WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-599/19**
Appellant:	**Kelly Anne Ryan**
Respondent:	**Bruce Gault**
Date of Decision:	**16 August 2019**
Citation:	**[2019] NSWWCCMA 118**

Appeal Panel:	
Arbitrator:	**Marshal Douglas**
Approved Medical Specialist:	**Dr Richard Crane**
Approved Medical Specialist:	**Dr Margaret Gibson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 26 April 2019, Kelly Anne Ryan lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Damodaran Kumar, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 1 April 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. While working for the respondent on 16 August 2016, laminating a boat, the appellant fell from a height of 3 metres. She suffered a complex fracture dislocation of her left ankle. She was taken to St George Hospital where she underwent an internal reduction and fixation of the left ankle and internal fixation of the medial malleolus. On 31 August 2017, she had further surgery to remove a broken screw in the left ankle.

7. The appellant subsequently claimed compensation from the respondent for a permanent impairment she has from her injury. The respondent's insurer declined to pay the compensation she claimed on the basis that her permanent impairment from her injury was not fully ascertainable and, in the alternative, the degree of her permanent impairment from her injury was not as great as she alleged.

8. A medical dispute thereby arose between the parties precipitating appellant to commence proceedings in the Commission seeking a determination of her disputed claim for compensation. A delegate of the Registrar, on 28 February 2019, referred that medical dispute to the AMS to assess. The referral specified that the body parts being referred for assessment were "Left Lower Extremity (incl foot), Scarring (TEMSKI)" (verbatim).

PRELIMINARY REVIEW

9. 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.

10. The Appeal Panel determined during its preliminary review, that the MAC contained a demonstrable error. The Appeal Panel provides its reasons for that below. Because the Appeal Panel found the MAC contained a demonstrable error, the Appeal Panel must re-assess the medical dispute that was referred for assessment.[1] The Appeal Panel considered it would need the appellant to submit herself for examination in order that it could re-assess the medical dispute. Dr Richard Crane of the Appeal Panel was appointed to do that. He conducted an examination of the appellant on 22 July 2019 and reported to the Appeal Panel on his findings. Insofar as is necessary for the Appeal Panel to explain its reasons for its assessment of the medical dispute, it recounts Dr Crane's findings below.

EVIDENCE

11. 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

12. The AMS examined the appellant on 15 March 2019. He said in the MAC that he based his assessment of the appellant's permanent impairment on the history he obtained, his physical examination of the appellant, the imaging studies that had been done and the specialist reports the Commission had provided him with the referral. He set in the MAC the history he obtained and summaries of the reports on the imaging studies. He recorded his findings from his examination of the appellant in these terms:

> "She presented as a pleasant and cooperative lady. She had a height of 172cm with a weight of 82kg. She walks with a walking stick. This stick is for her to balance herself when she walks. She walked with a gait favouring her left ankle which she held in a rather stiff position. Visual examination showed a symmetrical body with no muscle wastage and no asymmetry on either side. She was able to stand on either foot with good balance. She was unable to stand on tip toes with her left leg because of her stiff ankle, but was able to stand on her heels. On the right side she was able to stand on tip toes and on her heels and walk on the same without restriction or discomfort. Her squatting was limited to 50% of normal. She was able to sit on the ground, and was able to get up herself, but complained of pain in her ankle. She was able to sit on the edge of the bed and extend both legs fully. She was able to sit on the bed and was able to reach the ankles with both hands.

[1] See Drosd v Workers Compensation Nominal Insurer [2016] NSWSC 1053 at [61]

Left Lower Extremity (ankle, foot)
Circumferential measurement of the thigh was 41cm as measured from 10cm above the patella on the right side, while on the left the thigh measured 40cm. The maximum diameter of the calf was 35cm on the right side and 33cm on the left, indicating that there has been some loss of muscle bulk in the left lower limb when compared to the right. Reflexes were normal and equal on both sides. Straight leg raising test was normal and equal on both sides. Sciatic stretch test was negative. No sensory discrepancy was seen on either side.

Both knees examined normally with no effusion or crepitations. They were not tender to palpation. Both knees showed a range of movement from 0-130° and were symmetrical to each other. There was no varus or valgus deformity. Both knees were stable to anteroposterior and mediolateral movement.

The right ankle examined normally.

The left ankle showed limitation in movement. In extension the right ankle showed 20° of movement, while the left ankle was limited to 5° of movement. In plantar flexion on the right side she had 40° of movement, while the left side was limited to 10° of movement. In examining the hindfoot, in eversion on the right side she had 15° of movement, while on the left side she had 0° of movement. In inversion on the right side she had 15° of movement, while on the left side there was 0° of movement.

Scarring (TEMSKI)
She had a scar 7cm long on the left medial ankle and a 9cm long side scar on the lateral ankle. Above the ankle a prominence of the plate was palpable. This was tender. The scars themselves were easily identifiable and obviously visible from the rest of the skin. There was some slight tethering of the scars. In the deeper tissues no cross marks were felt. The scars showed some slight hypoesthesia but the adjacent skin was normal to sensory testing."
(Bold headings as per original)

13. He assessed the degree of the appellant's permanent impairment resulting from her injury to be 13% WPI, providing this explanation for his assessment:

"She has an impairment of the left ankle. This is best assessed using limitation in range of movement of the ankle. The right ankle has full and normal movements. In the left ankle the limitation in range of plantar flexion is considered to be a moderate impairment and works out to a 6% whole person impairment. The extension limit of 5° in the left ankle will work out to be a mild impairment and will carry a 3% whole person impairment. As advised, when added together, this becomes a 9% whole person impairment. She also has an assessable impairment of the hindfoot. She has no inversion or eversion of the left ankle, compared to normal movement of the right ankle. The inversion would be considered as moderate and works out to a 2% whole person impairment, while the lack of eversion would be considered to be mild and works out to a 1% whole person impairment. When these are added together they give a 3% whole person impairment. When the ankle and hindfoot impairments are combined together they give a 12% whole person impairment.

She has two obvious scars on both sides of the ankle. Furthermore, just above the ankle joint is a painful protuberance reflecting the plate underneath. This is very tender to touch. Using TEMSKI and a best fit situation I consider her to have a further 1% whole person impairment.

All these impairments are combined together give a 13% whole person impairment.

This is a traumatic injury and there will be no apportionment."

SUBMISSIONS

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

15. In summary, the appellant submits that the AMS did not provide any explanation regarding why range of motion was chosen as the methodology by which to assess the permanent impairment of her left ankle. She submits that the AMS also did not consider all parameters for measuring the restriction of her range of motion of her ankle, and specifically did not consider flexion contraction, varus and valgus. She submits that the AMS did not measure and therefore did not consider whether there was any limb limp discrepancy of her left lower extremity. She submits that when assessing her impairment due to scarring, the AMS did not consider criteria for location, contour, ADL/treatment or adherence.

16. The appellant contends that those amount to errors in the MAC such that the MAC has a demonstrable error. Further, she contends the AMS did not apply the correct criteria when assessing her impairment.

17. In reply, the respondent submits that the AMS adopted the most appropriate methodology for assessing the appellant's permanent impairment and that he considered sufficient criteria to enable an assessment to be made of the appellant's permanent impairment from scarring. The respondent says that the AMS applied the correct criteria to assess the appellant's permanent impairment. The respondent says the MAC does not contain a demonstrable error.

FINDINGS AND REASONS

18. 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.

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

20. As mentioned above, the Appeal Panel determined during its preliminary review of the MAC that the MAC did contain a demonstrable error. This is because the AMS did not, within the MAC, record his findings for each of the criteria stipulated within Table 14.1 of the Guidelines. He recorded findings for only two of the criteria. The Appeal Panel considered that, due to this, the AMS had not sufficiently explained how it was that he had concluded the appellant's scarring best fitted the criteria specified for 1% WPI. In other words, insofar as the AMS did not detail what his findings were with respect to each criterion, the AMS did not reveal the path of his reasoning for his assessment so as to enable the parties, and the Appeal Panel, why it was that he had assessed the appellant's permanent impairment from scarring to be 1% WPI. This amounts to a demonstrable error.

21. As also mentioned above, the Appeal Panel, having found that the MAC contained a demonstrable error, must reassess the medical dispute referred for assessment. Because the AMS had not set out his findings with respect to each criterion in Table 14.1 of the Guidelines, the Appeal Panel could not rely on the AMS's findings to assess the appellant's permanent impairment from scarring, and it was for this reason that the Appeal Panel required the appellant to be examined by Dr Crane. Because the appellant had to be examined again, and because the Appeal Panel had to reassess the medical dispute referred for assessment, which also involved the degree of her permanent impairment relating to her left lower extremity, the Appeal Panel considered that Dr Crane ought also examine the appellant's left lower extremity.

22. Dr Crane reported to the Appeal Panel the following findings from his clinical examination of the appellant:

> “The applicant was of average build and there was a slight left-sided limp. There was no obvious deformity of the left ankle region and no obvious muscle wasting in the limb.
>
> The length of the lower extremities was measured from the anterior superior iliac spine to the medial malleolus and was 81cm on each side. Mid-thigh circumference was 43cm on the right and 42cm on the left. Maximal calf circumference was 36cm on the right and 35cm on the left.
>
> Examination of the right ankle showed no swelling and the range of motion of dorsiflexion, plantar flexion, inversion and eversion was normal.
>
> Examination of the left ankle showed no evidence of swelling. Dorsiflexion showed a fixed flexion of 10°with plantar flexion normal at 30°. Inversion was 20° and there was zero eversion.
>
> There was no varus or valgus deformity of the left ankle and hind foot.
>
> Surgical scars were noted 7cm in length around the left lateral malleolus, 3cm in length around the medial malleolus and 2cm in length on the dorsum of the foot. Ms Ryan was conscious of the scars which did not exhibit any colour contrast. She was able to locate the scars which did not show any trophic changes or suture marks. The anatomic location of the scars would not be clearly visible with usual clothing. There was no contour defect in the scars which did not have any effect on the activities of daily living. No treatment of the scars was required and they were not adherent.”

23. Noting the matters that the Appeal Panel identified with the AMS’s findings with respect to his examination of the appellant’s scarring, the Appeal Panel has decided to adopt Dr Crane’s findings from his examination of the appellant’s scarring to re-assess the medical dispute insofar as it relates to scarring. In terms of the criteria specified in Table 14.1 of the Guidelines, the Appeal Panel notes, based on Dr Crane’s findings, that the appellant was conscious of her scars and was able to locate her scars. However, she has not required and will not require any treatment for her scars. Her scars do not affect her activities of daily living. There is no adherence and no staple or suture marks and no topic changes and no colour contrast with surrounding skin. Further, the locations of her scars were not such that they would be clearly visible with her usual clothing.

24. Dr Crane’s findings best fit with the criteria specified for 0% WPI in Table 14.1. His findings correlate completely with the examples provided in the table for four of the five criteria for 0% WPI. The criterion with which there is not complete correlation between Dr Crane’s findings and the examples provided for that specific criterion, is the criterion “Descriptions of the scars and or/skin conditions”, but even with this criterion, Dr Crane’s findings meet most of the examples set out in the table for 0% WPI. Moreover, the appellant’s scarring is uncomplicated and standard for the surgeries that she underwent. Hence, even though the appellant has scarring from her surgeries, in accordance with [14.6] of the Guidelines, her scarring can still attract a 0% WPI.

25. Given that, the Appeal Panel assesses the appellant’s permanent impairment from her scarring to be 0%.

26. Based on the findings of Dr Crane from his examination of the appellant’s left ankle, the appellant’s permanent impairment would be rated as 18% lower extremity impairment, which converts to 7% WPI. This is on the basis that the restricted dorsal flexion of her ankle is rated 15% lower extremity impairment and the normal plantar flexion movement is rated 0% lower extremity impairment, adding to 15% lower extremity impairment. The restricted inversion of 20^0 is rated 2% lower extremity impairment and the 0^0 eversion is rated 2% lower extremity impairment, adding to 4% lower extremity impairment. This two impairments when combined give 18% lower extremity impairment, which converts to 7% WPI.

27. The Appeal Panel however has decided to adopt the findings of the AMS from his examination of the appellant's left ankle, rather than the findings of Dr Crane.

28. This is because firstly, based on the AMS's description of his examination, the Appeal Panel cannot discern any fault in the manner in which the AMS conducted his examination of the appellant's left ankle. Nor can the Appeal Panel discern any fault with the findings he made from his examination.

29. Secondly, the respondent did not make any complaint, nor could it in the Appeal Panel's view, regarding the AMS's findings from his examination of the appellant's left ankle.

30. The Appeal Panel notes that in her submissions the appellant challenged the manner in which the AMS examined her left ankle in that the appellant suggested that the AMS did not consider all parameters for measuring range of motion of her left ankle. However, in the view of the Appeal Panel that is not correct. The AMS found that the appellant was able to extend her left ankle to 5^0 degrees. Given that, there was no flexion contracture of her left ankle. In other words, the AMS, by examining the extension of the appellant's ankle and finding it was 5^0, considered the parameter of flexion contracture. Further, because her ankle was internally fixed, there could not have been varus or valgus deformity.

31. A third factor the Appeal Panel has considered in terms of deciding to adopt the findings of the AMS rather than the findings of Dr Crane, is that based on the AMS's findings from his examination of the appellant, the appellant attracts a higher assessment of permanent impairment than those based upon Dr Crane's findings. In that circumstance, and given that the AMS's examination and his findings from examination of the appellant's left ankle are sound, and the respondent did not identify any issue with the AMS's examination or his findings from examination, the Appeal Panel has decided to, as said, adopt the findings of the AMS.

32. Based on those findings, the appellant's permanent impairment due to her left ankle is 11% WPI. The Appeal Panel observes that the AMS calculated it to be 12% WPI, but that calculation is wrong. The Appeal Panel notes that the AMS correctly rated the restriction of the range of motion of inversion of the appellant's right hind foot to be 2% lower extremity impairment. He correctly rated the lower extremity impairment of her left hind foot to be 7%, but he did not subtract the right lower extremity impairment from the left lower extremity impairment. The appellant's uninjured contralateral right joint provides a base line for what the movements of both her joints would have been prior to her injury. Hence, it is necessary to subtract the impairment due to her right hind foot from the impairment due to the left hind foot so as to establish the impairment of her left hind foot due to her injury. Whilst the AMS made no error in how he examined the appellant or the findings he made from his examination, he made an error in how he calculated his assessment of the appellant's impairment based on his findings.

33. As said, in re-assessing the medical dispute, the Appeal Panel shall rely on the AMS's findings. Based on his findings, the Appeal Panel rates that appellant's lower extremity impairment of her left ankle to be 22% lower extremity impairment. When that is added to the 5% lower extremity impairment due to her left hind foot, a total of 27% lower extremity impairment is achieved, which converts to 11% WPI.

34. Accordingly, the Appeal Panel assesses the appellant's permanent impairment due to the injury to her left ankle to be 11% WPI.

35. The Appeal Panel also notes that the appellant challenged the AMS's assessment because, according to her, he did not consider other methods for assessing her permanent impairment, and specifically did not consider osteoarthritis or limb length discrepancy. In terms of using the criteria for osteoarthritis to assess the degree of her permanent impairment, the appellant did not present any plain x-ray films, and specifically weight bearing films, to enable the cartilage loss in her joint to be measured properly. Absent such films, her impairment cannot be assessed based on arthritis.

36. With respect to her limb length discrepancy, the Appeal Panel notes that the AMS correctly did not use that as a measure to assess her permanent impairment because, it seems to the Appeal Panel, it is apparent from the MAC, when considered as a whole, that the appellant's medial malleolus had been fixed in surgery in an anatomical position. The limb length is measured from the anterior-superior iliac spine to the medial malleolus. Given that the medial malleolus was fixed in surgery in an anatomic position there could therefore be no limb discrepancy.

37. In any event, Dr Crane when he examined the appellant measured the anterior superior iliac spine to the medial malleolus of both lower extremities and found them to be 81 cm on each side. In other words, there is no limb length discrepancy.

38. For these reasons, the Appeal Panel has determined that the MAC issued on 1 April 2019 should be revoked, and a new MAC should be issued. The new 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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **599/19**
Applicant: **Kelly Anne Ryan**
Respondent: **Bruce Gault**

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 Dr Damodaran Kumar 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 the Guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA 5 Guides**	**% WPI**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Sub-total/s % WPI (after any deductions in column 6)**
1. Left lower extremity	16/8/16	Chapter 3 Table 17-11 Page 15	AMA5 Table 17-12 Page 537	11%	-	11%
2.Scarring (TEMSKI)		Chapter 14 Table 14-1 Page 74	Chapter 8 Page 173	0%	-	0%
Total % WPI (the Combined Table values of all sub-totals)					**11%**	

The above assessment is made in accordance with the Guidelines for the Evaluation of Permanent Impairment for injuries received after 1 January 2002

Marshal Douglas
Arbitrator

Dr Richard Crane
Approved Medical Specialist

Dr Margaret Gibson
Approved Medical Specialist

16 August 2019

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 Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar