

# WORKERS COMPENSATION COMMISSION

## Decision

This Decision is issued pursuant to section 327(4) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)

**Matter No:** M1-2685/19  
**Appellant:** Belinda Brosie  
**Respondent:** Stratco (NSW) Pty Ltd  
**Date of Decision:** 3 July 2020  
**Citation** [2020] NSWCCCR 3

1. The Medical Assessment Certificate (MAC) of Dr Christopher Bench, an Approved Medical Specialist (AMS), was issued on 20 May 2020. The AMS previously issued a MAC on 15 August 2019 in which he determined that the appellant had not reached maximum medical improvement.
2. On 17 June 2020 the appellant lodged an Application to Appeal the Decision of the AMS on the following grounds: the assessment was made on the basis of incorrect criteria (section 327(3)(c)); the MAC contains a demonstrable error (section 327(3)(d)).
3. On 24 June 2020 the respondent lodged a Notice of Opposition to Appeal Against Decision of Approved Medical Specialist.
4. Section 327(4) of the 1998 Act provides that an appeal is not to proceed unless the Registrar is satisfied that, on the face of the application and the submissions made to the Registrar, at least one of the grounds of appeal as specified in subsection 327(3) of the 1998 Act has been made out.
5. On the face of the application and submissions made, I am not satisfied that a ground of appeal as specified in section 327(3) is made out.

### Issues on appeal

6. The appellant challenges the AMS's assessment in two of the Psychiatric Impairment Rating Scale (PIRS) categories, being self-care and personal hygiene and travel. In each case, the appellant submits that the AMS's assessment does not accord with the descriptors in each category.

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7. My role and powers in making this decision are exercised under section 327 of the 1998 Act. They have been described as those of a "gatekeeper": *Marina Pitsonis v Registrar of the Workers Compensation Commission & Anor* [2008] NSWCA 88 (*Marina Pitsonis*). In *Kolundzic v Quickflex Constructions Pty Ltd* [2014] NSWSC 1523 (*Kolundzic*), Campbell J at [51] provided the following summary of the role of the Registrar:

"As has been said, the Registrar performs a gatekeeper function: *Campbelltown City Council v Vegan* [2006] NSWCA 284; 67 NSWLR 372 at [8] and [82]. His or her power is to determine whether on the face of the application and any submissions made 'at least one of the grounds of appeal specified in subsection (3) has been made out'. This is a precondition to an appeal involving an evaluative decision that at least one ground, on its face, is 'valid and apparently credible': *Vegan* at [8]."

8. In *Ballas v Department of Education (State of NSW)* [2020] NSWCA 86 (*Ballas*) the process of the Registrar in considering whether a ground of appeal is “made out” was held by Bell and Payne JA to be:

“This process does not involve the Delegate in assessing the correctness of the argument but simply that what has been put forward is arguable.”

9. For the following reasons, I do not consider the grounds of appeal relied on by the appellant to present an arguable case of error.

### **The PIRS categories**

10. For abundant clarity, lest I be accused of being “confused”, throughout these reasons, I will refer to the “scale” I am considering (per cl 11.11 of the Guidelines) as a “category” (per the PIRS rating form on page 60 of the Guidelines, as reflected on pages 8 and 9 of the MAC)<sup>1</sup>. The possible ratings, from 1 to 5, I will refer to as the “class”.
11. Psychiatric/psychological injuries are assessed in accordance with chapter 11 of the *NSW workers compensation guidelines for the evaluation of permanent impairment fourth edition* (the Guidelines). The Guidelines describe the PIRS as a way to assess the “behavioural consequences of psychiatric disorder”. There are six categories covering different areas of functioning. Each category contains examples of activities that an injured worker may or may not be able to perform. However, when considering the PIRS categories, it must be remembered that the examples given are examples only (cl 11.12 of the Guidelines), and are “generic and general in their description”: *Jenkins v Ambulance Service of New South Wales* [2015] NSWSC 633 at [62].
12. The pre-eminence of the AMS’s clinical judgement must also be recognised (per Campbell J in *Ferguson v State of New South Wales & Ors* [2017] NSWSC 887 (*Ferguson*) at [33]):

“By reference to *NSW Police Force v Daniel Wark* [2012] NSWCCMA 36, the Appeal Panel directed itself that in questions of classification under the PIRS:

‘... 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’.

### **Self-care and personal hygiene**

13. The AMS assessed class 1 in this category, providing the following reasons in the PIRS table on page 15 of the MAC:

“The applicant is living with her husband and two children in a mortgaged residence in Wallalong. She is showering twice a day, brushing her teeth twice a day and wearing clean clothes on a daily basis. She does “a lot of housework”, such as laundry, vacuuming, making the beds and washing the dishes. She noted she wipes down the bathroom daily and “scrubs the bath and toilet weekly”. She cooks “every day”. She is not missing meals. As such, there is no evidence of assessable impairment.”

14. The appellant submits that the worker best fits in class 2. It is noted that assessment under the PIRS is not on the basis of “best fit”, compared with the specific instruction contained in cl 14.8 (concerning scarring), which provides: “The TEMSKI is to be used in accordance with the principle of best fit”. No such similar instruction is provided in terms of consideration of the appropriate class within a PIRS category.

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<sup>1</sup> See *Ballas* at [87] and [99]

15. The AMS exercises clinical judgement to determine the appropriate class. A difference of opinion, or a view that a class should be higher, is not of itself a demonstrable error or the application of incorrect criteria.
16. The descriptor for class 1 in this category provides:

“No deficit, or minor deficit attributable to the normal variation in the general population”
17. Class 2, which the appellant submits was the appropriate classification, provides:

“Mild impairment: able to live independently; looks after self adequately, although may look unkempt occasionally; sometimes misses a meal or relies on take-away food.”
18. The appellant refers to the history recorded in the MAC which she says support a finding of class 2. In particular, on page 3, the appellant refers to the AMS’s history that (using the appellant’s quote): “she has lost a couple of kilograms since the previous evaluation... still has bad days... has intermittent difficulties lacking motivation and energy”. With all due respect to this submission, this selectively quotes from the history taken by the AMS and omits context and clarifying comments. The full quote (remembering that reasons must be read as a whole) provides:

“The applicant is fully compliant with her medication. She has lost a couple of kilograms since the previous evaluation. The applicant described her recent mood as “I still have my bad days and my good days ... I have more better days than bad days now”. She noted she has re-gained some of her humour. On a good day, she is able to enjoy some activities. She has intermittent difficulties lacking motivation and energy. She is getting tearful on a weekly basis, “at least”. She noted she is sleeping “better”. She is sleeping around six to eight hours per night with a lot of middle insomnia. She is no longer sleeping during the day, “unless I have a bad day.” She has had no suicidal ideation since the time of the previous evaluation. She has not made a suicide attempt or engaged in any deliberate self-harm. Her energy is erratic, some days I have good energy”. Her appetite is “fine”. She is able to enjoy spending time with her in-laws in Woodville, spending time with her parents such as to have a barbeque, playing games or crafts with the children, and “me and Leigh have been cooking – Leigh bought me a wood-fired pizza oven.””
19. For example, the appellant relies on a history that she “still has bad days”, however, when read in full, the history recorded is that “Still have my bad days and my good days... I have more better days than bad days now”.
20. Further, the loss of weight could be for any of a variety of reasons, and there is nothing in the history recorded above that it is due to the appellant’s psychological injury (or relevantly for the consideration of class 2, due to missing meals). In fact, the AMS specific records that the appellant’s appetite is “fine”, and that she has been cooking with her husband.
21. The appellant also relies on this aspect of the history recorded by the AMS and submits that the appellant does not cook her meals, her and her husband cook. Firstly, no evidence is provided for in support of this submission, and is inconsistent with the findings in the MAC as quoted above. Secondly, the relevance of this difference is not expanded on. It is clear that the appellant cooks. It may be with a support person or in conjunction with her husband. The Guidelines (in this category) do not distinguish. Thirdly, it must be remembered that the examples of activities are examples only, and the AMS should consider the worker’s functioning in a category as a whole. I am satisfied that this is what the AMS has done.
22. Accordingly, I am not satisfied, to the standard of a gatekeeper, that this ground of appeal is made out in terms of being arguable. The reasons provided by the AMS are clear and consistent with the history he took in the body of the MAC.

## Travel

23. The AMS assessed class 2 in this category and provides the following reasons in the PIRS table:

“The applicant noted the furthest she has travelled on an independent basis in recent times is the forty-five-minute trip from Wallalong to John Hunter Hospital to attend an appointment. However, she noted outside her appointments, she has not travelled further than the five to ten-minute trips in her local community. She has never been one to utilise public transport regularly. She has not had any recent holidays. Although she is able to travel outside her local community on an independent basis, such is rare and only for appointments. Utilising best clinical judgment, the deficit in her capacity is most consistent with a mild impairment.”

24. The appellant refers to two separate statements in the MAC concerning travel:

“She avoids thinking or talking about the trauma. She noted she avoids going out in her local community in fear of running into the perpetrators of the bullying and harassment.”

25. Contextually, this statement is provided in the context of the historical development of the injury, including symptoms of Posttraumatic Stress Disorder due to threats by the appellant’s ex-managers, who were associated with the Finks Motorcycle Club. In that regard, the comment was not necessarily about the applicant’s ability to travel, but when read in context, concerns her hypervigilance and fear.

26. The second statement appears under the heading “present symptoms”:

“She avoids going out by herself to the shops, after having a panic attack when she ran into one of the perpetrators there”.

27. The full paragraph provides further context of the appellant’s hypervigilance and triggers:

“The applicant noted she continues to have nightmares once to twice per week. She awakens agitated, heart racing, breathing faster, and shaking. She reported she has intrusive thoughts and images “not a great deal”, such as once per week associated with nausea, “panic attacks” including heart racing, tremulousness and rapid breathing. She reported she remains hypervigilant, especially after one of the staff involved in the bullying and harassment has been repeatedly coming into her son’s shop - the claimant believes he is trying to intimidate her. The claimant noted she is triggered by interactions with customers from Stratco who she is dealing with at the pharmacy. She is triggered by advertisements on the television or people yelling or arguing. She is less easily startled. She avoids thinking or talking about the trauma. She avoids going out by herself to the shops, after having a panic attack when she ran into one of the perpetrators there. She avoids the area of her old workplace. She engages in distraction in order to avoid being reminded of the trauma – she and the children have been “doing a lot of cooking and gardening ... and a lot of housework.””

28. The appellant submits that she fits within the class of moderate impairment for travel rather than mild impairment, based on the history recorded by the AMS that “she avoids going out by herself”, and had a panic attack at the shops.

29. Class 2 for travel, the assessment made by the AMS, provides:

“Mild impairment: can travel without support person, but only in a familiar area such as local shops, visiting a neighbour.”

30. Class 3 for travel, the assessment the appellant submits is appropriate, provides:  
“Moderate impairment: cannot travel away from own residence without support person. Problems may be due to excessive anxiety or cognitive impairment.”
31. In response, the respondent submits that there is no evidence that the appellant “cannot travel away from her own residence without a support person”, a requirement for class 3 impairment. Whilst the appellant avoids going out by herself, it is not evident that she cannot travel without a support person.
32. I accept the respondent’s submissions.
33. Whilst the AMS recorded a specific incident at the shops involving one of the perpetrators, he also records that she travelled to attend an appointment and the five to ten-minute trips in her local community. The AMS was of the view that this was consistent with class 2 impairment. Class 3 requires that a worker cannot travel away from own residence without a support person. This is not an example of an activity but rather a requirement. As the respondent submits, there is no evidence that the worker is unable to leave the house without a support person, but rather she avoids attending the shops without a support person. There is a clear history that she can attend appointments and the local community without support.
34. Reading the MAC as a whole, I am not satisfied that it is arguable that the MAC contains a demonstrable error or the AMS applied incorrect criteria. The appellant asserts that a higher category was appropriate, however the finding made by the AMS was open to him on the evidence and the history he took from the worker.
35. As I am not satisfied that at least one of the grounds of appeal as specified in section 327(3) has been made out, the appeal is not to proceed.

Parnel McAdam  
**Principal Lawyer**

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE DECISION ISSUED BY PARNEL McADAM, REGISTRAR’S DELEGATE, WORKERS COMPENSATION COMMISSION.

T Ng

Tina Ng  
Dispute Services Officer  
**As delegate of the Registrar**

