

WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION OF THE APPEAL PANEL IN RELATION TO AN APPLICATION UNDER SECTION 378 FOR A RECONSIDERATION OF A DECISION

Matter Number:	M1-527/19
Appellant:	Sydney Metro Taxis Fleet No 1 Pty Ltd
Respondent:	Michael Khan
Date of Decision:	22 August 2019
Date of reconsideration decision:	29 October 2019
Citation:	[2019] NSWCCMA 155

Appeal Panel:	
Arbitrator:	Marshal Douglas
Approved Medical Specialist:	Dr Ian Weschler
Approved Medical Specialist:	Dr Michael Delaney

Background

1. On 24 May 2019, Approved Medical Specialist Dr Michael Steiner (AMS) issued a Medical Assessment Certificate (MAC) in which he certified that Michael Khan had 66% whole person impairment (WPI) resulting from injuries Mr Khan suffered on 27 May 2015 whilst working for Sydney Metro Taxis Fleet No 1 Pty Ltd (the appellant). That WPI comprised 63% WPI that the AMS had assessed Mr Khan to have relating to his visual system and 7% WPI that Approved Medical Specialist Dr Allan Meares had assessed Mr Khan to have relating to his skin. The AMS had been appointed as the lead assessor, and hence the task fell to him to combine his assessment of Mr Khan's WPI with Dr Meares' assessment.
2. On 7 June 2019, the appellant lodged an Application to Appeal Against the MAC insofar as it related to the AMS's assessment of Mr Khan's permanent impairment of his visual system. On 22 August 2019, the Appeal Panel determined that the MAC should be confirmed.
3. On 11 September 2019, the appellant requested the Appeal Panel to reconsider its decision under s 378 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act). Under s 378(1) an Appeal Panel may reconsider any matter with which it has dealt and may rescind, alter or amend any decision it has previously made.
4. The injuries Mr Khan suffered on 27 May 2015 included an injury to his left eye. The referral to the AMS required the AMS to assess the permanent impairment of Mr Khan's visual system due to that injury. The AMS had assessed Mr Khan to have 86% WPI relating to his visual system, but the AMS had also found that a proportion of Mr Khan's impairment of his visual system was due to pre-existing conditions in Mr Khan's right eye. Those pre-existing conditions were glaucoma and cataract. The AMS, as he was required to do under s 323(1) of the 1998 Act, made a deduction for that proportion of Mr Khan's impairment of his visual system that was due to these pre-existing conditions.
5. The Appeal Panel saw no error with the AMS doing so, nor with the approach that the AMS had adopted in doing that.

6. The appellant's request to the Appeal Panel to reconsider its decision relates to whether the AMS was correct to make a deduction under s 323(1). The appellant contends that the glaucoma and cataract that Mr Khan had in his right eye were not pre-existing conditions because they were not diagnosed until after Mr Khan suffered the injury to his left eye. Essentially, the appellant contends that the Appeal Panel was therefore wrong to confirm the MAC.
7. The issue of whether or not Mr Khan had pre-existing conditions in his right eye was not raised by the appellant in the written submissions it made, dated 7 June 2019, in support of its appeal against the MAC. The grounds of appeal, subject to falling within one of the categories in s 327(3) of the 1998 Act, are limited to those articulated in the submissions accompanying the appeal.¹ The appellant is therefore seeking the Appeal Panel reconsider its decision on account of an issue that it did not raise in its grounds of appeal. The Appeal Panel considers that it does not have power to do so, because that would involve, essentially, the Appeal Panel determining the appeal by reference to a matter that did not fall within one of the grounds of appeal, and, for that reason alone, the Appeal Panel declines to exercise its discretion under s 378 to reconsider its decision.
8. But there is a further reason why the Appeal Panel declines to exercise its discretion to reconsider its decision, and that is that what the appellant contends as the basis for why the Appeal Panel should do so, is wrong.
9. Glaucoma is due to pressure within the eye affecting the optic nerve, with that pressure progressively damaging the optic nerve. It is not something that occurs "in one blow" on a particular day, but rather by the time of diagnosis it has been in place and developing for several years. Cataract is damage due to long term exposure of the eye to UV. It also does not happen in an instant, but is damage to the eye that has accumulated and been occurring over time. In other words, the chronic ophthalmic conditions of cataract and glaucoma have a long asymptotic latent period before clinical presentation. Generally, it takes up to 10 years of elevated ocular pressure to start having glaucoma visual field loss. Early cataract begins as hardening of the lens fibres and is not noticeable to the patient until visually significant lens opacity occurs which requires surgery.
10. The evidence in the form of a report dated 1 September 2016 from Mr Khan's treating ophthalmologist, Dr David Weschler, establishes that within 18 months after the injury to Mr Khan's left eye, Mr Khan had a significant cataract in his right eye requiring surgery and established glaucoma visual field loss in his right eye. This means that his cataract and glaucoma were existing conditions at the time Mr Khan suffered the injury to his left eye.
11. The Panel therefore declines to reconsider its decision.

¹ See *New South Wales Police Force v Registrar of the Worker Compensation Commission* [2013] NSWSC 1792 (*Police Force v Registrar*) Davies J at [49], applied in *The UGL Rail Services Pty Ltd (formerly United Group Rail Services Pty Ltd) v Attard* [2016] NSWSC 911 and *Wilkinson v C & M Leussink Pty Ltd* [2015] NSWSC 69.