WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1353/19**
Appellant:	**Yildiz Anar**
Respondent:	**State of New South Wales**
Date of Decision:	**5 November 2019**
Amended Decision	**7 November 2019**
Citation:	**[2019] NSWWCCMA 161**

Appeal Panel:	
Arbitrator:	**Jane Peacock**
Approved Medical Specialist:	**Dr Lana Kossoff**
Approved Medical Specialist:	**Dr Patrick Morris**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 12 August 2019 Yildiz Anar 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 16 July 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, and
    - 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).

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 Workers compensation medical dispute assessment guidelines.

7. As a result of the Appeal Panel's preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination.

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. They are not repeated in full but have been considered by the Appeal Panel.

FINDINGS AND REASONS

11. 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.

12. 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.

13. The matter was referred by the Registrar to the AMS as follows:

> "The following matters have been referred for assessment (s 319 of the 1998 Act):
>
> - **Date of injury: 8/7/2013**
> - **Body parts/systems referred: Psychiatric/Psychological disorder**
> - **Method of assessment: Whole Person Impairment**"

14. The AMS issued a MAC certifying as follows:

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)
1. Psycho-logical	8/7/2013	11, page 55-60	14	19	5%, see PIRS table	14
Total % WPI (the Combined Table values of all sub-totals)					**14**	

15. The worker appealed.

16. The AMS assessed an overall impairment of 19% whole person impairment (WPI) There is no complaint from either party about this aspect of the assessment.

17. The appeal concerns the deduction the AMS made under s 323. The AMS considered that there was a pre-existing condition and that this condition contributed to the level of permanent impairment assessed as a result of the work injury on 8 July 2013. The AMS made a deduction under s 323 of 5% WPI after conducting a Permanent Impairment Rating Scale (PIRS) assessment of the appellant in respect of impairment prior to the subject work injury.

18. In summary the appellant submitted that the AMS failed to make a diagnosis of any pre-existing condition and that there was no evidence to support the assessment made under PIRS in respect of any pre-existing condition in any event.

19. In summary the respondent submitted that approach taken by the AMS was open to him on the evidence and was in accordance with the Guides and submitted that the MAC should be confirmed.

20. The AMS took a detailed history as follows:

> "• Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:
>
> <u>Past psychiatric history:</u>
>
> I made enquiries regarding Ms Anar's psychological state before problems at work started. She said she was a bubbly person who was fun-loving, that she socialised regularly, she liked herself and she liked people. She said she had had not experienced depression or anxiety symptoms. I note this contradicted Ms Anar's own written submission and her treating clinicians' records.
>
> I made enquiry regarding Ms Anar's father's death. She recalled he died in a car accident when his car was struck by a semitrailer. She said it was a severe collision, where his car flipped and the top of the car was sliced open. This happened exactly one year before Ms Anar's work injury. She recalled she went overseas after his death, and that when she came back and returned to work, she became 'accepting' of his death and therefore did not suffer depression or anxiety symptoms, and she said that she had never taken any psychiatric medication before her work injury.
>
> I pointed out to Ms Anar, that this was different from her treating clinician's records - her response was that she did not agree with her treating clinician's assessment.
>
> On further enquiry, Ms Anar did not recall any other periods in her earlier life where she needed psychological or psychiatric treatment.
>
> I made a specific enquiry regarding the prescription of Lexapro in 2009. Ms Anar then recalled she took Lexapro, and reported that she felt upset because she was lonely. I asked Ms Anar why she felt lonely and she was not sure. She said it was 'a stage in my life' and 'it was nothing major'. She could not tell me more.
>
> I made enquiries regarding Ms Anar's mood swings and anger problems as recorded in her GP's records. She said she did not know what this is about, as she does not think she has anger issues or sedative medication/week. She disagreed with her General Practitioner's assessment.

I asked Ms Anar whether she suffered depression prior to her work injury, and she said she did not think so.

Ms Anar recalled she had problems with her sleep but could not explain why. Ms Anar considered the Lexapro antidepressant medication was prescribed for her sleep problems only.

Ms Anar said she has never been referred to a psychologist or a psychiatrist previously, and that if her GP had done his job properly, he would have referred her to a psychologist or a psychiatrist before prescribing the Lexapro, which she said was not helpful.

I noted that Ms Anar has had a medical negligence claim in relation to iron injection. She said she received a compensation payout for the permanent staining on the hips. I asked Ms Anar whether there was a psychiatric component to that claim and whether she saw a psychiatrist/psychologist for compensation purposes, and she could not recall.

I noted Ms Anar's GP's medical records:

- On 19 August 2009, the reason for contact was depression and anxiety. Ms Anar had supportive counselling, relaxation therapy, problem solving and positive thinking. She was on Lexapro 20 mg.
- On 23 June 2010, Depression was the reason for contact. Ms Anar was feeling depressed and down, lacking concentration. There was constant tearfulness. There were low energy and low confidence. She had been progressively worsening over the last 6 to 12 months. She was not suicidal. Ms Anar was on Lexapro 20 mg and was being given supportive counselling and provided advice on sleep hygiene. She was provided relaxation therapy. She was advised to stop all alcohol.
- On 1 September 2010 Ms Anar was on Lexapro 20 mg, emotionally improved but still anxious with mood swings. She was sleeping well.
- 2 October 2011, very depressed and upset, scarring and persistent staining of hips.
- 31 October 2011: lice infection.
- I noted various infections and her repeated need for antibiotics over time. I also noted various entries regarding high cholesterol and dietary advice.
- On 23 July 2012, there was a history of mood swings, insomnia, nightmares and a loss of interest in daily living.
- On 3 August 2012, there had been ongoing grief after her father's death with recurrent flashbacks and nightmares, constantly seeing her father's face, poor sleep, anxiousness, loss of concentration. She was on Endep 50 mg.
- On 26 October 2012 Ms Anar had returned from Turkey and was still grieving and depressed and lacking sleep. She had mood swings with anger explosions, she was panicky and tearful, and had recurring chest pain. Endep 50 mg was prescribed.
- 16 November 2012, severe hypercholesterolaemia, poor compliance with statin, which is treatment for high cholesterol.
- **Ms Anar's work injury occurred on 8/7/2013**
- On 30 July 2013 Ms Anar had been having physical symptoms of anxiety, nightmares and shortness of breath. She was on WorkCover.
- On 25 July 2018, there was a history of bipolar disorder and anxiety disorder, chronic lower back pain and stiffness, and she was on Lyrica.

History of Ms Anar's work injury and subsequent history:

Ms Anar reported having joined the Police Force in 2000 and had worked there for about 13 years. She had always worked full-time. She could not recall the last time she performed study. Ms Anar recalled that earlier on in her employment with the police, she also worked part-time doing shelf packing for Woolworths but had not done this for many years.

Ms Anar had worked as an executive assistant for three or four years. She first ceased work on 8 July 2013. She later returned to work once or twice, she said in a different section, however she felt everybody was looking at her and gossiping about her, and she could not tolerate being at work.

Since then, Ms Anar has not undertaken any further employment or study.

Ms Anar said she was a hardworking person and always wanted to be at work, and her supervisor had at times told her to go home because she was sick, and that she did not need to be at work. Ms Anar said she felt she fitted in well and treated her colleagues as a family.

One day before the one-year anniversary of his father's death, Ms Anar discovered the photo of her father that was on her desk, had been vandalized. She did not know who was the culprit and said she could not understand why someone did this on purpose to hurt her. Ms Anar was distressed and had to stop work the same day. She still feels hurt by this. Ms Anar said, 'How can somebody belittle and mock him on his one year anniversary?'.

After Ms Anar stopped working, she had been in consultation with her General Practitioner. She had consulted Dr John Kearney, Psychologist, for a few years and consulted Associate Professor Chanaka Wijeratne for a few years. The consultations with both clinicians ended in 2018. Ms Anar has not consulted other mental health professionals.

Ms Anar said she has trialled a large number of psychiatric medications over time. She has not felt substantially improved in her functioning and has never achieved full remission or substantial remission in her symptoms.

Ms Anar returned to Turkey and had consultations with a psychiatrist there, maybe three or four times. She said the psychiatrist told her that she suffered a 'borderline bipolar disorder' and she does not think that the psychiatrist had diagnosed a personality disorder. Ms Anar was prescribed Seroquel, which she has taken to the present day. Ms Anar said that Professor Wijeratne has never specifically told her that she has bipolar disorder or borderline personality disorder.

I made an enquiry regarding possible bipolar disorder symptoms, and Ms Anar did not confirm symptoms that would be consistent with bipolar disorder. I note Ms Anar had been on high doses of regular benzodiazepine medication. It is possible that some of her mood instability may be related to what Professor Wijeratne diagnosed as 'iatrogenic benzodiazepine dependence'. Ms Anar is only taking benzodiazepine on an as needed basis and infrequently, in recent times.

Ms Anar recalled that for a period of time she was hearing 'voices' inside her head. She has not heard 'voices' for many months. Ms Anar stated she can at times see shadows moving and there are no overt visual hallucinations. These perceptual phenomena only occurred after her work injury and may have been dissociative symptoms.

- Present treatment:

Ms Anar is taking:
- Seroquel XR 300 mg in the morning
- Mirtazapine 45 mg at night
- Melatonin to be taken when needed for sleep
- Diazepam 5 mg to be taken when needed, nil taken in the past 4 weeks
- Crestor
- Lyrica, to be taken when needed for sciatica pain

Ms Anar had previously taken Xanax 2 mg three times a day, regularly.

She had trialled Endep 50 mg, Escitalopram/Lexapro, Sertraline, doxepin, and Olanzapine 5 mg.

No psychiatric admission.

- Present symptoms:

Ms Anar described having depressed mood.

Ms Anar has suicidal thoughts – she has never attempted suicide. She was not immediately suicidal.

Ms Anar thinks she is gaining weight recently.

Her sleep fluctuates and is overall reasonable with her medications.

She reported being irritable.

She has become socially withdrawn.

Ms Anar denied having been physically aggressive, having self-harmed, having identity-related difficulties.

- Details of any previous or subsequent accidents, injuries or condition:

No alcohol use disorder.
No illicit substance use.

Ms Anar is not aware of a family history of mental illness or suicide.

Ms Anar's parents came from Turkey and she was born in Australia. She has two brothers, one a pharmacist and the other a rigger. Ms Anar stated that she came from a good family and things were very stable at home growing up. There was never any trauma either at home or at school. Ms Anar has never had any major sicknesses nor operations. She has never been abused.

Ms Anar stated that she has only ever had one long-term relationship - her husband. There have been no subsequent partnerships.

- general health:

Ms Anar suffered a carpal tunnel syndrome and had a right wrist operation in February 2019. She said her left wrist would need to be operated on soon as well.

- Work history including previous work history if relevant:

After Year 12, Ms Anar attempted to return to university twice to study nursing and then hospitality but did not complete these studies.

- Social activities/ADL:

Ms Anar is living with her two-year-old son, her mother, her brother and his family. Ms Anar's brother and his family are due to move out soon. She stated that her son is generally well however has been sick recently with flu symptoms.

Ms Anar is in a marriage with a man that she had known since childhood. She recalled they became a couple after her work injury, and less than one year later they married in 2015. They first separated in 2016. He is living in Turkey now. Ms Anar stated that the marriage did not work out because of her, because after her work injury she had become cautious and always looking for bad things in people and she no longer trusted people. Ms Anar stated that he could not cope with her paranoia and they were arguing a lot. They had separated and re-established the relationship a number of times. Ms Anar does not attribute the marital issues to him at all. She recalled that when she became pregnant, she thought about abortion but her sister and her mother told her they would be helping her, and wanted her to keep the child.

I made enquiries regarding Ms Anar's husband's forensic history. She said this was before they were together and she did not think there was any relevance and said he has not had legal issues after they were together. I explained to Ms Anar the reason for making my enquiry, and specifically the information contained in her medical records. With prompting from her medical files, Ms Anar later remembered that he was in remand again after they were together. Ms Anar stated that he was charged with drug-related offences.

I asked Ms Anar about her treating psychiatrist's opinion (Professor Chanaka Wijeratne, 18 August 2014), there appeared to be longstanding family difficulties exacerbated by her fiancée currently being in remand, which may indicate that there were pre-existing family issues before her work injury. Ms Anar's explanation was that she only became distrusting after the problems at work started, and that she had never had problems with her family or in her relationship previously.

Ms Anar said she is a very different person since her work injury. She said she does not want to get up, get dressed or go out and that she is a mess.

Ms Anar stated when she goes out she thinks people are looking at her and this makes her anxious. I asked her whether there are any other triggers or situations that make her anxious or depressed, and she said she was not sure.

When Ms Anar gets angry, she said she would isolate herself and has never been one to become physically aggressive. Her suicidal thoughts have subsided.

Ms Anar said she spends most of her time at home, doing household chores such as cleaning up. She estimated spending an hour to an hour and a half a day on housework.

Ms Anar's son is not in day-care and is always at home. She said she looks after him most of the time. They play together. Her mother and her sister-in-law would help, in doing the bathing, changing of nappies and feeding.

Ms Anar's sister-in-law does most of the cooking and occasionally Ms Anar would perform some cooking, such as making pasta. She does not binge eating anymore.

Ms Anar said she only showers once or twice a week. She ensures her son is bathed every day. She ensures he is fed regularly. I asked Ms Anar why there is such a difference, and her explanation was that because she knows he needs to be bathed every day."

21. The AMS conducted a mental state examination about which there is no complaint.

22. The AMS summarised the injury and his diagnosis as follows:

> "Ms Anar has a history of recurrent presentations to her General Practitioner with psychological symptoms that led to various periods of treatment. Ms Anar became depressed after her father's sudden death, and on the one-year anniversary, she sustained a work injury when her father's photo was vandalized, and her psychological injury has persistent to the present day.
>
> Different clinicians and assessors have diagnosed an adjustment disorder, major depressive disorder, anxiety disorder, borderline personality disorder and bipolar disorder.
>
> The substantial weight of evidence, from various clinicians and assessors that have assessed Ms Anar, is that she has developed chronic Major depressive disorder. This is consistent with my clinical opinion.
>
> Ms Anar had developed benzodiazepine dependence, which has been successfully treated and is no longer an active disorder. It is likely that benzodiazepine overuse for a significant period of time, had contributed to some of her affect instability and may have led to some clinicians to diagnose a bipolar disorder or personality disorder.
>
> Professor Robertson did not apply a deduction for a pre-existing psychiatric disorder. Dr George noted Ms Anar has a significant past psychiatric history and considered her father's death was the single most significant contributing factor in her current psychological presentation. I have also noted Ms Anar's General Practitioner's medical file. Overall, I consider there is a relevant past psychiatric history, and I have performed a PIRS to rate Ms Anar's pre-existing WPI.
>
> There is no addition for treatment effects to Ms Anar's current WPI, as Ms Anar has never achieved substantial remission or full recovery. This is consistent with Professor Robertson's assessment."

23. The AMS noted inconsistencies in the appellant's presentation as follows:

> "There were significant inconsistencies in Ms Anar's recalled history and information recorded in her medical file. I have made enquiries and noted her responses to these inconsistencies. I have made my independent assessment. Ms Anar's recalled past psychiatric history was clearly incorrect, and she also had difficulties recalling various aspects of her history and in confirming the history in her clinicians' files."

24. The AMS considered that there was a pre-existing condition which contributed to the level of permanent impairment assessment.

25. The Panel considers that the AMS's finding in this regard was open to him on the evidence and he has not erred in this regard, noting in particular the history of psychological difficulties and treatment for same that the AMS gleaned from the appellant's general practitioner's records that predate the work injury on 8 July 2013 as follows:

> "• On 19 August 2009, the reason for contact was depression and anxiety. Ms Anar had supportive counselling, relaxation therapy, problem solving and positive thinking. She was on Lexapro 20 mg.

- On 23 June 2010, Depression was the reason for contact. Ms Anar was feeling depressed and down, lacking concentration. There was constant tearfulness. There were low energy and low confidence. She had been progressively worsening over the last 6 to 12 months. She was not suicidal. Ms Anar was on Lexapro 20 mg and was being given supportive counselling and provided advice on sleep hygiene. She was provided relaxation therapy. She was advised to stop all alcohol.

- On 1 September 2010 Ms Anar was on Lexapro 20 mg, emotionally improved but still anxious with mood swings. She was sleeping well.

- 2 October 2011, very depressed and upset, scarring and persistent staining of hips.

…

- On 23 July 2012, there was a history of mood swings, insomnia, nightmares and a loss of interest in daily living.

- On 3 August 2012, there had been ongoing grief after her father's death with recurrent flashbacks and nightmares, constantly seeing her father's face, poor sleep, anxiousness, loss of concentration. She was on Endep 50 mg.

- On 26 October 2012 Ms Anar had returned from Turkey and was still grieving and depressed and lacking sleep. She had mood swings with anger explosions, she was panicky and tearful, and had recurring chest pain. Endep 50 mg was prescribed."

26. The AMS proceeded to conduct a PIRS assessment in respect of the condition that pre-existed the work injury as follows:

IMPAIRMENT BEFORE THE SUBJECT WORK INJURY

Category	Class	Reason for Decision
Self-care & Personal Hygiene	2	There is a pattern of reduced self-care in the context of her psychological symptoms. Recurrent infections noted (e.g. lice). General Practitioner provided advice regarding cleaning and personal hygiene, sleep management, in association with her anxiety and depressive symptoms. GP noted non-compliance with statin, prescribed for high cholesterol. Need for dietary advice from GP.
Social & Recreational Activities	2	Anxiety and depressive symptoms interfered with daily living and enjoyment
Travel	1	No impairment confirmed
Social Function	2	Ms Anar is reported to have confidence and anger issues before the subject injury, without physical aggression being confirmed.
Concentration, Persistence & Pace	2	Concentration problems documented before the subject injury

Employability and Adaptation	1	No impairment identified

List classes in ascending order:

Median Class Value: 2

Aggregate Score: 10

Whole Person Impairment: 5

Medication adjustment Under Workcover guideline	0%	Ms Anar reported being off psychotropic medications, and if she was on medication, it was not substantially effective.

Total pre-existing WPI is 0+5 = 5%

27. The Panel however considers that there was insufficient evidence available to enable impairment assessment under the PIRS to be accurately assessed as at the date of assessment in 2019 pertaining to a point in time prior to the work injury (that is, some six years ago).

28. In this regard the panel considers that the AMS has erred.

29. On the available evidence the Panel considers it was not possible for the AMS to calculate the extent of the deduction and accordingly a deduction of one-tenth should have been made by the AMS. The Panel will correct this aspect of the assessment.

30. From the overall impairment assessment of 19% WPI about which there was no complaint, the panel will deduct one-tenth (19% less 1.9) which gives 17% WPI after rounding as a result of injury on 8 July 2013.

31. For these reasons, the Appeal Panel has determined that the MAC issued on 16 July 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*.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **1353/19**
Appellant: **Yildiz Anar**
Respondent: **State of New South Wales**

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 Michael Hong Faithfull 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)
1. Psycho-logical	8/7/2013	11, page 55-60	14	19	1/10	17
Total % WPI (the Combined Table values of all sub-totals)					**17**	

Jane Peacock
Arbitrator

Dr Lana Kossoff
Approved Medical Specialist

Dr Patrick Morris
Approved Medical Specialist

5 November 2019

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*.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar