

# WORKERS COMPENSATION COMMISSION

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

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<b>Matter Number:</b>	<b>M2-6122-18</b>
<b>Appellant:</b>	<b>Illawarra Retirement Trust</b>
<b>Respondent:</b>	<b>Cassandra Jones</b>
<b>Date of Decision:</b>	<b>11 July 2019</b>
<b>Citation:</b>	<b>[2019] NSWCCMA 91</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Ms Deborah Moore</b>
<b>Approved Medical Specialist:</b>	<b>Dr Julian Parmegiani</b>
<b>Approved Medical Specialist:</b>	<b>Dr Patrick Morris</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 April 2019, Illawarra Retirement Trust lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr John J Baker, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 25 March 2019.
2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):
  - the assessment was made on the basis of incorrect criteria,
  - the MAC contains a demonstrable error.
3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. 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, 4<sup>th</sup> ed* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> 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 that preliminary review, the Appeal Panel determined that the worker should undergo a further medical examination because we considered that the AMS erred in finding that an additional 2% should be allowed for the effects of treatment, as submitted by the appellant.
8. In addition, the respondent has submitted, by way of a form of cross appeal, that the AMS erred in his assessment with respect to two of the PIRS categories, such that a re-examination was required.

## **EVIDENCE**

### **Documentary evidence**

9. 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.

### **Further medical examination**

10. Dr Julian Parmegiani of the Appeal Panel conducted an examination of the worker on 20 June 2019 and reported to the Appeal Panel.

## **SUBMISSIONS**

11. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
12. In summary, the appellant submits that the AMS erred in finding that an additional 2% should be allowed for the effects of treatment. In addition, in response to the respondent's appeal with respect to the AMS' assessment for the categories of social and recreational activities and social functioning, the appellant submits that no errors were made.
13. In reply, the respondent submits that it was open to the AMS to award 2% whole person impairment (WPI) for treatment effect "reflecting improved stability, independent return to the workforce whilst recognising ongoing areas of moderate impairment that had been unaffected by treatment".
14. In addition, the respondent submits that the class ratings ascribed with respect to the categories referred to above were inappropriate and should have been higher.

## **FINDINGS AND REASONS**

15. 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.
16. 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.
17. The respondent was referred to the AMS for assessment of WPI in respect of a primary psychological injury resulting from a deemed date of injury of 8 December 2016.

18. The circumstances of the incident and the onset of symptoms and of subsequent related events has been well documented by the AMS, and we do not propose to reiterate that here.
19. Similarly, the AMS set out in considerable detail the respondent's personal history and the circumstances and events in the past that led to her undergoing psychological treatment.
20. Relevant to the issues in dispute, the AMS said:

“Ms Jones had a pre-existing injury of a depressive illness after the birth of her son who had suffered severe neonatal distress. She had also had episodes of depressed mood in relation to her complex relationship with the father of her son, Huntah. She reported that with her psychological treatment she had been able to separate permanently from Huntah's father.”

21. He added:

“Ms Jones reported that she enjoyed watching real crime series and crime investigation programs on television. She reported she enjoyed CSI, NCIS as well as British crime investigation programs. She also enjoyed history and had developed a strong interest in her family's genealogy. She had investigated and reconstructed her family tree out of interest of her complex heritage. Ms Jones also attended her local gym to socialise and for fitness.

#### **Social & Recreational Activities.**

Ms Jones stated that she had stopped watching her crime series on television as she was unable to enjoy these activities. She also reported that she had stopped reading history novels for pleasure. She has ceased her genealogy hobby into her family tree. She had ceased going to the gym as she no longer was able to socialise in public without feeling anxious and distressed by her increased weight. She reported that her friend, Leanne, who has a son the same as her son Huntah, had booked a cruise for the family to share as a gift in 2019. Ms Jones planned to attend this cruise in support of her friend Leanne and the two boys.

#### **Social functioning.**

Ms Jones said that the separation from her partner, Ian, was unrelated to this work-related injury. She stated that she continued to have tension in the relationship with Huntah's father.

Ms Jones reported that there was tension in her primary relationship with her son. Since the onset of this work-related injury her son had developed a severe anxiety with him being unable to remain at school and constantly checking her whereabouts on the phone. This was witnessed during the assessment with him calling on about three occasions. The tension in their relationship was not likely to result in Ms Jones or her son being separated or estranged. She stated that she also had difficulty in her relationship with her eldest son who was describing difficulties in her inability to attend his interest, needs and career development.”

22. The AMS ascribed a Class 2 rating in both these categories.

23. He concluded:

“In my medical opinion, Ms Jones suffers from a Major Depressive Disorder recurrent type...

Ms Jones’ psychiatric condition had improved since the last report of Associate Professor Robertson where he assessed her as having a 19% WPI with a 1.9% (1/10th) deduction. I note that Associate Professor Robertson described the instability of Ms Jones depressive illness over the years. I note that he did not apportion out Ms Jones’ relationship with her son Huntah in his assessment of WPI. Ms Jones’ presentation at the time of this assessment was different to that described by Associate Professor Robertson and reflective in her ability to provide a better narrative and understanding of her pre-existing condition and affects. In my opinion Ms Jones had shown a significant change of 4% WPI in her permanent psychiatric impairment when comparing this assessment to that of Associate Professor Robertson.

For these reasons, it is reasonable to attribute a moderate treatment affect of 2%, reflecting improved stability, independent return to the workforce whilst recognising ongoing areas of moderate impairment that had been unaffected by treatment.

I have assessed her Whole Person Impairment using the PIRS rating scale at 15% plus a 2% treatment effect which is 17% WPI. I have further assessed Ms Jones’ pre-existing condition as being 1/10 deduction. I note that Associate Professor Robertson made a similar finding.

The final Whole Person Impairment is  $17\% - 2\% = 15\%$  WPI.”

24. The appellant refers to paragraph 1.32 of the Guidelines which states:

“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 WPI by 1%, 2% or 3%. This percentage should be combined with any other impairment percentage, using the Combined Values Chart...”

25. The appellant added:

“The AMS fell into error by placing too much significance or weight on the Respondent’s assessment and presentation to Associate Professor Robertson. In comparison, when reviewed by Dr Canaris and as noted in his report dated 17 July 2017, while he considered the Respondent had not reached maximum medical improvement, he did indicate the Respondent’s assessment of impairment would likely be less than 15% WPI.

The guidelines do not define the criteria of what is a ‘substantial or total elimination of permanent impairment.’

The Appellant submits that the correct interpretation of substantial should be something which is ‘large’ particularly when read in conjunction with the following words ‘total’ and ‘elimination’ and would be such that the level of impairment should be nil or close to nil.

In this case, a difference of 4% WPI from 19% WPI to 15% WPI would not meet the criteria of a substantial elimination of permanent impairment.

The Appellant submits that at the time of Associate Professor Robertson's examination, the Respondent had returned to work, was looking to increase her hours up to 20 hours per week. The Appellant submits that there is no significant improvement by her obtaining additional work. In essence, the only difference in the PIRS assessments between Associate Professors Robertson and the AMS is the class ratings in Social and Recreational and Social Functioning. Associate Professor Robertson assigned class 3 to both and the AMS assigned a class 2 to both. The Appellant submits that this is not supportive that there has been a substantial or significant elimination of permanent impairment.

The Appellant submits that there is no indication from the AMS that the second aspect of the criteria has been met. That is, that the Respondent would likely revert to the original degree of impairment if the treatment is withdrawn."

26. Following Dr Parmegiani's examination of the respondent on 20 June 2019, he reported to the Panel as follows:

"I assessed Ms Cassandra Jones on 20 June 2019, on behalf of the Medical Appeal Panel. Dr John Baker assessed Ms Jones in January 2019, and prepared a Medical Assessment Certificate dated 25 March 2019. Dr Baker rated Ms Jones' psychiatric impairment at 15%, and he added a further 2% to compensate for the effects of treatment. The final WPI was therefore 17%. Dr Baker deducted 1/10<sup>th</sup> because of Ms Jones' pre-existing condition. His final WPI rating was therefore 15%. The Appellant argued that Dr Baker made a demonstrable error in finding that an additional 2% should be allowed for the effects of treatment. The Respondent argued that Ms Jones was more impaired in Social & Recreational Activities and should be categorised as class 3. The Respondent also argued that Ms Jones suffered a greater impairment in Social Functioning, and should have been assessed as either class 3 or 4 instead of class 2. The reassessment therefore focused on Ms Cassandra Jones' current function and treatment.

#### The Assessment

Ms Cassandra Jones is a 44-year-old woman currently living in Berkeley with her son aged 17. She has another son aged 25 who lives elsewhere. Ms Jones' former partner was released from custody in March 2019. He visited her from time to time, but they did not re-establish a relationship. He accompanied her to the interview.

#### *Social and recreational activities*

Ms Jones saw her friend Jenny once or twice per week. Ms Jones attended recreational venues on six occasions over the past 12 months. She went to a McDonalds restaurant with a friend on average once per month. Ms Jones went on an 11-day cruise to Noumea between March and April 2019. She travelled with her son, her nephew, her friend Jodie and Jodie's two sons. Ms Jones enjoyed her holiday. She planned to go on a holiday in Bali in September 2019, with her sister, cousin and six friends. Ms Jones indicated that she previously had more social contact. Her current impairment of Social and Recreational Activities is rated at class 2.

### *Social Functioning*

Class 2. Ms Jones' emotional problems had a negative impact on relationships. She maintained regular contact with friends and her ex-partner. Her impairment of Social Functioning is class 2.

### *Effects of Treatment*

Ms Jones told me she stopped all psychotropic medication in 2018. I drew her attention to Dr Baker's Medical Assessment Certificate, which stated she was taking Lexapro. Ms Jones however confirmed that she had stopped it a long time ago, and she could not recall when she last saw a psychologist. She questioned whether it was in 2017. There are therefore no grounds to add 1-3% to compensate for the effects of treatment, as Ms Jones is no longer receiving any psychiatric treatment."

27. The appellant's arguments have some validity, but ultimately the issue is simply that there are no grounds to make any addition for the effects of treatment since there has been no treatment now for a number of years, and thus no suggestion that the respondent "is likely to revert to the original degree of impairment if treatment is withdrawn."
28. That, as the appellant correctly points out, is the second arm to the terms of paragraph 1.32 of the Guidelines. The first arm hasn't been met because there is no evidence of "effective long-term treatment" and without that, the second arm is equally not met.
29. For these reasons, we agree that the AMS erred in finding that an additional 2% should be allowed for the effects of treatment.
30. The respondent's arguments as regards the categories of social and recreational activities and social functioning also fail. The assessment made by Dr Parmegiani was consistent with that of the AMS, and in our view equally consistent with the totality of the evidence.
31. For these reasons, the Appeal Panel has determined that the MAC issued on 25 March 2019 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

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

*A MacLeod*

Ann MacLeod  
Dispute Services Officer  
**As delegate of the Registrar**



# WORKERS COMPENSATION COMMISSION

## APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

**Matter Number:** 6122/18  
**Applicant:** Cassandra Jones  
**Respondent:** Illawarra Retirement Trust

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

**Table - Whole Person Impairment (WPI)**

Body Part or system	Date of Injury	Chapter, page and paragraph number in the Guidelines	Chapter, page, 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)
1. Psychological Injury	8/12/16 (deemed)	Chapter 11, pages 60-68	Chapter 14	15%	1/10	13%
<b>Total % WPI (the Combined Table values of all sub-totals)</b>					<b>13%</b>	

**Ms Deborah Moore**  
Arbitrator

**Dr Julian Parmegiani**  
Approved Medical Specialist

**Dr Patrick Morris**  
Approved Medical Specialist

11 July 2019

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

*A MacLeod*

Ann MacLeod  
Dispute Services Officer  
**As delegate of the Registrar**

