

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-5764/19
Appellant:	JBS Australia Pty Limited
Respondent:	Vicki Ann Morgan
Date of Decision:	11 March 2020
Citation:	[2020] NSWCCMA 47

Appeal Panel:	
Arbitrator:	Catherine McDonald
Approved Medical Specialist:	Dr Drew Dixon
Approved Medical Specialist:	Dr Tommasino Mastroianni

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 3 February 2020, JBS Australia Pty Limited (JBS) lodged an Application to Appeal Against the Decision of Approved Medical Specialist in respect of Vicki Ann Morgan. The medical dispute was assessed by Dr Frank Machart, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 7 January 2020.
2. JBS relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):
 - availability of additional relevant information (being additional information that was not available to, and that could not reasonably have been obtained by, the appellant before the medical assessment appealed against),
 - the assessment was made on the basis of incorrect criteria, and
 - 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, being that in s 327(3)(c). The Appeal Panel has conducted a review of the original medical assessment but limited to the grounds 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. On 10 February 2016, Ms Morgan was working in the boning room of an abattoir, repacking and labelling boxes of meat, when her gumboots became caught on a cling wrap-covered pallet, causing her to fall heavily on the concrete floor onto her right wrist and hip. She suffered a fracture of the neck of her right femur for which she underwent open reduction and internal fixation. Ms Morgan underwent surgery to her right wrist and subsequently an arthrodesis. She also developed right knee pain as a result of the fall.
7. The AMS was asked to assess Ms Morgan's right lower extremity, right upper extremity and scarring under the TEMSKI. He determined that the scars were not rateable, being standard surgical scars. He assessed 5% lower extremity impairment (LEI) in respect of the right knee, 25% LEI in respect of the trochanteric fracture as a result of 10° angular valgus malunion and 7% LEI in respect of trochanteric bursitis which combined to 34% LEI or 14% whole person impairment (WPI). He assessed 18% WPI in respect of the right wrist and his combined assessment was 24% WPI.
8. JBS appealed only in respect of the AMS's assessment of the right hip, on the basis that the method of assessment used was contrary to that in the Guidelines.

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. 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 is sufficient information in the file to determine the appeal.

Fresh evidence

11. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.
12. JSB seeks to admit two reports by Dr V Panjraton, its independent medical examiner, dated 20 January 2020 dealing with the appropriate method of assessment of Ms Morgan's hip impairment. It says that the evidence is relevant to confirm that an error has been made. It submitted that the evidence was obtained at the earliest possible opportunity after the MAC was received.
13. Ms Morgan did not make any submissions in respect of the evidence.
14. The Appeal Panel determines that the evidence should not be received on the appeal. While the reports may have been of assistance to JBS in determining whether to appeal or not, they are not relevant to determination by an Appeal Panel, two members of whom are AMS's.

EVIDENCE

15. 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.
16. 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

17. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
18. In summary, JBS submitted that the AMS had used the wrong method of assessment when he said that “femoral neck fractures are best judged according to degree of potential malunion. Usage of a goniometer is necessary to measure the neck shaft angle,” relying on Table 17-33 of AMA 5 to make his assessment. JBS noted that paragraph 3.28 of the Guidelines provides:

"Hip: the item in relation to femoral neck fracture 'malunion' is not to be used in assessment impairment. Use other available methods."
19. JBS noted that neither Dr G Miller, who assessed Ms Morgan at the request of her solicitors, nor Dr Panjraton used the “malunion/neck shaft angle” method. It submitted that the MAC should be revoked and a new assessment made using the range of motion method. JBS did not seek a re-examination.
20. In reply, Ms Morgan, through her solicitor submitted that the reference to assessment of the hip in paragraph 3.28 should be read in the context of the material immediately above, with respect to pelvic fractures, so that Table 4.3 of the Guidelines should not be used. “Other available methods” should be used which include Table 17-33 of AMA 5.
21. Unhelpfully, Ms Morgan’s submissions included a complete copy of the Guidelines.

FINDINGS AND REASONS

22. 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.
23. 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.
24. The AMS reviewed a number of x-rays which Ms Morgan took to the examination. He noted that an x-ray of the right hip dated 4 March 2016 showed:

“Nail in-situ. Fracture neck of femur fixed. Mild degree of coxa valga, measured at 135°, on the left neck shaft angle 125°. No osteoarthritis within the knee joint.”
25. The AMS measured the range of motion of Ms Morgan’s hips and set out his findings:

Movement	Right Hip	Left Hip
Flexion	110°	130°
Extension	Minus 10°	Full
Abduction	20°	30°

Adduction	20°	30°
External rotation ^o	30°	30°
Internal rotation	30°	30°

26. The AMS set out his assessment with respect to the right hip:

“Trochanteric fracture, 10° angular valgus malunion, measured by a goniometer, and compared to neck shaft opposite side. Table 17-33, 25% LEI.

Trochanteric bursitis and limp = 7% LEI (Table 17-33)”

27. The AMS commented on the assessment made by Dr Miller and said:

“Femoral neck fractures are best judged according to degree of potential malunion. Usage of goniometer is necessary to measure the neck shaft angle. The doctor did not conduct this part of the assessment and instead chose to assess the right hip as per trochanteric bursitis.”

28. With respect to Dr Panjraton’s report, the AMS said:

“The major injury was the right femoral neck fracture. It does not appear that the doctor measured the fracture shape for the potential malunion as per Table 17-33 demands for intertrochanteric fractures.”

29. JBS is correct to submit that the AMS used the wrong method of assessment. The AMS did not refer to the Guidelines at all.

30. Table 17-33 of AMA 5 is headed “Impairment Estimates for Certain Lower Extremity Impairments” – they are diagnosis-based estimates. One of those diagnoses under sub-heading “Hip” is “Femoral neck fracture” being the fracture suffered by Ms Morgan. Impairment ratings are provided for “Good position”, “Malunion” and “Nonunion.”

31. The AMS instead used the method of assessment for a femoral shaft fracture, which was not appropriate.

32. Chapter 3 of the Guidelines sets out the modifications of AMA 5 required for assessment of the lower extremity. The following paragraphs appear under the heading “The approach to assessment of the lower extremity”:

“3.2 Assessment of the lower extremity involves physical evaluation, which can use a variety of methods. In general, the method should be used that most specifically addresses the impairment present. For example, impairment due to a peripheral nerve injury in the lower extremity should be assessed with reference to that nerve rather than by its effect on gait.

...

3.5 In the assessment process, the evaluation giving the highest impairment rating is selected. That may be a combined impairment in some cases, in accordance with the AMA5 Table 17-2 ‘Guide to the appropriate combination of evaluation methods’, using the Combined Values Chart on pp 604–06 of AMA5.”

33. One of the assessment methods permitted is the range of motion.

34. Under the heading “Diagnosis-based estimates” paragraphs 3.26 and 3.27 explain how the relevant part of AMA 5 is to be used:

“3.26 AMA5 Section 17.2j (pp 545–49) lists a number of conditions that fit a category of diagnosis-based estimates. They are listed in AMA5 Tables 17-33, 17-34 and 17-35 (pp 546–49). When using this table it is essential to read the footnotes carefully. The category of mild cruciate and collateral ligament laxity has inadvertently been omitted in Table 17-33. The appropriate rating is 5 (12)% whole person (lower extremity) impairment.

3.27 It is possible to combine impairments from Tables 17-33, 17-34 and 17-35 for diagnosis-related estimates with other components (e.g. nerve injury) using the Combined Values Chart (AMA5, pp 604–06) after first referring to the Guidelines for the appropriate combination of evaluation methods (see Table 3.5).”

35. The Guidelines then set out a number of diagnoses, in respect of which AMA 5 is amended, in the order in which they appear in Table 17-33. With respect to the hip, the Guidelines provide:

“Hip: The item in relation to femoral neck fracture ‘malunion’ is not to be used in assessing impairment. Use other available methods.”

36. Ms Morgan’s submissions are correct to say that paragraph 3.28 is to be read in context but that context is the whole of Chapter 3 of the Guidelines and paragraphs 3.36 and 3.27. The context is not the reference to assessment of the pelvic fractures appearing immediately above¹ because that is a different diagnosis.

37. The femoral neck is part of the hip. Ms Morgan suffered a malunion and the Guidelines provide that Table 17-33 is not to be used to assess her impairment.

38. The range of motion is the appropriate method of assessment of Ms Morgan’s impairment and none of the other methods permitted by the Guidelines is appropriate.

39. Taking the assessments made by the AMS and applying Table 17-9 of AMA 5, the impairment is:

Flexion	110°	0% LEI
Extension	Minus 10°	5% LEI
Abduction	20°	5% LEI
Adduction	20°	0% LEI
External rotation	30°	5% LEI
Internal rotation	30°	0% LEI

40. Those impairments are added² to achieve 15% LEI.

¹ While pelvic fractures are assessed under the lower extremity in AMA 5, they are assessed with the spine under the Guidelines.

² AMA 5 p 533, Guidelines paragraph 3.17.

41. Trochanteric bursitis is assessed under Table 17-33 at 3% LEI. That impairment cannot be added to the range of motion assessment because Table 17-2 precludes the combination of those assessments. The higher assessment is adopted.
42. The AMS assessed 5% LEI as a result of patellofemoral crepitus of Ms Morgan's right knee.
43. The combined LEI is 19% which converts to 8% WPI. When that result is combined with the impairment arising from Ms Morgan's wrist injury, the total impairment is 19% WPI.
44. For these reasons, the Appeal Panel has determined that the MAC issued on 7 January 2020 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*.

A Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 5764/19
Applicant: Vicki Ann Morgan
Respondent: JBS Australia 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 Frank Machart 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. Right lower extremity	10.2.2016	Chapter 3, paragraph 3.28		8		8
2. Right upper extremity	10.2.2016	Chapter 2		18	1/3	12
3. Scarring	10.2.2016	TEMSKI		0		0
Total % WPI (the Combined Table values of all sub-totals)						19%

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

Catherine McDonald
Arbitrator

Dr Drew Dixon
Approved Medical Specialist

Dr Tommasino Mastroianni
Approved Medical Specialist

11 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*.

A Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar

