WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4667/18**
Appellant:	**Ben Pearson**
Respondent:	**Carey's Freight Lines (Tamworth) Pty Ltd**
Date of Decision:	**5 August 2019**
Citation:	**[2019] NSWWCCMA 105**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Julian Parmegiani**
Approved Medical Specialist:	**Dr Nicholas Glozier**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 24 April 2019, Ben Pearson, the appellant, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Christopher Bench, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 27 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):

    - availability of additional relevant information (being additional information that was not available to, and that could not reasonably have been obtained by, the appellant before the medical assessment appealed against),
    - the assessment was made on the basis of incorrect criteria, and
    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The 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 Guides) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). WPI is a reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 5 December 2018, a delegate of the Registrar referred this matter to an AMS for assessment of WPI caused by psychological injury on 7 July 2015. At the time of the injury Mr Pearson had been employed by Carey's Freight Lines (Tamworth) Pty Ltd, the respondent, for approximately 11 years. He was employed as a truck driver delivering types of freight to various companies.

7. On 9 July 2015, Mr Pearson was handed a warning letter dated 7 July 2015 by Mr John Carey, his supervisor.

8. Mr Pearson claimed that this action caused him to suffer a psychological injury. The claim was defended but on 3 December 2018 an Arbitrator found the claim proven, and the matter was consequently referred to the AMS.

9. The AMS assessed a 10% WPI.

PRELIMINARY REVIEW

10. 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.

11. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because no ground was made out.

12. Mr Pearson's legal advisors submitted that he was "ready, willing and able" to be re-assessed. Mr Pearson had, they declared, "no qualms regarding the truth" of what he had asserted in his statements, and that such a re-examination would "facilitate justice" between the parties.

13. The purpose of a re-examination by a Medical Appeal Panel is to assist in a redetermination of an appellant's claim where a demonstrable error has been established. As no such error has been found in the application, this is accordingly refused.

Fresh evidence

14. Section 328(3) of the 1998 Act provides:

> "(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."

15. The appellant seeks to admit the following evidence:

    (a) Further statement of Benjamin Pearson dated 12 April 2019, and
    (b) Statement of Janice Pearson, his wife, dated 12 April 2019.

16. Mr Pearson's statement referred to various complaints he had regarding the assessment process. It was not prepared until after the MAC was issued on 27 March 2019, and there is no evidence before us that any of the matters that he now raises were the subject of any formal complaint prior to 27 March 2019, although he was assessed on 7 March 2019.

17. Mr Pearson said that he had read the MAC and wished to make a few points, after noting that it took him several days "to go through and think about the report."

18. Mr Pearson said that he did not "hit it off'" with the AMS, whom Mr Pearson found "very arrogant."

19. Mr Pearson noted that the AMS had a mobile phone on his desk, and "I asked him to put it away." The AMS explained that he was expecting an urgent call from the Commission which, if it occurred, would result in the termination of the assessment and Mr and Mrs Pearson being ushered into an outer office.

20. Mr Pearson said that during the interview he became more and more distressed, and he referred to questions asked by the AMS about his childhood, when "I was having difficulty trying to get my point across."

21. The AMS's findings regarding the Psychiatric Impairment Rating Scale (PIRS) were addressed by Mr Pearson.

22. Mr Pearson referred to the AMS's comment that Mr Pearson could read for up to 60 minutes at a stretch, saying that it was not an accurate summary. Mr Pearson was not an avid reader before his injury but that now he said he read less, and when he did his concentration was not as good. Mr Pearson went into some detail about how it was that he had to have breaks during a 60-minute stretch and sometimes lost the plot.

23. Whilst he conceded that he had said what the AMS recorded in general terms regarding the category of self-care and hygiene, nonetheless Mr Pearson asserted that he had been misunderstood, and taken out of context. He sought to explain what was said by reference to further details which also concerned the involvement of his wife.

24. Mr Pearson said that he did not remember speaking to the AMS about the chores he did around the house but conceded that the AMS was correct in what he did record, except that he did not “capture the whole picture." He then gave more detail and explanation of what the AMS had recorded. Again, he referred to the involvement of his wife and the motivational problems he had in doing the various activities described by the AMS.

25. Mr Pearson said he did not know why he would have told the AMS that he had plans to mow the lawn as he "really very rarely" did so these days. His wife, he said, did most of the mowing, and he would do it "once every three months at best."

26. Whilst conceding that he would cook one or two nights a week ("but only when I'm in a good enough mood…") Mr Pearson said that he would cook that night “if we get home early enough”, and he made other explanatory comments about his cooking habits.

27. Mr Pearson said that the comment by the AMS regarding his ability to work elsewhere on a full-time basis "just shows there is a complete breakdown in our communication." He agreed that the AMS accurately described his emotional state, but said he was not reliable enough to be an employee.

28. Mr Pearson also conceded in other respects that the AMS "might have been technically correct but didn't have the context." Mr Pearson then purported to make further explanation as to what had been recorded.

29. Mr Pearson said that "I couldn't wait to be out of the room" and he was unable to see how some questions asked of him by the AMS were relevant.

30. Mr Pearson’s statement was by and large supported by the statement of his wife, Janice.

31. Mrs Pearson said she was present at the assessment, and that she was not asked any questions by the AMS. She too referred to the presence of the AMS's mobile phone on his desk, and the explanation given by him.

32. Mrs Pearson observed that there was no rapport between the AMS and her husband, and that her husband became stressed and agitated as the interview progressed. She said that she had never seen her husband so agitated after an interview with a psychiatrist.

33. In considering the findings by the AMS, Mrs Pearson conceded that her husband might cook once a week but would leave a mess in the kitchen. She said that she did not know whether "to laugh or cry" at the suggestion that her husband could live independently. She said that she gave him the motivation to do what he does do, such as picking up the grandchildren from school twice a week.

34. Mrs Pearson said that she had to push her husband to shower and shave and that if it was not for her, the estimate that he probably showers every two or three days would be far less.

35. Mrs Pearson, too, said that she did not remember her husband saying some of the specific things that have been ascribed to him by the AMS. She agreed that her husband did chores and that he probably would cook dinner that night. She said, as did Mr Pearson, that the reason he would cook that night was because she had done the driving and would be really tired.

36. In her statement Mrs Pearson was careful to emphasise that her husband was motivated by her to perform several of the activities and functions described by the AMS.

37. Mr Pearson's legal advisers made submissions as to why the two statements should be admitted. The statements were admissible, it was argued, because they went to the process of the examination, Mr Pearson's level of agitation during the consultation, and the "actual" circumstances at the Pearson home.

38. The issues to be considered, it was argued, were that Mr Pearson had not experienced any communication difficulties with the prior "independent medical specialists" regarding matters of substance in the history or, as we understood the submission, the categorisation given as to the behavioural consequences of Mr Pearson's psychological condition.

39. Because no such difficulties have been encountered in the past, it was argued that there had been no reason to prepare additional materials in the anticipation that there would be a communication breakdown between Mr Pearson and the AMS.

40. The submissions relied upon the presence of the mobile phone and the suggestion that the interview might be interrupted as being of significant relevance. It was also suggested that there was no anticipation that there would be a "communication breakdown" between Mr Pearson and the AMS and that it was not reasonable to "seek out and secure witness statements against a background where it was not properly anticipated that such statements would become necessary."

41. Submissions concluded with a plea that not to accept this evidence would constitute "an injustice", and would be "contrary to the public interest."

42. The respondent objected to the admission of the two statements.

43. The evidence must be rejected. Firstly, as will be seen, an AMS is required to evaluate impairment arising from a psychiatric injury. The deponents in both statements have not denied that what was ascribed to Mr Pearson by the AMS was in fact said. The thrust of the evidence was to explain why the various statements had been made to the AMS. Mrs Pearson was at pains to point out, as was Mr Pearson, that she was the motivating force that enabled her husband to do the various functions that he admitted to, and that accordingly Mr Pearson's admissions were taken out of context.

44. The relevant question for an AMS in evaluating the degree of impairment caused by a psychiatric condition is not whether a claimant can do the tasks admitted happily, or with difficulty, or without motivation at times. The relevant question is whether a person is able to perform those activities.

45. Secondly, in *Lukacevic v Coates Hire Operations Pty Ltd* [2011] NSW CA 112 (*Lukacevic*), the Court of Appeal was concerned with fresh evidence that took the form of a statement by the appellant calling into question the conduct and enquiry of the AMS. The majority (Handley AJA and Hodgson JA), upheld the Appeal Panel's decision to reject the statement upon a consideration of the policy of the legislation, and its relation to the particular matters raised in a fresh statement. Hodgson JA at [78] said:

> "A dispute by the worker as to the history set out in the Certificate, or the observations made by the AMS, can readily be raised; and it could be raised honestly or dishonestly, on strong of flimsy grounds. Having regard to the matters I have set out, in my opinion, it would be reasonable for an AP not to admit evidence raising such a dispute unless that evidence had substantial prima facie probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, simply by raising such a dispute going to a matter relevant to the correctness of the Certificate, a worker could put the AP in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of the WIM Act."

46. Handley AJA agreed with Hodgson JA. He analysed the decision of the Panel and found that its conclusion was a finding of fact and that there was no error of law on the face of the record (at paragraph 151).

47. For the above reasons, we are not satisfied that the evidence of either Mr or Mrs Pearson has any substantial prima facie probative value. The observation by Mr Pearson that "I found [the AMS] to be very arrogant" was of no probative value, in view of the confirmation by both Mr and Mrs Pearson that the comments ascribed to Mr Pearson were in fact made.

48. The purpose of an assessment interview is for the AMS to evaluate WPI caused by the claimant's psychological injury. In order to do so an AMS relies upon the documentary evidence referred to him, but an important part of the process is the face to face interview whereby he/she can apply the clinical experience, knowledge, formal training and expertise necessary to make the evaluation. It is not, with respect, for a claimant to dictate what is relevant, and what is not, as each PIRS category is not just a tick box evaluation of the descriptors but a broad clinical evaluation of each area of impairment as relevant to the case before the AMS

49. Moreover, neither the appellant nor Mrs Pearson allege that the AMS had either not recorded Mr Pearson's statements or recorded them inaccurately. The thrust of their statements was an endeavour to put a gloss what they agree was stated.

50. In addition, it could not be said that Mrs Pearson's evidence was 'independent' support. She is Mr Pearson's wife, and has an interest in whether Mr Pearson is successful in his claim for lump sum compensation.

51. Accordingly, the additional evidence is rejected.

EVIDENCE

Documentary evidence

52. 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

53. 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

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

FINDINGS AND REASONS

55. 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.

56. 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.

57. The Grounds of Appeal submitted by Mr Pearson's legal advisors were, it must be said, discursive, argumentative and lacking in clarity. Such statements as "the matters addressed in this submission are never merely argumentative, rather they are fundamental to the proper discharge of the obligations of an AMS" we found to be unhelpful.

58. Many of the submissions made by Mr Pearson's advisors were made upon the assumption that we would accept into evidence the statements of Mr and Mrs Pearson dated 12 April 2019. As this evidence has been rejected, a number of the factual assumptions upon which the appellant's submissions relied have not been made out and accordingly may be put to one side.

59. Mr Pearson's advisors submitted that there was an inconsistency in the approach of the AMS as to the matters he "chose to delve deeper and whilst there was a deeper probing" in relation to alcohol consumption and employability, in relation to various other categories of the PIRS there was no such "deeper probing." "Deeper probing" was asserted as being the appropriate approach for all "criteria" and it was alleged that "it was not for the AMS to without reason be inconsistent."

60. We had a great deal of difficulty in comprehending this submission. The underlying implication was that there was somehow an obligation on an AMS to deal with the subjects, regardless of relevance, that Mr Pearson's advisors thought appropriate in the same manner as the AMS considered those matters that he/she, applying the expertise, experience and knowledge that is concomitant with his/her appointment, thought relevant. There is no such obligation.

61. A further somewhat unusual submission was made that the AMS had fallen into error by failing to exercise his powers pursuant to s 324 of the 1998 Act. Specifically, he had failed to "consult with any medical practitioner or other health professional who use or had treated the Appellant [sic]." It was alleged that the matter "cried out" for contact to be made with the treating psychologist and the treating general practitioner. This was apparently because Mr Pearson was unable to recall the name of his new psychologist beyond her Christian name, Vicki. No authority was cited for that proposition and it is rejected. A perusal of the terms of the section shows that an AMS has such a discretion, but no obligation. It hardly lay for Mr Pearson's advisors to allege error when the onus is always on an applicant to prove

his case. Many injured workers and/or their representatives provide treating clinician reports in their Application where these are thought likely to be probative.

62. The next submission insisted that it was not a "nit picking" one, but an assertion was made that "you are faced with fundamental errors and inconsistencies" and that they needed to be "recognised, reconciled and addressed." We were referred to item 7 on page 6 of the MAC and advised that the "significant inconsistency" there found by the AMS (regarding the PIRS category of "employment") should have been reconciled by the AMS contacting the treating psychologist and general practitioner, and to interview Mrs Pearson "to have further input on the relevant history."

63. Mr Pearson's advisors appear to be under the misapprehension that the task of an AMS includes the gathering of further evidence to enable the evaluation of impairment. The AMS only found one area of significant inconsistency. In this case he discounted the answer he recorded of the specific impairment in employability (which would lead to a rating of class 1 or 2, and a lower WPI) and used his overall clinical assessment to rate the worker as severely impaired, and thus providing a more generous WPI for Mr Pearson. Chapter 1.6a of the Guides provides that assessing permanent impairment involves clinical assessment of the claimant as he/she presents on the day of assessment, taking into account the claimant's relevant medical history and all available relevant medical information. This is exactly what the AMS has done and to the benefit of the worker. This submission too is rejected.

64. The next submission related to one of the PIRS categories, "social functioning." It is convenient at this point to consider the approach required by chapter 11 of the Guides, as considered by the authorities.

The Psychiatric Impairment Rating Scale (PIRS)

65. The PIRS 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.

66. Chapter 11.12[1] 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."

67. The assessor is required to classify each category, and to apply the resulting scores as set out in chapter 11[2].

68. The assessment of psychiatric disorder has been considered in a number of cases. In *Ferguson v State of New South Wales*[3] 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:

[1] Guides 55
[2] See 11.15-11.21 at Guides p 65 and Table 11.7 at Guides p 66
[3] [2017] NSWSC 887

> '… 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 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* [2015] NSWSC 633. 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]."

69. In *Glenn William Parker v Select Civil Pty Ltd*,[4] 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])….."

70. 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."

71. It is accordingly necessary for the Panel to be satisfied that the assessment by the AMS in this category was erroneous in one of the following ways (to use the reference by Campbell J in *Ferguson*):

    (a) if the categorisation was glaringly improbable;

    (b) if it could be demonstrated that the AMS was unaware of significant factual matters;

    (c) if a clear misunderstanding could be demonstrated, or

    (d) if an unsupportable reasoning process could be made out.

[4] [2018] NSWSC 140

72. The error identified was that although Mr Pearson complained to the AMS that he had "in substance no libido," this was "not recognised" in the reasons given for the assessment. The AMS gave the following reasons:

> "The defendant reported his relationship with Janis is 'really good'. He noted they have had more arguments 'over the last couple of years'. There have been no separations or violence. He has 'really good' relationships with each of his children. He noted he regularly supervises his grandchildren on an independent basis such as picking them up from school. He noted a loss of number of friendships. He noted having first seen any friend in six months at the aforementioned Memorial Day. As such, this is most consistent with a mild impairment."

73. The descriptors for this category are set out in Table 11.4 of the Guides. Class 2 for a mild impairment examples are:

> "Existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships."

74. Class 3, for a moderate impairment provides:

> "Previously established relationships severely strained, evidenced by periods of separation or domestic violence. Spouse, relatives or community services looking after children."

75. A loss of libido is likely to contribute to relationship strain and is completely compatible with class 2, particularly when the reasons given by the AMS are also consistent with a class 2, mild impairment. This submission too is rejected.

76. Mr Pearson's legal advisers then asserted that an error has been made regarding the comments made by the AMS regarding activities of daily living and social activities. This is not a PIRS category but part of the templated subjects given in the body of the MAC. A factual error was alleged in that the AMS recorded that Mr Pearson had been to the funeral of a nephew whereas, although that nephew had died, Mr Pearson had been planning to see Mr Pearson's sister.

77. Mr Pearson relied upon his rejected statement of 12 April 2019 for the factual basis to the submission and accordingly it is rejected. We would observe however that even had such an error been established, we were not enlightened as to how such an error would have vitiated the assessment.

78. The appellant then expanded on an earlier submission that the medico-legal referees on either side of the record had assessed a 19% WPI, in the case of Dr Michael Prior, the respondents medico-legal referee, on 1 September 2015 and 18 October 2017 and the medico-legal referee retained by Mr Pearson (Dr Jeff Bertucen) assessed a 17% WPI in reports of 9 May 2017 and 5 June 2018. This it was argued was compelling evidence of significant weight.

79. It is trite law that the purpose of an assessment by an AMS is for an independent expert in the particular field engaged to perform his own opinion based upon his clinical experience, learning and expertise. His/her function is neither arbitral nor adjudicative. He is not required to prefer or reject the opinions of other experts that are placed before him as part of the evidence. He is required, as we have already said, to give adequate reasons where more than one conclusion is open. Clearly, the two opinions referred to by Mr Pearson are other

conclusions, and the AMS accordingly was required to adequately explain why he preferred his assessment.[5]

80. The AMS took some care in providing a comprehensive and considered assessment. His reasoning was clear and internally consistent, and he took the time to carefully consider in some detail the documents that were before him[6]. Amongst them were the opinions of Dr Prior and Dr Bertucen. He said:

> "My brief comments regarding the other medical opinions and findings submitted by the parties and, where applicable, the reasons why my opinion differs
>
> …….
>
> Dr Jeff Bertucen noted in a report, dated 9 May 2017, the applicant had suffered a back injury in February 2015 when he stepped off a pallet and fell on to a metal lift platform. It was noted on 30 June 2015; Mr Pearson had knocked over a stack of pallets while reversing his truck which led to an altercation subsequently being summonsed to a meeting and given a letter of warning. It was noted he subsequently withdrew from work, consulted his general practitioner and was provided a certificate of incapacity. Dr Bertucen noted he had persistent difficulties with back pain. It was noted the applicant had received no mental health care between February 2015 and early July 2015. It was noted his alcohol use increased temporarily to four or five standard drinks per day. He was treated with the anti-depressant Sertraline and referred to a psychologist, Amanda Jefferys. It was noted he was able to read at length. There was no past psychiatric history noted. It was noted secondary to parental neglect and impoverishment, he spent the years between age seven to sixteen in institutional care. Dr Bertucen diagnosed an Adjustment Disorder with features of depressed mood and anxiety, which had evolved into a Major Depressive Disorder. He opined the Major Depressive Disorder was the result of perceived bullying, harassment and hostility from Mr Carey. Dr Bertucen completed an assessment of whole person impairment of 17% noting moderate impairments in Self-Care and Personal Hygiene and Social and Recreational Activities; no impairment with regard to Travel, mild impairment in Social Functioning and Concentration, Persistence and Pace, and being totally unfit for employment giving rise to a whole person impairment of 17%. (Comment: It is noted Dr Bertucen has scored the Psychiatric Impairment Rating Scale almost two years ago. As per the applicant, there has been some improvement in his condition since that time, likely accounting for the changes in scores at the present time. For example, the applicant is remiss with his personal hygiene, but completes numerous chores around the home and cooks regularly. He has adequate nutritional intake. As such, this is more consistent with a mild impairment. He reported he is only able to travel independently in the local community, which is more consistent with a mild impairment. Similarly, as per the applicant, there has been an increase in his capacity for employment since Dr Bertucen's report.)
>
> Dr Jeff Bertucen noted in a supplementary report, dated 5 June 2018, he did not believe the sexual abuse suffered by the applicant had any bearing on his psychological symptoms or injury.
>
> ……...
> (At Appeal Papers 41)

[5] See discussion by Campbell J in *Ryder v Sundance Bakehouse* [2015] NSW SC 526 at [24]
[6] Appeal Papers 38-42

Dr Michael Prior noted in a report, dated 1 September 2015, the applicant denied any contemporaneous stressors or any past history of psychiatric illness. He reported drinking 'a couple of cans of light or medium strength beer maybe three nights a week'. He denied any increased use of alcohol following the work injury. Dr Prior outlined his current level of functioning. (Comment: Given the historic nature of such, I will not make any further comment). Dr Prior noted the claimant reported he enjoyed playing golf, looking after his grandchildren, following football and travelling. It was noted he had a large group of friends at his local golf club. It was noted he was in care between ages seven and sixteen with child welfare. He denied any history of childhood abuse or neglect. Dr Prior diagnosed an Adjustment Disorder with depressed and anxious mood 'this is now essentially remitted'. He opined the above diagnosis was caused by the situation at workplace especially being called 'useless'.

Dr Michael Prior noted in a report, dated 18 October 2017, he had ceased working in 2015 and retired in February 2016. In the intervening periods since the previous evaluation, it was noted he had not been seen by a psychiatrist or had a psychiatric admission. It was noted he has been treated with Cipramil at a dose of 150mg. (Comment: Clearly this is a typographical error). He found psychotherapy with Amanda Jefferys to be helpful. He noted the Cipramil was changed over to Efexor, which he had been on for twelve months. Dr Prior obtained a history that he had a significant deterioration in his anxiety and depression following his having to resign from his employment. The applicant did not believe the historic childhood sexual abuse whilst in a boys' home had any significant negative impact on his psychological status. He had on-going suicidal ideation. He stated he had planned to work until he was eighty. It was noted he had a herniorrhaphy since the subject injury. He noted impaired functioning, including failure to shower on a daily basis and being amotivated towards contributing to domestic chores. It was noted he was avoiding crowds of people and did not like his wife inviting people home. It was noted he was avoiding the golf clubhouse secondary to the number of people there. He was travelling the seven-kilometre trip from home to the golf course independently. Otherwise, longer distances were done with his wife. It was noted he had been estranged from his siblings for a long period of time. He reported impaired attention and concentration. Dr Prior noted the claimant was drinking on average 250mL of whisky per day (approximately eight standard drinks). Dr Prior diagnosed Major Depressive Disorder, secondary Alcohol Abuse Disorder and secondary Gambling Disorder. Dr Prior noted 'It is likely that his Major Depressive Disorder once established has been perpetuated to some extent and possibly exacerbated, although he denies this, by his discovery that he was a victim of historic childhood sexual abuse in a boys' home together with the ongoing effects of his secondary alcohol abuse and secondary gambling on his finances and the relationship with his wife'. He opined he was unfit for employment. Dr Prior complete an assessment of whole person impairment. He assessed a moderate impairment in Self-Care and Personal Hygiene, mild impairment in Social and Recreational Activities, Travel and Social Functioning, moderate impairment in Concentration, Persistence and Pace and totally unfit for Employment with a final whole person impairment of 19%. Dr Prior noted the applicant displayed some objective cognitive difficulties on cognitive examination.

(Comment: As per the applicant's account, although remiss with his personal hygiene, he cooks daily and completes numerous chores around the home, which indicates he would be able to live independently. The applicant does not partake in any social or recreational activities outside the family home on an independent basis, which is consistent with a moderate impairment. The applicant specifically noted improved capacity for employment since the assessment of Dr Prior)."
(At Appeal Papers 42)

81. A number of submissions were made cavilling with the reasons given by the AMS. Mr Pearson conceded that the AMS had explained the reasons why he differed from the medico-legal reports. He submitted that none of those reasons "was put to the Appellant in a vigorous and comprehensive fashion." No authority was advanced in support of that submission. The only possible basis could be that there was in place a procedure that required the rule in Browne v Dunn to be observed, but no such procedure exists. We have referred to the functions of an AMS earlier in these reasons.

82. The appellant relied on complaints made to the AMS as to his "present symptoms." It was submitted that those complaints were significant and that they supported a clinical judgement that Mr Pearson had no capacity for employment.

83. An AMS is not under any compunction to accept complaints made by a claimant as being reliable or the sole basis for an assessment. In Mr Pearson's case, the AMS clearly did not rely solely on what he was told by Mr Pearson when rating employability. Dr Prior's evidence "should have been more rigorously tested by the AMS", it was suggested. The AMS had not been "consistent in his approach to reviewing core issues." With regard to the category of employability, it was argued that the AMS "has simply got it wrong."

84. It is not necessary to review the remaining submissions which are all similarly unhelpful. The submissions do not specify exactly how, beyond certain aspects of Mr Pearson's impairment potentially fit the descriptors of a different class in some PIRS categories but that, and the suggestions the AMS has not been consistent in his approach or more rigorously tested other IMEs opinions, the reasons provided by the AMS for his rating of impairments are actually erroneous.

85. It is not necessary to review the remaining submissions which are all similarly unhelpful. The submissions do not specify exactly how certain aspects of Mr Pearson's impairment potentially fit the descriptors of a different class in some PIRS categories, nor do they particularise how the reasons provided by the AMS for his rating of impairments are actually erroneous.

86. The AMS has engaged fully with the contents of the reports of both Dr Prior and Dr Bertucen. He has explained why he has differed from both assessments and his explanation is both consistent and logical – that is to say, Mr Pearson's condition has improved since those assessments were made. None of the many submissions have cast any doubt on the soundness of that explanation.

87. For these reasons, the Appeal Panel has determined that the MAC issued on 27 March 2019 should be confirmed.

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

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar