

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-5425/19
Appellant:	Duncan King
Respondent:	State of NSW (NSW Police Force)
Date of Decision:	28 April 2020
Citation:	[2020] NSWCCMA 79

Appeal Panel:	
Arbitrator:	Jane Peacock
Approved Medical Specialist:	Dr Lana Kossoff
Approved Medical Specialist:	Dr Michael Kong

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 30 January 2020, Mr Duncan King (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Wasim Shaikh, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 7 January 2020.
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):
 - availability of additional relevant information (being additional information that was not available to, and that could not reasonably have been obtained by, the appellant before the medical assessment appealed against);
 - 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.

Fresh evidence

8. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.
9. The appellant seeks to admit the following evidence:
 - (a) Statement of the appellant dated 29 January 2020.
10. The Appeal Panel determines that the following evidence should be received on the appeal:
 - (a) Statement of the appellant dated 29 January 2020.

EVIDENCE

Documentary evidence

11. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment as well as the statement of evidence admitted above and has taken them into account in making this determination.

Medical Assessment Certificate

12. 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

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

FINDINGS AND REASONS

14. 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.
15. 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.

16. 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: 9 January 2018 (deemed)
- Body parts/systems referred: Psychological
- Method of assessment: Whole Person Impairment”

17. 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. Psychological	9 January 2018 (Deemed)	PIRS		9%	0%	9%
Total % WPI (the Combined Table values of all sub-totals)					9% WPI	

18. The assessment was based on an assessment by the AMS conducted under the permanent impairment ratings scale (PIRS), as set out in the following table:

Table 11.8: PIRS Rating Form

Name	Duncan King	Claim reference number (if known)	5425/19
DOB	30 October 1967	Age at time of injury	50 years
Date of Injury	09 January 2018 (Deemed)	Occupation at time of injury	Police Officer
Date of Assessment	20 December 2019	Marital Status before injury	Married

Psychiatric diagnoses	1. PTSD	2. Major Depressive Disorder
	3. Alcohol Abuse	
Psychiatric treatment	Antidepressant	
Is impairment permanent?	Yes	

PIRS Category	Class	Reason for Decision
Self-Care and personal hygiene	2	Mild Impairment - he does not shower regularly, and requires some prompting from his wife, including for grooming. He has some involvement in cooking. He does housework, including mowing the lawn. He has some involvement in managing pets at home, including four dogs, a cat and birds, particularly when his wife is at work and his son is at school. He was well presented for the assessment, with evidence of good hygiene.
Social and recreational activities	2	Mild Impairment - he reports that he rarely socialises, and only with family and close friends. He has limited involvement in the local horse association, and attends to meetings, and very infrequently to events. He does invite friends to his place once a month for a barbeque/ dinner party. He has, earlier this year, been on a two week driving tour to North Queensland with a friend. He would go out with his wife for a

		meal once a month to six weeks. He can go by himself to the local shops. He does watch movies on Netflix.
Travel	1	No Impairment - he was capable of driving from home to Brisbane for the assessment (3 hrs each way). He noted that he struggled with concentration, but was able to complete the drive. He was to return the same day. He undertakes local driving for up to 30 minutes. During his trip to North Queensland, he did some driving. He and his friend camped by the side of the road, and also stayed at motels.
Social functioning	2	Mild Impairment - there has been strain in his relationship with his wife, due to his anger and mood swings. He finds the support from her to be irregular, "she does not understand where I'm coming from". He has had to sleep in a separate bedroom on certain days but there have been no periods of separation. He gets along well with his son and provides some support with his son's interest in motorbikes. He has always had limited contact with his family. He has friends coming over every month, and has one good friend with whom he travelled on the holiday.
Concentration, persistence and pace	3	Moderate Impairment - he can focus for about 20 to 30 minutes when watching a movie on Netflix. He otherwise struggled to follow instructions or read. He can read the news on the phone. He was able to prepare a statement but required assistance from his solicitor. He can focus whilst driving for short periods. There was some evidence of impaired concentration during the assessment.
Employability	5	Total Impairment - he is unsure if he would have the capacity to return to work, and cites his impaired concentration and anxiety to be an issue. He has been paid out by his superannuation for total and permanent disability. He is unlikely to be able to return to work in the near future.

Score

1	2	2	2	3	5
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Median Class

= 2

AGGREGATE IMPAIRMENT – 8% WPI

PRE-EXISTING IMPAIRMENT – 0% WPI

TREATMENT EFFECT– 1% WPI

FINAL IMPAIRMENT – 9% WPI

19. The AMS made no deduction under s 323 and adjusted the resultant 8% whole person impairment (WPI) for the effects of treatment by 1% WPI which left a final WPI of 9%.
20. The worker appealed.
21. The complaints on appeal concern the assessments made by the AMS under the PIRS (already abbreviated in [18] above) in respect of three of the categories, namely Social and Recreational Activities, Travel and Social Functioning. There was no complaint by either party on appeal about the adjustment of 1% WPI made by the AMS for the effects of treatment. Similarly, there was no complaint on appeal by either party about no deduction under s 323.

22. In summary, the appellant submitted that the AMS erred as follows:
- in his assessment of class 2 for social and recreational activities and submitted it should have been class 3;
 - in his assessment of class 1 for travel and submitted it should have been class 2, and
 - in his assessment of class 2 for social functioning and submitted it should have been class 3.
23. In summary, the State of NSW (NSW Police Force) (the respondent) submitted that the AMS did not apply incorrect criteria nor did he make a demonstrable error and that the MAC should be confirmed.
24. The assessments by the AMS in respect of three of the categories under PIRS were complained about on appeal.
25. The role of the AMS is to conduct an independent assessment on the day of examination. The AMS is required to take a history, conduct a mental state examination, make a psychiatric diagnosis and have due regard to other evidence and other medical opinion that is before the AMS. The AMS must bring his clinical expertise to bear and exercise his clinical judgement when making an assessment of impairment under the PIRS categories. The assessment is not to be based upon self-report alone. An appeal panel cannot disturb ratings under the PIRS scale for mere difference of opinion but must be satisfied as to error.
26. The Panel notes that the AMS has taken a detailed history of injury which is consistent with the other evidence that was before him.
27. The AMS has taken a detailed history of the workers self-reported present symptoms as follows:

“Mr King is currently resident in Billinudgel, near Byron Bay, with his wife of 25 years, and 14 year old son. His wife manages her own pet grooming business part time, 20 hours a week. Mr King discussed various symptoms, including recall phenomena, sleep disturbances, nightmares, and avoidance. The nightmares occur two to three times a week. He generally does not manage more than four hours of sleep at night. He reports that he avoids social engagements. He has ruminative thoughts of the incident.

He has reduced motivation to attend to the beach or be in crowds. He experiences anxiety, with some panic-like phenomena. He is easily fatigued, and has to have a nap most afternoons. He can be emotional, including teary. He also reports irritability and anger.

In relation to self-care and personal hygiene, he does not shower regularly, and requires some prompting from his wife, including for grooming. He has some involvement in cooking. He does housework, including mowing the lawn. He has some involvement in managing pets at home, including four dogs, a cat and birds, particularly when his wife is at work and his son is at school.

In terms of social and recreational activities, he reports that he rarely socialises, and only with family and close friends. He has limited involvement in the local horse association, and attends to meetings, and very infrequently to events. He does invite friends to his place once a month for a barbeque/dinner party. He has, earlier this year, been on a two week driving tour to North Queensland with a friend, although notes that he did not enjoy the same. He would go out with his wife for a meal once a month to six weeks. He can go by himself to the local shops. He does watch movies on Netflix.

In relation to his travel ability, he was capable of driving from home to Brisbane for the assessment. He noted that he struggled with concentration, but was able to complete the drive. He was to return the same day, driving for three hours. He undertakes local driving for up to 30 minutes. During his trip to North Queensland, he did some driving. He and his friend camped by the side of the road, and also stayed at motels.

In terms of social functioning there has been strain in his relationship with his wife, due to his anger and mood swings. He finds the support from her to be irregular, 'she does not understand where I'm coming from'. He has had to sleep in a separate bedroom on certain days but there have been no periods of separation. He gets along well with his son and provides some support with his son's interest in motorbikes. He has always had limited contact with his family. He has friends coming over every month and has one good friend with whom he travelled on the holiday.

In terms of his concentration, he can focus for about 20 to 30 minutes when watching a movie on Netflix. He otherwise struggled to follow instructions or read. He can read the news on the phone. He was able to prepare a statement but required assistance from his solicitor. He can focus whilst driving for short periods.

In relation to his work ability, he is unsure if he would have the capacity to return to work, and cites his impaired concentration and anxiety to be an issue. He has been paid out by his superannuation for total and permanent disability.

Mr King advises that he has had ideas of self-harm and has also on occasions made plans, but been prevented from doing anything due to thoughts about his son."

28. The AMS conducted a mental state examination and recorded his findings as follows:

"With regard to the *Mental State Examination*, the applicant presented as an aged male, casually dressed appropriate to the weather. He was balding. He was bearded. He had a couple of hearings. His front teeth bridge was loose. At times, such impeded his flow of speech, however, his speech was of normal rate, rhythm and volume. His thought processes were logical, relevant and coherent throughout. He described his recent mood as 'for the last two weeks, I have been stressed because I knew I was coming here'. On the other hand, prior to two weeks ago, he was 'pretty good'. His observed emotional tone was of broad range, reactive and stable with appropriate humour and laughter at times. There was no overt delusional material elicited. He was appropriately preoccupied with matters at hand. He denied any auditory or visual hallucinations. He denied any suicidal ideation."

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

"Summary of injuries and diagnoses:

Mr King clearly meets criteria to be diagnosed with Post-Traumatic Stress Disorder, Major Depressive Disorder, and Alcohol Abuse. From a DSM perspective, the following applies:

Axis I Clinical Syndromes
309.81 Posttraumatic Stress Disorder.

296.2 Major Depressive Disorder
305.0 Alcohol Abuse.

Axis II Developmental and Personality Disorders
V71.09 No Axis II Diagnosis

Axis III Physical Conditions
No Axis III diagnosis.

Axis IV Psychosocial and Environmental Problems
V62.2 Occupational Problem

Axis V Global Assessment of Functioning
GAF approx. 55-60”

30. The AMS’s role is to make an independent assessment on the day of examination. He must not base his assessment on self-report alone but must make a clinical judgment using his clinical expertise. The Panel’s notes the AMS’s comment on the appellant’s consistency of presentation as follows:

“Consistency of presentation:

There was some element of suggestibility. Mr King’s responses to his impairment seemed to be in keeping with the guidelines for psychiatric impairment.

From an overall perspective, he was a reasonable historian.”

31. The AMS has had regard to the other evidence that was before him and has explained where his opinions differed from the appellant’s IME DR Scurrah in the categories of Social and Recreational Activities, Travel and Social Functioning, which are the categories the subject of the appeal. The AMS explains why his opinion differs as follows:

“I disagree with ratings provided by Dr Scurrah.

- Dr Scurrah provides a rating of Class 3 for social and recreational activities, which generally applies to situations where the claimant ‘Rarely goes to social events, and mostly when prompted by family or close friend. Will not go without a support person. Not actively involved, remains quiet and withdrawn’. Mr King has dinner parties and barbeques at home. He goes out once a month or so with his wife for a meal. He can leave the house by himself, and travel a fair distance away. He has been able to go on a driving trip to North and Central Queensland. This does not indicate moderate impairment.
- Dr Scurrah has provided a Class 1 impairment in travel, but as noted, he has, despite noted anxiety, substantial travel ability.
- Dr Scurrah provides a Class 3 impairment in terms of social functioning, which generally applies when previous relationships are severely strained, evidenced by periods of separation or domestic violence. Mr King, whilst having a strained relationship, does not have periods of separation. He has a good relationship with friends, as well as his son.

I am in disagreement with Dr Ng, in terms of opinion on maximal medical improvement, for reasons explained above.”

32. The panel, after careful review, can discern no error in the ratings ascribed by the AMS to each of the categories complained about on appeal. There was no application of incorrect criteria. Each of the ratings were open to the AMS in accordance with the correct application of the criteria in the Guides. The AMS has given reasons for each rating. He has given a clear and reasoned explanation, that is based on the application of his clinical expertise, for why his impairment ratings differ from that of Dr Scurrah in the categories of Social and Recreational Activities, Travel and Social Functioning. The ratings ascribed by the AMS in each of these categories accord with the criteria for each class. The Panel cannot interfere with these ratings absent error by the AMS.
33. In respect of Social and Recreational Activities Table 11.2 of the Guidelines provides as follows:

Table 11.2: Psychiatric impairment rating scale – social and recreational activities

Class 1	No deficit, or minor deficit attributable to the normal variation in the general population: regularly participates in social activities that are age, sex and culturally appropriate. May belong to clubs or associations and is actively involved with these.
Class 2	Mild impairment: occasionally goes out to such events eg without needing a support person, but does not become actively involved (eg dancing, cheering favourite team).
Class 3	Moderate impairment: rarely goes out to such events, and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn.
Class 4	Severe impairment: never leaves place of residence. Tolerates the company of family member or close friend, but will go to a different room or garden when others come to visit family or flat mate.
Class 5	Totally impaired: Cannot tolerate living with anybody, extremely uncomfortable when visited by close family member.

34. The AMS has rated the appellant at class 2 Mild impairment explaining his reasoning as follows:

“Mild Impairment - he reports that he rarely socialises, and only with family and close friends. He has limited involvement in the local horse association, and attends to meetings, and very infrequently to events. He does invite friends to his place once a month for a barbeque/ dinner party. He has, earlier this year, been on a two week driving tour to North Queensland with a friend. He would go out with his wife for a meal once a month to six weeks. He can go by himself to the local shops. He does watch movies on Netflix.”

35. The AMS explained why his opinion differed from that of Dr Scurrah, who had rated the appellant as moderately impaired at class 3, as follows:

“Dr Scurrah provides a rating of Class 3 for social and recreational activities, which generally applies to situations where the claimant ‘Rarely goes to social events, and mostly when prompted by family or close friend. Will not go without a support person. Not actively involved, remains quiet and withdrawn’. Mr King has dinner parties and barbeques at home. He goes out once a month or so with his wife for a meal. He can leave the house by himself, and travel a fair distance away. He has been able to go on a driving trip to North and Central Queensland. This does not indicate moderate impairment.”

36. The Panel considers, even with regard to the evidence in the appellant’s statement, that the rating of a mild impairment in this class was open to the AMS on the evidence, accorded with the criteria in Table 11.2, and the panel can discern no error in the exercise of the AMS’s clinical judgment in rating a mild impairment in the class of Social and recreational Activities.
37. In respect of Travel, the Guidelines provide as follows at Table 11.3:

Table 11.3: Psychiatric impairment rating scale – travel

Class 1	No deficit, or minor deficit attributable to the normal variation in the general population: Can travel to new environments without supervision.
Class 2	Mild impairment: can travel without support person, but only in a familiar area such as local shops, visiting a neighbour.
Class 3	Moderate impairment: cannot travel away from own residence without support person. Problems may be due to excessive anxiety or cognitive impairment.
Class 4	Severe impairment: finds it extremely uncomfortable to leave own residence even with trusted person.
Class 5	Totally impaired: may require two or more persons to supervise when travelling.

38. The AMS considered that the appellant had no impairment with the following explanation:

“No Impairment - he was capable of driving from home to Brisbane for the assessment (3 hrs each way). He noted that he struggled with concentration, but was able to complete the drive. He was to return the same day. He undertakes local driving for up to 30 minutes. During his trip to North Queensland, he did some driving. He and his friend camped by the side of the road, and also stayed at motels.”

39. The Panel can discern no error in this assessment by the AMS, given the travel undertaken by the appellant.
40. In respect of social functioning, the Guidelines provide at Table 11.4 as follows:

Table 11.4: Psychiatric impairment rating scale – social functioning

Class 1	No deficit, or minor deficit attributable to the normal variation in the general population: No difficulty in forming and sustaining relationships (eg a partner, close friendships lasting years).
Class 2	Mild impairment: existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships.
Class 3	Moderate impairment: previously established relationships severely strained, evidenced by periods of separation or domestic violence. Spouse, relatives or community services looking after children.
Class 4	Severe impairment: unable to form or sustain long term relationships. Pre-existing relationships ended (eg lost partner, close friends). Unable to care for dependants (eg own children, elderly parent).
Class 5	Totally impaired: unable to function within society. Living away from populated areas, actively avoiding social contact.

41. The AMS rated the appellant as class 2 Mild Impairment with the following explanation:

“Mild Impairment - there has been strain in his relationship with his wife, due to his anger and mood swings. He finds the support from her to be irregular, 'she does not understand where I'm coming from'. He has had to sleep in a separate bedroom on certain days but there have been no periods of separation. He gets along well with his son and provides some support with his son's interest in motorbikes. He has always had limited contact with his family. He has friends coming over every month, and has one good friend with whom he travelled on the holiday.”

42. The AMS explained why his rating differed from Dr Scurrah who assessed class 3 as follows:

“Dr Scurrah provides a Class 3 impairment in terms of social functioning, which generally applies when previous relationships are severely strained, evidenced by periods of separation or domestic violence. Mr King, whilst having a strained relationship, does not have periods of separation. He has a good relationship with friends, as well as his son.”

43. The Panel can discern no error in the exercise of the AMS's clinical judgment in the assessment of a mild impairment in the class of social functioning. It accords with the criteria in Table 11.4 and is the best fit in that class noting the strain on, but not breakdown of, the appellant's close relationships.

44. The ratings the AMS has ascribed in each of the classes of Social and Recreational activities, Travel and Social functioning accord with the criteria in the Guides. The panel cannot disturb these ratings absent error by the AMS which the Panel cannot discern. The ratings for each of these categories are well-reasoned, not based on self-report alone and have had due regard to the history taken by the AMS, the mental state examination conducted by him, and having due regard to the other evidence that was before him. The AMS has exercised his clinical judgment on the day of examination and the Panel can discern no error.

45. For these reasons, the Appeal Panel has determined that the MAC issued on 7 January 2020 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

