

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-5829/19
Appellant:	David Carroll
Respondent:	Secretary, Department of Education
Date of Decision:	2 June 2020
Citation:	[2020] NSWCCMA 96

Appeal Panel:	
Arbitrator:	Ms Deborah Moore
Approved Medical Specialist:	Professor Nicholas Glozier
Approved Medical Specialist:	Dr Douglas Andrews

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 28 February 2020, David Carroll lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Michael Hong, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 3 February 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):
 - 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*, 4th ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed (AMA 5).

PRELIMINARY REVIEW

6. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.
7. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because none was requested, and we consider that we have sufficient evidence before us to enable us to determine the appeal.

EVIDENCE

Documentary evidence

8. 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.

SUBMISSIONS

9. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
10. In summary, the appellant submits that the AMS erred in making a deduction of one tenth, pursuant to section 323, "notwithstanding the evidence that the condition of the worker was, in no respect, attributable to a previous injury or to any pre-existing condition or abnormality."
11. No challenge is made to the assessments of the various PIRS categories.
12. The respondent's submissions in reply are a little confusing. Reference is made to prior proceedings and a prior MAC which is said to be consistent with the current MAC of Dr Hong. The prior MAC in 2011 assessed 0% whole person impairment (WPI) and is said to reflect a "pre-existing" condition, such that the AMS did not err in making a deduction.
13. The appellant filed supplementary submissions in reply to those of the respondent on 3 April 2020.
14. The delegate of the Registrar determined that "The admission of the appellant's supplementary submissions will be a matter for the Medical Appeal Panel."
15. Given the complex nature of the issues raised, particularly the existence of prior proceedings and a prior MAC, we are of the view that the supplementary submissions ought to be admitted, since they assist us in clarifying the nature of the prior proceedings and how they may relate to this appeal.

FINDINGS AND REASONS

16. 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.
17. 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.
18. The appellant was referred to the AMS for assessment of WPI in respect of a primary psychological condition resulting from a deemed date of injury of 4 May 2009.
19. The reference to the "deemed" date of injury is important to clarify at this point in time.
20. In the Application to Resolve a Dispute (the Application) the worker alleged his injury occurred "During the whole of employment with the respondent from 1997 -2009 deemed to have occurred on 4 May 2009."
21. At a teleconference before an Arbitrator on 11 December 2019, it was ordered that the claim be referred to an AMS "to assess the degree of permanent impairment, if any, of the psychological injury deemed to have occurred on 4 May 2009."

22. The terms of the referral were not challenged.
23. This is significant when we come to the primary issue on appeal, namely the section 323 deduction made by the AMS.
24. The AMS obtained the following history:

"I note that Mr Carroll had a MAC assessment by the AMS Dr Norman Rose in 2011...

Mr Carroll had not had any psychiatric problems before working for the Department of Education.

Mr Carroll reported that he first became psychologically unwell in 1997, when he worked at the Hunter School of Performing Arts as a drama teacher. He felt distressed when the new Principal referred to him as using the "Peter Boys technique" (who was a convicted paedophile from the same school). Mr Carroll said that after he made a complaint against the Principal, the Principal and Board of Directors then lied and his career was put on the line, the Department decided to support the Principal and not him. Mr Carroll suffered "massive anxiety attacks" and could not even go across the road to go into the school.

Once Mr Carroll moved to a different school, he started feeling better. He felt that he was getting better and could attend work at a number of primary schools, and he said he proved that he was capable of going back to his normal working environment at a different school.

After about six months, Mr Carroll transferred to the Lambton High School as a supernumery, however he stated that because he was supernumery they could do whatever they wanted with him.

Mr Carroll experienced further workplace problems. He was told that he would be the next in line for the next permanent job, and when a job became available on the Central Coast he applied, and he felt confident he would get the job. However, the response was that Mr Carroll did not meet the qualifications and when he looked at the job description again, he discovered that the department had changed the job requirements and he felt the department had lied, and changed the job so he would not be successful.

The final problem that cause Mr Carroll to "crash" and led to him being completely incapacitated for work at Lambton school, was in relation to a boy who had walked out of an art class and when he called him over, the boy responded by saying "Suck my dick". Mr Carroll said the teacher would not allow him to take the boy to the office and to report the issue to the Deputy Principal, and the boy then ran off. Mr Carroll later saw the Deputy Principal on the playground and told her about what happened, and said she laughed in his face and doubled over from laughing. Mr Carroll does not know why she responded in this way. He became distressed and went off work...He described ongoing anxiety and depressive symptoms since that time, and his alcohol consumption has remained elevated since that time."

25. In discussing the appellant's present treatment, the AMS noted: "Mr Carroll first had treatment around 1997 and has remained on continuous antidepressants since."
26. The AMS then documented his present symptoms, general health, and details of his past social and family history.

27. The AMS added:

“Mr Carroll has worked for the Department of Education since 1976 as a high school teacher.
He last worked as a teacher at the Lambton School between 2004 and 2009 and was medically retired in 2010.”

28. The AMS then documented his social activities and activities of daily living (ADL's) and his findings on examination.

29. He diagnosed a major depressive disorder.

30. When asked: “Is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality?” the AMS said:

“Yes, there is a pre-existing condition, which contributed to a proportion of Mr Carroll's impairment. Mr Carroll reported that he was stabilized on treatment, however he was not able to cease treatment before the subject injury in 2009.”

31. The AMS then set out his comments “regarding the other medical opinions and findings submitted by the parties and, where applicable, the reasons why my opinion differs.”

32. Relevant to the issue in dispute, he said:

“MAC by Dr Norman Rose on 9 December 2011 for the injury dated 4 May 2009 (**Comment:** which is the subject injury for this MAC). Mr Carroll had previously taught at the Hunter School of Performing Arts for 10-11 years and had had a prior WorkCover claim. Mr Carroll then started work at Lambton High School... He had never recovered from the previous episode at the Hunter School of Performing Arts and had had significant symptoms and problems in his ADLs since that time...

Dr Rose noted Mr Carroll suffered psychological symptoms with anxiety attacks and mood swings at the Hunter School of Performing Arts. By the time Mr Carroll started at Lambton High School he was not able to concentrate adequately to take classes on his own. He remained under the treatment of a psychologist and a psychiatrist. He became more psychiatrically disabled. Treatment had greatly improved his ADL functioning.

Dr Rose diagnosed an adjustment disorder and considered any residual impairment was totally due to the pre-existing injury related to the prior WorkCover claim. Dr Rose assessed Mr Carroll's current WPI at that time at 5%, with 5% for pre-existing impairment.

Dr Anthony Dinnen, IME psychiatrist reported on 21 March 2019 advised that his first assessment was in 2009... Dr Dinnen concluded Mr Carroll suffered a major depressive illness and required ongoing treatment. Nothing had changed and there was an obvious need for ongoing psychiatric treatment with high doses of antidepressant medication. Dr Dinnen provided a WPI with a rating of 22% plus 3% for treatment effects. He did not believe there was an adjustment necessary for a pre-existing impairment.

Dr Sharon Reutens, IME psychiatrist reported on 18 August 2017, noted that when Mr Carroll was ten years old his mother had a heart condition and had to live with a relative in Sydney. There was an uncle who was very strict and fondled his genitals

and would flog him but he did not inform anyone about the abuse at the time. There were no other prior psychiatric issues identified. The first psychiatric problem was in 1997 in relation to "Peter Boys". Mr Carroll had been depressed and suffered anxiety attacks... Dr Reutens diagnosed an exacerbation of persistent depressive disorder and advised that he never fully recovered from the episode starting at the Hunter School. Maximum medical improvement had been reached. Dr Reutens completed a WPI with a current rating of 7%. She further completed a WPI for pre-existing impairment based on the documentation of his functioning at the time he started at Lambton High School, and advised there was a 6% pre-existing WPI.

In regard to a Section 3.23 deduction, Dr Dinnen did not believe that a deduction should be applied. Dr Rose applied a 5% s323 deduction for the subject injury dated 4 May 2009, which is also the injury that had been referred to me for an assessment. Dr Reutens on the other hand performed a WPI based on the documentation and the history of functioning when Mr Carroll first moved to Lambton High School. Dr Reutens came to a 6% pre-existing impairment. In my assessment, I noted that *the first injury occurred at the Hunter School of Performing Arts* (our emphasis) and Mr Carroll's symptoms had never fully recovered since then. He had remained on treatment ever since that injury. He had improved to the point that he could return to work and subsequently deteriorated in the context of the problems at Lambton High School. Mr Carroll's psychiatric impairment has persisted since that time. Overall, I do not believe there is sufficient information to perform an accurate WPI for Mr Carroll's pre-existing impairment. I also do not believe all of Mr Carroll's impairment could be attributable to the prior injury and therefore I do not agree with Dr Rose's assessment. Finally, I note there are persisting symptoms and impairment even when on treatment, which predated the subject injury (date of injury 4 May 2009) and therefore I do not agree with Dr Dinnen that no deduction is applicable. I have adopted a one-tenth deduction to minimise dispute."

33. We agree with the appellant that the AMS has misdirected himself "as to the nature, process and temporal scope of the injury suffered by the worker."
34. As the appellant correctly submits, the AMS:
 - (a) Failed to appreciate that the worker had a continuing period of employment with the respondent from 1976 to the date on which he became incapacitated in 2009;
 - (b) Failed to appreciate that the worker's period of employment with the respondent prior to his transfer to Lambton High School in 2004 did not constitute employment with a different employer, and did not constitute a period in which a "previous injury" was received or in which "a pre-existing condition or abnormality" developed;
 - (c) Failed to note and appreciate that the injury in respect of which WPI was to be assessed was received over a period which embraced the whole of employment with the respondent from 1997 – 2009 deemed to have occurred on 4 May 2009;
 - (d) Misdirected himself which caused the AMS to erroneously treat a period of the worker's employment with the respondent prior to his posting to Lambton High School as constituting a period prior to injury... , and
 - (e) Erroneously made a deduction pursuant to section 323 "in circumstances in which there is no evidence of the receipt of a psychological injury, or the development of a psychological condition, prior to the worker's commencement of employment with the respondent.
35. The submissions by the respondent quite frankly are misconceived, and only serve to confuse the issue.

36. There is simply no basis upon which the respondent can validly argue that that “the incidents which had occurred at Hunter Performing Arts High School gave rise to a different psychological pathology to those which subsequently occurred at Lambton High School after the Appellant’s transfer in 2004” because the respondent accepted the terms of the referral and the basis upon which the impairment assessment should be made.
37. As the appellant correctly points out, there was no “first injury” at the Hunter School of Performing Arts but rather “a gradual process which, as pleaded, and was not disputed, covered the whole of employment with the respondent from 1997 – 2009...”
38. In short, the appellant was employed by the respondent, the Department of Education, for a continuous period commencing in 1976. This claim related to the period of employment from 1997 to 2009.
39. As the AMS noted: “Mr Carroll had not had any psychiatric problems before working for the Department of Education.”
40. He also noted that “He had never recovered from the previous episode at the Hunter School of Performing Arts and had had significant symptoms and problems in his ADL’s since that time” indicative that this has been one continuous condition.
41. This, simply stated, means that there was no pre-existing psychological condition which occurred prior to the appellant’s employment with the respondent.
42. We should add that there was no suggestion by either party that the appellant’s background including some sexual assault in his youth constituted a “pre-existing condition” in terms of any deduction, and we agree with this approach.
43. Equally, the respondent’s submission that “the appellant did not seek to appeal the MAC of Dr Rose in 2011 such that it is conclusively presumed to be correct...” is misconceived.
44. Section 329(2) of the 1998 Act provides that: “A certificate as to a matter referred again for further assessment or reconsideration prevails over any previous certificate as to the extent of any inconsistency.”
45. As the appellant correctly points out in his supplementary submissions:

“The worker’s injury is a disease which has been contracted over an extended period in the course of his employment with the respondent, inclusive of periods at different schools, and that the date of injury is a deemed date relevant to the extended period of injury.

The AMS was required to assess whole person impairment which resulted from that gradual process which extended over a period of 12 years.

It was not open to the AMS to conceive of different injuries in the course of the...undisputed period of injury which extended from the date on which he commenced employment with the respondent until the date on which he ceased to work for the respondent.

If the respondent wished to distinguish between different injuries, received at different schools, it would need to have disputed the worker’s case of a single process of injury over the period from 1997 to 2009. The respondent would, moreover, need to have secured a determination, limiting the subject injury to the time the worker was performing duties at Lambton High School, from 2004 to 2009. In failing to dispute that the worker suffered injury, as pleaded, over the period 1997 to 2009, it is not open to the respondent, following issue of the Medical Assessment Certificate, to now argue that there was not one injury, but two separate injuries.

It was not open to the AMS to conceive of different episodes of injury within the entirety of the worker's employment with the respondent. The only period in respect of which it was open to the AMS to consider the existence of a previous injury or pre-existing condition, was the period prior to the commencement of the worker's employment with the respondent in 1997."

46. We agree entirely with all the appellant's submissions, both the primary and supplementary.
47. The AMS erred in applying a deduction pursuant to section 323 when there was simply no basis for him to do so, given the nature of the referral.
48. For these reasons, the Appeal Panel has determined that the MAC issued on 3 February 2020 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 5829/19
Applicant: David Carroll
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 Michael Hong 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, 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)
1. Psychological	4 May 2009 (deemed)	Chapter 11, page 55-60		15	Nil	15
2.						
Total % WPI (the Combined Table values of all sub-totals)						15%

Ms Deborah Moore
Arbitrator

Professor Nicholas Glozier
Approved Medical Specialist

Dr Douglas Andrews
Approved Medical Specialist

2 June 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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

