WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1597/19**
Appellant:	**Emily Stevens**
Respondent:	**Secretary, Department of Education**
Date of Decision:	**3 September 2020**
Citation:	**[2020] NSWWCCMA 142**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Professor Nicholas Glozier**
Approved Medical Specialist:	**Dr Patrick Morris**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 7 May 2020, Emily Stevens, the appellant, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Wayne Mason, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 8 April 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,
    - 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 WorkCover Medical 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 WorkCover Medical 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). "WPI" is reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 20 February 2020, further to an Order of Arbitrator Bachelor following a defended hearing, a further amended referral was made to the AMS for assessment of WPI caused by a psychiatric/psychological disorder on the deemed date of 17 December 2010.

7. The facts regarding the onset of Ms Stevens' condition are not in dispute. They were described by Arbitrator Bachelor, and the AMS himself referred to an earlier MAC he had issued dated 28 August 2019 for a General Medical Dispute.

8. To summarise, Ms Stevens qualified at the University of Technology with a Bachelor of Teaching Degree. She commenced work as a High School Art Teacher in 2008 at Castle Hill High School. During 2009, in late term 3 or early term 4, a colleague died of breast cancer within six months. The loss of her colleague affected Ms Stevens and she began to have more difficulty in the workplace.

9. By 2010, she was teaching two separate HSC classes, which was double the normal load. She was struggling under this pressure about which her superiors were aware. She suffered increasing emotional and psychological problems and she applied for a full year's leave in 2011. She became panicked about her return to work that she was given an anti-depressant medication by her GP on 24 December 2010.

10. Her symptoms continued unabated and she was referred to a psychiatrist, Dr Eng Lim, from whom she received treatment both before and after she went to New Zealand in 2011.

11. In 2012 she moved to Wingham to stay with her mother. During this time she was housebound and profoundly depressed. She took no medication at that time.

12. She moved back to Sydney in 2013 and moved around in the Camperdown/Newtown area. She said that at that time she went "quite wild" and was socialising, clubbing, drinking alcohol to excess, using some recreational drugs and engaging in brief relationships. She described the 12 month period consistent with hypomania.

13. She had some psychological counselling with Dr Jennifer Flatt. When she broke up with her boyfriend she became quite distressed and presented in a suicidal state to the Emergency Department of Royal Prince Alfred Hospital. She was referred to Dr Tony Merritt, Psychologist with a provisional diagnosis of borderline personality disorder.

14. In 2014 she then went to stay with her mother in Wingham and returned to Sydney where she found accommodation in Surry Hills.

15. She attended a number of psychiatrists including:

    (a) Dr Liz Cannon at Broadway in 2015;
    (b) Dr Mark Rowe at Greenwich in 2015 and 2016;
    (c) Dr Matthew Davies of Roseville in 2015 and 2016;
    (d) Dr Jan Siefken of Sydney in 2017 (who did not agree to treat her), and
    (e) Dr Adam Bayes of Surry Hills from January 2018.

16. Dr Bayes was at that time her treating psychiatrist.

17. Ms Stevens had been referred to second opinions to Professor Philip Mitchell at Randwick and Professor Gordon Parker at Randwick.

18. The AMS said[1]:

> "All psychiatrists agreed that she suffered from a major depressive disorder on the background of a bipolar affective disorder (type 2). There was some difference of opinion regarding the diagnosis of a borderline personality disorder, with one psychiatrist (Dr Siefken) offering the opinion that she presented with an underlying borderline personality organisation which became significantly symptomatic under stress."

[1] Appeal papers page 33

19. Ms Stevens has been treated with a wide range of medication and her alcohol consumption was described as being at levels of two bottles of wine and four long neck bottles of beer per day until six months before the consultation on 28 August 2019. At that time Ms Stevens had agreed to an alcoholic detoxification programme and had been alcohol free since February 2019, apart from the last two weeks when she had been drinking one bottle of wine per day over the last six days because of anxiety regarding the General Medical Dispute of 28 August 2019.

20. In his current MAC the AMS took a further history that Ms Stevens had lived in New Zealand from May 2012 to March/April 2013, with a visit back to Australia over Christmas 2012. She lived at Wanaka near Queensland and lived like a hermit.

21. Further past history was obtained as to prior relationships and her last particularly distressing relationship had ended at the time Ms Stevens was working as an art teacher at Castle Hill High School. She became very distressed over that loss.

22. There was only one other close friend once that relationship had finished, a woman called Elise. However that friendship had ceased in 2015 because Elise could not cope with Ms Stevens's difficulties.

23. She described further relationships in 2013 during her hypomania period, following which she became acutely suicidal, resulting in her presentation at Royal Prince Alfred Hospital and referral to psychologists Mr Tony Merritt, as well as the local community mental health team.

24. The AMS certified a WPI of 19% but the doctor deducted therefrom 3/10th pursuant to the provisions of s 323 of the 1998 Act, leaving a combined table value of 13%.

PRELIMINARY REVIEW

25. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.

26. The appellant requested that she be re-examined by an AMS who is a member of the Panel. For the reasons given below, a re-examination was not required.

EVIDENCE

Documentary evidence

27. 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

28. 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

29. Both parties made written submissions which have been considered by the Appeal Panel.

FINDINGS AND REASONS

30. 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.

31. 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.

32. The appellant adopted a two pronged challenge to the finding by the AMS. Firstly it was alleged that the assessment of 19% WPI ought to have been significantly greater. Secondly, the deduction pursuant to s 323 of 2/10^{ths} was challenged.

33. The appellant placed significant weight on the documents it sought to have admitted to the appeal by way of additional evidence. The evidence consisted of the documents Ms Stevens consulted during the assessment process with the AMS. It is convenient to deal with the admissibility of those documents after considering the submissions.

The Psychiatric Impairment Rating Scale (PIRS)

34. The Psychiatric Impairment Rating Scale is established as the rating criteria for assessing psychiatric/psychological impairment, by virtue of Chapter 11 of the Guides. Chapter 11 sets out six categories of behaviour to be considered, each being divided into five classes, ranging in seriousness from 1 to 5. Class 1 relates to a situation where there is no psychological deficit, or a minor deficit attributable to the normal variation in the general population. Class 5 pertains to a person who is totally impaired.

35. Chapter 11.12[2] provides:

> "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."

36. The assessor is required to classify each category, and to apply the resulting scores as set out in Chapter 11[3].

37. The assessment of psychiatric disorder has been considered in a number of cases. In *Ferguson v State of New South Wales*[4] Campbell J was concerned the case where the Medical Appeal Panel had revoked the MAC on the basis that the finding by the AMS had been glaringly improbable. His Honour found that the Panel had fallen into jurisdictional error. He said at [23]:

> "By reference to *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 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'.
>
> 24. The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were

[2] Guides 55
[3] See 11.15-11.21 at Guides p 65 and Table 11.7 at Guides p 66
[4] [2017] NSWSC 887 (*Ferguson*)

regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.

25. The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides 'the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment': Appeal Panel reasons at [37]. The descriptors, or examples, describing each class of impairment in the various categories are 'examples only': see *Jenkins v Ambulance Service of New South Wales*[5]. The Appeal Panel said 'they provide a guide which can be consulted as a general indicator of the level of behaviour that might generally be expected': Appeal Panel reasons at [37]."

38. In *Glenn William Parker v Select Civil Pty Ltd*,[6] another case regarding assessment of psychiatric disorder, Harrison AsJ cited [23] of *Ferguson* with approval at [65]. Her Honour said at [66]:

> "In relation to classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense. (*Ferguson* [24])….."

39. In *Jenkins* Garling J said at [73]:

> "It was a matter for the clinical judgment of the AMS to determine whether the impairment with respect to employability was at the moderate level, as he did, or at some other level. But, in seeking judicial review, a mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to judicial review."

The impugned PIRS categories

40. The appellant submitted that demonstrable errors had been made in all categories save that of employment, that is:

- Self-care and personal hygiene
- Social and recreational activities
- Travel
- Social functioning
- Concentration, persistence and pace

41. We note that the assessment was conducted by way of video link.

42. Before embarking upon a consideration of the detail of the appellant's submissions regarding each category, it is convenient to set out the findings by the AMS on his examination of the appellant's mental state. This was conveniently summarised by the respondent as follows[7]:

> "3.25 In particular on mental state examination (paragraph 5 MAC) the appellant:
> a. was neatly dressed and well-presented without make up;
> b. was not depressed in appearance and displayed a full range of appropriate effect throughout the interview (of 2 hours);

[5] [2015] NSWSC 633 (*Jenkins*)
[6] [2018] NSWSC 140 (*Parker*)
[7] Appeal papers page 28

c. was capable of humorous and positive feelings;
d. was tearful briefly on a few occasions;
e. at times displayed an effect that was incongruent with the material under discussion (giving an implausible explanation);
f. showed no overt evidence of anxiety;
g. showed no evidence of cognitive impairment such as memory difficulty or lapses of concentration and her thinking appeared to be quite sharp;
h. was very aware of the categories and scoring levels of the psychiatric impairment rating Scale;
i. referred to her own self assessments as the AMS conducted his assessment of her level of functioning;
j. had a very well-developed knowledge of psychiatric conditions and psychiatric treatment modalities;
k. had fully researched monoamine oxidise inhibitors and transcranial magnetic stimulation;
l. offered agoraphobia as a diagnosis;
m. was fully oriented in time person and place;
n. displayed no evidence of organic or psychotic psycho pathology."

Self-care and personal hygiene

43. The class 2 descriptors were as follows[8]:

> "Class 2 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."

44. The class 3 descriptors are:

> "Class 3 Moderate impairment: Can't live independently without regular support. Needs prompting to shower daily and wear clean clothes. Does not prepare own meals, frequently misses meals. Family member or community nurse visits (or should visit) 2–3 times per week to ensure minimum level of hygiene and nutrition."

45. The AMS assessed Ms Stevens as a class 2, saying:

> "Ms Stevens showers twice weekly in order to attend her psychologist. She said she does her laundry regularly and always wears clean clothing; she would not want to draw attention to herself by being smelly or dirty. She eats once daily and uses frozen or takeaway meals which she has delivered, or else makes a sandwich. She did not look malnourished. She said the tidiest part of her apartment was what I could see, which consisted only of the couch and a wall with an art work on it. She said the rest of the place is never cleaned; it is dusty, covered in dog hair and she has 'stuff' piled up everywhere. She said she thought 'this was her lowest score, either 2 or 3', referring to the PIRS category. In my opinion she is mildly impaired."

Submissions

46. The appellant referred to the reasons given by the AMS regarding the twice weekly showering she took in order to attend her psychologist. The appellant then stated[9]:

> "The appellant needs prompting by the scheduled appointments to shower and dress, and does not do so daily."

[8] Guides page 56
[9] Appeal papers page 9 [18]

47. Ms Stevens contended that the descriptor of needing to be prompted to shower daily and wear clean clothes applied to her, and was therefore an example of a class 3 impairment.

48. Reference was then made to the AMS's comment that Ms Stevens ate once a day, and used frozen or takeaway meals which she had delivered, or else made a sandwich.

49. The appellant submitted that it could be therefore concluded that Ms Stevens does not prepare her own meals which was equivalent also of one of the descriptors for a class 3 impairment.

50. The appellant then referred to the comments by the AMS, which repeated Ms Stevens' statement that the part of her place that the AMS could not see on the video link was never cleaned, and was "dusty, covered in dog hair and had "stuff" piled up everywhere."

51. The appellant then asserted that "Ms Stevens cannot attend to her home in a minimal level and ostensibly support services should visit her residence".

52. This, it was argued, should have led to an inference that the AMS should have found - that a family member or community nurse should visit to ensure a minimum level of hygiene and nutrition in accordance with one of the descriptors in class 3.

53. The appellant then stated that before the AMS there was evidence of deliberate self-harm involving cutting, skin picking and chronic alcohol abuse. Indeed, it was submitted, in the GMD MAC of 28 August 2019, the AMS had accepted that she had suicidal ideation.

54. In contrast to the argument that the AMS ought to have assessed a class 3, the appellant appeared to abandon that argument and submitted that the AMS should have found a class 4 in this category on the basis of a descriptor that there appears; "if unsupervised, may accidently or purposely hurt self".

55. Be that as it may, the appellant concluded her submissions as to this category by stating that the assessment of impairment by the AMS was inaccurate "due to relevant and significant evidence being discounted or omitted".

Decision

56. It is fundamental that if a submission alleges the existence of a fact, it must be independently established within the evidence. The appellant in this case has asserted the existence of many facts in her submissions, but has not supported her assertions by reference to the evidence, or by additional evidence in the form of a further statement or other relevant material. (As will be seen, we have not been assisted by the documents that have been lodged as additional evidence.)

57. We were not referred to the evidence on which the assertion that Ms Stevens needed prompting to shower and dress when she saw her psychologist was founded. The AMS simply observed that the appellant showered twice weekly for that purpose. He said nothing about any need for Ms Stevens to be prompted. The submission is founded on speculation and is rejected.

58. We would also observe that in any event, the complaints made by a claimant are but part of the material an AMS has to consider. His clinical appraisal will include an assessment of the medical evidence, and an assessment of the reliability of the claimant his/herself. As Campbell J indicated in *Ferguson,* 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 AMS.

59. The submission regarding whether Ms Stevens prepared her own food we found to be somewhat trivial, particularly as pre-prepared food and meal delivery now constitute regular meals for much of the population. The appellant sought to establish an inference that the AMS's comments regarding her eating habits meant that she was unable to prepare her own meals. That was not the finding of the AMS – indeed for Ms Stevens to make her own sandwich would entail some preparation in any event. Reliance on takeaway food, we observe, is one of the descriptors for a class 2 assessment in any case. Further, the comment by the AMS that she did not look malnourished indicated that he did not consider her self-care was commensurate with a class 3 finding. As we have shown in the cases we referred to above, an appellant has to show that the issue is more than a "mere disagreement" or a "mere difference of opinion on a subject about which reasonable minds might differ".

60. The appellant also appeared in her submissions to mistake the descriptors as criteria. They are not. They are examples only, as was also found in the above authorities. The AMS has given a thorough and well considered MAC, and we see no glaring improbability in any of the examples he utilised in his reasons.

61. The AMS has clearly applied his clinical skill and considered his classifications with some care, and his reasoning has included some reservations as to the reliability of the appellant's presentation which we discuss below.

62. With regard to Ms Steven's assertion regarding the state of her place, again the appellant has adopted the approach of seeking to draw an inference from a finding of the AMS. We were not referred to any evidence which supported her submission. There was no evidence apart from the appellant's reported statement to the AMS of what condition her home was in. That statement was not adopted by the AMS and in any event was of such generality that it did not amount to a suggestion that Ms Stevens was unable to ensure for herself a minimum standard of hygiene.

63. The submission that an inference could be drawn that support services as defined in the class 3 descriptors were accordingly necessary is fanciful, and is another example of where the appellant has construed the reasons for the AMS's assessment too minutely, and with an eye too keenly attuned to the perception of error.[10]

64. We reject the submission that in fact the AMS should have certified a class 4 value on account of historical episodes of self-harm. The AMS took a history that Ms Stevens had been admitted to Royal Prince Alfred Hospital in June 2013 due to a risk of self-harm, and this was discussed by him in his GMD MAC of 28 August 2019. The AMS also noted Ms Steven's declaration that she believed she would commit suicide if she did not have her dog. The panel are not persuaded by the implicit assumption that her dog has supervised her since 2013 and prevented any self-harm over those seven years.

65. These matters had the potential to impact on this category, but again depended on the clinical assessment by the AMS. In the context of the care with which he has approached Ms Steven's statements, and the circumspection evident in his reasons, we accept that this behaviour was not a relevant consideration at the time of the assessment.

66. We confirm the classification in this category, and that it reflected a proper application of the professional skill and judgment by the AMS.

[10] See *Jones v The Registrar WCC* [2010] NSWSC 481 per James J at [36], citing Handley AJA in ***Bojko v ICM Property Service Pty Ltd*** [2009] NSWCA 175

Social and recreational activities

67. The AMS applied a class 3 rating to this category. Table 11.2 contains the descriptors for the various classes of behavioural consequences and a class 3 provides:

> "Class 3 Moderate impairment: rarely goes out to such events[11] and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn."

68. The appellant submitted that a class 4 or 5 assessment ought to have been made. Class 4 provides:

> "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."

69. Class 5 provides:

> "Class 5 Totally impaired: Cannot tolerate living with anybody, extremely uncomfortable when visited by close family member."

70. The AMS said[12]:

> **"Social and recreational activities:** Ms Stevens said she has no social or recreational activities apart from taking her dog to the park. She said she doesn't read, but then remarked, "that belongs in the concentration category" (of the PIRS). She does not go to art galleries, cinemas or the library. Nor does she go out with friends for recreational activities. She does not indulge in her hobby of photography. In my opinion she is moderately impaired."

71. The AMS also recorded under "Present Symptoms":[13]

> "…..She said she doesn't like her mother to worry about her so she contacts her by SMS almost every day but she is not honest about her state. She said her mother visits a couple of times a year but she doesn't let her stay in her home. She said it is bad enough having her inside her home as a visitor. She said she last visited her mother in Wingham in 2015 and since then has lived in the same place in Surry Hills …… At this point in the interview she said she felt very uncomfortable about me being in her home, even though it was via a screen."

Submissions

72. The appellant referred to the descriptor under class 5 and submitted that an inference was available from the AMS's comments that Ms Stevens could not tolerate living with anybody and was extremely uncomfortable when visited by a close family member, thus qualifying for a class 5 assessment.

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[11] These are identified in descriptors under class 1 and 2 as being "social activities that are age, sex and culturally appropriate. May belong to clubs or associations and is actively involved with these" and in the case of a mild impairment, class 2, occasionally able to go "out to such events e.g. without support person but does not become actively involved (e.g. dancing, cheering favourite team.",

[12] Appeal papers page 37

[13] Appeal papers page 35

73. With regard to the findings of the AMS Ms Stevens walked her dog in the park, the appellant said[14]:

> "However Ms Stevens's dog is an accredited psychiatric assistance animal. Protected by the Disability Discrimination Act, an assistance animal is akin to a medical aid. The animal enables Ms Stevens to level her place of residence as times, by alleviating the effects of some of her psychiatric symptoms related to being away from the home".

74. This, the appellant submitted, could be parlayed into a finding Ms Stevens never leaves her residence pursuant to the descriptor in class 4.

Decision

75. We repeat the principles to which we referred above. Allegations of fact contained within submissions must be supported by the evidence, and it is an error to treat the descriptors as criteria.

76. We were asked to draw an inference that Ms Stevens was totally impaired because she said that she felt uncomfortable about the AMS having even a virtual presence in her home. We also repeat the statements made by a claimant are but part of the material an AMS has to consider, and in this case he has clearly referred to the reservations he held as to the reliability of Ms Steven's assertions. He referred to Ms Stevens' knowledge of the psychiatric impairment rating scale in both his findings on examination, and in the reasons he gave in this category. She suggested to him that one comment she made as to reading "belongs in the concentration category," and she used the terminology of a class 5 social and recreational activities descriptor in saying she was "uncomfortable" about the AMS's virtual presence in her home.

77. Whilst such familiarity might be understandable in a person preparing for an assessment, when considered with the other findings on examination by the AMS we have referred to above, the clinical assessment of the behavioural consequences of Ms Stevens' condition did not convince him that the matters she was describing were as significant as either she would have had him find, or as significant as the appellant contends before us.

78. The submission that that Ms Stevens' dog was an accredited psychiatric assistance dog protected by the Disability Discrimination Act we had difficulty understanding in context. The AMS described the dog as Ms Stevens' "companion" dog, so he was aware to that extent of its purpose, and this would have informed his rating. There is no evidence that it attained the status described in the submission, but even had there been, the appellant seemed to be asserting that because the dog was akin to a medical aid, the act of walking it in the park could not be seen as sociable or recreational. Again, the appellant was relying on facts that had not been proved to establish an inference that was based on speculation.

79. The panel are aware of the paras 1.29 and 1.30 of the guidelines regarding the treatment of assistive devices. In this respect if the dog were an assistive device (and we are not convinced that it meets the definition of an "orthosis" or "prosthesis") the AMS would have rated her social and recreational activities that she did without the dog. However there is no evidence that the dog does function as an "assistive device" and enable the appellant to undertake any social and/or recreational activities as she avoids other social and recreational situations. She does not go to art galleries, cinemas or the library. Nor does she go out with friends for recreational activities. She goes to the park specifically to walk the dog rather than vice versa. As such the Panel do not find that these paragraphs can be applied.

80. We confirm the assessment in this category.

[14] Appeal papers page 11 [38]

Travel

81. The AMS applied a class 3 rating in this category. Class 3 provides:

> "Class 3 Moderate impairment: cannot travel away from own residence without support person. Problems may be due to excessive anxiety or cognitive impairment."

82. The appellant contended that a class 4 assessment was more appropriate.

83. The class 4 descriptor is as follows:

> "Class 4 Severe impairment: finds it extremely uncomfortable to leave own residence even with trusted person."

84. Class 2 provides:

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

85. The AMS found[15]:

> **"Travel:** Ms Stevens is able to drive alone as far as Centennial Park, which is a 1.5 km journey. She can also attend her psychologist, general practitioner and local supermarket unaccompanied. Prior to 2015, she had been able to drive to Wingham and had been able to manage overseas travel to New Zealand. She said she is unable to use public transport now because of anxiety and could not fly for the same reason. She could not drive further than Centennial Park. In my opinion she is moderately impaired."

Submissions

86. The appellant conceded that Ms Stevens drove to Centennial Park with her dog.

87. She advised that the locations to which Ms Stevens travelled were all in the local area to where she lived. Whether she drove or walked to the locations she mentioned (shops, medical treaters) was not mentioned.

88. A Class 4 rating was accordingly appropriate.

Decision

89. The evidence did not establish the primary descriptor for a class 3 descriptor, which is that she could not travel away from her own residence without a support person. The submissions as to this category indeed accept that a support person was not a pre-requisite for her travelling away from her own residence. It was also stated (again without reference to any supporting evidence) that Ms Stevens travels to familiar places without a support person. The AMS noted she only drove to Centennial Park to walk her dog, who he recorded was a 'companion dog'. Conversely there is no evidence of any necessity of any type of support for her other regular local travel.

90. The appellant did not elaborate as to why a class 4 rating was appropriate. On her own submissions it appears that she concedes that she fulfils the description of a class 2 rating. It follows that the class 3 assessment is erroneous.

[15] Appeal papers page 37

Social functioning

91. The AMS assessed a class 3 impairment. The descriptors for a class 3 are as follows:

> "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."

92. Ms Stevens argued that she qualified for a class 5 rating. Class 5 descriptors are:

> "Class 5 Totally impaired: unable to function within society. Living away from populated areas, actively avoiding social contact."

93. The AMS's findings were:[16]

> "**Social functioning:** Ms Stevens is not in a relationship and said she has no friends. I note she was not in a relationship at the time of her work injury and had only one friend. She maintains contact with her mother on almost a daily basis via SMS, but does not maintain contact with her father and has irregular contact with her brother who lives in America. She will not allow visitors into her home. The work injury has cost her only friendship. In my opinion she is moderately impaired."

Submissions

94. The appellant challenged this finding by surveying her history, which included her 2011-2012 sojourn in Wanaka in New Zealand and her staying with her mother at Wingham, which apparently is also a small isolated town.

95. Reference was also made to the findings of the AMS, including that Ms Stevens was not involved in a relationship. The appellant referred to a comment made by the AMS when dealing with the details of a previous period of hypomania when she presented in a suicidal state in 2013 following a breakup with her boyfriend of six months. The appellant also referred to the comment by the AMS that Ms Stevens was now a virtual hermit.

96. The history of Ms Stevens' sojourns in Wanaka and Wingham qualified her for a class 5 rating, she submitted. She was thus living away from populated areas and unable to function in society.

Decision

97. As with her submissions in all categories, the appellant has placed emphasis on her various statements that have been recorded by the AMS. We repeat that such statements are only part of the material an AMS has to consider in his assessment, as we have explained above.

98. The appellant has selected various statements made by the AMS and ignored the context in which they were made. She relied upon evidence that covered her movements over a number of years and she did not seek to make any distinction between the discussion by the AMS when he was discussing her personality disorder, and the subject injury. This aspect of the case will be discussed further when we come to consider the challenge to the s 323 deduction.

99. Suffice it to say that an AMS is required by Chapter 1.6a of the Guides to assess a claimant as he/she presents on the day of assessment. Whilst relevant medical history and medical information is taken into account, it is the condition of the appellant at the time of assessment that is the relevant factor.

[16] Appeal papers page 37

100. Ms Stevens has been living in Surry Hills since 2015, so we are satisfied that she is not living away from populated areas. The appellant's submissions did no more than evidence her disagreement with the rating. No error has been made by the AMS.

Concentration persistence and pace

101. The AMS assessed Ms Stevens as a class 1 impairment in this category. That provides:

> "Class 1 No deficit, or minor deficit attributable to the normal variation in the general population. Able to pass a TAFE or university course within normal time frame."

102. The appellant submitted that her impairment was consistent with a "class 3 rating or greater".

103. A class 3 rating is described as:

> "Class 3 Moderate impairment: unable to read more than newspaper articles. Finds it difficult to follow complex instructions (e.g. operating manuals, building plans), make significant repairs to motor vehicle, type long documents, follow a pattern for making clothes, tapestry or knitting."

104. A class 4 impairment is described as:

> "Class 4 Severe impairment: can only read a few lines before losing concentration. Difficulties following simple instructions. Concentration deficits obvious even during brief conversation. Unable to live alone, or needs regular assistance from relatives or community services."

105. A class 2 impairment is described as:

> "Mild impairment: can undertake a basic retraining course, or a standard course at a slower rate. Can focus on intellectually demanding tasks for periods of up to 30 minutes. Then feels fatigued or develops headache."

106. The reasons given by the AMS were[17]:

> **"Concentration, persistence and pace:** Ms Stevens told me this is not good. She said she gets tired and finds it hard work to read a letter. She said her mind is muddy and not sharp. When I pointed out it seemed to be excellent throughout the interview she explained she was trying very hard. She said all her household accounts are automated because she had a habit of forgetting to pay them. She said she doesn't keep track of dates; she agreed she does not miss her regular appointments. I noticed throughout the interview that Ms Stevens consulted papers that she had on the couch beside her. There was no evidence of impaired concentration. The interview lasted two hours with a brief comfort break at one hour and her attention did not flag. In my opinion she is unimpaired."

Submissions

107. Ms Stevens submitted that the "evidence before the AMS showed that Ms Stevens has failed in her attempt to study in "2013". It was alleged "she was unable to pass a course, or even the preliminary components of the course, which was at an equivalent institution to TAFE (the Commercial Arts Training College)". This we take to be reference to paragraph 41 of Ms Stevens's supplementary statement[18] in which she said:

[17] Appeal papers page 37
[18] Appeal papers page 78

> "41. I attempted to try and study at the commercial arts training college but was only able to get through two units and I had to withdraw."

108. She went on to describe at paragraph 43 as she was unable to try any work until "around December 2012" which would imply that her attempt to study occurred before that date.

109. There was no evidence as to the applicant being unable to pass the preliminary components of the course, that it was an equivalent institution to TAFE, or that her reason for withdrawal was cognitive impairment rather than the social stressors in 2013 noted by the AMS. Again, the appellant is relying on unproven allegations of fact to justify the challenge to the assessment made by the AMS.

110. The appellant submitted that the AMS recorded Ms Stevens' assertion that it was "hard work to read a letter," only to reject it on the basis that the A4 notes that she had with her during the consultation were "sophisticated 'reference material'". This, it was argued, was a misconception. The notes were used to "overcome her depleted memory and concentration". The appellant then referred to the fact that as a young adult she was an avid reader, but that she no longer had that capacity.

111. The following submissions were made[19]

> "67. Ms Stevens endured the assessment and experienced fatigue from it, although this was inapparent (sic) to the AMS.
>
> 68. As detailed above, the AMS misinterpreted the appellant's use of notes as somehow demonstrating no impairment of concentration."

112. The appellant submitted that the notes that she used were "merely support to her memory and concentration, to assist her answering questions during the assessment. The notes were not a prepared speech or an attempt to make submissions".

Decision

113. The appellant has again made assertions of fact that are unsupported by evidence. There was no suggestion that Ms Stevens' "endured" the assessment, nor that "she experienced fatigue" from it. To the contrary, the AMS specifically drew her attention to the sharpness of her mind, when she asserted that her concentration was "not good," to which she responded that she was "trying very hard". The AMS did not accept Ms Stevens' self-reporting, and the fatigue and endurance alleged in the appellant's submissions were "inapparent" to him, because they were not there. Moreover, the AMS noted specifically that the appellant did not show any evidence of impaired concentration over the two hours of the interview, that her mind seemed to be excellent throughout the interview, and that her attention did not flag.

114. The appellant sought to counter those findings by seeking to tender additional evidence, which we turn to now.

Additional evidence

115. The evidence consisted of four pages of material.[20] The first page consisted of a typed chronology covering the years from 2006 to 2019. It consisted of 6 columns each referring to:
    - a year,
    - an unexplained number from 23 to 36,
    - occupation and "DSP",
    - area location,

[19] Appeal papers page 14
[20] Appeal papers pages 17 - 20

- medical practitioners (from 2011), and
- medication (in 2011, and from 2014).

116. The second page listed Ms Stevens' medical regime from 18 March 2011 to 2019.

117. The third and fourth pages consisted of handwritten notes, presumably written by the appellant which were undated, and which described various symptoms.

118. We admit the evidence, as it falls within the provisions of s 328(3) of the 1998 Act:

> "(3) Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the medical assessment appealed against may not be given on an appeal by a party to the appeal unless the evidence was not available to the party before that medical assessment and could not reasonably have been obtained by the party before that medical assessment."

119. As Ms Stevens had the four pages ready specifically for the interview, we are satisfied that they were not available prior to the assessment, and could not reasonably have been obtained before then.

120. Their contents however do not assist the appellant. Whilst the chronology and the list of medications were self-explanatory to a point, the handwritten notes were not. The appellant did not seek to give any evidence in explanation.

121. In any event, the evidence supplied information as to the precise nature of Ms Stevens' medication, which was quite varied, down the years. We would accept that a person of normal psychological fortitude would need that information at hand should any specific enquiry be made. Similarly, access to a chronology in a varied life style does not of itself indicate that the appellant was suffering any cognitive impairment.

122. The category of concentration, persistence and pace is not concerned with whether Ms Stevens had a poor memory or not. It is concerned with whether she had the ability to concentrate, and to persist in her concentration within in a normal timeframe. The descriptors commence at class 1 with a description of a person without a deficit or a minor deficit who is able to pass a TAFE or university course within a normal time frame. As the severity of the behavioural consequences increases, the descriptors give examples where such an ability is compromised by a slowing of the ability to concentrate and focus on tasks over time and, an inability to comprehend what is being read, until a person's concentration deficit results in institutionalisation.

123. Ms Stevens was able to concentrate for the two hour duration of the interview. That observation by the AMS has not been challenged by admissible evidence. The notes Ms Stevens had with her show that she had the cognitive capacity to prepare for possible enquiry as to her movements and her medication, and it is common ground that she referred to them during the interview. Ms Stevens' ability to anticipate the kind of questions she would be asked does not support that she had any cognitive deficit of any significance.

124. However, we are not satisfied that the appellant's rating in this category should have been assessed as a class 1, that is to say, a minor deficit attributable to the normal variation in the general population. The AMS is inconsistent in this respect as he finds that her perceived cognitive deficits contribute to her being unable to work at all, which was the conclusion reached by the AMS in the employment category.

125. The reasons given for his finding regarding employment were:[21]

> "Ms Stevens told me she is unable to work because she can't deal with people and she can't maintain her concentration. She said she is too slow, she experiences too much anxiety and she becomes too stressed. She said she could not work as a cleaner because she can't even clean her own house. When I asked if perhaps she could enjoy being a dog walker she said she would not be able to deal with the people involved. In my opinion she is totally impaired."

126. There is an incongruity in the AMS finding in the one category that the appellant's ability to concentrate was normal, when in the next category he accepted that because of, amongst other things, her inability to maintain concentration, she was unemployable.

127. We note that the AMS simply relayed what Ms Stevens had told him, and did not comment thereon, save for the cross-examination regarding dog walking. He appeared to accept that in this category it was only the subjective view of a claimant that was relevant, as a person cannot be forced to work if he/she does not wish to.

128. Be that as it may, we are of the view that the rating for concentration persistence and pace should be revoked. Whilst the AMS was not convinced about Ms Steven's reliability, we note that he sounded a warning when he said, in discussing Ms Steven's personality disorder, to which we shall return in more detail presently. He said:[22]

> "….I am of the opinion that there is a personality disorder with some borderline, obsessional and avoidant features. This offers some understanding of her claimed extreme anxiety and the fact that she can appear to be asymptomatic at interview."

129. In the light of that observation, we are satisfied that the AMS did not give sufficient consideration to that underlying condition, which may well have been masking Ms Stevens' presentation. However, the extent of Ms Steven's deficit in this category we do not find to be significant, and does not warrant a class 3 rating. The AMS specifically did not observe any objective impairment in cognition or her extended ability to concentrate over the two hour interview, and her ability to refer to extrinsic material such as the notes she consulted, suggest how that she would be able to undertake a basic retraining course (many of which are online and require no social interaction), and that she is able to concentrate on intellectually demanding tasks for more than the stipulated 30 minutes suggested in the class 2 descriptor.

130. For these reasons, the rating in this category will be revoked, and a class 2 rating substituted.

Other matters

131. During her submissions regarding this category, the appellant appeared to refer in passing to the provisions of Chapter 1.32 of the Guides. This provides:

> "1.32 Where the effective long-term treatment of an illness or injury results in apparent substantial or total elimination of the claimant's permanent impairment, but the claimant is likely to revert to the original degree of impairment if treatment is withdrawn, the assessor may increase the percentage of WP I by 1%, 2% or 3%."

132. There is no evidence that Ms Stevens' treatment has resulted in the apparent substantial or total elimination of her permanent impairment.

[21] Appeal papers page 47
[22] Appeal papers page 40

133. Reference was made to the fact that the appellant was assessed by means of a video conference by the AMS due to the COVID-19 pandemic. We agree with the submission that these are extraordinary circumstances however were unable to discern the point of the submission.

Summary

134. The appellant has shown some industry and ingenuity in her submissions. However most of them were either unsupported by the evidence or based on speculative assertions, and we agree with the respondent that the appellant has in the final analysis done no more than show a dissatisfaction with the AMS and that her opinion differs from his.

135. We agree with the respondent that there is no evidence that Ms Stevens took notes with her because the AMS had previously commented that she had difficulty remembering various aspects of the history of her case. We have already commented Ms Stevens did not seek to make an additional statement raising any of the factual matters being alluded to in her submissions.

136. We also concur that the AMS observed Ms Stevens consult the papers that she had with her but as we have already indicated the point is that over the two hour interview she was able to consult them and that there was no evidence of cognitive impairment during the interview. Her attention did not fade and the AMS thought that her thinking appeared to be quite sharp.

137. We also concur with the respondent's submission that the appellant has shown no more than a mere disagreement about the level of impairment that should be applied to a particular category.

138. As we have found, the appellant made a highly selective and minute dissection of the evidence, looking for error. In *Bojko v ICM Property Services Pty Ltd*[23] Handley AJA, with whom Allsop P and Giles JA agreed said at [36]:

> "36 …. Both [grounds of appeal] involved a hyper-critical approach to the reasons of the Panel which is contrary to authority and ignores the presumption of regularity which attends administrative action. The correct approach is that mandated by the joint judgment in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6, 185 CLR 259, 272 which approved the following statement of principle in a decision of the full Federal Court:
>
> > '... a court should not be concerned with looseness in the language nor with unhappy phrasing of the reasons of an administrative decision-maker. ... the reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error'."

139. Having revoked the MAC, we are required to consider whether the Guides have been properly applied in other respects.[24]

140. We have already indicated that the AMS erred in his assessment relating to travel at [92] above. We will accordingly increase the rating for the concentration persistence and pace category from a class 1 to a class 2, but will reduce the travel category from class 3 to class 2.

141. The observations, which we have set out in bullet points above, in his findings regarding Ms Steven's mental state examination demonstrated these difficulties.

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[23] [2009] NSWCA 175

[24] *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC 1053 at [61] per Garling J: *Mercy Connect Limited v Kiely* [2018] NSWSC 1421 at [103] per Harrison AsJ

142. Amongst other things, the AMS found her to be humorous at times, with no evidence of anxiety or cognitive impairment. She made her own self assessments during the assessment of her level of functioning, and was well aware of the categories and scoring levels regarding the PIRS. She also displayed a "very well developed knowledge of psychiatric conditions and psychiatric treatment modalities." These considerations, along with his other findings on mental state examination, are matters on which the experience, learning and expertise of the AMS were brought to bear.

Section 323

143. Section 323 of the 1998 Act provides relevantly:

> "(1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.
> (2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence."

144. In *Ryder v Sundance Bakehouse Pty Ltd* [25] Campbell J stated at [45]:

> "45 What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if that proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of the *degree* of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the *degree* of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to the pre-existing abnormality. To put it another way, the Panel must be satisfied that but for the pre-existing abnormality, the *degree* of impairment resulting from the work injury would not have been as great."

145. In his summary of injuries and diagnoses, the AMS said[26]:

> "**• summary of injuries and diagnoses:**
> Ms Stevens presents a confusing clinical picture. History and reported symptoms support a diagnosis of bipolar affective disorder with both depressive symptoms and associated anxiety, but mental state examination reveals a person without overt psychological problems. I can only explain this discrepancy on the basis of a significant restriction in activities of daily living in order to avoid the activation of symptoms. Ms Stevens herself suggested a diagnosis of agoraphobia, which is more descriptive than explanatory.
>
> Her isolative behaviour is more consistent with a trauma-related syndrome without the usual overt accompaniments of both severe anxiety and depression. However I do not regard the work related injury as being sufficiently traumatic to result in such a severe disorder.

[25] [2015] NSWSC 526
[26] Appeal papers page 38

Therefore personality features are a more likely explanation for this situation. Early parental separation and the relative absence of a father in her life are partly explanatory. She describes her mother as depressive in nature and her father as a lifelong cannabis user.

Medical opinions in the documentation provided refer to the possibility of borderline personality disorder and the presence of obsessional and anxious traits. I note she has failed to maintain a stable treating relationship with any medical professional with the exception of her current psychologist.

In conclusion I diagnose Bipolar Affective Disorder type II (DSM-5), Other Specified Personality Disorder with borderline, obsessional and avoidant features (DSM-5), and an Alcohol Use Disorder(DSM-5)."

146. With regard to Ms Stevens's consistency of presentation, the AMS noted that there were inconsistencies and that the AMS had brought Ms Stevens's attention to them. The AMS said there was an inconsistent affect when discussing suicidality, and her statement that her ability to concentrate was poor.

147. The AMS noted also that there was "the matter of her sharpness of mind whilst discussing her own psychiatric diagnosis and treatment, and the evaluation of her level of impairment within the psychiatric impairment rating scale categories."[27]

148. In paragraph 8 of the MAC which has templated questions, the AMS was satisfied that the proportion of the WPI was due to a pre-existing condition or abnormality, and that the pre-existing condition or abnormality related to psychological injury.

149. In explaining his reasons for assessment, the AMS provided a very detailed explanation, incorporating the large body of contemporaneous clinical documentation, from some of the most respected clinicians in the country, before him[28]

"**a. My opinion and assessment of whole person impairment**
I have assessed whole person impairment at 13% using the psychiatric impairment rating scale and making a deduction of 3/10 for pre-existing conditions.

In making that assessment I have taken account of the following matters:-
Ms Stevens suffered from pre-existing bipolar affective disorder. She was aware of being an anxious child during her earlier childhood. She suffered depression and some episodes of hypomania over a 12 month period at 16 years when she changed high schools. She suffered depression in 2004 or 2005 while at art school; this was treated with the antidepressant sertraline and she attended psychologist Ms Nireskanani at Edgecliff for about 12 months. Ms Stevens attributed these episodes to external factors such as being excluded by groups at school or the stress of attending art school. However, given the later development of a period of hypomania/mania in 2013, and another mild period of hypomania in 2016, a DSM-5 diagnosis of bipolar affective disorder can be made.

Ms Stevens suffered two significant losses during the period of teaching at Castle Hill high school. Her four year relationship with her boyfriend ended during her first year of teaching, and with that she also lost her entire friendship group. She described quite an isolated lifestyle and had only one friend from art school. She noted that she did not fraternise with the other teachers and

[27] Appeal papers page 39
[28] Appeal papers 40

tended to eat meals alone while at school rather than in the staff room. In addition, her mentor Miss Ann Blythe was regarded as a good friend and an important support; she subsequently died of breast cancer in her second year of teaching. Ms Stevens acknowledged she was terribly upset by this loss.

I am therefore satisfied that she did develop a major depressive episode with significant anxiety during the latter half of 2010 while teaching at Castle Hill high school. This episode was part of her pre-existing bipolar affective disorder type 2.

I am puzzled by the deterioration in her functioning since 2011. While she did experience anxiety and depression at that time to the degree that she could not teach, she was much more able to participate in the world. She was able to travel to New Zealand and drive to visit her mother in Wingham. Ms Stevens is now a virtual hermit I Surry Hills and has been so since 2015. This is despite exhaustive psychiatric and psychological treatment. It is difficult to conceptualise that a lack of support at school during the last two terms of 2010 could alone result in such profound ongoing psychiatric disablement 10 years later. It is easy to understand that such lack of support could have resulted in an exacerbation of her bipolar affective disorder, which I believe it has done. However the subsequent history of her illness is not consistent with the normal progression of a bipolar affective disorder, which usually consists of periods of depression and or hypomania/mania interspersed with periods of normal functioning. It is also entirely common for people suffering from bipolar disorder to form a lasting and trusting relationship with a treating psychiatrist.

This leads me to conclude that other factors such as personality features are operating to maintain such a disabled state. Professor Mitchell commented on personality features which included obsessionality and anxiety. Other treating health professionals diagnosed borderline personality disorder or an underlying borderline personality organisation. Professor Parker was "not convinced" by borderline aspects. I am of the opinion that there is a personality disorder with some borderline, obsessional and avoidant features. This offers some understanding of her claimed extreme anxiety and the fact that she can appear to be asymptomatic at interview."

150. The AMS then turned his attention to the medical evidence before him. He gave a most comprehensive and insightful survey of the medical records. He noted that on 29 August 2013 Ms Stevens had been admitted to Royal Prince Alfred Hospital and discharged the following day where a diagnosis of "borderline personality disorder in crisis" was made. That was the time she was referred to her psychologist Mr Tony Merritt and the AMS stated:

> "This report confirms my conclusions regarding personality disorder".

151. The AMS then referred to the clinical notes of the Alice Street General Practice in Newtown between 2 July 2013 and 5 July 2017. The analysis of those records was thorough and accurate. We do not intend to reproduce them but simply note the AMS's comments[29]:

> "These general practitioner entries confirm a diagnosis of bipolar disorder and offer further support for the diagnosis of a personality disorder."

152. The clinical record of the Genesis medical practice of Epping dates from 25 August 2010 to 1 April 2011 was considered by the AMS. Those notes showed a history of depression since age 18 and that Ms Stevens had been on and off Zoloft intermittently. The AMS noted[30]:

[29] Appeal papers page 41
[30] Appeal papers page 41

> "This general practitioner file confirms major depressive symptoms at the time she was unable to return to work."

153. The AMS then referred to the report of Dr Matthew Davies, Psychiatrist of Hurstville who diagnosed major depression, alcohol dependence and borderline personality disorder. That report of Dr Matthews was dated 31 October 2016[31].

154. The AMS noted the medication regime that Ms Stevens was on at that time (the AMS did not identify the date of Dr Matthews's report). The AMS found[32]:

> "This is the appropriate treatment for a bipolar affective disorder."

155. The AMS noted the history taken from Ms Stevens as to the time she was a patient at the Wingham Family Health Clinic where on 28 March 2014 she completed a form in which she said that she had suffered for 10+ years of major depression and for the last 3+ years a "bipolar disorder (possibility)" and that she was when taking Pristiq 100mg per day and diazepam 5 mg as required[33].

156. The AMS noted there was some consultation with the general practitioner Dr Bruce Stewart on 28 March 2014 from that practice when medication was prescribed. The AMS said[34]:

> "Her self-report regarding psychiatric history is confirmatory of bipolar disorder."

157. The AMS noted the clinical notes from the Glebe Medical Centre from 9 November 2012 to 7 May 2019 and he noted that Ms Stevens presented with depression and social isolation initially requesting diazepam after she had moved from Taree.

158. The AMS thought that that information "adds very little".

159. The AMS considered the records from the Alice Street Medical Practice in Newtown which covered the period from 4 February 2013 to 11 June 2013. He noted that Ms Stevens was referred to a psychologist, Dr Jennifer Flatt who diagnosed borderline personality disorder and noted that the DASS21 scores on intake were extremely severe for depression and severe for stress but normal for anxiety.

160. The AMS reported Dr Flatt's opinion that the result for depression is more severe than would have been expected from clinical assessment and he said:

> "This confirms the experience of a number of treating health professionals that her reported depression is far worse than observed in clinical assessment."

161. The AMS referred to the clinical record of psychiatrist Dr Adam Bayes which dated from 10 January 2018 to 26 July 2018. The AMS noted an undated entry wherein the doctor stated that Ms Stevens did not wish to make any further appointments. The AMS said[35]:

> "This is another therapeutic relationship which has broken down. It is unlikely that Dr Bayes contributed to the breakdown because it is a normal pattern in her relationship with treating doctors."

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[31] Appeal papers page 503
[32] Appeal papers page 42
[33] Appeal papers page 527
[34] Appeal papers page 42
[35] Appeal papers page 42

162. Finally the AMS referred to the clinical records of S & G Prabhala Pty Ltd, a general practitioner of Epping, which covered the period from 3 March 2009 to 24 December 2010. He noted that Ms Stevens initially attended for a respiratory condition and travel vaccinations but that on 24 December 2010 she presented in a teary, upset and depressed state. She reported on 27 January 2010 that she had been unable to stand in front of the children to introduce herself as she was very teary. She noted the history of depression two years before. The AMS said[36]:

> "This report is suggestive of the fact that her condition had begun to deteriorate at the beginning of 2010."

163. At paragraph 11 the AMS then explained his reasoning for the deduction he made. He said that Ms Stevens suffered from a pre-existing Bipolar Affective Disorder, other Specified Personality Disorder with borderline, obsessional and avoidant features, and Alcohol Use Disorder.

164. His explanation regarding the deduction was in keeping with the thorough and comprehensive attention to detail that the AMS has exhibited throughout this exemplary report. The AMS summarised that Ms Stevens functioning as a teacher began to deteriorate at the beginning of 2010 and that she was unable to return to work in 2011 having reported experiencing a lack of support from the school during the latter half of 2010. The AMS said[37]:

> "In my opinion this amounted to a more than insignificant contribution to the development of her condition."

165. The AMS said however that there were other contributing factors such as her pre-existing bipolar disorder and it appeared that she was struggling with the onset of a Major Depressive episode (which is part of her chronic and pre-existing condition of bipolar disorder) from the beginning of 2010. There were in addition the personality difficulties referred to in the medical evidence which resulted in Ms Stevens's relative social isolation during her period of teaching at Castle Hill High School.

166. The AMS agreed with Ms Stevens's claim that the lack of support that she received during the latter half of 2010 contributed to the development of her condition and said that he was unable to comment on her further claim that she carried an excessive teaching load. He said[38]:

> "….However, it is my opinion that she was developing a major depressive episode which was due to her pre-existing condition of bipolar disorder, and not her treatment by the school. She was not abused, harassed or ill-treated by school staff, but slightly neglected according to her statement.
>
> The abnormal course of her bipolar affective disorder since 2011 can only be explained on the basis of her personality difficulties. This cannot be attributed to the lack of support she received at Castle Hill High School in the latter part of 2010.
>
> Consequently I have concluded that her pre-existing psychiatric conditions have made a significant contribution to her level of impairment over and above that caused by her work injury."

167. In considering the provisions of s 323(2) the AMS altered the templated form of question 11c to alter the deductible proportion from 1/10th to 3/10^{ths}, and he explained his reasons. He said that Ms Stevens had failed to respond to any form of treatment provided by multiple psychiatrists and psychologists, and that was due to the underlying pre-existing personality

[36] Appeal papers page 42.
[37] Appeal papers page 43.
[38] Appeal papers page 43.

issues and not to the subject work injury. He thought therefore that the deduction of 1/10th was not reasonable. He said a deduction of 5/10ths would not recognise the lack of support that Ms Stevens's "contends she received from the school" and he therefore made a deduction of 3/10ths.

SUBMISSIONS

168. At the outset of her submissions, the appellant submitted that the MAC should be revoked and replaced with one in which the deduction under s 323 was less than 3/10ths.

169. The AMS had, it was submitted, failed to refer to the "available evidence" and thus had failed to provide a detailed explanation for his assessment of the appropriate s 323 deduction.

170. It was further submitted that the Act was "beneficial legislation."

Decision

171. Although we were not referred to any statutory ambiguity that would make the submission relevant, we agree that the Statutes by which the NSW workers compensation scheme is administered are broadly, but not universally, beneficial. We did not find however that such a submission was helpful.

172. The reasons given for the 3/10ths deduction the AMS assessed were particularised in his most careful and considered reasons. We have acknowledged during the discussion of this MAC the thorough and comprehensive attention to detail demonstrated by the AMS, and the scrutiny by which he presented an exceptional discourse as to the relevant and complex issues with which he had to deal in his exegesis of the many factors involved in this particularly complicated case.

173. In the light of the evidence to which we have referred, we reject the appellant's submission that the AMS failed to refer to the available evidence on which he based his assessment of the appropriate deduction.

174. To adopt the reasons of Campbell J in *Ryder*, the AMS identified other causes, in the form of the appellant's pre-existing bipolar condition and personality disorder, of an impairment caused by the work injury. That pre-existing abnormality has made a difference to the outcome, as it has affected the degree of impairment resulting from work injury, to the extent that but for those other causes, the degree of impairment would not have been as great. That assessment has been attended by medical evidence of such probative value that the statutory assumption of 1/10th is at odds with the available evidence.

175. For these reasons, the challenge to the s 323 assessment is rejected.

Re-examination

176. We indicated that the application by the appellant to be re-examined by a Panel AMS was refused. Such a re-examination was not warranted, as the issues raised by the appellant were clear on the evidence before the AMS, and before us. No probative purpose would have been served by such a re-examination.

DECISION

177. For these reasons, the Appeal Panel has determined that the MAC issued on 8 April 2020 should be revoked, and a new MAC should be issued, noting that the new certificate attached to this statement of reasons does not alter the assessment by the AMS.

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*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Table 2-Assessment in accordance with AMA5 and NSW workers compensation guidelines for the evaluation of permanent impairment for injuries received after 1 January 2002

Matter Number: **1597/19**
Applicant: **Emily Stevens**
Respondent: **Secretary, Department of Education**

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 Wayne Mason and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Category	Class	Reason for Decision
Self-Care and personal Hygiene	2	See paras 56-66
Social and Recreational Activities	3	See paras 75-80
Travel	2	See paras 89-90
Social functioning	3	See paras 97-100
Concentration, persistence and pace	2	See paras 113-130
Employability	5	Ms Stevens told me she is unable to work because she can't deal with people and she can't maintain her concentration. She said she is too slow, she experiences too much anxiety and she becomes too stressed. She said she could not work as a cleaner because she can't even clean her own house. When I asked if perhaps she could enjoy being a dog walker she said she would not be able to deal with the people involved. In my opinion she is totally impaired.

Score **Median class**

2	3	2	3	2	5	3

Aggregate Score Impairment **Total WPI = …19%**

2	4	6	9	12	17	19

Table - Whole Person Impairment (WPI)

Body Part or system	Date of Injury	Chapter, page and paragraph number in WorkCover Guides	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 Injury/mind	1 October 2010	Chapter 11, Chapter pages 60-68	Chapter 14	19	3/10	13%
Total % WPI (the Combined Table values of all sub-totals)					**13%**	

John Wynyard
Arbitrator

Professor Nicholas Glozier
Approved Medical Specialist

Dr Patrick Morris
Approved Medical Specialist

24 August 2020

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*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar