WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-5279/19**
Appellant:	**Secretary, Department of Family and Community Services**
Respondent:	**Esther Oh**
Date of Decision:	**25 March 2020**
Citation:	**[2020] NSWWCCMA 63**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Brian Noll**
Approved Medical Specialist:	**Dr Philippa Harvey-Sutton**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 14 January 2020, Secretary, Department of Family and Community Services the appellant employer lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Roger Pillemer, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 17 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 WorkCover Medical 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 WorkCover Medical 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 Guides) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). "WPI" is reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 14 November 2019, the delegate of the Registrar referred this matter to an AMS for two purposes. Firstly, an assessment pursuant to the Table of Disabilities of the permanent impairment of the neck and the permanent loss of efficient use of the right arm at or above the elbow including any loss below the elbow. The date of injury was expressed as:

> **"* 2 July 1998 and 6 March 2001**
>
> ***(for assessment of the combined effects of the injuries sustained on 2 July 1998 and 6 March 2001).**"

7. Secondly a WPI assessment was sought for injury caused to the cervical spine and the right upper extremity (shoulder and wrist) caused by the same injuries as described in the referral regarding the Table of Disabilities.

8. Prior settlements were noted with regard to the injuries sustained on 6 March 2001. Firstly, a s 66A Agreement was registered on 21 May 2004 showing that a 15% permanent loss of efficient use of the right arm below the elbow had been agreed. A second Complying Agreement dated 22 May 2012 showed that a further 5% was agreed for the permanent loss of use of the right arm below the elbow.

9. Ms Oh initially injured her neck and right shoulder region on 2 July 1998 when she and a colleague were trying to prevent a patient from falling. She complained of ongoing problems with her neck and right shoulder since that time.

10. On 6 March 2001 Ms Oh was injured in a motor vehicle accident when she lost control of her vehicle, which struck a gutter and a tree. She was taken to Gosford Hospital, where it was established that she had sustained a fracture to her right scaphoid and aggravated her neck symptoms.

11. The AMS noted that Ms Oh had on-going problems with headaches, neck pain, right shoulder pain, and pain down her right arm into the digits of her right hand.

12. The AMS assessed a 10% upper extremity impairment (UEI) for the reduced range of shoulder motion and 3% UEI for the reduced range of right wrist movement.

13. The AMS also found that Ms Oh had carpal tunnel syndrome in her right hand. The AMS found Grade 3 sensory loss of the median nerve, and Grade 4 motor loss, giving 12% and 3% UEI respectively, which gave a combined total of 15% UEI. This gave a total of 26% UEI when combined with the assessments regarding the restricted range of movement for the shoulder and wrist. The combined UEI totalled 16% WPI. To that was added a further 5% WPI in respect of the cervical spine, giving a combined value of 20% WPI.

14. The AMS found a 10% permanent impairment of the neck pursuant to the Table of Disabilities and an additional 5% WPI to the cervical spine (making 25%) as a result of both referred injuries.

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 WorkCover Medical Assessment Guidelines.

16. The appellant employer did not seek to have the worker, Ms Oh, re-examined by a Panel specialist. Although we have found a demonstrable error, a re-examination was not called for in view of the nature of the error, as explained below.

EVIDENCE

Documentary evidence

17. 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

18. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out in the body of this decision.

SUBMISSIONS

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

FINDINGS AND REASONS

20. 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.

21. 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.

22. In giving his reasons the AMS noted the following history[1]:

> "Ms Oh's history was confirmed of having initially injured her neck and right shoulder region on **2 July 1998** when she and a colleague were trying to prevent a patient from falling. She feels she has had ongoing problems with her neck and right shoulder region since then.
>
> Ms Oh was involved in a motor vehicle accident on **6 March 2001** when she lost control of her vehicle which struck a gutter and a tree, and I note that she had to be taken to Gosford Hospital. She feels she aggravated her neck symptoms at the time and also apparently sustained a fracture of her right scaphoid.
>
> As will be noted below Ms Oh has ongoing problems with headaches, neck pain, right shoulder pain, and pain down her right arm into *the digits of her right hand.*
>
> As far as treatment is concerned I note that her fractured scaphoid was treated in a cast for some 8 weeks and she has also had fairly extensive conservative treatment including an injection in her right shoulder, tablets, physiotherapy, hydrotherapy, Pilates, acupuncture, remedial massage, and has also had cream to

[1] Appeal papers page 20.

rub in. I note that she has also been under the care of a psychiatrist for anxiety and depression." (Emphasis added).

23. The AMS noted Ms Oh's present symptoms as consisting of on-going problems with headaches, neck pain, and pain going down her right arm into the digits of her right hand, particularly the thumb and index finger. The AMS noted that "more specifically" Ms Oh's neck and right hand worried her the most.

24. The AMS described Ms Oh's complaints regarding her neck. He then said[2]:

> "Her next main concern is with her right hand, and it should be noted that on examination she has classical features of a carpal tunnel syndrome, and on specific questioning she wakes every night of the week with numbness and pins and needles in the digits of her right hand, and this will wake her as often as twice a night and she will have to get her husband to rub her hand for her and shake her hand around, and open and close the fingers. On specific questioning she often drops things during the day. She also has numbness in her right hand during the day."

25. In his examination the AMS said[3]:

> "Importantly percussion over the right wrist region causes intense paraesthesias to radiate into her thumb and index finger (positive Tinel's sign), and pressure over the carpal tunnel again causes paraesthesias into these digits (positive Phalen's test). In my opinion there was also slight weakness of abduction and opposition of the right thumb. There was no obvious thenar wasting."

26. In his diagnosis the AMS said that Ms Oh suffered "what would seem to be" a soft tissue injury to her cervical spine and "possibly" her right shoulder region (presumably in 1998) which was aggravated by the motor vehicle accident in March 2001, in which she sustained the fracture of the right scaphoid, which had healed in a good position.

27. The AMS then said[4]:

> "As noted Ms Oh has been left with ongoing symptoms in her neck and right upper limb, and in my opinion the main cause of her ongoing problems is a carpal tunnel syndrome on the right side. It is not unusual for carpal tunnel problems to cause referred pain proximally.
>
> In my opinion then at this stage Ms Oh needs to see a hand specialist and noting the duration of her symptoms, is likely to require nerve conduction studies and in my opinion will require a carpal tunnel release."

Submissions

28. The appellant employer submitted that the AMS had fallen into error by assessing the entitlements arising from the presence of the carpal tunnel syndrome. The appellant employer, whilst neither disputing the claim for a soft tissue injury to the cervical spine and right shoulder, nor for the fracture of the right scaphoid as a result of the two referred injuries, did dispute that the diagnosis of carpal tunnel syndrome had any causal relationship to those injuries.

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[2] Appeal papers page 21
[3] Appeal papers page 22[4]
[4] Appeal papers page 23

29. Ms Oh, it was submitted, had never made an allegation of a carpal tunnel injury regarding the two injuries and there was no medical evidence that confirmed the diagnosis, let alone establishing a causal connection between the referred injuries and the carpal tunnel syndrome.

30. We were referred to the evidence in the case, which confirmed, it was submitted, that Ms Oh had never complained of carpal tunnel symptoms, and that the condition had never been diagnosed hitherto.

31. The appellant employer then rather contradicted itself by referring to evidence from Dr John Tawfik, Hand and Wrist Surgeon in a report of 8 August 2013.

32. Dr Tawfik noted[5]:

> "Esther has a history of atypical carpal tunnel type symptom affecting the right hand with altered sensation in the index finger and thumb and associated pain in the thenar eminence. She does describe difficulty with fine motor control and dropping things. She has had the symptoms since 2003 and was investigated previously at Sydney Hospital and tells me that she had some nerve conduction studies at the time which may have suggested carpal tunnel which were consistent with carpal tunnel syndrome." (As written).

33. Dr David Crocker, Occupational/Musculoskeletal Physician reported on 12 October 2016 to Dr Pope (Consultant Neurosurgeon) in relation to the referred injuries. Under the heading "Past Medical History" Dr Crocker said[6]:

> "She reported that it had been raised that she was diagnosed with a right sided carpal tunnel syndrome in 2002. I was unable to fully clarify the nature of Investigations undertaken at that time".

34. The appellant employer also submitted that no claim had been made in relation to an injury for the carpal tunnel syndrome.

35. Ms Oh sought to support the AMS assessment. She submitted that the AMS was asked to "assess right upper extremity (shoulder and wrist)" and that it was open to the AMS to make findings as to causation. We were referred to *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd*[7].

36. Ms Oh sought to refute the allegation that by assessing carpal tunnel syndrome the AMS had applied incorrect criteria. We were referred to Chapter 1.6(c) of the Guides, in particular the provision enabling an AMS in circumstances where a related injury/condition had not previously been identified, to record the nature of that injury or condition and specify the causal connection to the referred injuries.

37. Ms Oh contended that the terms of Chapter 1.6(c) had no application because in fact the condition had been identified by both Dr Tawfik and Dr Crocker.

38. Ms Oh submitted that the evidence accordingly showed that there had "been alternative diagnoses over the years."

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[5] Appeal papers page 232
[6] Appeal papers page 273
[7] [2014] NSWCA 264 [109]-[110](*Bindah*)

39. We were referred to the comment made by the AMS that it was not unusual for carpal tunnel problems to cause referred pain proximally, and to the finding by the AMS that the carpal tunnel syndrome was the main cause of Ms Oh's on-going problems.

40. Reference was also made to the statement by the AMS that his opinion was based upon the clinical history obtained, his findings on clinical examination, examination of the investigations and the reports thereof, as well as his review of the accompanying documents.

41. We were also referred to the examination results that showed definitely the presence of carpal tunnel syndrome. Ms Oh concluded:

> "On this basis and in line with his findings on examination, the AMS has correctly diagnosed carpal tunnel syndrome and as such there is no demonstrable error."

DISCUSSION

42. The appeal must be upheld. Ms Oh is quite correct that the AMS has correctly diagnosed carpal tunnel syndrome, and indeed that Ms Oh had been diagnosed as suffering from that condition as recorded by Dr Tawfik and Dr Crocker.

43. However, there is no suggestion in those reports that either of the referred injuries had caused or aggravated her condition. Indeed it would seem from Dr Tawfik's opinion that the symptoms did not begin until 2003. Moreover, contrary to the assumption by the AMS, her condition has been previously investigated. Nerve conduction studies were done, according to Dr Tawfik, at Sydney Hospital when her condition was being assessed.

44. Dr Crocker reported that the diagnoses occurred in 2002 but in either case it is clear that the onset of the carpal tunnel syndrome occurred after the occurrence of the two referred injuries.

45. Both parties referred to chapter 1.6(c) of the Guides. They provide:

> "c. In calculating the final level of impairment, the assessor needs to clarify the degree of impairment that results from the compensable injury/condition. …. If, in an unusual situation, a related injury/condition has not previously been identified, an assessor should record the nature of any previously unidentified injury/condition in their report and specify the causal connection to the relevant compensable injury or medical condition."

46. We note Ms Oh's submission that because the carpal tunnel syndrome was mentioned by Dr Tawfik and Dr Crocker, it could not therefore be said that the condition had not been previously identified. However, in context the Guideline is to be read as referring to a related condition to the subject of the referral. This was why the Guideline provides that an assessor should both record the condition and "specify the causal connection".

47. It was noted at the outset of these reasons there is an obligation to give adequate reasons by an AMS. That requirement is emphasised in Chapter 1.6(c). Whilst the AMS identified a current carpal tunnel syndrome, he made no attempt to connect its onset to the injuries of 1998 or 2001. Such evidence as there is regarding onset indicates 2002 or 2003.

48. Moreover, no claim had specifically been made for a carpal tunnel condition in Ms Oh's application. The medico-legal referee retained by Ms Oh was Dr Peter Conrad, who concluded after a comprehensive assessment, that she had suffered a 5% UEI because

of her wrist motion impairment.[8] This had been caused by the fracture to the scaphoid. In his report of 6 August 2018, Dr Conrad said:[9]

> "She has pain and restriction in her right shoulder, which tends to radiate down the right arm. She has pain and stiffness in the right wrist in the region of the scaphoid bone which was fractured in the motor vehicle accident. She has weakness of the grip of the right hand."

49. It is thus clear that the reference to the wrist in the referral was related to the opinion of Ms Oh's specialist that she had an impairment caused by stiffness following the fracture of the scaphoid bone.

50. Ms Oh is correct that an AMS is able to make independent assessments as to medical causation. The Appeal Panel in *Bindah* found that the worker's blindness, which occurred a year or so after he had struck his eye in a workplace accident, was not as a result of that accident. However, the Panel's reasoning was carefully explained in precise detail as to why it reached that conclusion. There has been no such explanation given in the current case.

51. We note that the AMS has increased the assessment under the Table of Disabilities from 20% to 25% loss of use of the right arm (to simplify the nomenclature). No submissions were addressed to this assessment and we accordingly will simply confirm it.

52. However the WPI assessment must be revoked as it was devoid of any explanation regarding any causal nexus between the carpal tunnel syndrome and either of the referred injuries.

53. Accordingly, Ms Oh is entitled to 10% UEI reduced range of shoulder movement and 3% UEI for the reduced range of wrist movement. Thus the assessment is 13% UEI which pursuant to table 16-3 of AMA 5[10] gives an entitlement to 8% WPI. This, when combined with the 5% WPI assessment of the cervical spine, gives an entitlement of 13% WPI. No re-examination is necessary, as the AMS has included an assessment for the reduced range of movement of the wrist, the injury identified by Dr Conrad.

54. For these reasons, the Appeal Panel has determined that the MAC issued on 17 December 2019 should be revoked, insofar as it related to the WPI assessment 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 Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar

[8] Report Dr Peter Conrad 2 July 2019: Appeal papers page 80.
[9] Appeal papers page 71.
[10] At page 439.

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received before 1 January 2002

Matter Number: **5279/19**
Applicant: **Secretary, Department of Family and Community Services**
Respondent: **Esther Oh**

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 Pillemer and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Assessment in accordance with the Table of Disabilities for injuries received before 1 January 2002

Body Part (describe the body part as per Table of Disabilities) e.g. right leg at or above the knee	**Date of injury**	**Total amount of permanent % loss of efficient use or impairment**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Total permanent % loss of efficient use or impairment attributable to this injury** (after deduction of any pre-existing impairment in column 4.)
Neck	2 July 1998 and 6 March 2001	10%	Nil	10%
Right arm at or above the elbow	2 July 1998 and 6 March 2001	25%	Nil	25%

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **5279/19**
Applicant: **Secretary, Department of Family and Community Services**
Respondent: **Esther Oh**

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 Pillemer 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 WorkCover Guides**	**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)**
Cervical spine	2 July 1998 and 6 March 2001	Chapter 4 Page 24-29	Chapter 15 Page 392 Table 15-5	5%	Nil	5%
Right upper extremity	2 July 1998 and 6 March 2001	Chapter 2 Pages 10-12	Chapter 16 Pages 433 to 521	8%	Nil	8%
Total % WPI (the Combined Table values of all sub-totals)					**13%**	

John Wynyard
Arbitrator

Dr Brian Noll
Approved Medical Specialist

Dr Philippa Harvey-Sutton
Approved Medical Specialist

25 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 Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar