

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-3383/19
Appellant:	Coles Supermarkets Australia Pty Ltd
Respondent:	Luke Anthony Smith
Date of Decision:	5 March 2020
Citation:	[2020] NSWCCMA 40

Appeal Panel:	
Arbitrator:	Ms Deborah Moore
Approved Medical Specialist:	Dr Nicholas Glozier
Approved Medical Specialist:	Dr Michael Hong

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 23 December 2019, Coles Supermarkets Australia Pty Ltd lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Christopher Bench, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 4 December 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 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).
6. **PRELIMINARY REVIEW**
7. 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.

8. 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 none was requested, and we consider that we have sufficient evidence before us to enable us to determine this appeal.

EVIDENCE

Documentary evidence

9. 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.

SUBMISSIONS

10. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
11. In summary, the appellant submits that the AMS erred in three respects, namely,
 - a. Making an adjustment for the effect of treatment;
 - b. The finding of moderate impairment in 'self-care and personal hygiene'; and
 - c. The finding of moderate impairment in 'concentration, persistence and pace'
12. In reply, the respondent submits that no errors were made.

FINDINGS AND REASONS

13. 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.
14. 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.
15. The respondent was referred to the AMS for assessment of WPI in respect of a primary psychological injury resulting from a deemed date of injury of 9 November 2015.
16. The AMS obtained a detailed history of various events leading up to his ceasing work, noted in paragraph 4 of the MAC.
17. Relevant to the issues in dispute, the AMS documented present symptoms as follows:

“The applicant reported he is fully compliant with his medication. There were no side effects elicited. When asked to describe his mood he noted “I don’t care ... It’s like I’m in mud ... they say they are going to make an empathy club for me”. He is sleeping 4 to 5 hours per night. He will occasionally nap during the day. His appetite is impaired however he has put on 4 kilograms of weight. He has difficulties with lethargy and apathy. He has no libido. He reported an inability to enjoy activities. For example, being unable to enjoy his daughter’s wedding or that she is expecting her first child. He denied having had any suicidal ideation. He noted his anxiety is “generally not too bad”. It is increased if he is around more than a few people, including his family. He avoids events such as birthday parties or going out for dinner. He spends a lot of time in his shed.”

18. As regards social activities and ADL's, the AMS said:

"With regard to his activities of daily living, the applicant reported he showers 2 to 3 times per week. He brushes his teeth daily. He will wear the same clothes for days at a time. He does various chores around the home such as yard maintenance. He will occasionally wash the dishes or hang out the laundry. He "rarely" cooks basic foods such as bacon and eggs.

The applicant spends the vast majority of his spare time on his mobile phone playing bingo or gin rummy. He will occasionally do some reading. He has not played cards euchre for 3 to 4 years. He no longer plays cricket. He will occasionally clean the shed. He walks the dog nearly every day for 15 minutes. He is no longer collecting stamps. He last went to a hotel for lunch one week prior the clinical evaluation when he and his wife were on holidays. He attends the cinema once or twice per year. He has recently been kayaking whilst on vacation. He will walk the dog. He last went fishing some two months ago.

The applicant noted having driven the four-hour trip from East Maitland to Nambucca Heads on an independent basis for a recent holiday.

The applicant noted there are occasional arguments in his relationship with [his wife]. There have been no separations or violence. He noted having "grown apart" from his three children. However, stated "if they need me, I'll go". There has been no change in his relationship with his siblings. He sees one friend Gary approximately twice per week. He has had a loss of numerous friendships. He has five grandchildren. He noted on rare occasions he will supervise his older three grandchildren aged 8 to 14. He will not babysit the younger grandchildren aged 3 and 5.

The applicant has not done any sudoku for months. He will count the church offerings with his wife. This usually involves some \$200-\$500 dollars; it only takes a few minutes. He was specifically asked with regard to the renovations he was noted to have completed around the home. He stated he had a new deck built for the granny flat. He did minimal activity himself other than some painting or digging some holes.

The applicant retired three years ago. On the other hand, he is a volunteer with the church. He will do maintenance jobs or yard work such as cleaning the gutters and mowing lawns. He noted the tasks would essentially be considered labouring. He noted he was previously managing the church finances. He noted the church has a congregation of 24 people. He now does "not much at all" of the administrative work, noting his daughter and wife now have to do most of the administrative tasks because of his poor attention and concentration."

19. Findings on mental state examination were reported as follows:

"There was no evidence of any motor disturbance. He was calm settled and cooperative throughout the evaluation. His speech was of normal rate, rhythm and volume. His thought processes were logical, relevant and coherent throughout. He described his recent mood as "I don't care ... they say they are going to make an empathy club for me". His observed emotional tone was constricted in the dysphoric range. There was no overt delusional material elicited. He was appropriately preoccupied with the matters at hand. He denied any auditory or visual hallucinations. He denied any suicidal ideation."

20. The AMS diagnosed "Persistent Depressive Disorder with anxious distress."

21. He added:

“It is noted he has a panoply of depressive symptoms that have been present at some level or another now for four to six years. He reported difficulty with depressed, anxious and irritable mood, lethargy, being more isolative and withdrawn, emotional numbing, insomnia, impaired appetite and no libido. Given the symptoms have been persistent for more than two years, he meets diagnostic criteria for Persistent Depressive Disorder with anxious distress.

The only competing stressor that was identified during the clinical evaluation was the recent death of his father some twelve months prior to the clinical evaluation. He denied any persistent change in his mood or functioning resulting from such. It is the evaluator’s opinion the death of his father may well have contributed to an exacerbation of his depressive illness. There is no evidence to suggest it is having any persistent and ongoing impact on his symptomatology or functioning.”

22. The AMS assessed 18% WPI. He added:

“With regard to adjustment for the effects of treatment, the applicant has had a mild improvement in his symptomatology and functioning provoked by evidence-based psychopharmacological treatment of sertraline. There has only been a mild improvement in his functioning. In this context a 1% adjustment for effects of treatment is indicated.”

23. The AMS assessed a Class 3 in the PIRS category of Self Care and personal hygiene and the same in respect of Concentration, persistence and pace (CPP).

24. Dealing firstly with the adjustment with respect to the effects of treatment, we accept, as does the respondent, the appellant’s submission that this was not compatible with the Guidelines for the Assessment of Permanent Impairment.

25. The Guidelines provide at Chapter1.32:

“Where the effective long-term treatment of an illness or injury results in apparent substantial or total elimination of the claimant’s permanent impairment, but the claimant is likely to revert to the original degree of impairment if treatment is withdrawn, the assessor may increase the percentage of WPI by 1%, 2% or 3%. This percentage should be combined with any other impairment percentage, using the Combined Values Chart.”

26. The AMS noted sertraline treatment resulted in a mild improvement only.

27. The appellants submits that it cannot be said that the treatment of the respondent’s condition has resulted in substantial or total elimination of his permanent impairment.

28. We agree, and find that the AMS erred in allowing a 1% adjustment for the effects of treatment.

29. Turning now to the second ground of appeal, namely the assessment with respect to the PIRS categories.

30. Dealing firstly with Self Care and personal hygiene, the appellant submits that the respondent should be placed in class 2 – mild impairment, the descriptor for that class being “able to live independently, looks after self adequately, although may look unkempt occasionally, sometimes misses a meal or relies on take-away food.”

31. This is because in his statement dated 8 June 2019, the respondent said that he changes his clothes daily and eats at least two meals a day. In addition, he told Dr Takyar that while he was prompted to bath, he only missed a shower once or twice a week. He further advised he eats 3 meals a day and would do grocery shopping at times by himself. Finally, he confirmed he was able to do more around the house than he used to, given he is home more (Dr Takyar report dated 29 October 2018).
32. Further, it is submitted that Mr Smith “attended the AMS appointment appropriately dressed and with combed hair.”
33. The AMS placed the respondent in class 3 for ‘self-care and personal hygiene’, stating: “The applicant reported he showers 2 to 3 times per week. He brushes his teeth daily. He will wear the same clothes for days at a time. He does various chores around the home such as yard maintenance. He will occasionally wash the dishes or hang out the laundry. He ‘rarely’ cooks basic goods such as bacon and eggs. As such, it is evidence the applicant would be unable to live independently without the regular support of his family to ensure a level of hygiene and nutrition.”
34. The descriptor for a class 3 rating is as follows: “Moderate impairment: Cant live independently without regular support. Needs prompting to shower daily and wear clean clothes. Does not prepare own meals, frequently misses meals. Family member or community nurse visits (or should visit) 2-3 times per week to ensure minimum level of hygiene and nutrition.”
35. We accept the evidence to which the appellant refers in this category, and in our view it could certainly be said that the respondent presented as borderline or on the cusp of a class 2 but the fact that the AMS chose a class 3 in such circumstances does not disclose an error.
36. It is noted that Dr Vickery reported: “There is reduced hygiene and grooming over the past seven months. He can miss meals however his weight is stable.”
37. Dr Takyar noted: “His memory is poorer and his wife now prompts him to remember things. He continues to eat three meals of a normal size each day, but with reduced interest in food.” He also rated Mr Smith as a class 3 in this category.
38. Whilst some medical experts may have ranked Mr Smith as class 2, the evidence the AMS described could support a class 3 rating such that we cannot see any error by the AMS.
39. As regards concentration, persistence and pace, (CPP) the appellant makes the following submissions:
 - a. The respondent should be placed in class 2 – mild impairment: “can undertake a basic retraining course, or a standard course at a slower pace. Can focus on intellectually demanding tasks for periods of up to 30 minutes, then feels fatigued or develops a headache:”
 - b. The respondent’s history is more suitable to a class 2 rating on the following basis:
 - i. In a report dated 14 February 2019, Dr Vickery records that the worker enjoyed reading novels and can read all day if not disturbed. He is also able to play on his iPad and complete Suduko and crossword puzzles:
 - ii. In his statement dated 8 June 2019 he submits that reading is a form of escape.
40. The AMS rated the respondent as class3, the descriptor for which is as follows:

“Moderate impairment: unable to read more than newspaper articles. Finds it difficult to follow complex instructions...make significant repairs to motor vehicle, type long documents, follow a pattern for making clothes, tapestry or knitting.”

41. Once again, we regard the respondent's presentation as borderline, but again, there was evidence to support the conclusion the AMS reached.

42. He rated the respondent as class 3, stating:

"The applicant has not done Sudoku for months. He will count the church offerings with his wife. This usually involves some \$200-\$500 dollars; it only takes a few minutes. He was specifically asked with regard to the renovations he was noted to have completed around the home. He stated he had a new deck built for the granny flat. He did minimal activity himself other than some painting or digging some holes. With a reasonable degree of medical certainty it is the evaluator's opinion the applicant would be unable to complete a basic retaining [sic] course or a standard course at a slower pace. Such is most consistent with moderate impairment."

43. Dr Takyar also rated a class 3, adding:

"He reported being able to read for periods of time as a form of escape. He does not watch the television. When he is completing volunteer work at the church, he finds that his concentration lapses after 10-15 minutes. He struggles to multitask. He would not be able to engage in an intellectually demanding task for more than around 15 minutes. He would not be able to undertake a basic retraining course. He would find it difficult to engage in multi-staged tasks."

44. The appellant's submissions focus heavily on the respondent's reading ability, particularly as documented by Dr Vickery. That however is just one aspect of the CPP category, but as Dr Takyar noted, the respondent had difficulties with other functions in this category.

45. For these reasons, we are not persuaded that the AMS erred in his assessment of CPP.

46. The AMS may well have erred on the side of generosity in his assessments, but that is not an error within the meaning of Sections 327(3)(c)/(d) of the 1998 Act.

47. Accordingly, we cannot find any error in the assessments made by the AMS in the two PIRS categories the subject of appeal.

48. For these reasons, the Appeal Panel has determined that the MAC issued on 4 December 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 3383-19
Applicant: Luke Anthony Smith
Respondent: Coles Supermarkets Australia 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 Christopher Bench 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 the Guidelines	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. Psychiatric and psychological disorders	9/11/2015	Chapter 11, pages 54 – 60, paragraphs 11.1 to 11.20	N/A	17%	0%	17%
2.						
3.						
4.						
5.						
6.						
Total % WPI (the Combined Table values of all sub-totals)						17%

Deborah Moore
Arbitrator

Professor Nicholas Glozier
Approved Medical Specialist

Dr Michael Hong
Approved Medical Specialist

5 March 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

