WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-5045/18**
Appellant:	**Hannah Burton**
Respondent:	**Queanbeyan Racing Club**
Date of Decision:	**5 March 2020**
Citation:	**[2020] NSWWCCMA 38**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr Michael Fearnside**
Approved Medical Specialist:	**Dr Ross Mellick**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 23 December 2019 Hannah Burton lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Michael Davies, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 4 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 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 background 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:

Ms Burton was riding a race horse at Queanbeyan Racecourse on 5 June 2013. The horse bucked and she was thrown onto the ground, landing on her right hip. She told me she had pain in the right hip, right knee and lower back following that incident. She was taken to Queanbeyan Hospital, where she was given analgesia and x-rays were performed. She was discharged with crutches and said she was unable to take any weight on the right lower limb at that stage.

Ms Burton subsequently saw Dr Hendry, who had been supervising her care at hospital. He documents the incident in an entry dated 26 June 2013. At a review visit on 28 August 2013 he records 'now essentially pain free and has full range of movement.' I asked Ms Burton about that but she said that is not true. She said Dr Hendry told her that he could only manage one thing at a time and he was focusing on her hip injury. She also said that she was told that the pain in the back and right lower limb were related to the hip injury. She reports ongoing pain at that stage. I note Dr Hendry's entry of 26 June 2013 records no tenderness in the hip and knee and a full range of movement. There was no comment about back pain. There is reference to pain over the right iliac crest and sacroiliac joint region on 8 August 2013 and she is also documented as limping after she has been walking for a while.

Ms Burton was off work for some time following the accident. She obtained work at Spotlight in January 2014 but found it difficult to stand on hard floors for prolonged periods and saw Dr Hendry again on 19 March 2014 with a complaint of pain in the right groin, sacroiliac joint region and in both legs.

Ms Burton moved to the Northern Territory with her partner and was driving tractors. She found the jolting and jarring aggravated her back pain and she stopped driving tractors and started doing alternative duties, such as preparing lunches for the other workers. They remained in the Northern Territory for about six months and then returned to Collinton. She did some administrative work for a period of time and then began working as a Cleaner. However, she found the work and the driving involved exacerbated her pain too much and she left that position. She then started doing some cleaning in her local area but demand for her work increased quite rapidly and she couldn't cope because of her pain. She stopped doing that work and subsequently began doing some administrative work for her partner's business.

Ms Burton reports ongoing pain in the back and lower limbs. She has had several episodes of a heavy shooting, burning pain in the legs that has caused her to fall. On one occasion it occurred whilst she was sitting on a horse and she couldn't get off the horse. The episodes lasted 1-2 hours.

Ms Burton was referred to Professor Neil (Orthopaedic Surgeon), who felt that her ongoing hip and leg symptoms were coming from the lumbar spine. He referred her to Professor Day (Musculoskeletal Physician), who diagnosed her with chronic pain and recommended psychological and physical therapy. She was investigated for possible ankylosing spondylitis, which was negative. He diagnosed possible sacroiliac joint pain.

Ms Burton developed numbness and painful paresthesiae in both thighs, together with burning pain in the thighs. She could not recall when that first began. Reviewing the documents, the first mention of paresthesiae in the General Practitioner's notes is on 15 September 2017, when it is said to have started about a month earlier. She reportsdecreased sensation when she touches the lateral aspect of her thighs."

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.

12. The respondent requests leave to make oral submissions should the appeal proceed to a Panel, but the Panel is able to deal with the issues in the appeal without the need for oral submissions.

13. The appeal concerns the assessment of the lower extremities, and whether there should have been an assessment for dysesthesia in both lower extremities.

Appellant

14. In summary, the appellant worker submits that the AMS has erred in failing to diagnose and assess dysesthesia. Dr Patrick assessed an additional 3% whole person impairment (WPI) for each leg for that deficit.

15. The AMS's findings on examination are consistent with dysesthesia. In explaining his assessment the AMS says he found no hypersensitivity, but this is not a requirement.

16. The Panel should re-examine Mr Burton and include the dysesthesia in the lower extremity assessments.

Respondent

17. The respondent submits there is no demonstrable error by the AMS, and no obligation to make a finding either way as to dysesthesia.

18. There is also no obligation to accept the findings of Dr Patrick. As noted by the AMS, previous AMS Dr Assem also found no dysesthesia at the time of his examination.

19. The respondent seeks to make oral submissions if the matter is referred to the Panel.

20. The MAC should be confirmed.

FINDINGS AND REASONS

21. 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.

22. 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

23. The AMS described symptoms in the thighs at Part 4 as extracted above, which includes, “She reports numbness, paraesthesiae and a sharp burning sensation over the lateral aspect of both thighs”.

24. The AMS makes the following physical findings,

> “There was impaired sharp sensation over the territory of the lateral cutaneous nerve in each thigh and reports of impaired sensation to light touch in the same area. There was no allodynia or hyperalgesia. There was non-dermatomal impairment of sharp sensation below the knee in each lower limb.”

25. The AMS assessed 1% WPI for each leg for sensory loss in the territory of the lateral cutaneous nerve of the thigh.

26. At Part 10.b. when explaining his assessment, the AMS says,

> “Using the WorkCover Guides (Chapter 3, paragraph 3.32) in association with AMA 5 (table 17-37 on page 552), Ms Burton has impairment in relation to the lateral femoral cutaneous nerve in each lower limb. There is impaired sensation over the distribution of the lateral femoral cutaneous nerve in each lower limb. There is no hypersensitivity but there is reduced sensation in the area. She has 1% whole person impairment in respect of the right lower extremity and 1% whole person impairment in respect of the left lower extremity.”

27. Paragraph 3.32 of the Guidelines, to which the AMS refers above, provides,

> “3.32 When assessing the impairment due to peripheral nerve injury (AMA5, pp 550–52) assessors should read the text in this section. Note that separate impairments for the motor, sensory and dysaesthetic components of nerve dysfunction in AMA5 Table 17-37 (p 552) are to be combined.”

28. The AMS says about Dr Patrick’s report of 16 April 2018, at Part 10.c.,

> “Dr Patrick records ‘quite marked dysesthesia’ over the region of the lateral femoral cutaneous nerve in each lower limb and assesses 3% WPI for each lower limb relating to that. Examination today shows impaired sensation to light [touch] and sharp testing but no hypersensitivity over the distribution of the lateral cutaneous nerve in the thigh.”

29. It seems that in the above extracts the AMS accepts impaired sensation over the distribution of the lateral femoral cutaneous nerve, but implies that because hypersensitivity is absent a diagnosis of dysesthesia is not indicated. However, as the appellant submits, this is not the test.

30. The Panel notes that Dr Patrick says: “There is readily demonstrated dysesthesia over region of distribution of lateral femoral cutaneous nerves (bilateral meralgia paraesthetica with dysesthesia bilaterally).” Dr Patrick reiterated this opinion in his report of 13 March 2019 based on the history of the unpleasant abnormal sensation.

31. As the respondent to the appeal submits, there is no obligation on the AMS to accept Dr Patrick’s opinion. An AMS is required to use their own clinical judgement.

32. Associate Professor Miniter and the other practitioners relied on do not appear to have addressed the question of dysesthesia directly. The previous AMS, Dr Assem, to whom the matter was referred as a General Medical Dispute did not find dysesthesia at examination for his MAC.

33. The definition of dysesthesia, according to the *International Association for the Study of Pain (IASP)* is,

> “Dysesthesia
> An unpleasant abnormal sensation, whether spontaneous or evoked.
>
> *Note:* Compare with pain and with paresthesia. Special cases of dysesthesia include hyperalgesia and allodynia. A dysesthesia should always be unpleasant and a paresthesia should not be unpleasant, although it is recognized that the borderline may present some difficulties when it comes to deciding as to whether a sensation is pleasant or unpleasant. It should always be specified whether the sensations are spontaneous or evoked.”

34. The history taken by the AMS reflects the presence of dysesthesia in each lower limb. Hypersensitivity is not a requirement for dysesthesia. The history is of a burning sensation over the area of the lateral femoral cutaneous nerve in each leg. This history is of spontaneous dysesthesia; that is; what is experienced by Ms Burton, whereas the AMS has focussed only on what was evoked on physical examination, which is not the complete clinical picture on which to base the assessment.

35. The AMS assesses 1% WPI for reduced sensation over the distribution of the lateral femoral cutaneous nerve in each lower limb in terms of Table 1-37 of AMA 5, but the Panel finds that the evidence is of dysesthesia present in each leg and this should have been should have been assessed. This omission is a demonstrable error on the face of the Certificate.

Findings

36. 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). The Panel can correct the omission of an assessment of bilateral dysesthesia without recourse to further examination of Ms Burton.

37. The Panel is satisfied that the impairment is permanent, and the injury has reached maximum medical improvement. There is no subsequent injury.

38. As discussed above, the Panel finds that dysesthesia is present in both legs. Applying Table 17-37 and paragraph 3.32 of the Guidelines for Ms Burton the symptoms as recorded in the history taken by the AMS place her close to the maximum in terms of Table 16-10 at page 482 of AMA 5, and a further 3% WPI is applicable for each lower extremity.

39. The ratings for sensory deficit (1% WPI) and dysesthesia (3% WPI) at Table 17-37 of AMA 5 should be combined, which gives 4% WPI for each lower extremity. These ratings combined with the assessment of the lumbar spine of 7% WPI results in a total of 15% WPI.

40. For these reasons, the Appeal Panel has determined that the MAC issued on 4 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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Matter Number: **5045/19**
Appellant: **Hannah Burton**
Respondent: **Queanbeyan Racing Club**

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 Michael Davies 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)
Lumbar spine	05.06.2013	Ch 4, Pg 24	Ch 15-3 Page 384	7	nil	7
Right lower extremity (peripheral nerve)	05.06.2013	Chapter 3, paragraph 3.32	Table 17-37, page 552	4	nil	4
Left lower extremity (peripheral nerve)	05.06.2013	Chapter 3, paragraph 3.32	Table 17-37, page 552	4	nil	4
Total % WPI (the Combined Table values of all sub-totals)					**15%**	

Ross Bell
Arbitrator

Dr Michael Fearnside
Approved Medical Specialist

Dr Ross Mellick
Approved Medical Specialist

5 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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar