

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-1642/19
Appellant: Amway of Australia
Respondent: Georgina Owen
Date of Decision: 28 October 2019
Citation: [2019] NSWCCMA 153

Appeal Panel:
Arbitrator: Ross Bell
Approved Medical Specialist: Dr Drew Dixon
Approved Medical Specialist: Dr J Brian Stephenson

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 5 July 2019, Amway of Australia lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tim Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 4 June 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 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 history reported by the AMS at Part 4 of the MAC,

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

- (1) Mrs Owen related that she started working for Amway in 1989. A lot of the work was involved with lifting and shifting stores and also involved a lot of reaching upwards to retrieve items from higher shelves. Often, some of the items were quite heavy.
- (2) As time went on, she started developing aches and pains in her shoulders. This came to a head before mid-year 2009.
- (3) She saw her doctor. General attempts at conservative management were tried but without a great deal of success.
- (4) She had further investigations and it was identified that there was tendinopathy and partial thickness tears of the major rotator cuff components in each shoulder. She came under the care of Specialist Shoulder Surgeon, Dr David Duckworth.
- (5) He advised that the most appropriate clinical management was to continue conservatively. There was also the administration of a cortisone injection.
- (6) Unfortunately, there has been no significant improvement to her condition.
- (7) She did her best to continue with her occupation on a lighter form of duties. Ultimately, her position was terminated in 2012.”

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.

Appellant

12. In summary, the appellant submits that the AMS has erred in outlining the pathology suffered by the worker without considering precisely what pathology has resulted from the “injurious event/events” in making the diagnosis.

13. The AMS has erred in failing to consider the pre-existing pathology in the shoulders. There is imaging from before the time of injury which should have resulted in a deduction pursuant to s 323 of the 1998 Act. Dr Wallace considered that the entirety of the impairment was a result of degenerative change, and Dr Patrick found 1/10 was deductible for this reason.
14. The Panel should apply a deduction of “at least 20%”, or alternatively conduct its own re-examination of the worker.

Respondent

15. The respondent submits, in summary, that the AMS did in fact make a diagnosis of the pathology in the shoulders, and this is set out in the MAC.
16. The submissions of the appellant as to radiology taken before the date of injury that shows degenerative change are incorrect. The earliest imaging before the AMS is dated 6 May 2009, which is after the deemed date of injury.
17. The reference to the deemed date of injury by the appellant does not take account of the long period of employment with the appellant from 1989. The scans of 6 May 2009 show the worker’s pathology after some 20 years in the employ of the appellant, rather than pre-existing pathology.
18. The AMS has correctly assessed the shoulders and was not obliged to agree with the assessors relied on by the parties. The AMS was obliged to make his own diagnosis and assessment and there is no error in the finding that there should be no deduction pursuant to section 323 of the 1998 Act.

FINDINGS AND REASONS

19. 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.
20. 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.

Diagnosis/pathology for both shoulders

21. The AMS says at Part 7.a.,

“Mrs Owen gives a long history of dysfunction of both of her shoulders. The right shoulder has been more affected than the left. The radiological picture demonstrates chronic tendinopathy and bursitis with partial thickness tears affecting predominantly the supraspinatus and, to a lesser extent, the infraspinatus and subscapularis. This features in both sides but again, the right side is more severely affected.”

- 22.
23. It is clear from the above that the AMS has made a diagnosis of the shoulder pathology. He has also considered the relevant criteria in assessing the impairment. Contrary to the submissions of the appellant, this approach is correct because the AMS must first assess the impairment of the referred body parts.¹
24. The appellant seems to submit that the AMS should have considered pre-existing pathology during the first step of the overall assessment. To the extent the appellant's submissions suggest this, the Panel cannot accept them. It is only after the overall assessment of the referred body parts that the AMS considers any applicable deduction, either under s 323 for pre-existing injury, condition, or abnormality; or under 8.g. of the MAC for subsequent injury.
25. There is no error on the face of the Certificate in relation to the diagnosis by the AMS.

Section 323 of the 1998 Act deduction

26. For a deduction to be properly made under s 323 there must be evidence that there is a pre-existing injury; condition; or abnormality and that this element contributes to the impairment² and "assumption will not suffice".³
27. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526 Campbell J explained the requirement [emphasis in original],

"What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if that proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of the *degree* of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the *degree* of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to the pre-existing abnormality."

28. A pre-existing condition can be asymptomatic before the injury providing the evidence establishes that it existed before the injury and that it forms part of the impairment.⁴
29. The appellant submits that the imaging studies of 6 May 2009 establish a pre-existing degenerative condition that demands a deduction under s 323. However, the date of injury is a deemed date, and the shoulder injuries occurred over the period of employment from 1989. What is required in these circumstances is evidence of a pre-existing element that pre-dates the period of employment. If this is established the AMS then considers whether that element contributes to the impairment.
30. In *Fire & Rescue NSW v Clinen* [2013] NSWSC 629 Campbell J said,
- "As Schmidt J pointed out in *Cole and Elcheikh*, it is necessary to find a pre-existing abnormality or condition, here the latter, actually contributing to the impairment before s. 323 *WIM* is engaged. This conclusion has to be supported by evidence to that effect. Assumption will not suffice."

¹ See *Greater Western Area Health Service v Austin* [2014] NSWSC 604, in which the Court notes that the first task of an AMS is to assess the body part referred, and then to address whether s 323 applies (MAC Part 8.e.) or if there is an element of the impairment due to subsequent injury (MAC Part 8.g.).

² *Cole v Wenaline Pty Ltd* (2010) NSWSC 78;

³ *Fire & Rescue NSW v Clinen* [2013] NSWSC 629

⁴ *Vitaz v Westform (NSW) Pty Limited* [2011] NSWCA 25

Campbell J also noted that it is ‘... necessary for the evidence acceptable to the appeal panel to actually support the connection between a previous injury (here, pre-existing abnormality or condition) and the overall degree of impairment in the instant case.’

31. It is quite apparent that there is no evidence of any pre-existing injury, condition, or abnormality which contributes to the current impairment in this matter. The AMS does answer “Yes” to the question at Part 8.e. but the Panel infers that this is a slip of no consequence because there is no discussion at Part 11 of any evidence of a pre-existing element, and the AMS says at Part 7, “Due to the specific nature of her occupation, there does seem to be a predominant work-related aetiology to her condition.”
32. This conclusion is consistent with the evidence. Dr Wallace and Dr Patrick are some way apart in their findings as to s 323 and they also both arrive at different conclusions to that of the AMS on the question. Neither Dr Patrick nor Dr Wallace point to any evidence to support a deduction in the circumstances of this matter. Dr Patrick says,

“The deductible proportion is appropriately one tenth of the assessed impairment each injured region in relation to any pre-existing or co-existing constitutional/degenerative change contributing to her impairment assessment now.”
33. It is not apparent that Dr Patrick was considering the issue as one requiring evidence of a pre-existing condition that existed before the period of employment. Dr Wallace does not address the period of employment from 1989 or point to evidence establishing a condition that existed before that time that could contribute to the current impairment. The AMS explains why his opinion varies from that of Dr Wallace at Part 10.c.
34. There is no evidence of any condition in the shoulders before Ms Owen began her period of employment with Amway in 1989 through to September 2012. Such a finding would be based on assumption. The Panel notes that even in the imaging of 6 May 2009, reported by Dr Cooke following the onset of symptoms, the bursitis was seen but there was no osteoarthritis in the right acromioclavicular joint found.
35. The Panel discerns no demonstrable error on the face of the Certificate regarding the findings under s 323 of the 1998 Act.

Findings

36. For these reasons, the Appeal Panel has determined that the MAC issued on 4 June 2019 is 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

