

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1- 4180/20
Appellant:	Tamsin Forbes
Respondent:	The Fox Den Cafe
Date of Decision:	8 February 2021
Citation No:	[2021] NSWCCMA 24

Appeal Panel:	
Arbitrator:	R J Perrignon
Approved Medical Specialist:	Dr Douglas Andrews
Approved Medical Specialist:	Dr Julian Parmegiani

BACKGROUND TO THE APPEAL

1. On 7 October 2016, the appellant worker, Ms Forbes, suffered extensive burns in the course of her work as a chef. She also suffered a primary psychiatric injury.
2. By a Medical Assessment Certificate dated 19 October 2020, approved medical specialist Dr Hong assessed an 8% whole person impairment (psychiatric) as a result of her primary psychiatric injury. In terms of the Psychiatric Impairment Rating Scale (PIRS), he assessed each of the categories, *Self-care and personal hygiene* and *Concentration persistence and Pace*, as being within a class 2 or 'mild' impairment.
3. The appellant appeals from the Medical Assessment Certificate on the basis that in both categories her symptoms were consistent with a class 3 impairment, and inconsistent with the class 2 impairment assessed.
4. On 10 December 2020, the Registrar by his delegate was satisfied that the ground of demonstrable error was made out in respect of *Concentration persistence and Pace*, and referred the matter to this Appeal Panel for determination.
5. On 4 February 2021, the Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the *NSW workers compensation guidelines for the evaluation of permanent impairment (Guidelines)*.

Submissions

6. The Appeal Panel has had regard to the written submissions filed by both parties. It is unnecessary to set them out in full, but they may be summarised as follows.
7. With respect to *Self-care and personal hygiene*, the appellant submits that the assessment of a class 2 impairment was in error for the following reasons.
 - (a) It was based on a finding that, though she had gained weight, neglected her self-care, skipped meals and failed to shower regularly, she was nevertheless capable of independent living without regular support.
 - (b) The latter finding was not reasonably available on the evidence, because in her statement she said that her mother comes over to help with cleaning and meal preparation, and she relies on her parents for assistance with her daughter.

- (c) The other findings were inconsistent with a class 2 impairment and consistent with a class 3 impairment.
 - (d) The approved medical specialist failed to give reasons for preferring a class 2 impairment.
 - (e) The reports of Dr Oldtree Clark and Dr Khan support a class 3 impairment rating.
8. With respect to *Concentration persistence and Pace*, the appellant worker submits that the assessment of a class 3 impairment was in error for the following reasons.
- (a) The approved medical specialist found that the appellant worker had reduced concentration and memory, that her focus was 'not great', and that 'overall she has been managing'. These findings were consistent with those of Dr Oldtree Clark, who assessed a class 3 impairment, and were inconsistent with a class 2 impairment.
 - (b) The approved medical specialist reasoned that a class 2 impairment was appropriate because the worker was able to follow instructions and recipes, and had been trying different baking products in her new job as a baker. It was impermissible to conflate employment capacity with the assessment of *Concentration, persistence and pace*: submissions at [22].
 - (c) In the absence of explanation as to 'whether the Appellant Worker's new employment circumstances have resulted in a less stressful workplace, such as, the duration and number of breaks provided and whether these breaks are assistive, workplace resources and any additional assistance provided', 'the connection between her ability to follow recipes when baking and *concentration, persistence and pace* cannot be substantiated: *Ballas v Department of Education* [2020] NSWCA 86 (*Ballas*) - submissions at [21].
9. In summary, the respondent submits as follows:
- (a) The mere fact that Dr Hong and Dr Oldtree Clark arrived at different assessments does not demonstrate error.
 - (b) The approved medical specialist explained his reasons for assessment in respect of both PIRS categories.
 - (c) The approved medical specialist was entitled to have regard to the worker's duties in her current employment in assessing *Concentration, persistence and pace*.

Reasoning of the Approved Medical Specialist

10. Dr Hong examined the worker on 13 October 2020 by video. He took a history of the injury at [4], and diagnosed chronic post-traumatic stress disorder at [7] as a result.
11. He noted at [4] that the worker reported 'reduced concentration and memory', and 'appetite and weight problems since the subject injury, she has gained 30 kg ... her weight has been same in the past 12 months'.
12. In the PIRS rating form, he gave the following reasons for assessing a class 2 impairment in respect of *Self-care and personal hygiene*:
- "Ms Forbes described having neglected her self-care and gained weight. She reported skipping meals. She said she does not shower regularly. Ms Forbes is capable of independent living without regular support."
13. He gave the following reasons for assessing a class 2 impairment in respect of *Concentration, persistence and pace*:
- "Ms Forbes reported having reduced concentration and has some difficulties with reading. She can manage light reading for hours. She can follow recipes when baking. She can follow reasonably complex instructions."

14. He noted at [4] that she was working on a part time basis in a café kitchen on Mondays and Tuesdays, and as a baker in a commercial kitchen up to 25 hours per week, where she was ‘trying some new recipes’.

15. He took a history that ‘her focus is not great and overall, she has been managing’.

16. He also noted at [4]:

“Normally, Ms Forbes likes to read books but she found it hard to read after her accident. Recently she reported that if she is reading light fiction, she can read for a couple of hours but not the heavy stuff.”

17. He also recorded:

“Ms Forbes has been making candles and soap and has been doing it less since she started work again. It takes about an hour to make a batch of soap and then six weeks to cure it.”

18. He explained the reasons for the differences between his assessments and that of Dr Oldtree Clark at [10c] - emphasis added:

“I noted Ms Forbes’ statement with a similar history and she reported ongoing problems with various symptoms and impairment. Pre-accident she enjoyed meeting up with her friends for dinner and shopping and going to the cinema. She is deeply upset she is no longer engaged in her previous hobbies and no longer playing netball and going to the gym. Ms Forbes did some light reading but cannot read for prolonged periods and struggles with her concentration. She’s done soap and candle making.

Dr Thomas Oldtree Clark, IME psychiatrist reported on 9 October 2019 noted the subject accident and noted that Ms Forbes was still active in hobby activities, soap making and candle making, but neglects her garden. She had gained 25 kg. He provided a WPI with the final rating being 19% and further added 2% for treatment effects because she takes psychotropic medication. I note Dr Clark did not record a psychiatric medication in his report.

In terms of WPI rating, Dr Clark rated 3 for self-care and personal hygiene and advised Ms Forbes could not live independently and has assistance from parents and others. **In my assessment I noted that Ms Forbes has improved, she has reduced self-care, but she is nevertheless able to live independently and therefore I rated 2.**

Dr Clark rated Ms Forbes’ concentration, persistence and pace as a 3 and advised she cannot entertain complex tasks. **In my assessment, I noted that she enjoys light reading. She can follow instructions and recipes, and has been trying different baking products in her new job. Based on her presentation on the day I have rated her as a 2.**”

Self-care and personal hygiene

19. Before the Panel can make its own assessment of the appellant’s level of impairment, the Panel must first be satisfied of demonstrable error or the application of incorrect criteria as alleged by the appellant.

20. The appellant alleges that her symptoms in respect of Self-care and personal hygiene were consistent with a class 3 impairment and inconsistent with a class 2 impairment as assessed. The *Guidelines* set out the following descriptors for each of these classes.

“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.

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.”

21. The task of the approved medical specialist was to examine the appellant as she presented on the day, and to assess into which category her symptoms best fitted. He noted her reported neglect of self-care, failure to shower regularly, her weight gain and tendency to skip meals. Nevertheless, on the history he took, despite the fact that her mother came over to assist her with cleaning and meal preparation, and that she relied to some extent on her parents for help with her child, he found that she was capable of living independently. This was the reason he gave for making a different assessment from that of Dr Oldtree Clark.
22. In our view, that conclusion was well open to him on the evidence. The history he took was that Ms Forbes lived apart from her parents without requiring 'regular support'. That is consistent, in our view, with a finding that she was capable of living independently, and inconsistent with a class 3 impairment.
23. None of the other symptoms elicited, in our view, were inconsistent with a class 2 impairment.
24. It follows that the assessment of a class 2 impairment was well open to the approved medical specialist.
25. He gave detailed reasons for that assessment, and for the differences between it and the assessment of Dr Oldtree Clark.
26. The mere fact that Dr Oldtree Clark made a different assessment on a previous date, or that Dr Khan's report supported a different assessment on a different date, does not demonstrate error.
27. We can identify neither demonstrable error nor the application of incorrect criteria. This ground fails.

Concentration, persistence and pace

28. In respect of the category, *Concentration, persistence and pace*, the appellant alleges that her symptoms were consistent with a class 3 impairment and inconsistent with a class 2 impairment as assessed. The *Guidelines* set out the following descriptors for each of these classes.

"Class 2 Mild impairment: can undertake a basic retraining course, or a standard course at a slower pace. Can focus on intellectually demanding tasks for periods of up to 30 minutes, then feels fatigued or develops headache.

Class 3 Moderate impairment: unable to read more than newspaper articles. Finds it difficult to follow complex instructions (eg operating manuals, building plans), make significant repairs to motor vehicle, type long documents, follow a pattern for making clothes, tapestry or knitting."
29. The task of the approved medical specialist was to take into account the applicant's difficulties with reading - light fiction only, which she said she could read 'for hours', but 'not the heavy stuff'. He also took into account the history she gave him, namely that she could follow recipes when baking, and was exploring new recipes in her job as a baker. He appears to have concluded that she can follow 'reasonably complex instructions'.
30. That conclusion was well open to him, in our view, on the history she gave. It is consistent with a class 2 impairment, as are the other findings mentioned above.
31. Contrary to the appellant's submissions, he did not conflate employment capacity with *Concentration, persistence and pace*. He reasoned that, because Ms Forbes was capable of exploring new recipes in her job as a baker, she demonstrated a certain level of ability to concentrate. That reasoning, in our view, was permissible, reasonably open to the approved medical specialist, and did not require an assessment of all the circumstances of the employment, none of which in our view justified a different conclusion.
32. Nor did it offend the principle in *Ballas*. *Ballas* is authority for the proposition that an approved medical specialist may not, in assessing impairment in a particular category or scale, take into account an activity that is not relevant to that category or scale. In *Ballas*, for instance, the Court found it arguable (*Ballas* being an appeal from a gatekeeper's decision) that the approved medical specialist had impermissibly taken into account a solitary activity in assessing *Social and recreational activities*. In this case, the approved medical specialist did not assess *Concentration, persistence and pace* directly by reference to her employment as a baker. He simply reasoned that, because she concentrates at

work, she must have a certain ability to concentrate. In our view, that did not involve taking into account an irrelevant consideration, as - arguably, at least - occurred in *Ballas*.

33. The mere fact that Dr Oldtree Clark made a different assessment on a different date does not demonstrate error or the application of incorrect criteria.
34. The approved medical specialist gave detailed reasons for his assessment. The symptoms he elicited were in our view consistent with a class 2 impairment. That assessment was also consistent with the concentration shown by the appellant in making soaps.
35. We can identify neither demonstrable error nor the application of incorrect criteria. This ground fails.

Conclusion

36. We consider that the selection of a class 2 impairment was well open to the approved medical specialist in respect of both PIRS categories. His assessment demonstrates neither error nor the application of incorrect criteria.
37. The Medical Assessment Certificate dated 19 October 2020 is 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*.

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

