WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1246/19**
Appellant:	**Rhondda Prosser**
Respondent:	**Roads and Maritime Services**
Date of Decision:	**15 August 2019**
Citation:	**[2019] NSWWCCMA 116**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Julian Parmegiani**
Approved Medical Specialist:	**Dr Patrick Morris**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 11 June May 2019 Rhondda Prosser (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Michael Hong, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 15 May 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,
    - 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 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, 4th* ed 1 April 2016 (the Guides) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). "WPI" is reference to whole person impairment.

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. The appellant did not request that she be re-examined by a Panel AMS and in view of the issues raised, such a re-examination would not have assisted the deliberations of the Panel.

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.

Medical Assessment Certificate

9. 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

10. Both parties made written submissions which have been considered by the Appeal Panel.

RELEVANT FACTUAL BACKGROUND

11. On 16 April 2019, a delegate of the Registrar referred this matter to the AMS for assessment of WPI assessment for psychiatric/psychological injury caused on "1 June 2016 for nature and conditions of employment," from which we assume 1 June 2016 was a deemed date of injury.

12. Ms Prosser was employed by the respondent as a school crossing supervisor on a part time basis working about five days per week. She was working at a crossing at Assumption Catholic School Bathurst. She was harassed and intimidated by a particular individual, beginning in late October 2015, which escalated in intensity until she was unable to complete her activities.

13. She took the individual to Court seeking an AVO, and received no support from her employer over this period.

14. She had a prior history of psychiatric difficulties which she described to Dr Himalee Abeya, a Consultant Psychiatrist retained by the respondent. She said that in 1996 after her husband suffered a stroke early in their marriage, she required some anti-depressant medication for a condition which Dr Abeya thought was not significant.[1] However she never ceased taking the anti-depressant medication. At that time, she had been working full time in the banking industry.

15. The AMS found that Ms Prosser was suffering a 9% WPI, from which the AMS deducted 1/10th pursuant to s 323 of the 1998 Act, leaving an entitlement of 8%.

FINDINGS AND REASONS

16. 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.

[1] Appeal Papers 96

17. 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.

18. Ms Prosser through her counsel, Mr Bruce McManamey challenged one of the six categories set out in the psychiatric impairment scale, namely the category for self care and personal hygiene. A challenge is also made to the deduction pursuant to s 323.

The Psychiatric Impairment Rating Scale (PIRS)

19. The Psychiatric Impairment Rating Scale is established as the rating criteria for assessing psychiatric/psychological impairment, by virtue of Chapter 11 of the Guides. Chapter 11 sets out six categories of behaviour to be considered, each being divided into five classes, ranging in seriousness from 1 to 5. Class 1 relates to a situation where there is no deficit, or a minor deficit attributable to the normal variation in the general population. Class 5 pertains to a person who is totally impaired.

20. Chapter 11.12[2] provides:

> "Impairment in each area is rated using class descriptors. Classes range from 1 to 5, in accordance with severity. The standard form must be used when scoring the PIRS. The examples of activities are examples only. The assessing psychiatrist should take account of the person's cultural background. Consider activities that are usual for the person's age, sex and cultural norms."

21. The assessor is required to classify each category, and to apply the resulting scores as set out in Chapter 11[3].

22. The assessment of psychiatric disorder has been considered in a number of cases. In *Ferguson v State of New South Wales*[4] Campbell J said at [23]:

> "By reference to *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36, the Appeal Panel directed itself that in questions of classification under the PIRS:
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> > '… the pre-eminence of the clinical observations cannot be underrated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face'.

24. The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.

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[2] Guides 55
[3] See 11.15-11.21 at Guides p 65 and Table 11.7 at Guides p 66
[4] [2017] NSWSC 887

25. The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides 'the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment': Appeal Panel reasons at [37]. The descriptors, or examples, describing each class of impairment in the various categories are 'examples only': see *Jenkins v Ambulance Service of New South Wales* [2015] NSWSC 633. The Appeal Panel said, 'they provide a guide which can be consulted as a general indicator of the level of behaviour that might generally be expected': Appeal Panel reasons at [37]."

23. In *Glenn William Parker v Select Civil Pty Ltd*,[5] another case regarding assessment of psychiatric disorder, Harrison AsJ cited [23] of *Ferguson* with approval at [65]. Her Honour said at [66]:

> "In relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense. (*Ferguson* [24])….."

24. In *Jenkins* Garling J said at [73]:

> "It was a matter for the clinical judgment of the AMS to determine whether the impairment with respect to employability was at the moderate level, as he did, or at some other level. But, in seeking judicial review, a mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to judicial review."

25. It is accordingly necessary for the Panel to be satisfied that the assessment by the AMS in this category was erroneous in one of the following ways (to use the reference by Campbell J in *Ferguson*):

    (a) if the categorisation was glaringly improbable;

    (b) if it could be demonstrated that the AMS was unaware of significant factual matters;

    (c) if a clear misunderstanding could be demonstrated; or

    (d) if an unsupportable reasoning process could be made out.

Self-care and personal hygiene

26. The AMS certified a class 2 value for the category of self care and personal hygiene. The reasons for his decision were as follows:

> "Ms Prosser's self-care is reduced and her overall diet has deteriorated. Ms Prosser performs limited housework and cares for her husband. She is capable of independent living."

27. In the body of his report when considering Ms Prosser's social activities/ADL he said[6]:

> "Ms Prosser said she does not want to go anywhere, and she does not like driving anymore. She does not exercise. When Ms Prosser is hungry she will eat simple food such as cereal. Ms Prosser cooks dinner every day for her husband and son."

[5] [2018] NSWSC 140
[6] Appeal Papers 21

28. In considering the documentary evidence before him, the AMS said:[7]

> "I note Ms Presser's statement, including her commentary regarding her lifestyle and she addressed the PIRS categories."

29. Under Present Symptoms[8] the AMS noted:

> "She has gained weight from feeling stressed recently – she is not sure how much weight".

30. In his findings on physical examination, the AMS noted[9]:

> "Ms Prosser appeared overweight. She was neat and tidy and wore clean cloth[e]s".

31. When discussing the comparative values given regarding the PIRS categories, the AMS said[10]:

> "My assessment of Ms Prosser's WPI was generally consistent with Dr Clark and Dr Whetton. Dr Clark and Dr Whetton disagreed in two categories. Dr Whetton rated Ms Prosser self-care and personal hygiene at 2 as she is able to care for herself and the household at a basic level, but not at the previous level. Dr Clark rated 3 and said that Ms Prosser neglects her weight and appearance.
>
> In my assessment, I noted that Ms Prosser cooked for the family every day. She performed minor household duties. She cares for her husband diligently but has a poor diet herself. Overall, I consider she has a capacity for independent living which is consistent with a rating of 2."

Submissions

32. Ms Prosser submitted that the relevant factors in this category were concerned with motivation and ability of persons to look after themselves. It was submitted that considerations of whether Ms Prosser was able to look after her husband or not were irrelevant to this category, which it was alleged was based upon subjective feelings of self-worth and motivation regarding Ms Prosser's own wellbeing.

33. Reference was made to the examples given in Table 11.1 of the Guides[11] and Ms Prosser argued that such matters as showering daily, wearing clean clothes and preparing meals were important matters to be considered.

34. Ms Prosser referred to the history taken by the AMS which we have reproduced above.

35. It was alleged that the AMS did not take any history concerning the details of Ms Prosser's personal hygiene regarding whether she showered, wore clean clothes, washed her hair or the like. Ms Prosser referred to the AMS's comment regarding her eating simple food such as cereal. It was alleged that he did not enquire about the circumstances in which such meals were eaten. It was alleged that the AMS did not enquire as to whether Ms Prosser required prompting to prepare meals which was "reflected," Ms Prosser argued, by the fact that none of those matters were referred to.

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[7] Appeal Papers 23
[8] Appeal Papers 20
[9] Appeal Papers 22
[10] Appeal Papers 24
[11] Guides 26

36. Reference was then made to statements that were in evidence before the AMS. Error was alleged as the AMS failed to refer to the statements made by Ms Prosser. Ms Prosser referred to assertions that she made within her 7 March 2019 statement regarding her lack of care about her appearance; that she had not cut her hair in over 12 months "until recently;" that she had neglected nail care; that she had neglected shaving her legs, and that she rarely wore makeup.

37. Further reference was made to details within that statement regarding Ms Prosser's fluctuating eating pattern. It was submitted that it could be seen from the contents of that statement that Ms Prosser was then neglecting personal hygiene and missing meals. Had the AMS taken those matters into account, Ms Prosser argued, the AMS would have assessed a class 3 value. In failing to do so the AMS had applied incorrect criteria and made a demonstrable error.

38. Ms Prosser also referred to the opinion of Dr Thomas Oldtree Clark in September 2018, in which comments were made that Ms Prosser's self-care had "collapsed." She had gained weight, and was indifferent about her appearance. Ms Prosser submitted that Dr Clark had assessed a class 3, and the AMS was criticised for not explaining adequately why he disagreed with the opinion of Dr Clark.

39. Ms Prosser submitted that the AMS's consideration of Dr Clark's opinion, which referred again to Ms Prosser caring for her husband, were irrelevant matters that caused him to fall into error by taking account of them. It was submitted that the assessment in this category could only be properly carried out if enquiries had been made to what Ms Prosser asserted were relevant matters "as set out in the Guidelines".

40. The respondent relied on some Medical Appeal Panel decisions which have perhaps more authoritively been set out in the cases to which we have already referred.

41. The respondent noted that the AMS had in fact considered Ms Prosser's statement of 7 March 2019, because he said so in paragraph 10 of the MAC.

DISCUSSION

42. The respondent also referred to a 2009 Medical Appeal Panel case as authority for the proposition that an AMS is required to apply his own expertise and clinical judgment in reaching an assessment. This principle was perhaps better enunciated by Campbell J in *Ryder v Sundance Bakehouse*[12], who adapted the language of the High Court in *Wingfoot Australia Partners Pty Ltd v Kocak*[13] in finding at [24]:

> "The function of [an AMS] is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and to give [his/her] own opinion on the medical question referred … by applying [his/her] own medical experience and [his/her] own medical expertise."

43. The assertion by Ms Prosser that the AMS had not considered evidence that was before him (in this case her statement of 7 March 2019 and the report of Dr Clark) needs to be seen in the light of presumption of regularity that attends the decisions of administrative decision makers.[14] Simply because an AMS did not mention evidence which an injured worker thought to be relevant, it does not follow that the AMS has therefore failed to note or consider that particular evidence.

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[12] [2015] NSWSC 256
[13] [2013] HCA 43
[14] Jones v. Registrar WCC [2010] NSWSC 481 (Jones)

44. An AMS must be presumed to have read all of the material that is supplied to him, and whilst a presumption may be rebutted, it requires more than an unsupported assertion to do so. His failure to advert to the specific evidence shows no more than that he did not regard it as importantly as did the party relying on it. Ms Prosser's submission is further weakened by the fact, as demonstrated in the extract from the MAC above, that the AMS had read the statement of 7 March 2019 in any event.

45. Further, in calling the descriptors "criteria" and referring to a failure to refer the guidelines, Ms Prosser has overlooked the provisions of Chapter 11.12, which were considered by Campbell J in *Ferguson*, outlined above. The examples contained within the descriptors are simply a guide which can be consulted as a general indicator of the level of behaviour that might usually be expected from an injured person.

46. In that regard, Ms Prosser's ability to care for her family was not an irrelevant observation. The AMS noted that her overall diet had deteriorated, but also recorded that she had gained weight. These facts went to Ms Prosser's motivation, and had to be weighed up against her own evaluation of her impairment contained in her statement of 7 March 2019. This the AMS did, and we find no error in his assessment of this category.

Section 323 deduction

47. The AMS noted the prior history, saying[15]:

> "Details of any previous or subsequent accidents, injuries or condition:
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> Ms Prosser confirmed the past history in Dr Abeya's report, but thought that her previous psychiatric episode occurred in the late 1990s. Ms Presser stated that not long after her husband suffered a stroke she became depressed and stressed from caring for her husband. She commenced taking citalopram 20 mg and felt that she coped well, and that her depression and anxiety had resolved, but she could never come off the antidepressant medication. She recalled that at the time she was working full time in the banking industry.
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> Ms Prosser has never had a psychiatric admission."

48. In his summary, the AMS said[16]:

> "The overall evidence indicated that Ms Presser has suffered depression and anxiety previously. Her symptoms had stabilised on antidepressant medication; however, she has never been able to come off the medication. Had Ms Prosser not taken citalopram, she would likely experience a return of psychological symptoms and associated impairment. On medication, Ms Presser had functioned well. Overall, I consider a deduction for pre-existing impairment to be appropriate."

49. In considering the opinions of Drs Clark, Abeya, and Whetton, the AMS noted that Dr Clark did not record any past psychiatric history, and that Dr Whetton, although aware of the history, had not made any deduction.

50. At paragraph 11[17] he said:

> "a. In my opinion, the worker suffers from the following relevant previous injuries, pre-existing conditions or abnormalities:
>
> (i) There was a pre-existing condition.

[15] Appeal papers 20
[16] Appeal Papers 22
[17] Appeal Papers 24

b. The previous injury, pre-existing condition or abnormality directly contributes to the following matters that were taken into account when assessing the whole person impairment that results from the injury, being the matters taken into account in 10a, and in the following ways:

(i) Ms Prosser's pre-existing condition contributed to her current impairment.

c. The extent of the deduction is difficult and/or costly to determine, so in applying the provisions of s.323(2), I assess the deductible proportion as one-tenth. This is not at odds with the available evidence.

One-tenth deduction of 9% is 0.9%, rounded up to 1%"

Submissions

51. Ms Prosser referred to paragraph 11.10 of the Guides as to the procedure for dealing with deductions in psychiatric cases for pre-existing impairment. It was submitted that the AMS failed to comply with that requirement and that constituted both demonstrable error and the application of incorrect criteria.

52. Ms Prosser submitted that if that exercise were performed, it would be seen that no deduction should have been made.

53. Ms Prosser submitted that the depressive condition was in remission at the time of the assessment by the AMS and that neither of the medico-legal experts retained on each side of the record made any such deduction.

54. The respondent referred to s 323(2) of the 1998 Act and relied on its content to justify the deduction made by the AMS.

DISCUSSION

55. Section 323 of the 1998 Act provides relevantly:

(1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.

(2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.

56. Chapter 11.10 of the Guides provides[18]:

"11.10 To measure the impairment caused by a work-related injury or incident, the psychiatrist must measure the proportion of WPI due to a pre-existing condition. Pre-existing impairment is calculated using the same method for calculating current impairment level. The assessing psychiatrist uses all available information to rate the injured worker's pre-injury level of functioning in each of

[18] 55

the areas of function. The percentage impairment is calculated using the aggregate score and median class score using the conversion table below. The injured worker's current level of WPI% is then assessed, and the pre-existing WPI% is subtracted from their current level, to obtain the percentage of permanent impairment directly attributable to the work-related injury. If the percentage of pre-existing impairment cannot be assessed, the deduction is 1/10th of the assessed WPI."

57. It is accordingly apparent that the AMS has not applied the relevant criteria at Chapter 11.10.

58. There are some conceptual difficulties in the application of Chapter 11.10 when considered against the terms of s 323. They were considered in *Broad-spectrum (Australia) Pty Ltd v Wills*[19]. The Appeal Panel in that case said:

> "58. The method set out in Chapter 11.10 of assessing pre-existing condition is contrary to the development of the principles applicable to the application of s 323.. … Those principles require that the first enquiry is as to whether there is any whole person impairment caused by the injury, the second is as to its extent or degree, the third is as to whether a pre-existing condition relevantly has contributed to that impairment, and the fourth is the quantification of the contribution. Such a condition does not have to be symptomatic and may contribute to the level of impairment caused by the subject injury even if it were asymptomatic. In such situations, a clear explanation is required. Assumption or hypothesis is not sufficient, and there must be a reference to the relevant evidence to show the path of reasoning by which the assessment was reached.
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> 59. Chapter 11.10 on the other hand would seem to have an outcome that is at odds with those principles..… Chapter 11.10 is entitled 'Pre-existing impairment' which gives an indication of the limitations the exercise required by the guideline illustrate. In the present situation…. there is no evidence supporting a pre-existing impairment, although there was at least one pre-existing condition. In these circumstances, the exercise of using the same method of calculating pre-existing condition as is set down for the calculating of the current impairment is an unhelpful task. It stands to reason that if a worker has not suffered an injury at the outset of his/her employment, it may very well be that he/she is not suffering from any impairment. It may be, as in the present case, that the person is functioning with a pre-existing condition, but if it is asymptomatic then the result of the exercise will be that at the time just before injury the injured worker had no whole person impairment that was due to his/her pre-existing condition.
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> 60. Although the last sentence of chapter 11.10 mandates a finding of 1/10th if the percentage of pre-existing impairment could not be assessed, in the case of a worker carrying a pre-existing condition which was asymptomatic the percentage of pre-existing impairment can easily be assessed. In the present case, the assessment would be nil. In all the categories of the Psychiatric Impairment Rating Scale, Ms Wills would be assessed as a class I value, that is to say, prior to the subject injury, she had either no deficit, or a minor deficit attributable to the normal variation in the general population. The logical application of that method would be that Ms Wills is entitled to the full assessment, without deduction.
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> 62. Having complied with the requirement that we measure the WPI due to a pre-existing condition as mandated by Chapter 11.10 and then subtract this from the current WPI, we decline to apply it to the present circumstances, as it would produce an anomalous assessment contrary to the principles we have above referred to."

[19] [2019] NSW WCC MA 13

59. This decision we understand is on appeal at the moment, but as it is current law, we adopt it.

60. In the present case Ms Prosser would also be assessed as having a nil percentage of pre-existing impairment if the provisions of Chapter 11.10 were applied. At the time the conduct of this particular individual began she was performing her duties in a normal manner. The evaluation of the categories in the PIRS would have resulted in a value of one for each category. There is no evidence of any behavioural consequences of Ms Prosser's earlier anxiety and depression in the 1990s when her husband suffered his stroke. The AMS's conclusion was that without Ms Prosser's continued prescription of citalopram she would likely have experienced a return of her psychological symptoms, notwithstanding that she was asymptomatic when she suffered the subject injury.

61. Such a conclusion was open to the AMS on the evidence. Whilst the mere fact of a prior psychological condition would not justify an assumption that it contributed to the impairment caused by her present condition, the fact that Ms Prosser was continuing to take her medication, notwithstanding her recovery from the earlier condition, is evidence that the degree of impairment caused by the subject injury may not have been as great but for the treatment effect that the continued prescription of that particular medication had in controlling her pre-existing psychiatric condition.

62. In any event, a successful outcome of Ms Prosser's present appeal on this issue would not have enabled her to reach the relevant threshold.

63. For these reasons, the Appeal Panel has determined that the MAC issued on 15 May 2019 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 Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar