

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1- 871/20
Appellant:	Grant David Field
Respondent:	EB Manufacturing Industries Group
Date of Decision:	23 February 2021
Citation No:	[2021] NSWCCMA 37

Appeal Panel:	
Arbitrator:	Carolyn Rimmer
Approved Medical Specialist:	Dr Margaret Gibson
Approved Medical Specialist:	Dr John Brian Stephenson

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 24 September 2020, Grant David Field (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr David Lewington, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 26 August 2020.
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, 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. In these proceedings, the appellant is claiming lump sum compensation in respect of an injury to the lumbar spine and left lower extremity on 6 August 2015 when he was working as an apprentice boilermaker. The applicant was injured when he was removing a plate from an excavator and the plate swung unexpectedly striking the appellant and the stand he was on, causing him to fall to the ground.

7. In a Certificate of Determination – Consent Orders dated 20 March 2020, Arbitrator Bell remitted the matter to the Registrar to refer to an AMS for assessment of whole person impairment (WPI) of the lumbar spine, left hip and lateral cutaneous nerve of the left thigh as a result of injury on 6 August 2015.
8. The matter was referred to the AMS, Dr David Lewington, in the Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 12 August 2020 for assessment of WPI of the left hip, lumbar spine and left lateral cutaneous nerve of the thigh as a result of the injury on 6 August 2015.
9. The AMS had a pre-examination conference on 21 August 2020 and examined the appellant on 24 August 2020. He assessed 7% WPI of the lumbar and 8% WPI for the left lower limb (hip and peripheral nerve). Therefore, the total assessment was 14% WPI in respect of the injury on 6 August 2015.

PRELIMINARY REVIEW

10. 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.
11. The appellant requested that he be re-examined by an AMS, who is a member of the Appeal Panel.
12. The appellant did not request that he be given an opportunity to make oral submissions to the Appeal Panel.
13. As a result of that preliminary review, the Appeal Panel determined that it was unnecessary for the worker to undergo a further medical examination because there was sufficient evidence by way of medical reports and clinical investigations in relation to assessment of the left hip on which to make a determination.

EVIDENCE

Documentary evidence

14. 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

15. 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

16. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.
17. The appellant's submissions include the following:
 - (a) The appellant relied on the report of Dr Philippa Harvey-Sutton dated 18 January 2019 who expressed the opinion that the appellant sustained 17% WPI comprising 7% of the lumbar spine, 8% left hip soft tissue injury chronic and 4% lateral cutaneous nerve of the thigh. The AMS assessed 7% WPI of the lumbar spine and 8% WPI of the left lower limb.

- (b) The AMS erred in failing to account or comment upon the gait of the appellant when providing an assessment of WPI despite having medical evidence concerning this injury/impairment, namely, the report of Dr Harvey-Sutton dated 18 January 2019.
- (c) Dr Harvey Sutton justified her findings in relation to chronic trochanteric bursitis on the basis of clinical examination and MRI findings, concluding that the appellant had “In relation to the left hip, two conditions, namely chronic trochanteric bursitis with abnormal rhythm of gait.”
- (d) The AMS at paragraph 8.c [sic] of the Medical Assessment Certificate (MAC) wrote: “On today’s examination there was no indication of trochanteric bursitis (and to the best of my knowledge this has not been reported by other examiners).”
- (e) The report of Dr Harvey-Sutton dated 18 January 2019 in which she assessed 3% WPI in relation to chronic trochanteric bursitis, was available to the AMS at the time of assessment.
- (f) The AMS was silent on the issue of gait. The failure to address gait constitutes a demonstrable error. Gait was an injury/condition that required assessment and it was clear and apparent from the MAC that it was not assessed. Had gait been assessed, it would have attracted at least 3% WPI and resulted in a total assessment of 17% WPI.

18. The respondent’s submissions include the following:

- (a) The AMS obtained a history from the appellant at page 2 of the MAC in relation to the injury sustained on 6 August 2015 and the onset of lower back and hip pain, medical treatment undertaken and referral to medical specialists and to health service providers.
- (b) The AMS conducted a comprehensive physical examination and reported his findings at pages 3-4 in the MAC. The AMS made a diagnosis of mechanical back pain associated with small lumbar disc lesions, mechanical hip pain associated with a labral tear; and clinically left lateral cutaneous nerve of the left thigh neuropathy consistent with nerve conduction studies.
- (c) Dr Harvey Sutton assessed 17% WPI, Dr Harrington assessed 12% WPI. The discrepancies between the AMS’s assessment and the respective IME assessments came down to the clinical findings made.
- (d) The appellant submitted that the AMS failed to assess gait and this failure constituted a demonstrable error. When Dr Harrington examined the appellant there was no reference to gait and Dr Harrington reported that the appellant walked without a limp. The clinical findings and report of Dr Harrington were consistent with the findings of the AMS.
- (e) The assessment of the AMS was based on the history obtained and the clinical examination. The AMS referred to the medical opinions and documents provided by the parties and preferred his recorded history, analysis and clinical examination findings. The AMS properly applied AMA 5 Guides and the Guidelines and the assessment does not contain a demonstrable error. The assessment of the AMS is correct and consistent with the available evidence.

- (f) In *Raijka (Rachel) Topic v Department of Aging, Disability and Home Care NSW WCC MA 2020* (16 June 2019) the Medical Appeal Panel held that "... The scheme is designed to provide that the findings as to the relevant measurements made by the AMS are final. Of course, if it appears from a review of all the evidence that the findings are so at variance with other measurements as to be inexplicable, then the medical appeal panel always has the power to re-examine."
- (g) In this case there was no such variance between the assessment of the AMS and those of the various specialists. The fact that at an earlier time, Dr Harvey-Sutton and Dr Harrison provided different assessments is neither a demonstrable error nor an application of incorrect criteria. The AMS must reach his assessment independent of other medical opinion.
- (h) The AMS was entitled to rely on his expertise and judgment to arrive at an assessment on the day of examination. The fact that some of the findings may be different from those of other doctors was not of itself a proper basis to make a finding of demonstrable error or of the application of incorrect criteria.
- (i) The MAC should be confirmed.

FINDINGS AND REASONS

19. 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.
20. 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.
21. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 (*Siddik*). The Court held that while prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gateway, it can consider other grounds capable of coming within one or other of the s 327(3) heads, if it gives the parties an opportunity to be heard. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation.
22. Section 327(2) was amended with the effect that while the appeal was to be by way of review, all appeals as at 1 February 2011 were limited to the ground(s) upon which the appeal was made. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 Davies J considered that the form of the words used in s 328(2) of the 1998 Act being, 'the grounds of appeal on which the appeal is made' was intended to mean that the appeal is confined to those particular demonstrable errors identified by a party in its submissions.
23. In this matter, the Registrar has determined that he is satisfied that a ground of appeal under s 327(3)(c) and (d) is made out in relation to the AMS's assessment of permanent impairment.

24. The Appeal Panel reviewed the history recorded by the AMS, his findings on examination, and the reasons for his conclusions as well as the evidence referred to above. The Appeal Panel accepted the findings on examination that the AMS made in the MAC.

Assessment of chronic trochanteric bursitis and gait

25. Under "Present symptoms" the AMS wrote:

"Mr Field reports ongoing pain in his left hip, left greater than right groin, and low back pain.

There is intermittent radiation of pain and tingling involving the left leg extending to the posterior calf at times, but not into the foot.

Exploring the thigh symptoms a little further, he found it difficult to articulate, but described a "fairly constant dead feeling". This extends from around the lower back, the left lower hip and left lateral thigh. This distribution was confirmed when seen in person."

26. Under "Physical Examination Findings" the AMS wrote: "There were no signs of trochanteric bursitis and without tenderness over the greater trochanteric region."

27. Under "Summary of injuries and diagnoses" the AMS wrote:

"Mechanical back pain associated with small lumbar disc lesions, mechanical hip pain associated with labral tear, and clinically left lateral cutaneous nerve of the thigh neuropathy consistent with nerve conduction studies."

28. Under "Reasons for Assessment", the AMS wrote:

"The added ROM LEI for the left hip ROM impairment is 15%.

Total Lower limb Impairment

Is obtained by combining hip joint LEI of 15% with peripheral nerve LEI of 5%, and using the combined tables is equivalent to 19% LEI 19% LEI equates to 8% WPI using Table 17 – 3."

29. In commenting on other medical opinions, the AMS wrote:

"Dr Harvey-Sutton, occupational physician medicolegal report 18 January 2019: assessed lumbar spine DRE Category II equivalent to 5% W.P.I and 2% ADL contribution; 7% LEI or trochanteric bursitis and 15% LEI for restricted hip movements; and lateral cutaneous nerve of the thigh 4% W.P.I based on maximal sensory deficit and dysesthesia.

On today's examination I assessed the same 5% WP. for lumbar spine with 2% ADL contribution. On today's examination there was no indication of trochanteric bursitis (and to the best of my knowledge this has not been reported by other examiners). Regarding lateral cutaneous nerve of the thigh I disagree with the IME's assessment which is equivalent to a 100% sensory deficit and maximum figure for dysesthesia. It is noted that the IME does not offer pinprick or two-point discrimination findings to support a total deficit (as would be required in the respective tables). On today's examination there was a Grade 3/50% deficit. While I obtained the same 15% LEI for restricted hip movements it is necessary to combine his LEI figure with the LEI for peripheral nerve before converting to WPI for the whole lower limb (the IME converts lower limb peripheral nerve deficit to WPI and then combines that with a separate WPI for hip joint)."

30. The appellant submitted that the AMS erred in failing to account or comment upon the gait of the appellant when providing an assessment of WPI despite having medical evidence concerning this injury/impairment, namely, the report of Dr Harvey-Sutton dated 18 January 2019.
31. In particular, the appellant noted that the AMS (at paragraph 10.c of the MAC) wrote:

“On today’s examination there was no indication of trochanteric bursitis (and to the best of my knowledge this has not been reported by other examiners).”
32. The Appeal Panel noted that Dr Harvey-Sutton in her second report, dated 18 January 2019, made an assessment of 3% WPI in relation to chronic trochanteric bursitis under the Diagnosis Based Estimates, Paragraph 17-20, Page 545 and Table 17-33, Page 546 of the AMA 5 Guides. Dr Harvey-Sutton wrote:

“In relation to the left hip, two conditions namely chronic trochanteric bursitis with an abnormal rhythm of gait.
In relation to trochanteric bursitis, I noted that he had abnormal rhythm of gait and the MRI findings noted mild insertional tendinosis/greater strain of the gluteus minimus with mild trochanteric bursitis.”
33. In her first report dated 18 January 2019, Dr Harvey-Sutton found on examination that there was generalised tenderness over the left groin/left hip and tenderness laterally over the trochanteric bursa. She reported that there was decreased range of left hip movements with flexion to 90°, extension 30°, abduction 25°, adduction 20°, internal rotation - decreased -20°, external rotation 40°. Dr Harvey-Sutton noted that on formal examination of gait, the appellant walked with an abnormal rhythm of gait and was able to walk on his “heels, toes and heel/toe”.
34. The Appeal Panel accepted that the AMS made no reference to gait in the MAC.
35. Dr Harrington, in his report dated 29 April 2019, noted that the appellant walked without a limp. On examination, Dr Harrington noted that there was no tenderness over the greater trochanter. He wrote: “He is not tender over the greater trochanter therefore a diagnosis of trochanteric bursitis is not accurate”.
36. Dr Mitchell Hansen, treating neurosurgeon, in a report dated 25 March 2019, noted that the appellant walked into the consultation room with a normal gait.
37. The AMS referred to the reports of Dr Harvey-Sutton in the MAC when commenting on other medical opinions. The comment by the AMS that to the best of his knowledge, trochanteric bursitis had not been reported by other examiners, was clearly incorrect and a demonstrable error.
38. The Appeal Panel reviewed the evidence in this matter and the provisions in AMA 5. Table 17-2 of AMA 5 (page 526) headed “Guide to the Appropriate Combination of Evaluation Methods” indicates that the impairment from a ROM Ankylosis assessment cannot be combined with the impairment from Diagnosis Based Estimates (DBE) assessment.
39. In the view of the Appeal Panel, Dr Harvey-Sutton, in her second report dated 18 January 2019, incorrectly combined an assessment from ROM with a diagnosis-based assessment, namely, trochanteric bursitis (chronic) with abnormal gait.
40. The correct approach to be taken is to adopt the method of assessment, if more than one method can be used, that provides the higher rating.

41. Even if the Appeal Panel accepted that the appellant had trochanteric bursitis (chronic) with abnormal gait, any assessment in respect of that condition could not be combined with the assessment from loss of range of motion in the hip. The assessment made for loss of range of motion in the left hip by the AMS was 15% LEI. Dr Harvey-Sutton also assessed 15% LEI for restricted hip movements. Under Table 17-33 in AMA 5 (page 546) the assessment for trochanteric bursitis (chronic) with abnormal gait is 3% WPI or 7% LEI. Assessment under the loss of range of motion methods provides the higher rating in this case.
42. The appellant has failed to take into account Table 17-2 of AMA 5. The Appeal Panel was satisfied that the alleged errors result did not result in an incorrect assessment. The Appeal Panel concluded that regardless of whether the AMS made slight errors in not commenting on gait and reporting that to the best of his knowledge no doctor reported bursitis, such errors were inconsequential and were not material to the assessment.
43. The Appeal Panel has accepted the findings on examination that the AMS made in the MAC. While the Appeal Panel has found that there was a demonstrable error in the MAC, the Appeal Panel, for the reasons above, accepted that the assessment of WPI by the AMS was correct. The Appeal Panel agreed with the assessment of the left hip of 15% LEI based on loss of range of motion. The Appeal Panel saw no error in the assessment of loss of range of motion in the left hip and were satisfied that the AMS did not base his assessment on incorrect criteria.
44. In summary, the assessment of total WPI by the Appeal Panel was the same as that made by the AMS. In those circumstances the Appeal Panel will confirm the MAC as the review has not led to a different result and should not be interfered with (*Robinson v Riley* [1971] 1 NSWLR 403).
45. For these reasons, the Appeal Panel has determined that the MAC issued on 26 August 2020 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

