

# 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>M1-6686/14</b>
<b>Appellant:</b>	<b>Michael Kennewell</b>
<b>Respondent:</b>	<b>ISS Facility Services Australia Limited t/as Sontic Pty Ltd</b>
<b>Date of Decision:</b>	<b>24 February 2021</b>
<b>Citation No:</b>	<b>[2021] NSWCCMA 40</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Ross Bell</b>
<b>Approved Medical Specialist:</b>	<b>Dr James Bodel</b>
<b>Approved Medical Specialist:</b>	<b>Dr Mark Burns</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. The decision of the Delegate of the Registrar pursuant to s 327(4) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) outlines the unusual history of this matter which it is convenient to reproduce:

“The parties have been involved in several separate proceedings before the Commission, and the present matter has been the subject of a long procedural history. The details of that history will be referred to where relevant to the present medical appeal.

On 2 May 2005, the appellant worker sustained an injury to his right arm in the course of his employment with the respondent.

On 6 May 2015, Dr O’Keefe, an Approved Medical Specialist (AMS), issued a Medical Assessment Certificate (MAC) in respect of the appellant’s whole person impairment in relation to the injury sustained on 2 May 2005. The AMS assessed 11% whole person impairment in respect of the appellant’s right upper extremity and scarring (TEMSKI).

On 10 June 2015, the Commission issued a Certificate of Determination ordering that the respondent pay the appellant lump sum compensation under s 66 of the Workers Compensation Act 1987 (the 1987 Act) in respect of 11% whole person impairment for injury sustained on 2 May 2005.

On 6 April 2018, Dr Burrow, AMS, assessed that the appellant’s whole person impairment for the purposes of determining whether the appellant was exempt from the operation of s 39 of the 1987 Act. Dr Burrow assessed that the degree of the appellant’s permanent impairment in respect of the subject injury to the right upper extremity was not fully ascertainable.

On 14 September 2018 and 29 November 2018, Arbitrator Sweeney issued a Certificate of Determination following a claim for retrospective payments of weekly compensation pursuant to s 38 and 39 of the 1987 Act. Arbitrator Sweeney entered an order for retrospective payments.

On 21 March 2019, the appellant's independent medical expert, Dr Anderson, occupational physician, assessed the appellant to have 26% whole person impairment in respect of injury to the right upper extremity sustained on 2 May 2005. That assessment was revised in a supplementary report, dated 17 April 2019, in which Dr Anderson assessed the appellant to have a final whole person impairment of 28% in respect of the subject injury.

On 6 December 2019, the appellant lodged a Miscellaneous Application seeking a reconsideration of the Certificate of Determination dated 10 June 2015. The reconsideration was sought for the purpose of a referral of the matter for further medical assessment or reconsideration pursuant to s 329 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

On 13 March 2020, Arbitrator Read issued a Certificate of Determination revoking the Certificate of Determination dated 10 June 2015 pursuant to s 350 of the 1998 Act. However, Arbitrator Read declined to refer the matter to an Approved Medical Specialist for further assessment or reconsideration."

2. On 24 March 2020, the appellant lodged an Application to Appeal Against Decision of Approved Medical Specialist. The appellant appeals against Dr O'Keefe's MAC, dated 6 May 2015, on the following grounds of appeal under s 327(3) of the 1998 Act:
  - deterioration of his condition that results in an increase in the degree of permanent impairment pursuant to s 327(3)(a) of the 1998 Act, and
  - availability of additional relevant information pursuant to s 327(3)(b) of the 1998 Act.
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).

## **PRELIMINARY REVIEW**

6. 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.
7. As a result of that preliminary review, the Appeal Panel determined that it was necessary for the worker to undergo a further medical examination because the right upper extremity could not be assessed from the materials before the Panel, given the apparent deterioration in the fresh evidence from Dr Anderson.

## **EVIDENCE**

### **Documentary evidence**

8. 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.

### **Fresh evidence**

9. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.
10. The appellant seeks to admit the following evidence:
  - (a) Letters from Dr Cass to Dr English, 22 June 2017; 28 August 2017; 4 December 2017; 11 March 2018, and 11 May 2018;
  - (b) Medical Certificate of Dr English 3 December 2018;
  - (c) Medical Assessment Certificate of Dr Burrow 6 April 2018, and
  - (d) Reports of Dr Tim Anderson 21 March 2019; 17 April 2019.
11. The appellant submits that the evidence is relevant to establishing deterioration in the appellant's condition. It is submitted the evidence was not available and could not reasonably have been obtained because,

"The fact of the Appellant's deterioration could not have been known to him at the time he was assessed by AMS O'Keefe. He received no advice from his legal representatives that his condition might deteriorate and that he should exercise caution in proceeding to be assessed by AMS O'Keefe. All of the material relied upon to establish deterioration post dates the O'Keefe MAC and it is self-evident that it was not reasonably available to the Appellant at the time of the O'Keefe MAC."
12. The respondent concedes that the further surgery to the right shoulder in December 2017 is additional relevant evidence not available at the time of the assessment of Dr O'Keefe in 2015.
13. The Appeal Panel determines that the evidence identified above should be received on the appeal given its relevance to the issue of deterioration in the circumstances of this matter.

### **Further medical examination**

14. Dr James Bodel of the Appeal Panel conducted an examination of the worker on 26 October 2020 and reported to the Appeal Panel as shown below.

### **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.

## **Appellant**

17. In summary, the appellant submits that the MAC of AMS Dr Burrow, the reports of Dr Anderson, together with the reports of Dr Cass and Dr English establish that the appellant's condition has deteriorated. Mr Kennewell should be re-assessed.

## **Respondent**

18. The respondent notes that the further surgery in December 2017 resulted in AMS Dr G Burrow finding in his MAC that the right shoulder had not reached maximum medical improvement. It is conceded that the evidence of Dr Anderson is of deterioration since the MAC of Dr O'Keefe of 2015. Noting the surgery has resulted in a change of the worker's condition but not that it has necessarily deteriorated, the Panel should conduct its own assessment of the appellant.

## **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.

## **Deterioration of right upper extremity**

21. The Panel notes that the Certificate of Determination issued on 10 June 2015 following the MAC of AMS Dr O'Keefe dated 6 May 2015 was revoked in the Certificate of Determination of 13 March 2020 in associated Matter 6432/19. The Arbitrator refused to refer the matter for further medical assessment or reconsideration pursuant to s 329 of the 1998 Act. The result of this is this appeal against the MAC of Dr O'Keefe.
22. The Panel is of the view that in all the circumstances of the matter Mr Kennewell should be assessed by a member of the Panel given the evidence that the condition of the right upper extremity has changed.
23. The report of Panel member, Dr James Bodel, follows:

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### **REPORT OF THE EXAMINATION BY APPROVED MEDICAL SPECIALIST MEMBER OF THE APPEAL PANEL**

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<b>Matter No:</b>	<b>M1-6686/14</b>
<b>Appellant:</b>	<b>Mr Michael Kennewell</b>
<b>Respondent:</b>	<b>ISS Facility Services Australia Limited t/as Sontic Pty Ltd</b>

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<b>Examination Conducted By:</b>	<b>Dr James G Bodel</b>
<b>Date of Examination:</b>	<b>26 October 2020</b>

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## **1. The workers medical history, where it differs from previous records**

You are aware that this gentleman suffered an injury to his right arm and right shoulder in particular, at work on 02 May 2005. That has been recorded in the Medical Assessment Certificate under review here, prepared by Dr O'Keefe, dated 06 May 2015.

I confirm that this gentleman worked as a school cleaner and also worked at the TAFE in Orange. The specific injury that occurred on 02 May 2005 was to the right shoulder while "lifting a wheelie bin into a dumpster". I have seen colour photographs of the dumpster in question and a "trolley" used for this purpose.

The record confirms that he was seen by the local doctor, then Dr Geoffrey Mutton, an orthopaedic surgeon. An MRI scan was done of the right shoulder, but this was a long time later. He had shoulder pain and elbow pain and he eventually had a series of surgical procedures.

The most recent surgical procedure was done by Dr Benjamin Cass in Sydney on 04 December 2017. He had a repair of the rotator cuff in the region of the right shoulder and a biceps tenodesis. Mr Kennewell reports that this made things worse and he has a much more restricted range of movement (? frozen shoulder) and also increased pain levels.

Mr Kennewell has tried to continue to manage this with exercises and physiotherapy. He has been certified fit to work two hours a day, five days a week but no lifting or pushing or pulling. At the time of my examination he is still in receipt of weekly benefits.

I note in the extensive documentation that has been provided that there were issues about stopping weekly benefits. They did stop for a brief period of time but were then reinstated after the determination had been made about his shoulder impairment. I understand that a dispute has arisen about whether he was at Maximum Medical Improvement at the time that this was undertaken.

He has a number of other health issues which are not related to this specific event which is under review.

## **2. Additional history since the original Medical Assessment Certificate was performed**

As I have indicated above, this gentleman's certificate under review is dated 06 May 2015, which is now nearly 5 ½ years ago. Since that time, he has had a further surgical procedure in the region of the right shoulder done by Dr Benjamin Cass which has been of no value and has made things worse. There have been a series of surgical procedures prior to that.

## **3. Findings on clinical examination**

Mr Kennewell is 65 years of age. He is comfortable when sitting on a chair and he rises without difficulty. He does have great difficulty undressing for examination and removing his shirt.

He has fairly gross wasting in the region of the right shoulder collectively in the deltoid, the supraspinatus and infraspinatus muscles posteriorly and in the biceps where there has been a tenodesis. The scars are moderately complex surgical scars when rated collectively under the TEMSKI scale.

He has a good range of neck flexion, extension and rotation and no asymmetry of neck movement.

<b>Shoulder Movements</b>	<b>Active ROM Measured RIGHT</b>	<b>Active ROM Measured LEFT</b>
Flexion	70°	180°
Extension	30°	50°
Adduction	10°	50°
Abduction	60°	180°
Internal Rotation	40°	90°
External Rotation	40°	90°

restricted range of shoulder movement on the right-hand side. The range of movement in each shoulder is recorded in the table which follows.

There is impingement in the right shoulder but no instability.

There is also a restricted range of elbow movement on the right-hand side. The range of movement in each elbow is recorded in the table which follows.

<b>Elbow Movements</b>	<b>Active ROM Measured RIGHT</b>	<b>Active ROM Measured LEFT</b>
Flexion	120°	140°
Extension	-10°	0°
Pronation	70°	80°
Supination	50°	80°

Grip strength is weak on the right-hand side but there is no objective evidence of median or ulnar nerve pathology. The reflexes are present and equal and there is no clinical sign of radiculopathy in the upper limbs.

#### **4. Results of any additional investigations since the original Medical Assessment Certificate**

There have been no new x-rays or other tests available here for review today.

#### **5. Comment**

I have carefully been through all of the relevant documentation in this very difficult matter.

There have been a number of Medical Assessment Certificates issued but the one that is being reviewed is the assessment by Dr O'Keefe on 06 May 2015. Dr O'Keefe determined an 11% Whole Person Impairment for the right upper extremity because of the injuries to the right shoulder and elbow.

The matter of the appeal is for a claim for "deterioration". He has been subsequently assessed by Dr Burrow who was asked to determine whether his level of Whole Person Impairment was fully ascertainable and at that stage, soon after the most recent procedure done by Dr Cass, he quite correctly identified that it was not.

This gentleman's clinical condition has now stabilised and it is static.

He was also assessed by Dr Anderson on 21 March 2019. At that time, Dr Anderson found a much more restricted range of shoulder and elbow movement than I have identified here today. There has been some further improvement in range of motion, although still a very restricted range of motion when I re-examined him today.

Finally I would also point out that I have carefully been through the Appellant's submissions, the Respondent's submissions and the chronology prepared by the Appellant in the series of events that have occurred in relation to this gentleman's injury.

I am satisfied that today's clinical findings fairly represent his current clinical disability and associated impairment in the right upper extremity involving the right shoulder and the right elbow.

In the right shoulder he is assessed using Figure 16-40 on Page 476, Figure 16-43 on Page 477 and Figure 16-46 on Page 479. The degree of recorded restriction of movement constitutes a 19% Upper Extremity Impairment.

In addition to that, there is medical evidence that he has had a surgical excision of the outer end of the clavicle (a resection arthroplasty) and this is assessed using Table 16-27 on Page 506 of AMA5 which is modified on Page 12 of the SIRA WorkCover Guidelines as follows:-

*"Please note that the AMA5 Table 16-27 (Page 506) the figure for resection arthroplasty of the distal clavicle (isolated) has been changed to 5% Upper Extremity Impairment".*

For the right shoulder therefore, the total level of Upper Extremity Impairment is determined by combining the 19% for the restricted range of shoulder movement with the 5% for the resection arthroplasty, giving a 23% Upper Extremity Impairment overall.

The elbow is assessed using Figure 16-34 on Page 472 and Figure 16-37 on Page 474. There is a 5% Upper Extremity Impairment.

When the 23% for the shoulder is combined with the 5% for the elbow, there is a 27% Upper Extremity Impairment. This converts to a 16% Whole Person Impairment using Table 16-3 on Page 437.

The only other rating is the scarring. I rate the scarring as a 2% Whole Person Impairment under the TEMSKI scale because of moderately complex surgical scars. These are rated collectively in the region of the right shoulder for the multiple surgical procedures undertaken.

This gives a total of an 18% Whole Person Impairment overall for the injury that occurred on 02 May 2005.

There is no indication clinically of any pre-existing abnormality or condition in this circumstance and no basis for pre-existing impairment.

**Signed:**



**Date:** 16 November 2020

24. The Panel agrees with and adopts the report of Dr Bodel.
25. The Panel is satisfied on the history that the impairment is permanent, and the injury has reached maximum medical improvement.
26. There is no evidence that any part of the impairment is due to a subsequent injury.
27. For these reasons, the Appeal Panel has determined that the MAC issued on 6 May 2015 should be revoked, and a new MAC 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*.

*J Burdekin*

**Jenni Burdekin**  
**Dispute Services Officer**  
As delegate of the Registrar





# WORKERS COMPENSATION COMMISSION

## APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

**Matter Number:** 6686/14  
**Applicant:** Michael Kennewell  
**Respondent:** ISS Facility Services Australia Limited t/as Sontic Pty Ltd

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 David Daniel O'Keefe 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 S323 for pre-existing injury, condition or abnormality (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
Right upper extremity (shoulder & elbow)	02.05.2005	Chapter 2 Pages 10-12	Chapter 16 Pages 476/477/479 Figures 16.34,16-37, 16.40,16.43, 16.46	16	nil	16
Scarring	02.05.2005		TEMSKI 2	2	nil	2
<b>Total % WPI (the Combined Table values of all sub-totals)</b>					<b>18%</b>	

**Ross Bell**  
Arbitrator

**Dr James Bodel**  
Approved Medical Specialist

**Dr Mark Burns**  
Approved Medical Specialist

24 February 2021

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**

