure 16-1a for combining, adding and converting the raw findings. The AMS measures the range of motion in accordance with the relevant criteria and the findings are correctly converted into hand impairment, with the exception of the IP joint extension finding as discussed below.

Ground of appeal (b) range of motion found IP joint extension

19. As submitted by the appellant and conceded by the respondent there is a simple omission in the finding for extension of the IP joint of the thumb, with the AMS's Figure 16-1a Evaluation Record showing 0% digit impairment for "Nil" extension. This finding should have given 1% digit impairment. The additional 1% changes the outcome. This constitutes a demonstrable error on the face of the Certificate. This is discussed further below.

Ground of appeal (c) sensory loss in the arm; consideration of the evidence

20. The AMS says about sensory loss at Part 4, "present symptoms",

> "With respect to the innervation of the upper limb, Ms Ross described 'tingling' and altered sensation affecting the hand. The feeling is of constant coldness and tingling, in the hand and fingers, with sparing of the 4th and 5th digits. She stated that the hand and fingers get glossy on occasion and some occasional sweating."

21. On examination the AMS found,

> "Neurological examination of the left upper limb demonstrated abnormal sensation affecting the extent of the median nerve below the elbow, with sparing of the ulnar and radial nerves. There were no objective trophic signs."

22. The findings of the AMS as to sensory loss taken together are sufficiently clear. He reported these for each component of the upper extremity involved. There is a presumption of regularity for assessments by an AMS[1] which is not rebutted by the evidence as to sensory loss or the face of the MAC. The findings overall are consistent with the other evidence including that of Dr Ivers who also suggests Grade 4 at 25% from Table 16-10 of AMA 5.

23. At Part 10 the AMS notes that Mr Ross did not meet the criteria for Complex Regional Pain Syndrome (CRPS) and that the appropriate measures are range of motion and sensory loss. Sensory loss is then assessed for each relevant upper limb part. The AMS says, "In the left upper limb, there is a loss in sensation affecting the median nerve (below mid forearm)."

24. The AMS goes on to explain,

> "The calculation to determine sensation loss for the Median nerve (below mid forearm) is (100% x 20% x 39%), which equals 8% UEI.
>
> There are no additional conditions affecting the upper limb that attract a permanent impairment."

[1] *Vegan*; *Bjkov v ICM Property Services Pty Limited* [2009] NSWCA 175; and *Jones v The Registrar* WCC [2010] NSWSC 481

25. The AMS discusses the findings of Professor Gumley and how he differed from his findings and says,

> "The calculations performed by Professor Gumley indicate that sensation losses were assessed in each finger, as opposed to the higher level (median and ulnar nerve). This resulted in markedly higher levels of impairment in the hand that were calculated by myself. It also resulted in areas of abnormal sensation outside of the fingers (palm and forearm) not being assessed for the sensation loss."

26. The Panel notes that the examination by Professor Gumley for his report of 3 July 2019 was a little more than six months after the surgery of left endoscopic carpal tunnel release and de Quervain's release performed on 20 December 2018 and therefore too soon for maximum medical improvement (MMI) to have occurred. The AMS assessment was 12 months after the surgery and MMI would be expected by the time of the assessment by the AMS.

27. When referring to the assessment by Dr Ivers, the AMS noted,

> "Also, Dr Ivers found losses in the sensation of the ulnar nerve that were not present at the time of my assessment. This could represent further improvement of Ms Ross in the time between Dr Ivers assessment and mine."

28. From this it is apparent that the AMS considered the sensory loss element and the outcome reflects the use of the correct criteria. The Panel discerns no error in this part of the assessment.

29. The appellant submits that the AMS did not take enough account of the evidence of Ms Ross in her written statement dated 30 September 2019. However, the AMS took the history at the time of the examination and applied his clinical judgement on the day, as he was required to do. There is no error apparent in the treatment of this evidence.

Ground of appeal (d) assessment of scarring (TEMSKI)

30. The AMS records his findings on examination as to the scarring at Part 5,

> "Inspection of the left wrist elicited scarring from the surgery (3x 1cm incisions) that is well healed, with no disruption in contour or colouration, no adherence, and no effect on Activities of Daily Living (ADLs)."

31. At Part 10.b. the AMS explains his calculation of the scarring impairment,

> "With respect to the scarring arising from the surgery performed, this is assessed with reference to Chapter 14 of NSW GEPI 2016. Noting Sections 14.6 through 14.9, Table 14.2 – Table for the evaluation of minor skin impairments (TEMSKI) is utilised to determine that there is 0% Whole Person Impairment. This is due to the line of best fit demonstrating 3 out of the five criteria (Contour, ADL/Treatment, and Adherence) falling into the 0% Whole Person Impairment category."

32. A scar may be present but be rated as 0% WPI (paragraph 14.6 of the Guidelines). The conclusion under "best fit" was open to the AMS and there is no error apparent to the Panel.

Ground of appeal (e) qualifications of the AMS

33. The Panel notes that this ground of appeal lacks merit. As the respondent submits, the appellant does not proceed to point to any error in the MAC within this ground. The ground of appeal cannot be made out.

Findings

34. If a ground of appeal is successfully made out and an error identified, the Panel must correct the error or errors found "applying the WorkCover Guides fully" (see *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499).

35. The Panel can correct the simple error in the allocation of digit impairment for the IP joint of the thumb without recourse to further examination of Ms Ross.

36. The Panel is satisfied that the impairment is permanent, and the injury has reached MMI. There is no subsequent injury.

37. As discussed above, the Panel finds that there must be the allocation of 1% digit impairment for the IP joint under "Abnormal Motion" for the thumb, which gives a total of 2% digit impairment (not 1). This gives a total digit impairment for the thumb of 7% (not 6); and a total digit impairment of 7% (not 6), which converts to 3% hand impairment (not 2). Adding the other digit impairments to the thumb gives 5% total hand impairment which converts to 5% upper extremity impairment UEI. The combined hand (5%) and wrist (6%) assessments give 11% UEI, which when combined with the 8% UEI for the peripheral nerve system impairment gives a total of 18% UEI. This converts to 11% WPI (Table 16-3 AMA 5).

38. For these reasons, the Appeal Panel has determined that the MAC issued on 3 December 2019 is revoked. A new Certificate is provided below.

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 De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Matter Number: **5078/19**
Appellant: **Kylie Ross**
Respondent: **Pet Medical Upper Hunter 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 Robin "Sid" O'Toole 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 NSW Workers Compensation Guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**WPI deductions pursuant to s 323 for pre-existing injury, condition or abnormality** (expressed as a fraction)	**Sub-total/s % WPI** (after any deductions in column 6)
Left upper extremity	12.01.2018	Chapter 2 (p 10-12)	Chapter 16 (p 433-522) Figures 16-9, 16-12, 16-15, 16-21, 16-23, 16-25, 16-28, 16-31, 16-34, 16-37, 16-40, 16-43, 16-46. Tables 16-10a, 16-13, 16-14, 16-15.	11	nil	11
Scarring (TEMSKI)	12.01.2018	Chapter 14 (p 73-76) Table 14.1		0	-	0
Total % WPI (the Combined Table values of all sub-totals)					**11%**	

Ross Bell
Arbitrator

Dr Paul Curtin
Approved Medical Specialist

Dr Mark Burns
Approved Medical Specialist

20 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*.

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar