WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3476/19**
Appellant:	**Broadspectrum (Australia) Pty Ltd**
Respondent:	**John Lowe**
Date of Decision:	**18 December 2019**
Citation:	**[2019] NSWWCCMA 195**

Appeal Panel:	
Arbitrator:	**Catherine McDonald**
Approved Medical Specialist:	**Professor Nicholas Glozier**
Approved Medical Specialist:	**Dr Julian Parmegiani**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 15 October 2019, Broadspectrum (Australia) Pty Ltd (Broadspectrum) 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 17 September 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(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).

RELEVANT FACTUAL BACKGROUND

6. Mr Lowe was employed by Broadspectrum as a teacher on Manus Island. He suffered post-traumatic stress disorder (PTSD) as a result of witnessing a shooting on 14 April 2017. There is no dispute about the diagnosis in the reports in the Commission's file.

7. The AMS assessed 17% whole person impairment (WPI) as a result of the injury.

PRELIMINARY REVIEW

8. 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.

9. 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 there is enough information in the file to determine the appeal.

EVIDENCE

10. 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.

11. 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

12. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.

13. In summary, Broadspectrum submitted that the misstatement of the date of injury as 21 August 2019 instead of 14 April 2017 was a demonstrable error. It also submitted that the AMS was in error in failing to make a deduction under s 323 of the 1998 Act in respect of a pre-existing psychiatric disorder suffered as a result of a motor vehicle accident in 2012 or to take into account a subsequent bus accident on 11 July 2017. It submitted that the AMS failed to give reasons for the conclusion that there was no pre-existing injury or condition and failed to refer to clinical notes from Wollongong Medical Centre attached to the Reply. It submitted that there was evidence that bus accident caused a condition requiring treatment with counselling and medication in conjunction with the PTSD symptoms.

14. In a submission which is somewhat difficult to follow, Broadspectrum said that the AMS applied incorrect criteria in that he

> "made an assessment of a psychiatric condition for which, its causes may be mixed, and is not one which should have excluded of impairment arising from anxiety which appears to be clearly a component that was impacting the Worker as referred to in the clinical record".

15. No complaint was made by Broadspectrum in respect of the application of the Psychiatric Impairment Rating Scale categories by the AMS.

16. In reply, Mr Lowe, through his counsel, Mr Horan, correctly pointed out that neither Dr R Rastogi, qualified on his behalf, or Dr P Brown, who saw him on behalf of Broadspectrum, made a deduction under s 323. He submitted that the nature of the injury was not appropriate for a s 323 deduction because of the immediacy of the symptoms following the critical incident. He submitted that all assessing psychiatrists knew about the subsequent physical injury in the bus.

17. The material with respect to the motor vehicle accident in 2012 was before the AMS and Mr Lowe submitted that it related to "a period of anxiety". Dr Brown noted his propensity toward anxiety. Mr Lowe submitted that the ground of appeal that the AMS ignored the clinical history was not made out nor was the submission that the AMS had applied incorrect criteria.

FINDINGS AND REASONS

18. 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.

19. 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.

20. The first issue raised by Broadspectrum is that the misstatement of the date of injury by the AMS as 21 August 2019 is a demonstrable error. It is not a demonstrable error as defined by case law but an obvious error within the meaning of s 325 of the 1998 Act.

Previous psychological injury

21. There is no dispute that Mr Lowe suffered PTSD as a result of the incident on 14 April 2017. The history obtained by the AMS was:

> "On 14 April 2017, Mr Lowe was involved in a critical incident on Manus Island. He said that on that particular day there were shootings, which happened suddenly and he has never been able to forget it. There was repeated shooting by the PNG Defence Force and involved some drunk soldiers.
>
> Mr Lowe said he has some resentment because subsequently, his employer and the government tried to downplay the extent of the shooting incident. He stated that whilst other staff were being evacuated he was hiding in his room.
>
> Mr Lowe recalled he became distressed immediately, with nightmares and poor sleep. He was subsequently evacuated and started having consultations with Sue Martin, a psychologist. He said essentially, he has not changed since the initial incident, and that even this morning he felt like the shooting incident had only happened yesterday."

22. The AMS obtained the following history of a subsequent injury on a bus:

> "On 10 July 2018, Mr Lowe had left his GP and was going him when he was injured on a bus. He was taken to Wollongong Hospital. He had sustained predominantly a right knee injury with a neck injury as well. Mr Lowe had consulted a surgeon who had at one point recommended a keyhole meniscal repair as a day procedure, but he stated he had been fearful and indecisive and did not go ahead. In any case, Mr Lowe's knee problem has since been improving significantly. He said there was no change to his PTSD symptoms after this accident."

23. With respect to previous relevant history, the AMS recorded:

> "Mr Lowe has never had a psychiatric admission.
> No alcohol use disorder.
> No illicit substance use.
> Mr Lowe is not aware of a family history of mental illness or suicide."

24. Later in the certificate, the AMS recorded that Mr Lowe has "not suffered from a psychiatric problem previously."

25. Mr Lowe denied that he had suffered any previous relevant condition. Neither Dr Rastogi nor Dr Brown obtained a history of previous psychological treatment. Dr Brown examined Mr Lowe on three occasions and it is surprising that Broadspectrum's representatives did not draw his attention to the documents on which they now rely.

26. However, the clinical notes from Wollongong Medical Centre contain several entries which are relevant to the assessment of Mr Lowe's condition and which the AMS should have taken into account. On 1 June 2012, Dr Talic recorded:

> "Had MVA on 27/5/12. Patient was driving a car, hit motor bike driver- seriously injured, currently in hospital, having surgery. Patient not coping well, insomnia, nightmares, nil suicidal thoughts, feels guilty. Never been depressed in his life."

27. Dr Talic prescribed Diazepam.

28. On 8 June 2012, she recorded that Mr Lowe "wants to see a psychologist on GPMP" and created a Mental Health Plan. A copy of the plan appears in the general practitioners' notes and records:

> "Had MVA on 27/5/12. Patient was driving a car, hit motor bike driver-seriously injured, currently in hospital having surgery. Patient not coping well: insomnia, nightmares, feels guilty, nil suicidal thoughts. Nil PHx of depression/Anxiety. Currently avoiding contact with people, anxious, worried about being judged."

29. On 29 August 2012, Dr Talic recorded that Mr Lowe had been to court that morning and had pleaded guilty. He was undertaking counselling which helped. On 27 September 2012, she noted that he needed a "Corrective Services NSW medical assessment." On the same day, Dr Andrew Mackie recorded that Mr Lowe had anxiety about the court case. He provided counselling and a medical certificate.

30. On 2 October 2012, Dr Talic wrote:

> "Went to court today- positive for patient- received 2 years good behaviour bond, $1500 fine, no driving for 18 months, the person who was hit recovered - will resume working in November 2012.Feeling pressure in his chest while in court today- presented to court twice today. Feels he cannot work this week."

31. Dr Talic provided a medical certificate. On 30 November 2012, she recorded that Mr Lowe was seeing a psychologist regularly, had been taking Cipramil since 12 November and was feeling unwell and unable to attend work. On 4 December, Dr Talic recorded that Mr Lowe had seen his psychologist that day and that someone was harassing him at work. The psychologist had recommended time off work and Dr Talic provided a medical certificate.

32. On 10 December 2012, Mr Lowe told Dr Talic that he was going to Nauru to work with asylum seekers.

33. After that date, the visits to his general practitioner become more spasmodic, consistent with working on a fly in/fly out basis. On 22 May 2017, Dr Talic recorded a history of the incident which is the subject of these proceedings.

34. On 11 July 2017, Dr Talic recorded Mr Lowe had been sitting on a bus which stopped suddenly, injuring his right knee, back, neck and left thumb. On 25 July, Dr Talic noted "since bus accident anxiety is worsening." At subsequent visits, Dr Talic noted that Mr Lowe remained off work and was undergoing counselling.

35. In December 2017, Dr Talic noted that Mr Lowe's employer was planning a work trial which was postponed when Mr Lowe developed a panic attack at home. His psychologist did not consider him ready for a work trial.

36. On 12 January 2018, Dr Talic recorded that Mr Lowe had "a few episodes of anxiety if someone else is driving the car and suddenly hits the break [sic]. Remembers the bus accident. Patient is still off work due to PTSD."

37. There are no reports from Mr Lowe's psychologist in the general practitioners' file. He was referred to Dr A Farrer, psychiatrist, in 2019 and four reports appear in the Application to Resolve a Dispute. She recommended ongoing treatment for PTSD. She recorded that Mr Lowe "denied history of depression or mental health issue prior to the incident on Manus Island."

38. The condition suffered by Mr Lowe in 2012 was relevant to the assessment made by the AMS. The notes indicate that Mr Lowe suffered a pre-existing condition, that had clinically significant symptoms, led to him seeking help, required both psychological and psychotropic treatment and resulted in sickness absence. At the minimum this would constitute an adjustment disorder which was not disclosed to the AMS or the psychiatrists qualified for the parties, and was present for at least six months. Mr Lowe was still undergoing treatment at least until he left to work on Nauru.

39. While it might be argued that there was no evidence that Mr Lowe suffered a pre-existing impairment at the time of the injury in 2017, the epidemiological literature shows that a pre-existing psychiatric disorder contributes to an increased likelihood of future PTSD following a traumatic event and, importantly for this Appeal, the severity and chronicity of any subsequent PTSD.[1] The condition suffered in 2012 was significant – Mr Lowe underwent two forms of treatment and had time off work.

40. It is not possible to determine the extent of the contribution of the previous condition to his current impairment so that this is an appropriate case for a deduction of one-tenth of the assessed impairment under s 323(2).

Bus accident

41. The AMS wrongly recorded the date of the injury on the bus as 10 July 2018 but his conclusions with respect to the relevance of the incident are correct. The general practitioners' notes show that Mr Lowe was extremely psychiatrically unwell before the bus accident and remained so following the bus accident. While there might have been an increase in his anxiety symptoms following that incident, there is no dispute that he remained significantly incapacitated as a result of the injury on Manus Island.

42. Both Dr Rastogi and Dr Brown recorded a history of the bus accident and the symptoms suffered by Mr Lowe immediately following it which were a manifestation of PTSD.

43. Apart from that error, the MAC is well written and contains a careful consideration of the issues, providing clear reasons for the conclusions reached by the AMS.

44. There is no medical basis for Broadspectrum's submission that the bus accident caused additional symptoms or the need for additional treatment – Mr Lowe was prescribed treatment for PTSD, rather than any heightened anxiety as a result of the bus accident. The bus accident was not a significant psychological blow which led to permanent effects.

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[1] See, for example - Morina et al. *Clinical Psychology Review* 2014; Schnurr et al J *Traumatic Stress* 2004; Armenta, R.F., Rush, T., Leard Mann, C.A. *et al.* "Factors associated with persistent posttraumatic stress disorder among U.S. military service members and veterans" *BMC Psychiatry* 18**,** 48 (2018) doi:10.1186/s12888-018-1590-5

Other submissions

45. The submission that the AMS failed to give reasons does not need to be considered.

46. The submission that the AMS relied on incorrect criteria is difficult to understand. The submission appears to be that the AMS should have excluded any impairment arising from anxiety. If that is so, it is inconsistent with the medical evidence, including that of Dr Brown who considered that Mr Lowe's psychological condition was somewhat anxious and it was not unexpected that he developed PTSD in the circumstances of the injury. Dr Brown did not suggest that there should be any deduction to take account of that propensity, nor would a deduction have been appropriate.

47. For these reasons, the Appeal Panel has determined that the MAC issued on 17 September 2019 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

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: **3476/19**
Applicant: **John Lowe**
Respondent: **Broadspectrum (Australia) Pty Limited**

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 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)
Psychological	14 April 2017	11, pp 55-60		17	One-tenth	15%
Total % WPI (the Combined Table values of all sub-totals)					**15%**	

Catherine McDonald
Arbitrator

Prof Nicholas Glozier
Approved Medical Specialist

Dr Julian Parmegiani
Approved Medical Specialist

18 December 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION