WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-2601/19**
Appellant:	**Wolfgang Puntigam**
Respondent:	**Tyzebet Pty Ltd**
Date of Decision:	**20 November 2019**
Citation:	**[2019] NSWWCCMA 169**

Appeal Panel:	
Arbitrator:	**Carolyn Rimmer**
Approved Medical Specialist:	**Dr Drew Dixon**
Approved Medical Specialist:	**Dr Mark Burns**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 September 2019 Wolfgang Puntigam (Mr Puntigam) 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 8 August 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. In these proceedings, Mr Puntigam is claiming lump sum compensation in respect of an injury to the cervical spine, left upper extremity, right upper extremity, lumbar spine, left lower extremity and right lower extremity on 7 February 2000 that occurred in the course of his employment as a roof tiler with the respondent.

7. In the Terms of Settlement dated 23 June 2003 in proceedings in the Compensation Court of New South Wales (Matter No 44442/2001), the respondent paid to Mr Puntigam pursuant to s 66 of *the Workers Compensation Act 1987* (1987 Act), $5,000 in respect of 12.5% permanent impairment of the neck, $2,000 in respect of 2.5 % loss of efficient use of the right arm at or above the elbow and $3,750 in respect of 5% loss of efficient use of the left arm at or above the elbow.

8. In a s66A Complying Agreement dated 20 November 2007 Mr Puntigam was paid by the respondent $3,000 in respect of a further 7.5% permanent impairment of the neck, $12,000 in respect of 20% permanent impairment of the back, $2,750 in respect of a further 3% permanent loss of use of the left arm at or above the elbow, $4,400 in respect of a further 5.5% permanent loss of use of the right arm at or above the elbow and $6,000 in respect of 8% permanent loss of use of the right leg at or above the knee in respect of the injury on 7 February 2000 and during the course of employment prior to 7 February 2000.

9. In prior proceedings in Matter No 009383/11, Arbitrator Edwards, in a Certificate of Determination dated 7 February 2012, made orders including an order that the matter be remitted to the Registrar for referral to an AMS for assessment of the loss of efficient use of the left arm at or above the elbow, the loss of efficient use of the right arm at or above the elbow and the loss of efficient use the right leg at or above the knee with the date of injury being 7 February 2000.

10. In Matter No 009383/11, Dr John McKee, AMS, in a MAC dated 5 June 2012 assessed under the Table of Disabilities 12% loss of efficient use of the left arm at or above the elbow, 12% loss of efficient use of the right arm at or above the elbow and 10% loss of efficient use the right leg at or above the knee. Dr McKee made a deduction of one tenth for pre-existing injury, abnormality or condition in respect of the left arm right arm and right leg. This resulted in an assessment of 11% loss of efficient use of the left arm at or above the elbow, 11% loss of efficient use of the right arm at or above the elbow and 9% loss of efficient use the right leg at or above the knee as a result of the injury on 7 February 2000.

11. In a letter dated 24 October 2018, the solicitor for the respondent advised Mr Puntigam's solicitors that their client did not concede that Mr Puntigam had reached the requisite threshold in order to continue to receive weekly payments of compensation pursuant to s 39 of the 1987 act.

12. In an Application for Assessment by an Approved Medical Specialist dated 27 May 2019, Mr Puntigam requested an assessment as to whether the degree of permanent impairment was more that 20%.

13. The matter was referred to the AMS, Dr Anderson, in the Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 26 June 2019 for assessment of whole person impairment (WPI) of the cervical spine, left upper extremity, right upper extremity, lumbar spine, left lower extremity and right lower extremity as a result of the injury on 7 February 2000.

14. The AMS examined Mr Puntigam on 23 July 2019. He assessed 7% WPI of the cervical spine and made a deduction of one tenth pursuant to s 323 of the 1998 Act which resulted in an assessment of 6% WPI for the cervical spine, 8% WPI for the left upper extremity, 8% for the right upper extremity and made a deduction of ten tenths pursuant to s 323 of the 1998 Act which resulted in an assessment of 0% WPI for the right upper extremity, 5% WPI of the lumbar spine and made a deduction of one tenth pursuant to s 323 of the 1998 Act which resulted in an assessment of 5% WPI for the lumbar spine, 0% WPI for the left lower extremity and 0%WPI for the right lower extremity. These assessments combined to produce a total assessment of 18% WPI.

PRELIMINARY REVIEW

15. 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.

16. The appellant did not request that Mr Puntigam be re-examined by an AMS, who is a member of the Appeal Panel.

17. 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 there was sufficient evidence on which to make a determination.

EVIDENCE

Documentary evidence

18. 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

19. 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

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

21. Mr Puntigam's submissions include the following:

- The AMS purported to decide "injury". The issue of "injury" to the left shoulder, right shoulder and right knee has been dealt with by the arbitrator. It is within the sole remit of the Commission to decide the issue of "injury" (*Ooi v NEC Business Solutions Limited* [2006] NSW WCCPD131, *Connor v Trustees of the Roman Catholic Church* [2006] NSW WCCPD124 [at 43]).

- In this particular matter the AMS has purported to decide "injury", even though this matter has been previously decided by the Commission and the AMS is bound by this decision.

- The AMS made the following comments on page 8 of the MAC: (a) "There is no history of injury to the right upper extremity associated with this particular event. Therefore, there is 0% for the right upper extremity" and (b) "No significant features of either lower extremity, particularly the knees, can reasonably be attributed to this event of February 2000". (page 8) However, in previous proceedings in Matter No 9383/2011 the question of "injury' was decided in respect of both the right shoulder and in respect of each knee.

- In respect of the right shoulder, the AMS reduced the assessment of 8% WPI pursuant to s 323 by ten tenths because he effectively decided that Mr Puntigam did not have an "injury" as defined within the legislation. The AMS should have found 8% WPI in respect of the right upper extremity, which would have resulted in a total assessment of 25% WPI.

- Dr Robinson, in his report dated 13 March 2017, found Mr Puntigam had 5% WPI in respect of his right shoulder and reduced that by one pursuant to s 323. Dr Dodd, in his report dated 10 September 2018, was of the opinion that Mr Puntigam had 10% upper extremity impairment with respect to his right shoulder but went on to say this shoulder was not injured.

- In respect of each knee the AMS at paragraph 9(b) of the MAC purported to decide "injury" in respect of the knees. The AMS should have made an assessment in respect of each knee but instead he came up with 0% WPI. He appeared not to have assessed that body part because he didn't believe it was injured, contrary to his powers. Dr Dodd assessed Mr Puntigam as having 4% WPI in respect of the left knee.

- In relation to radiculopathy, Dr Neil Cochrane, treating neurosurgeon, in a report dated 28 July 2016 noted various scan reports and symptoms equating to radiculopathy. In his report dated 29 September 2016, Dr Cochrane again recommended decompressive surgery to deal with the symptoms found, which equated to radiculopathy.

- In his findings on examination the AMS found: (a) very obvious muscle wasting in the right hand, and (b) loss of sensation down the right arm and hand (at least complaints thereof). The AMS should have found radiculopathy. He should have found radiculopathy with a base of 10% and added 2% for the Activities of daily Living (ADLS), making 12% WPI for the neck.

22. The respondent's submissions include the following:

- The respondent disputes Mr Puntigam's submissions the AMS purported to decide injury. The AMS obtained a history of the injury as outlined in Part 4 of the MAC. The AMS then summarised the injury under Part 7 of the MAC by stating:

  > "In early February 2000, Mr Puntigam sustained a severe jarring event which affected his left shoulder and his neck. There is evidence of quite a lot of pre-existing degenerative change in the cervical spine although this was undoubtedly quite badly aggravated by this event. There is also evidence of hurting his lower back in the same event although this was less severe."

- Nowhere in the MAC does the AMS purport to decide injury. The AMS accepts the appellant sustained injury. The AMS however suggests there are deductions applicable pursuant to s 323 of the 1998 Act as explained in his assessment of WPI.

- The fact the AMS has assessed 0% WPI of the left lower extremity and right lower extremity does not mean the AMS has not accepted there is no injury. The AMS does not consider there is any assessable impairment arising out of the injury.

- In relation to the submissions regarding a deduction pursuant to s 323 of the 1998 Act there is clear medical evidence of pre-existing condition or abnormality which would have directly contributed to the impairment of the right upper extremity. In the presence of pre-existing pathology, although asymptomatic, there should be a deduction (*Vitaz v Westform (NSW) Pty Limited* (2011) NSWCA 254, *Elcheikh v Diamond Formwork (NSW) Pty Limited (in liquidation)* (2013) NSWSC 365.)

- 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.

- The decision of the AMS and the MAC should be confirmed.

FINDINGS AND REASONS

23. 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.

24. 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.

25. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 (*Siddik*). The Court held that while prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gateway, it can consider other grounds capable of coming within one or other of the s 327(3) heads, if it gives the parties an opportunity to be heard. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation.

26. Section 327(2) was amended with the effect that while the appeal was to be by way of review, all appeals as at 1 February 2011 were limited to the ground(s) upon which the appeal was made. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 Davies J considered that the form of the words used in s 328(2) of the 1998 Act being, 'the grounds of appeal on which the appeal is made' was intended to mean that the appeal is confined to those particular demonstrable errors identified by a party in its submissions.

27. In this matter, the Registrar has determined that he is satisfied that at least one of the grounds of appeal under s 327(3)(d) is made out, in relation to the AMS's assessment of Mr Puntigam's impairment.

28. The Appeal Panel reviewed the history recorded by the AMS, his findings on examination, and the reasons for his conclusions as well as the evidence referred to above. The Appeal Panel accepts the findings on examination that the AMS made in the MAC.

29. Mr Puntigam submitted that the AMS decided "injury", even though that matter had been previously decided by the Commission and the AMS was bound by this decision.

30. On page 8 of the MAC, the AMS wrote:

> "There is no history of injury to the right upper extremity associated with this particular event. Therefore, there is 0% for the right upper extremity …
>
> No significant features of either lower extremity, particularly the knees, can reasonably be attributed to this event of February 2000. There is ample evidence of extensive pre-existing pathology of the left knee well before this occasion. Also, at this assessment, the clinical findings were insufficient to generate a numerical whole person impairment."

31. The Appeal Panel noted that in the previous proceedings in Matter No 9383/2011 the question of “injury” was decided in respect of both the right shoulder and in respect of each knee. Dr John McKee, AMS, in a MAC dated 5 June 2012 assessed under the Table of Disabilities 12% loss of efficient use of the right arm at or above the elbow.

32. The Appeal Panel was of the view that the AMS had decided “injury” in respect of the right upper extremity. The AMS, on page 8 of the MAC, made an assessment of 0% for the right upper extremity. At 8(f) of the MAC, the AMS stated that there had been previous injuries to the left knee and right shoulder complex. The AMS at 8(g) of the MAC noted that there had been a subsequent injury to the right elbow complex associated with an event in 2010.

33. At Part 10(c) of the MAC, the AMS wrote:

> “Dr Peter Dodd, in his report of 10/09/18 finds DRE II for the cervical spine and a further 3% for the activities of daily living, giving 8%. He deducts half which gives 4%. For the lumbar spine there is 5% WPI. With the left lower extremity, there is 4%. He advises that the condition of the right shoulder is slightly worse than that of the left and therefore there is unlikely to be any contributing factor from the left shoulder. With the greatest of respect, I believe that there has been subsequent injury of the right upper extremity which would account for the associated restriction of movement.”

34. In the Table at the end of the MAC, the AMS assessed 8% WPI for the right upper extremity and then deducted ten tenths under s 323 for pre-existing injury, condition or abnormality resulting in an assessment of 0% in respect of the right upper extremity.

35. The Panel noted that the AMS made a deduction under s 323 yet stated that there had been a subsequent injury and he believed that the subsequent injury accounted for the restriction of movement in the right upper extremity. In those circumstances, the Appeal Panel also concluded that it was an error to make a deduction under s 323 for a pre-existing injury or condition.

36. The AMS assessed 8% WPI in respect of the right upper extremity, which would have resulted in a total assessment of 25% WPI. The AMS had noted under “Present symptoms” that there was a gross restriction of movement in the shoulders and the right side was more affected than the left. Shoulder movements were recorded by the AMS as being:

MOVEMENT	RIGHT	LEFT
Flexion	100°	100°
Extension	20°	20°
Abduction	90°	90°
Adduction	30°	30°
Internal rotation	60°	60°
External rotation	60°	60°

37. The Appeal Panel agreed with the assessment of 8% WPI in respect of the right upper extremity. The Panel did not accept that a reduction should be made for the subsequent injury in 2010 as that involved an elbow injury and the AMS found that there was a normal range of movements of the elbows.

38. In respect of the knee Mr Puntigam submitted that the AMS, at paragraph 9(b) of the MAC, purported to decide "injury" in respect of the knees. The Appeal Panel agreed that the AMS made an assessment in respect of each knee of 0% WPI. However, the Appeal Panel considered that this assessment was made not because the AMS did not believe the knees were injured, but because on examination there was no impairment to be assessed. The AMS found a normal range of movement in each knee, no instability and there was no history of direct trauma to the front of each knee. The Appeal Panel agreed after looking at the examination findings of the AMS that there was no assessible impairment in either knee.

39. At Part 11 of the MAC, the AMS wrote:

> "I was unable to identify any significant condition associated with the lower limbs, nor with the right upper extremity which could reasonably be associated with this specific event of February 2000 although it is well acknowledged that there have been other events and circumstances which may well account for these."

40. At Part 10(b)the AMS wrote:

> "No significant features of either lower extremity, particularly the knees, can reasonably be attributed to this event of February 2000. There is ample evidence of extensive pre-existing pathology of the left knee well before this occasion. Also, at this assessment, the clinical findings were insufficient to generate a numerical whole person impairment".

41. Mr Puntigam submitted that in relation to radiculopathy, the AMS should have found radiculopathy. Dr Neil Cochrane, treating neurosurgeon, in a report dated 28 July 2016 noted various scan reports and symptoms equating to radiculopathy. In his report dated 29 September 2016, Dr Cochrane again recommended decompressive surgery to deal with the symptoms found, which equated to radiculopathy. On examination the AMS found: (a) very obvious muscle wasting in the right hand, and (b) loss of sensation down the right arm and hand (at least complaints thereof). He should have found radiculopathy with a base of 10% and added 2% for the ADLS, making 12% WPI for the neck.

42. At Part 5 of the MAC under "Findings on Physical Examination", the AMS wrote:

> "Cervical Spine
> There was ache in his neck with associated tenderness throughout. The movements of lateral flexion to each side and extension were minimal. Forward flexion and lateral rotation to each side were restricted at half of the normal range.
> Upper Limbs
> He had a normal range of movement of the elbows, wrists, hands and all digits. There was very obvious muscle wasting in the right hand although he still had quite good power with abduction of the digits (ulnar nerve). Sensation to pin prick was throughout the normal distribution (in spite of his complaints of loss of sensation down the right arm and hand). There was very obvious arthritic change in the acromio-clavicular joints."

43. Part 4.27 of the Guidelines provide:

> "Radiculopathy is the impairment caused by malfunction of a spinal nerve root or nerve roots. In general, in order to conclude that radiculopathy is present, two or more of the following criteria should be found, one of which must be major (major criteria in bold):
>
> - **loss or asymmetry of reflexes**
> - **muscle weakness that is anatomically localised to an appropriate spinal nerve root distribution**
> - **reproducible impairment of sensation that is anatomically localised to an appropriate spinal nerve root distribution**
> - positive nerve root tension (AMA5 Box 15-1, p 382)
> - muscle wasting – atrophy (AMA5 Box 15-1, p 382)
> - findings on an imaging study consistent with the clinical signs (AMA5, p 382).

44. Part 4.28 of the Guidelines provides:

> "Radicular complaints of pain or sensory features that follow anatomical pathways but cannot be verified by neurological findings (somatic pain, non-verifiable radicular pain) do not alone constitute radiculopathy."

45. The Appeal Panel agreed with the AMS that Mr Puntigam was in DRE Cervical Category II. There was only a complaint of sensory change and no finding of sensory change that was anatomically localised to an appropriate spinal nerve root distribution. The sensory changes in the hand were, in the Appeal Panel's view, associated with the ulna nerve injury in 2010 and this had been confirmed by nerve conduction studies. Therefore, no major criteria could be found and it could not be concluded that radiculopathy was present.

46. For these reasons, the Appeal Panel has determined that the MAC issued on 8 August 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 De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **2601/19**
Applicant: **Wolfgang Puntigam**
Respondent: **Tyzebet Pty Ltd**

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 Anderson 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.Cervical spine	07/02/00	Chap 4 P 24	P392 T 15-05	7%	1/10th	6%
2.Left upper extremity	07/02/00	Chap 2 P 10	P476 F16-40 P477 F 16-43 P479 F 16-46 P439 T16-03	8%	0	8%
3.Right upper extremity	07/02/00	Chap 2 P 10	P476 F16-40 P477 F 16-43 P479 F 16-46 P439 T16-03	8%	0	8%
4.Lumbar spine	07/02/00	Chap 4 P 24	P384 T 15-03	5%	1/10th	5%
5.Left lower extremity	07/02/00	Chap 3 P 13	Chap 17	0%	0	0%
6.Right lower extremity	07/02/00	Chap 3 P 13	Chap 17	0%	0	0%
Total % WPI (the Combined Table values of all sub-totals)					**24%**	

Carolyn Rimmer
Arbitrator

Dr Drew Dixon
Approved Medical Specialist

Dr Mark Burns

Approved Medical Specialist

20 November 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 De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar