

# WORKERS COMPENSATION COMMISSION

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

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**Matter Number:** M1-3407/19  
**Appellant:** Australian Nationwide Investments Pty Ltd  
**Respondent:** Michael Hudson  
**Date of Decision:** 23 March 2020  
**Citation:** [2020] NSWCCMA 60

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**Appeal Panel:**  
**Arbitrator:** Ross Bell  
**Approved Medical Specialist:** Dr Drew Dixon  
**Approved Medical Specialist:** Dr David Crocker

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### 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 Tim Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 2 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, 4<sup>th</sup> ed* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> 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:

Mr Hudson related that on 17/10/14, he was getting out of the driver's side of a Freightliner Argosy. He had gone into the cab to pick up his log-book. He described that the vehicle had an automatic set of steps (rather like a small staircase) which pivoted out just behind the front right-hand wheel, so that the driver could easily access or leave the cab safely. There were also two long vertical handrails, one in front and one behind the access steps.

On this occasion, the reason why this event occurred does not seem to be apparent. Somehow or other, he got his foot caught inside the cab with the door shutting on it. He did his best to hang onto (what must have been) the rear access handrail. This wrenched his left shoulder. He was unable to hold on and let go. This left him dangling upside down with his head very close to the ground. When he let go, it looks as though he swung down and banged his back against either the side of the truck or the front right-hand wheel, or possibly both.

He gave a yell for help and Mario Tabone (transport Supervisor), his wife Natalie Walkling and others came running to his aid. They hoisted him up, released his foot from the cab and lowered him down on to the ground. His wife is called an ambulance. His main injury at the time seemed to be a laceration to his left shin. However, this event occurred in the depot at Moorebank and he was taken by ambulance with full spinal supportive precautions to Liverpool Hospital. He was checked over. At that stage, no severe issues were identified, and he was released home.

He was a couple of weeks off work and then returned to work. In the extensive file, comment is made that he and his wife were actually 'living' in the cab and he was told that either they would have to move out of the cab or that he would have to return to driving. As a result, he did return to driving for a short while.

His left shoulder continued to be a severe issue and he was referred to Specialist Shoulder Surgeon, Dr Stephen Brindley. It was identified that there were rotator cuff tears to the supra-spinatus and infra-spinatus and also the long head of biceps was frayed. An arthroscopic procedure was conducted in April 2015. In studying Dr Brindley's subsequent reports, it looks as though the supporting care of Mr Hudson was sub-optimal. Severe and apparently dysfunctional social circumstances could be associated with this, although Dr Brindley describes in stern terms, the need for good and appropriate post-surgical management and review.

Ultimately, it looks as though there was probably a re-tear of at least part of the rotator cuff complex. Ultimately, this was managed by a further repair procedure in January 2016. During this, there was an excision of the distal left clavicle.

There was again subsequent review by Dr Stephen Brindley, but the strong impression is given that this was not a particularly successful repair.

Mr Hudson was recently reviewed by Specialist Orthopaedic Surgeon, Dr Joe Ghabrial. In this, Dr Ghabrial concludes that there was injury to Mr Hudson's neck, lower back and left shoulder associated with this specific event.

There has also been pain management care. It looks as though there has been difficulty with appropriate medication and extensive attempts have been made to try to wean Mr Hudson off Diazepam and also opiates."

## **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.

### **Fresh or additional evidence**

10. The appellant seeks to have admitted the following additional evidence which was annexed to the Notice of Opposition:

- (a) Reports of Dr David Millons, 13 July 2018 and 28 March 2019, and
- (b) Report of Yvonne Varela, Occupational Therapist, 2 June 2018.

11. Section 328(3) of the 1998 Act sets out the conditions for the admission of additional evidence sought to be admitted by a party on appeal:

“(3) Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the medical assessment appealed against may not be given on an appeal by a party to the appeal unless the evidence was not available to the party before that medical assessment and could not reasonably have been obtained by the party before that medical assessment.”

12. The Panel notes that the material came into existence well before the assessment by the AMS. The respondent submits in this regard,

“The Respondent seeks to rely on the documents produced under Direction by NRMA Limited under Access Order dated 13 September 2019 ('the NRMA file') in response to the issues raised in the Appellant's Appeal. The Respondent Worker has not previously sought to admit these documents into the proceedings.”

13. The respondent also submits that there is no prejudice to the appellant. There is no explanation as to why the material was not filed in the proceedings prior to the assessment by the AMS when, from the above submission, it was available to the respondent worker's legal representatives from approximately 13 September 2019. This does not satisfy s 328(3), and the material is therefore excluded.

14. The Panel also notes that even if the material were not excluded by operation of s 328(3) then it would in any case be excluded because of its lack of probative value.<sup>1</sup> The reports of Dr Millons and the occupational therapist do not contain any history of injury to the right shoulder causing restrictions, or any objective evidence of such an injury such as imaging studies.

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<sup>1</sup> *Lukasevic v Coates Hire Operations Pty Limited* [2011] NSWCA 112; Hodgson JA, in the majority, says (at 78),

“in my opinion it would be reasonable for an AP [Appeal Panel] not to admit evidence raising such a dispute unless that evidence had substantial prima facie probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, simply by raising such a dispute, going to a matter relevant to the correctness of the certificate, a worker could put the AP in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of the WIM Act.”

## **Medical Assessment Certificate**

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

## **SUBMISSIONS**

16. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.
17. The appeal concerns the assessment of the left upper extremity. The assessments for the cervical spine and lumbar spine are not appealed.

## **Appellant**

18. In summary, the appellant employer submits that the AMS has erred in failing to deduct the assessment for the contralateral right shoulder as a baseline assessment. Paragraph 2.20 of the SIRA Guidelines requires such an adjustment to be made when there is no history of injury to the contralateral joint.
19. The AMS erred in assessing 10% upper extremity impairment (UEI) when the SIRA Guidelines at paragraph 2.14 adjust the figure for excision of the distal clavicle from 10% UEI in Table 16-27 of AMA 5 to 5% UEI.
20. The MAC should be revoked.

## **Respondent**

21. The respondent submits that the AMS has not erred in not deducting the impairment of the right shoulder from that of the left shoulder as a baseline because there is material from an unrelated matter that includes medical reporting on the right shoulder which suggests issues with that shoulder.
22. The respondent concedes that the AMS erred in applying 10% UEI for the excision of the distal clavicle; the correct figure being 5% UEI in accordance with the SIRA Guidelines.

## **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.

## **Discussion**

### ***Ground of appeal - Failure to assess uninjured limb as baseline assessment***

25. As the appellant submits, paragraph 2.20 of the SIRA Guidelines provides,  
"2.20 When calculating impairment for loss of range of movement, it is most important to always compare measurements of the relevant joint(s) in both extremities. If a contralateral 'normal/uninjured' joint has less than average

mobility, the impairment value(s) corresponding to the uninvolved joint serves as a baseline and is subtracted from the calculated impairment for the involved joint. The rationale for this decision should be explained in the assessor's report (see AMA5 Section 16.4c, p 543)."

26. The Panel notes that the AMS lists previous medical events under "General health" at Part 4 of the MAC. This includes several physical injuries, but there is nothing recorded of any injury to the right shoulder.
27. The AMS explains at Part 10.b.,

"With a reduced range of movement on the contra-lateral side to the injury and with no history of injury to that side, this would normally be deducted from the measured findings of the injured side. In this situation, the movement of the right shoulder was far from normal and suggests significant associated pathology. Therefore, the impairment from this side cannot reasonably be deducted from the injured side. As a result, his impairment of the Left Upper Extremity revolves around the 27% upper extremity impairment of this side."
28. In the absence of a history of injury to the contralateral right shoulder, the AMS was unable to leave aside the impairment found for that shoulder given paragraph 2.20 of the SIRA Guidelines extracted above. The AMS explained that he did not make the subtraction because there was significant pathology in the right shoulder.
29. The Panel notes there is no history of injury upon which to base that approach. To leave aside the deduction of the degree of impairment of the right shoulder in these circumstances is a demonstrable error on the face of the Certificate; and bases the assessment on incorrect criteria.

#### ***Ground of appeal - figure for excision of the distal clavicle***

30. It is common ground between the parties that the figure that should be applied to the excision of the distal clavicle is 5% UEI, rather than 10%, by the operation of paragraph 2.14 of the SIRA Guidelines which adjusts Table 16-27 of AMA 5 in that manner.
31. The Panel agrees with the submission and finds the figure of 10% UEI applied by the AMS for the excision of the distal clavicle to be a demonstrable error on the face of the Certificate; and the assessment is based on incorrect criteria.

#### ***Findings***

32. 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).
33. The Panel can correct the errors comprising the omission of an adjustment for the uninjured contralateral shoulder joint; and the incorrect figure for excision of the distal clavicle, without recourse to further examination of Mr Hudson.
34. The Panel is satisfied that the impairment is permanent, and the injury has reached maximum medical improvement. There is no subsequent injury.
35. As discussed above, the Panel finds that there should be an allocation of 5% UEI for the excision of the distal clavicle (not 10%).

36. The finding of the AMS for the right shoulder of 15% UEI should be deducted as the baseline from the 27% UEI found for the left shoulder. This gives 12% UEI for the left upper extremity which, combined with 5% UEI for the distal clavicle, gives 16% UEI, equating with 10% WPI (Table 16-3 AMA 5). Combining this with the figures for the lumbar and cervical spine as assessed by the AMS gives 20% WPI, as reflected in the Panel's Certificate.
37. The assessed figure of the AMS for the lumbar spine was 8% WPI as set out at Part 10.b., but there is a typographical error in the AMS' Table showing 7% WPI and this has been corrected.
38. For these reasons, the Appeal Panel has determined that the MAC issued on 2 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 Bhasin

**Gurmeet Bhasin**  
**Dispute Services Officer**  
As delegate of the Registrar



# WORKERS COMPENSATION COMMISSION

## APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

**Matter Number:** 3407/19  
**Appellant:** Australian Nationwide Investments Pty Ltd  
**Respondent:** Michael Hudson

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 Tim 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 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	17.10.2014	Chapter 2 p10	Chapter 16 P 476 Fig 16-40 P 477 Fig 16-43 P 479 Fig 16-46 P 439 Table 16-03	10	nil	10
Cervical spine	17.10.2014	Chap 4 P 24	P 392 Table 15-5	5	nil	5
Lumbar spine	17.10.2014	Chap 4 P 24	P 384 T 15-3	8	nil	8
<b>Total % WPI (the Combined Table values of all sub-totals)</b>					<b>20%</b>	

**Ross Bell**  
Arbitrator

**Dr Drew Dixon**  
Approved Medical Specialist

**Dr David Crocker**  
Approved Medical Specialist

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**

