

# WORKERS COMPENSATION COMMISSION

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

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<b>Matter Number:</b>	<b>M1-583/19</b>
<b>Appellant:</b>	<b>Sydney Knight</b>
<b>Respondent:</b>	<b>Vegemania Pty Ltd t/as Chipmasters</b>
<b>Date of Decision:</b>	<b>9 July 2019</b>
<b>Citation:</b>	<b>[2019] NSWCCMA 90</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Grahame Edwards</b>
<b>Approved Medical Specialist:</b>	<b>Dr Sophia Lahz</b>
<b>Approved Medical Specialist:</b>	<b>Dr Drew Dixon</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 8 May 2019, Sydney Knight (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Mohammed Assem, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 17 April 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, 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. 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. Mr Knight was employed as a food processor with Vegemania Pty Ltd t/as Chipmasters (the respondent) from 2007 until 23 February 2017. His work involved cutting and mixing of food products, made up of batches of approximately 25 to 30 kg of ingredients, and repetitive lifting of boxes and bags of vegetable produce.

7. In 2009, Mr Knight noticed gradual onset of pain in both upper extremities (elbows and shoulders).
8. The AMS recorded a history of Mr Knight injuring his right elbow while operating a cutting machine, although Dr Bodel, independent medical expert qualified by Mr Knight's solicitors, recorded a history of pain developing in the right elbow and right shoulder without any specific incident or injury.
9. Mr Knight consulted his general practitioner, Dr Wighton.
10. On 22 September 2009, Mr Knight consulted Dr Jansen, Orthopaedic Surgeon, on referral from Dr Wighton.
11. Dr Jansen reported to Dr Wighton that Mr Knight injured his left [sic] elbow while operating a pumpkin press<sup>1</sup>.
12. Clinical records<sup>2</sup> of Dr Jansen dated 22 September 2009 record:
 

"Heavy and repetitive.  
Gardening.  
R elbow pain.  
1st May.  
Dicing Pumpkin.  
Pumpkin caught.  
Snap in elbow.  
1/52 with Lateral epicondylar pain  
..."
13. Mr Knight was treated conservatively with extracorporeal shockwave therapy, physiotherapy and cortico-steroid injection into the right lateral epicondyle.
14. On 16 November 2009, Dr Jansen reported to Dr Wighton that Mr Knight obtained some benefit from a cortico-steroid injection in his right lateral epicondyle<sup>3</sup>.
15. On 18 February 2010, Mr Knight underwent lateral epicondylitis debridement surgery of the right elbow by Dr Jansen<sup>4</sup>.
16. On 28 July 2010, Dr Jansen reported to Dr Wighton that Mr Knight underwent an MRI guided subacromial cortico-steroid injection of the right shoulder<sup>5</sup>.
17. On 27 January 2011, Mr Knight underwent surgery in the form of a right shoulder arthroscopic subacromial decompression by Dr Jansen.
18. Post-operatively, Mr Knight was treated conservatively with physiotherapy.
19. On 23 May 2012, Dr Jansen reported to Dr Wighton that an acromioclavicular joint (AC) injection had given him some transient benefit<sup>6</sup>.
20. On 1 February 2017, Mr Knight suffered the injury.

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<sup>1</sup> report of Dr Jansen dated 22 September 2009 – Application to Resolve a Dispute – p 63

<sup>2</sup> Application to Resolve a Dispute – p 41

<sup>3</sup> report of Dr Jansen dated 16 November 2009 – supra – p 63

<sup>4</sup> report of Dr Jansen dated 1 March 2010 – supra – p 59

<sup>5</sup> report of Dr Jansen dated 28 July 2010 – supra – p 55 and report dated 8 September 2010 – p 54

<sup>6</sup> report of Dr Jansen dated 23 May 2012 – supra – p 46

21. On 21 March 2017, Dr Jansen reported to Dr Wighton that Mr Knight had responded to cortisone injection, and that he had been careful with his activities but since 2015 there had been increasing pain in the right shoulder which<sup>7</sup>:

“came to a head when he was lifting a 30kg basket out of the water and he developed pain in his neck and both shoulders. Sydney has a right superior shoulder pain. He points to an area around the AC joint. In the left shoulder, there is a left lateral pain.”

22. On 22 February 2018, Mr Knight underwent surgery in the form of a left shoulder arthroscopy, AC joint excision, decompression and rotator cuff repair by Dr Jansen<sup>8</sup>.

## **PRELIMINARY REVIEW**

23. 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.
24. 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 as requested by the appellant because it was satisfied, after reviewing the documentary evidence, that the AMS's assessment was not made on the basis of incorrect criteria and the MAC does not contain a demonstrable error.

## **EVIDENCE**

### **Documentary evidence**

25. 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**

26. 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**

27. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.
28. In summary, the appellant submits the assessment was made on the basis of incorrect criteria, and that the MAC contains a demonstrable error.
29. The appellant submits the injury was referred to the AMS for assessment of a “disease or aggravation of a disease of gradual process” with the injury deemed to have happened on 1 February 2017, being the last day he worked for the respondent.
30. The appellant submits the AMS erroneously assumed the claim was for a personal injury on 1 February 2017 by recording:

“On 1 February 2017, he sustained an injury to both shoulders while lifting a heavy basket of potatoes.”

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<sup>7</sup> report of Dr Jansen dated 21 March 2017 – Application to Resolve a Dispute – p 44

<sup>8</sup> operation report of Dr Jansen dated 22 February 2018 – supra – p 34

31. The appellant submits because of the AMS's misunderstanding, he erroneously applied a deduction pursuant to s 323 of the 1998 Act for "previous history of the right shoulder".
32. The appellant submits the AMS failed to assess his elbows, and that he should undergo a further medical examination by an Approved Medical Specialist, who is a member of the Appeal Panel.
33. In reply, the respondent submits the assessment was not made on the basis of incorrect criteria, and that the MAC does not contain a demonstrable error.
34. The respondent submits a demonstrable error is not established on the basis of an allegation that the AMS took an inaccurate history of the injury<sup>9</sup>.
35. The respondent submits the AMS was provided a history by the appellant of the injury he sustained on 1 February 2017, and that the appellant did not have any condition of the elbows that warranted an impairment assessment.
36. The respondent submits the appellant gave a history as to the mechanism of injury to Dr Wallace, independent medical expert, consistent with the history taken by the AMS from him.
37. The respondent submits the appellant made no complaints about his elbows when assessed by Dr Wallace.
38. The respondent submits the terms of the referral to the AMS made no mention of a "deemed" date of injury.

## **FINDINGS AND REASONS**

39. 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.
40. 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.
41. It is not a ground of the appeal that the AMS incorrectly assessed the active range of motion of the shoulders to find 5% upper extremity impairment (UEI) of the right upper extremity which converts to 3% whole person impairment (WPI); and 12% UEI of the left upper extremity with an additional 5% UEI for excision of the distal clavicle, giving a combined 16% UEI for the left upper extremity, which converts to 10% WPI.
42. The appellant does not dispute the AMS's review of the radiologists' observations of the special investigations or his opinion that the radiological imaging identified a small partial thickness tear involving the anterior supraspinatus tendon on a background of mildly active arthritic changes in the glenohumeral joint and degenerative changes of the left acromioclavicular joint requiring arthroscopic surgery in the form of an AC joint excision and decompression and rotator cuff repair.

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<sup>9</sup> *Merza v Registrar of the Workers Compensation Commission & Anor* [2006] NSWSC 939

43. The appellant does not dispute the histories taken by the AMS that he sustained an injury to his right elbow requiring surgical debridement on 18 February 2010, and that he developed pain in his right shoulder for which he was given steroid injections followed by arthroscopic surgical decompression on 27 January 2011.
44. The appellant does not dispute the AMS observations that the post-operative right shoulder radiological imaging taken on 17 April 2012 showed minor tendinosis and limited AC joint degenerative changes; that he resumed his pre-injury duties, but continued to have intermittent residual discomfort, with him having a right AC joint injection on 23 April 2012.
45. The Appeal Panel is unable to accept the appellant's submission that he was referred for assessment of a "disease injury" or a "disease contracted by a gradual process" because the terms of referral issued by the Delegate of the Registrar clearly state the date of injury as "1 February 2017".
46. The terms of referral did not request the AMS to assess permanent impairment of the upper extremities on the basis of "disease or aggravation of a disease of gradual process" with the injury deemed to have happened on 1 February 2017 as submitted by the appellant.
47. The history taken by the AMS from the appellant about the mechanism of the injury on 1 February 2017 that "he sustained an injury to both shoulders while lifting a heavy basket of potatoes" is consistent with the histories recorded by Drs Jansen and Wallace.
48. Dr Jansen recorded<sup>10</sup>:

"... lifting a 30kg basket out of the water and he developed pain in his neck and both shoulders."
49. Dr Wallace recorded<sup>11</sup>:

"lifting a 30kg basket of potatoes out of some water when he felt an elastic band-like feeling across the posterior aspect of his shoulders bilaterally. He then lifted and poured the potatoes onto a conveyor and not further aggravation of his bilateral shoulder pain."
50. The Appeal Panel is unable to accept the appellant's submission that the AMS "erroneously assumed the claim was a personal injury on 1 February 2017" because it would have required an assumption by the AMS that he was assessing a "disease injury" or "disease of gradual process" when the appellant gave a history of suffering bilateral shoulder injury as a result of "lifting a heavy basket of potatoes".
51. The AMS conducted his assessment upon the history provided, the documentary medical evidence, review and comment upon the forensic reports of Drs Bodel and Wallace, the special investigations, and the physical findings on examination to assess permanent impairment of the upper extremities (shoulders).
52. The AMS was aware of the previous elbow and shoulder problems, noting a history of injury to the right elbow in or around 2009 and surgical debridement of right lateral epicondylitis on 18 February 2010, and right shoulder arthroscopy and decompression surgery on 27 January 2011.

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<sup>10</sup> Clinical records of Dr Jansen dated 21 March 2017 – Application to Resolve a Dispute – p 38

<sup>11</sup> Report of Dr Wallace dated 10 December 2018 – Reply 15

53. It is evident to the Appeal Panel that the AMS on the presumption of regularity read the documentary evidence, including the radiologists' reports of the special investigations, provided to him because of the detail he set out in the MAC under the heading: "**Details of any previous or subsequent accidents, injuries or condition**" (emphasis in original).
54. The AMS referred to Dr Bodel's assessment of 1% UEI for limitation in right elbow motion, commenting that he did not include any limitations of elbow motion as the referral was for assessment of injury on 1 February 2017.
55. The Appeal Panel agrees with the AMS's finding that there is no evidence that there was a further injury to the right elbow at the time of the incident on 1 February 2017.
56. While the terms of referral were for assessment of the upper extremities, the AMS's comment that "there is no evidence that there was a further injury to his right elbow at that time" is supported, significantly in the Appeal Panel's view, by the history of complaint of neck and bilateral shoulder pain from "lifting 30kg basket out of water" given to Dr Jansen at the consultation on 21 March 2017. No history of elbow pain was recorded by Dr Jansen at that consultation or referred to in his report to Dr Wighton. Dr Jansen was aware of the previous right shoulder and right elbow problems because of his comment that he last saw the appellant for those conditions "back in 2012".
57. The Appeal Panel finds the AMS complied with the terms of referral issued to him by the Delegate of the Registrar; assessing permanent impairment of both upper extremities as a result of injury on 1 February 2017.
58. The Appeal Panel agrees with the AMS's conclusion that the appellant sustained an injury to both shoulders while lifting a heavy basket of potatoes on 1 February 2017; confirmed by radiological imaging identifying a small partial thickness tear involving the anterior supraspinatus tendon on a background of mildly active arthritic changes in the glenohumeral joint and degenerative changes of the left AC joint; requiring arthroscopic surgery in the form of AC joint excision, decompression and rotator cuff repair of the left shoulder.
59. The Appeal Panel distils no error by the AMS in his assessment of permanent impairment of both upper extremities as a result of injury on 1 February 2017.
60. The Appeal Panel finds the AMS's assessment was not made on the basis of incorrect criteria as submitted by the appellant.
61. The AMS reviewed and commented upon the radiologists' reports of the special investigations undertaken of the right elbow, and both shoulders from 9 July 2009 to 3 April 2017.
62. The Appeal Panel agrees with the AMS's conclusion that the injury on 1 February 2017 "aggravated pre-existing symptomatic pathology", and that the "previous pathology had contributed" to the degree of permanent impairment with a one-third deduction on a background of problems with the right shoulder requiring steroid injection and arthroscopic subacromial decompression in January 2011.
63. The Appeal Panel finds the AMS provided more than adequate reasons upon which he based his assessment of the deductible proportion due to the previous injury or due to the pre-existing abnormality or condition which contributed to the degree of the permanent impairment resulting from the injury.

64. The Appeal Panel distils no error by the AMS in his assessment and determination of the deductible proportion of one third due to the previous injury or due to the pre-existing abnormality or condition which contributed to the degree of permanent impairment resulting from the injury as required by s 323 of the 1998 Act.
65. For these reasons, the Appeal Panel has determined that the MAC issued on 17 April 2019 does not contain a demonstrable error and should be confirmed.

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 Jackson*

Ann Jackson  
Dispute Services Officer  
**As delegate of the Registrar**

