

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-981/19
Appellant: Amy Hand
Respondent: State of NSW
Date of Decision: 5 December 2019
Citation: [2019] NSWCCMA 180

Appeal Panel:
Arbitrator: Catherine McDonald
Approved Medical Specialist: Prof Nicholas Glozier
Approved Medical Specialist: Dr Michael Hong

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 12 September Amy Hand lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Patrick Morris, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 21 August 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, being that in s 327(3)(d). 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 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).

RELEVANT FACTUAL BACKGROUND

6. Ms Hand was employed by the State of NSW as a trainee paramedic with the NSW Ambulance Service. In October 2012 she was involved in a motor vehicle accident whilst driving an ambulance under lights and sirens from the scene of an accident to Canberra Hospital. Ms Hand, the patient and the other driver were all injured. Ms Hand began to suffer psychological symptoms after the accident. She returned to work in early 2014 after her physical injuries resolved. She began to suffer severe anxiety and was placed on selected duties until she resigned in 2017.

7. Ms Hand was prescribed Endone for her physical injuries and developed opioid use disorder for which she has taken medication for the last year.
8. Ms Hand worked for about six months as a customs officer but ceased because she was unable to cope with the work and study required. Apart from a very short period of casual factory work in December 2018, Ms Hand has not returned to work. She married in early 2019 and lives with her spouse, mother and sister.
9. The AMS diagnosed post-traumatic stress disorder (PTSD) and opioid use disorder. He considered that the latter condition was in remission on maintenance therapy and that it did not impact on her level of permanent impairment. The AMS assessed 13% whole person impairment (WPI).

PRELIMINARY REVIEW

10. 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.
11. 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 the AMS has not made an error in his assessment.

EVIDENCE

12. 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.
13. 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

14. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
15. Ms Hand's submissions were limited to one class of the Psychiatric Impairment Rating Scale (PIRS). Her solicitor submitted that the AMS had applied incorrect criteria and made a demonstrable error in his assessment of class 1 for travel. He submitted that the Guidelines "stipulate" that class 1 applies if there is "No deficit, or minor deficit attributable to the normal variation in the general population: Can travel to new environments without supervision." Ms Hand's solicitor said that the AMS did not find that she had no deficit and did not comment in the body of the report if she had a minor deficit or not, merely recording that she was able to drive herself to the appointment. The AMS did not take a history to whether Ms Hand travelled to the appointment with or without supervision. The solicitor said that Ms Hand "instructs that she travelled with her mother to the appointment precisely due to her difficulties travelling without supervision or assistance." Ms Hand submitted that the correct class was class 2. In the alternative, she submitted that the AMS provided insufficient reasons for the allocation of class 1.

In reply, the State submitted that the AMS had addressed the issue of travel and that the best fit in respect of the relevant PIRS category was class 1. The State said that the Application to Resolve a Dispute is replete with evidence from which it can be inferred that Ms Hand has a low deficit with respect to her capacity to travel, including the fact that she was able to continue driving an ambulance to unfamiliar locations until 2017. Other reports in the file show that Ms Hand was able to travel to medical examinations by herself. She resigned her subsequent employment not because of travel but because she could not cope with the work and study involved. She also travelled from south west Sydney to the city to see her psychologist Lyndsey Byron. The State submitted that A/Prof Robertson, qualified for

Ms Hand, assessed her in class 2 for travel because “she experiences travel anxiety in circumstances that are relevant [sic] of the accident.” The State noted that those circumstances were irrelevant when Ms Hand ceased employment in 2017.

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.
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.

The MAC

18. The AMS described the incident in 2013 and set out the following history:

“Ms Hand said that after the accident her life “changed”. She blamed herself for the motor accident. She started having very poor sleep. She started having nightmares about the accident. She also had intrusive traumatic memories of the accident associated with severe anxiety and tremors and sweating. She said she was not able to drive because of her anxiety. She tried to avoid thinking and talking about the accident. She lost interest in playing sport which was a great interest of hers. She lost interest in socialising. Her relationship of eight years duration broke up. She became isolated and found it difficult to feel happy. She reported a reduced concentration. She had trouble both getting off and staying asleep. She reported increased irritability and being easily frustrated. She described being angry “at the whole world”. She felt tense and on guard and on the lookout for danger. Hearing ambulance sirens trigger unpleasant emotions in her.

Ms Hand said she was off work for two months because of her physical injuries and returned to work at the beginning of 2014. She said she could not cope with work at all because of her severe anxiety and was put on light duties until she resigned from the NSW Ambulance Service in 2017.”

19. The AMS recorded Ms Hand’s present symptoms, including that she can drive but feels more anxious than before the accident. Under the heading “Social activities/ADL” the AMS noted that Ms Hand lives in Gledswood Hills and that “she is able to drive her car and came by herself to the appointment for the assessment.”
20. The referral for assessment in the file confirms that the examination took place in Ashfield.
21. The AMS reviewed the other medical reports in the file, including that of A/Prof Robertson discussed below. He said:

“Associate Professor Robertson rated Ms Hand a Class 2 for Travel whereas I rated her a Class 1 based on the fact that she was able to drive herself for about one hour in heavy traffic from her home to my consulting rooms, a new location to her, for the assessment.”

22. When providing his reasons for his PIRS assessment, the AMS said:

“Ms Hand reports being more anxious when driving, but was able to drive herself for about one hour to and from home, in heavy traffic, for the assessment.”

23. Contrary to Ms Hand's submissions, the AMS has given reasons for his assessment, clearly setting out the factors he has taken into account in forming his opinion.
24. Paragraph 1.6 of the Guidelines required the AMS to make an assessment of Ms Hand as she presented on the day of the examination. His reasons reveal that is what he did.
25. The assertion in the submissions that Ms Hand's mother travelled with her to the appointment is not the subject of evidence nor any application to admit fresh evidence. Any fresh evidence going to that matter would not have been admissible in any event. In *Petrovic v BC Serv No 14 Pty Limited*¹ Hoeben J held that "additional relevant information" did not include material going to the process of the examination by the AMS. The decision was followed by Smart AJ in *Robertson v Registrar of the Workers Compensation Commission & Beny's Joinery Pty Ltd*².

Other medical evidence

26. The assessment made by the AMS is consistent with other medical reports in the file and the improvement in Ms Hand's condition observed over time.
27. Ms Hand prepared a statement dated 10 December 2018 which was structured to deal with each of the PIRS categories. With respect to travel she said that she initially had significant anxiety driving after her injury and only wanted to be a passenger. She said:

"I have now grown more comfortable with driving however I do get very frustrated on the road when others are not driving safely; I had never experienced these feelings before my injuries. I still struggle to travel to unfamiliar areas by myself and only feel comfortable when I have a support person accompanying me."

28. That statement reveals a significant improvement over the period since psychological treatment ceased in late 2016. Although the panel notes Ms Hand's preference for a support person when travelling to unfamiliar areas this statement does not indicate that this required, only that it makes Ms Hand more comfortable (indicative of the anxiety, a symptom not an impairment, noted by the AMS).
29. Ms Hand was treated by Lynsey Byrom, psychologist, whose rooms are in the Sydney CBD. In an Allied Health Recovery Request form dated 16 August 2016, Ms Byrom was asked to comment on Ms Hand's capacity under a series of headings including "Community (driving, transport, leisure)". In respect of her current capacity, Ms Byrom wrote:

"Is a cautious driver and still worries that people may "pull out" like what occurred in the accident but is reacting in a calm manner when other drivers fail to indicate (eg at roundabouts). Drove through site of accident in past week with no flashbacks or overwhelming anxiety. Found experience very positive."

30. Her last consultation was in October 2016. Ms Byrom noted that Ms Hand had decided not to return to on road duties and said that it was "anxiety regarding the possibility of another accident happening in the future" that led to her decision. Somewhat inconsistently with the form completed in August, Ms Byrom said:

"Ms Hand stated that her anxiety regarding driving also impacts upon her outside of work. For instance, Amy reported that she sometimes gets excessively distressed at intersections if someone pulls out unexpectedly. It was discussed in session yesterday that she would benefit from completing an exposure hierarchy to overcome her fear of driving and further therapy sessions would be needed for this to be accomplished. She is currently avoiding driving certain roads at certain times of day due to her anxiety and

¹ [2007] NSWSC 1156.

² [2008] NSWSC 918.

is aware that this avoidance can easily escalate if not addressed. Attending a defensive driving course (or the like) was also discussed with Amy to help improve her driving confidence and skills.”

31. In a report dated 6 December 2016 to the State’s insurer, Ms Byrom wrote:

“I sent you an updated psychological report on 19/10/16 and in that report I mentioned that Ms Hand was keen to continue with therapy however at that point no further therapy sessions were scheduled. Since that date various efforts to make contact with Amy have provide unsuccessful. Today I have received an email from you advising that Amy wishes to terminate her claim and thus, therapy has come to a close.”

32. Dr H Abeya, psychiatrist, examined Ms Hand on 11 August 2017 and prepared a report for the purpose of ascertaining her fitness for work. She obtained a more detailed history about Ms Hand’s work after the injury than that recorded by some other practitioners or contained in Ms Hand’s statement. Dr Abeya recorded that Ms Hand had returned to full duties in Queanbeyan and was then transferred to Campsie which required her to do a lot of driving around the eastern suburbs which she struggled with. In September 2014, she suffered another shoulder injury lifting a heavy patient which led to surgery and ongoing pain issues. Ms Hand returned to selected duties in an office-based role in November 2015 and was upgraded to driving an ambulance without lights and sirens in mid 2016. She was provided with a day for study towards her Diploma of Paramedical Science but found that difficult and resigned in November 2016.

33. Dr Abeya recorded that Ms Hand resigned from the Ambulance Service in November 2016. She moved to Canberra where her partner lived and stopped seeing her psychologist. She commenced working with Border Protection in Canberra but struggled with training. Dr Abeya also recorded that Ms Hand was able to pass the accident site without significant anxiety.

34. Dr Abeya diagnosed PTSD which was chronic but with milder symptoms. She said Ms Hand had “low grade anxiety symptoms” related to chronic PTSD. She considered that Ms Hand did not have the capacity to “safely or enduringly” return to work as a paramedic because that work was likely to exacerbate her symptoms.

35. A/Prof Michael Robertson saw Ms Hand at the request of her solicitors and reported on 5 December 2018. His report is short and lacking in detail and consists mainly of brief answers to a long series of questions. He provided a brief summary of Ms Hand’s symptoms over the period since the injury. He said that she “experiences travel anxiety in circumstances that are redolent of the injury” and assessed her in class 2 for travel. He did not explain what he meant by “circumstances redolent of the injury” and he did not provide any additional reasons for his assessment.

36. A/Prof Robertson assessed 15% WPI.

Conclusion

37. The assessment made by the AMS with respect to the PIRS category of travel was open to him and consistent with the history obtained.

38. It is important to bear paragraph 11.12 of the Guidelines in mind:

“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.”

39. As noted above, Ms Hand's statement appears to have been prepared by reference to the PIRS categories and to the examples of activities in respect of each of those classes. The example of activities for class 1 is "No deficit, or minor deficit attributable to the normal variation in the general population: Can travel to new environments without supervision" and class 2 is "Mild impairment: can travel without support person, but only in a familiar area such as local shops, visiting a neighbour."
40. The history recorded by the AMS and by other medical practitioners is consistent with class 1.
41. In *Parker v Select Civil Pty Limited*⁶ Harrison AsJ said:
- "To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence.
- The AMS took the history from Mr Parker and conducted a medical assessment, the significance or otherwise of matters raised in the consultation is very much a matter for his assessment. It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ. Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error. The material before the AMS, and his findings supports his determination that Mr Parker has a Class 3 rating assessment for impairment for self-care and hygiene, that is to say, a moderate impairment of self-care and hygiene."
42. That statement is apposite in this case. The AMS obtained a history from Ms Hand as to her ability to drive and attend the appointment by herself. He assessed Ms Hand in class 1 for travel which was an appropriate exercise of his clinical judgement on the basis of the history he obtained, and the relevant information in the documentation.
43. For these reasons, the Appeal Panel has determined that the MAC issued on 21 August 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*.

H Mistry

Heena Mistry
Dispute Services Officer
As delegate of the Registrar



³ [2018] NSWSC 140.