

# 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>M1-1900/19</b>
<b>Appellant:</b>	<b>Milena Cerbic</b>
<b>Respondent:</b>	<b>Express Transport &amp; Packaging Pty Ltd</b>
<b>Date of Decision:</b>	<b>23 January 2020</b>
<b>Citation:</b>	<b>[2020] NSWCCMA 10</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Mr William Dalley</b>
<b>Approved Medical Specialist:</b>	<b>Dr Mark Burns</b>
<b>Approved Medical Specialist:</b>	<b>Dr John Brien Stephenson</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 9 September 2019 Milena Cerbic (the appellant/Mrs Cerbic) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Nigel Ackroyd, an Approved Medical Specialist (AMS), who issued an amended Medical Assessment Certificate (MAC) on 3 September 2019.
2. The appellant relies on the ground of appeal under s 327(3)(d) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act): the MAC contains a demonstrable error.
3. The Registrar is satisfied that, on the face of the application, the ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground 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, 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. Mrs Cerbic suffered injury on 2 June 2003 (the subject injury) while working for Express Transport & Packing Pty Ltd (the respondent). Mrs Cerbic was employed packing chicken parts. In February 2007 Mrs Cerbic entered into a Complying Agreement pursuant to s 66A of the *Workers Compensation Act 1987* (the 1987 Act) recording agreement that Mrs Cerbic had suffered 11% whole person impairment arising from injury to the lumbar spine with an award for the respondent in respect of a claim for primary psychiatric injury and further agreement that whole person impairment resulting from injury to the neck and left shoulder was 0%.

7. By letter dated 5 January 2018 Mrs Cerkic's solicitors made a claim asserting that the applicant was now suffering 5% whole person impairment in respect of injury to the cervical spine and 10% whole person impairment as a result of a consequential medical condition of the cardiovascular system (hypertension) in addition to the claim already paid in respect of impairment of the lumbar spine.
8. The respondent disputed that Mrs Cerkic was suffering impairment as result of injury to the cervical spine and further disputed that any impairment arising from the cardiovascular system was causally related to the subject injury
9. An Application to Resolve a Dispute was filed in the Commission and the parties ultimately reached agreement following conciliation with consent orders being made by the Arbitrator:
  - “1. Remit the Matter to the Registrar for referral to an Approved Medical Specialist to assess the whole person impairment, if any, of the cervical spine and a consequential medical condition of the cardiovascular system (hypertension) as a result of injury on 2 June 2003 noting that the applicant has previously been compensated for 11% WPI for the lumbar spine.
  2. Approved Medical Specialist to have access to the Application, the Reply and the documents attached to each together with a copy of an EMG report provided same is lodged and served undercover of an Application to Admit Late Documents by 30 May 2019.”
10. Pursuant to those orders the dispute as to the extent of impairment to the cervical spine was referred by the Registrar to an AMS, Dr Alan Home, and the dispute as to the extent of impairment to the cardiovascular system (hypertension) to an AMS, Dr Nigel Ackroyd. The “body parts referred” were “Cervical Spine and a consequential medical condition of the cardiovascular system (hypertension).”
11. On 19 July 2019 Dr Ackroyd issued a MAC assessing Mrs Cerkic as having 0% whole person impairment in respect of Mrs Cerkic's cardiovascular system.
12. On 6 August 2019 Dr Home issued a MAC assessing 0% whole person impairment in respect of Mrs Cerkic's cervical spine.
13. Mrs Cerkic's solicitors noted that the MAC of Dr Ackroyd contained material that constituted an “obvious error”. The AMS had included “non-relevant pro forma” material and the MAC was amended to delete that material. An amended MAC was issued on 3 September 2019. No variation was made to the assessment of whole person impairment.

## **PRELIMINARY REVIEW**

14. 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.
15. 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 because adequate information is available to the Panel to enable reassessment of the impairment arising from the cardiovascular system (hypertension). Neither party sought re-examination. Re-examination would not assist the assessment.

## **EVIDENCE**

### **Documentary evidence**

16. 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

17. The AMS noted the history relating to the appellant's hypertension. The AMS stated: "The history will be limited to my area of expertise and will address the dispute in question namely to what extent the hypertension, which has been accepted as a workplace injury, has resulted in impairment." The AMS recorded the history of injury noting Mrs Cerkic's continuing pain and her treatment including medication. He commented "These issues have been detailed and settled in the past years and now the issue remains as to the degree of permanent impairment caused by her latterly developed hypertension."
18. In assessing impairment the AMS said:

"She presents with hypertension. This has been accepted as an injury. However, her impairment as result of that injury is nil, for the reasons given below.

The injury occurred in January 2003. At that time, she was normotensive. She remained normotensive for the next 11 years as can be seen in the correlation of the BP readings from her GP notes (Dr Zeiko Oreb). I think a time lag of 11 years makes the connection of her impairment due to hypertension (HBP) to the injury very tenuous indeed. I note that Dr Herman and Dr Di Mascio opined that the HBP was the result of stress over the years.

Perusal of Dr Oreb's notes document that she had many attendances for stress, pain management, depression and anxiety associated with the compensation case over the years. I would argue that this actually indicates that her constitution was resilient to the effects of 'stress' on her blood pressure. If there was a causal relationship between her accident and the impairment due to HBP then it would have manifested at a much earlier timespan such as one-three years given the intense stress spoken of that almost every one of her GP visits to Dr Oreb. As the mild hypertension only manifested itself, one could say somewhat reluctantly, after 11 years I think the more satisfactory explanation is that she is one of the 50% of people who developed what is called 'essential hypertension' in their latter years. Dr Herman also refers to this particular cohort of patients in his appraisal.

For the same reasons for lack of exercise was also in evidence from just after the accident through to the present day and would appear not to have affected the BP for 11 years.

For these reasons any impairment due to hypertension today is not the result of a workplace accident nor any subsequent 'stress' reactions to it and is therefore not a rateable workplace impairment."

19. The AMS assessed 0% whole person impairment in respect of the cardiovascular system (hypertension).

## SUBMISSIONS

20. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
21. In summary, the appellant submits that the AMS fell into demonstrable error in basing his assessment upon a conclusion that there was no causal relationship between Mrs Cerkic's hypertension and the subject injury. The AMS had addressed the wrong issue in assessing that the appellant had not suffered hypertension as a result of injury.
22. In reply, the respondent submits that no error was demonstrated. The AMS had not proceeded on the basis of there being no connection. A "tenuous" link was accepted and was sufficient. The AMS correctly assessed Mrs Cerkic as having 0% impairment with respect to the level of impairment attributable to the consequences of the subject injury.

## FINDINGS AND REASONS

23. 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.
24. 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.
25. The respective submissions raise the issue of whether the AMS misunderstood the task that he had been requested to undertake.
26. Included in the reasons provided by the AMS was the statement “any impairment due to hypertension today is not the result of the workplace accident nor of any subsequent ‘stress’ reactions to it and is therefore not a rateable workplace impairment.” The AMS also said “If there was a causal relationship between her accident and the impairment due to HBP then it would have manifested at a much earlier timespan such as one-three years given the intense stress spoken of that almost every one of her GP visits to Dr Oreb.”
27. The appellant submits that the AMS has proceeded from an assumption that there is no causal relationship between Mrs Cerkić’s high blood pressure and the subject injury.
28. The respondent pointed to the statement by the AMS that he accepted that “She presents with hypertension. This has been accepted as an injury” and submitted that the AMS had accepted a link that he described that link as “tenuous indeed”.
29. The Macquarie dictionary defines “tenuous”;  
“tenuous  
adjective 1. thin or slender in form.  
2. thin in consistency; rare or rarefied.  
3. of slight importance or significance; unsubstantial.  
4. flimsy; lacking a firm or sound basis; weak; vague: \*the fact that Nan remained singularly unimpressed with my efforts added only confusion to my already tenuous sense of identity. –SALLY MORGAN, 1987.”<sup>1</sup>
30. The Panel is of the view that the phrase “tenuous indeed” connotes a link that does not require to be taken into consideration. The words subsequently used by the AMS clearly indicate that he did not accept that the appellant had suffered hypertension as a result of the subject injury. In *Jaffarie v Quality Castings Pty Ltd*<sup>2</sup> (*Jaffarie*) Roche DP noted the decision of the Court of Appeal in *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd*<sup>3</sup> (*Bindah*) and said at [259]:  
“In *Bindah*, the parties agreed that the worker had received an injury and, as Emmett JA observed at [119], the Arbitrator did not ‘need’ to make a determination about the precise nature of the injury. However, consistent with the reasoning of Meagher JA, when the Commission, either by consent or after a contest, has determined the nature of the injury, it is for the AMS to determine the degree of whole person impairment that

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<sup>1</sup> Macquarie Dictionary Online, 2020, Macquarie Dictionary Publishers, an imprint of Pan Macmillan Australia Pty Ltd, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au)

<sup>2</sup> [2014] NSWCCPD 79 (appeal to the Court of Appeal allowed in part on a different issue).

<sup>3</sup> [2014] NSWCA 264

has resulted from that injury. While it is open to an AMS to determine that no whole person impairment has resulted from the agreed or found injury (Austin; Haroun), it is not open to an AMS to find that the worker suffered no injury or has suffered a different injury to that found or agreed.

31. On a fair reading of the whole of the reasons provided by the AMS, it appears that the AMS based his assessment upon the absence of a causal link rather than by assessing the extent of impairment as the appellant presented on the day and then addressing the issue of the contribution of the injury to that impairment. In so doing the AMS fell into the error identified by Roche DP in *Jaffarie*.
32. “Demonstrable error” is an error “which is readily apparent from an examination of the medical assessment certificate and the document referring the matter to the AMS for assessment.”<sup>4</sup> The Panel is satisfied that demonstrable error has been made out.
33. The AMS has helpfully collated the blood pressure readings from the medical evidence. The Panel accepts that the table provided by the AMS accurately reflects the evidence. Chapter 15 of the Guidelines provides that assessment of the cardiovascular system (hypertension) is to be addressed pursuant to chapter 4 of AMA 5. Accepting the blood pressure measurements as tabulated, Mrs Cerkic falls within Stage 1 of Table 4-1 of AMA 5 (systolic – 40-159 and diastolic 90-99)
34. Mrs Cerkic meets the criteria for Class 2 of Table 4-2 (Criteria for Rating Permanent Impairment Due to Hypertensive Cardiovascular Disease); “Asymptomatic, Stage 1 or 2 hypertension despite multiple medications”. Mrs Cerkic’s classification as falling within Stage 1 of Table 4-1 is at the lower end of the range and the Panel assesses 10% whole person impairment based on the reported blood pressure readings.
35. As noted by the parties, Mrs Cerkic was normotensive at the time of injury and no deduction pursuant to s 323 of the 1998 Act is applicable.
36. For these reasons, the Appeal Panel has determined that the MAC issued on 3 September 2019 should be revoked, 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*.

G De Paz

**Glicerio De Paz**  
**Dispute Services Officer**  
As delegate of the Registrar



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<sup>4</sup> Per Hoeben J *Merza v Registrar of the Workers Compensation Commission and Another* at [2006] NSWSC 939 at [39].

# WORKERS COMPENSATION COMMISSION

## APPEAL PANEL

### MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

**Matter Number:** 1900/19  
**Applicant:** Milena Cerkic  
**Respondent:** Express Transport & Packaging Pty Ltd (Deregistered)

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 [insert name of Doctor] 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)
1. Cardiovascular system (hypertension)	23/01/03	Chapter 15, Page 77	Chapter 4, Table 4-1, table 4-2 (page 66)	10%	Nil	10%
<b>Total % WPI (the Combined Table values of all sub-totals)</b>					<b>10%</b>	

**Mr William Dalley**  
Arbitrator

**Dr Mark Burns**  
Approved Medical Specialist

**Dr John Brian Stephenson**  
Approved Medical Specialist

23 January 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*.

G De Paz

**Glicerio De Paz**  
**Dispute Services Officer**  
As delegate of the Registrar

