WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4986/19**
Appellant:	**Secretary, Department of Communities and Justice**
Respondent:	**David Marks**
Date of Decision:	**14 August 2020**
Citation:	**[2020] NSWWCCMA 133**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Julian Parmegiani**
Approved Medical Specialist:	**Dr Michael Hong**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 6 May 2020, the Secretary, Department of Communities and Justice, the appellant employer, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Wasim Shaikh, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate on 24 October 2019 (first MAC) and a further MAC on 14 April 2020 (second MAC) in response to an Order of the Commission referring the matter back to the AMS for further assessment.

2. The appellant employer appealed against both MACs.

3. 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 MAC contains a demonstrable error.

4. 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.

5. 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.

6. 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 reference to whole person impairment. "MAC" is a reference to a Medical Assessment Certificate.

RELEVANT FACTUAL BACKGROUND

7. As indicated above, the appellant employer has appealed against two MACs issued by the AMS. The original MAC was issued on 24 October 2019, in respect of which proceedings were brought within the Commission before Arbitrator Harris. The Arbitrator issued a number of Directions to Produce dated on 15 November 2019, following a teleconference on 14 November 2019.

8. The directions were addressed to:

    - New South Wales Police Force
    - Employers Mutual Ltd
    - St John of God Hospital
    - Dr Mills, O'Sullivan Rd, Leumeah
    - The Park Central Family Medical Practice

9. The matter came back before Arbitrator Harris, who made Orders on 10 January 2020 extending the time for compliance with some of his directions. Order 10 was in these terms:

    "10. I refer the matter back to the Approved Medical Specialist (AMS) for further assessment pursuant to s 329(1)(a) of the 1998 Act. I note that the applicant consents to this order provided he has an opportunity to respond to any further documentation produced by EML and/or the NSW Police Force."

10. The AMS issued his second MAC on 14 April 2020, acknowledging receipt of "GP Records, Hospital Records."

11. The history taken by the AMS in his MAC of 14 October 2019 (first MAC) was that the respondent had been subjected to perceived bullying and harassment along with other personal conflicts whilst employed as a Sheriff's Officer with the appellant employer between 2014 and 2018. The AMS took a history that Mr Marks was subject to threats, had faeces thrown at him and was intimidated. He was subject to unfavourable postings and ceased work in 2018 after being subjected to death threats. He sought treatment from Psychiatrist Dr Abhishek Nagesh in 2018 and also consulted his psychologist, Ms Michelle Everett at the same time.

12. We would observe in passing that this history has been somewhat truncated. Mr Marks described the circumstances of the onset of his condition in a statement dated 27 July 2018, in which the focus of his complaint was that he perceived he had been bullied firstly by a Sergeant Baroudi, and then by a Sergeant Khaoula. The throwing of faeces was not mentioned.[1] The references to the throwing of faeces and death threats were referred to in the history taken by the respondent's psychiatrist Dr Nagesh on 1 November 2018, and Mr Marks' medico-legal referee, A/Prof Robertson on 10 April 2019.

13. The AMS had certified a 21% WPI in his first MAC.

14. Following the Order of 1 January 2020, the AMS reconsidered his decision. In his second MAC he had available to him additional documentation produced pursuant to the above directions.

15. The AMS then confirmed his first MAC.

[1] Appeal papers pages 58-64.

PRELIMINARY REVIEW

16. 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.

17. The appellant employer requested a re-examination by a Panel AMS. For the reasons given below, the Panel determined that a re-examination was not required.

EVIDENCE

Documentary evidence

18. 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

19. 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

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

FINDINGS AND REASONS

21. 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.

22. 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.

23. The issue that provoked the appellant employer's application to Arbitrator Harris concerned the state of the evidence regarding a prior psychiatric injury Mr Marks had suffered in September 2009. The additional evidence produced under direction revealed that Mr Marks had suffered a Post-Traumatic Stress Disorder (PTSD) whilst employed by the NSW Police Force. A settlement had been obtained at common law, part of which was the undertaking by Mr Marks, presumably in a deed, that the terms of the settlement would be confidential.

24. In discussing the present psychiatric injury, Mr Marks believed that the terms of the deed meant that he could not reveal the nature of his injury, nor the identity of his employer at the time. Accordingly none of the expert witnesses reporting on the present psychiatric injury were able to ascertain the nature of the prior injury. This included the AMS at the time that he made his first assessment.

The first MAC

25. In his first MAC, under the templated heading "Details of any previous or subsequent accidents, injuries or condition" the AMS said:[2]

> "Mr Marks has suffered PTSD from witnessing a traumatic event in the past. He was subject to a gag order preventing him disclosing information. He notes he had a 'couple' of sessions with a psychiatrist, but had not received any treatment in the years preceding the nominated work issues."

26. Under the heading "Work history including previous work history" the AMS recorded:[3]

> "Mr Marks has worked in a hardware company and with a locksmith. He was a retained fireman but could not undertake this role whilst also managing a maintenance business, so retired 10 years ago. He then worked as general assistant at his wife's school."

27. It can be seen that Mr Marks made no mention of his employment with the NSW Police Force.

28. In the templated questions at paragraph 8, the AMS was 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?"

29. The AMS answered:

> "No. Whilst there is evidence of past PTSD, his mental health was seemingly stable prior to the nominated work issues."

30. Of relevance also was the AMS's adding a further 2% WPI for the effects of treatment. At paragraph 10 he said:[4]

> "Mr Marks presents with an impairment of 19% WPI. I believe his treatment has led to an improvement in his mental health, and led to a significant reduction in impairment. Without such treatment, he is likely to decompensate, leading to an increased impairment. With benefits from psychiatrist and psychologist involvement as well as medications, a 2% addition is indicated, and is final impairment is, therefore, 21% WPI."

31. The findings of the AMS were set out in Table 11.8:[5]

Mr Marks

32. In his statement of 27 July 2018 Mr Marks gave the following resume of his employment history:[6]

> "I have been employed with NSW Sheriff since 2015. Prior to that I was a retained fireman employed by Fire Rescue NSW. I was in that job for five years and took an early retirement from that job to start with the NSW Sheriff. As a retained fireman I was on call seven days a week but with days off and my choice to leave was prompted by lifestyle considerations."

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[2] Appeal papers page 21.
[3] also at page 21.
[4] Appeal papers page 23.
[5] Appeal papers page 26.
[6] Appeal papers page 53.

33. It can again be noted that Mr Marks made no mention of his employment with the NSW Police Force.

34. Mr Marks did not seek to disguise the fact of his prior condition of PTSD, however. He explained in his statement of 27 July 2018[7]:

> "29. Around 10 years ago I was diagnosed as suffering from PTSD for which I was taking medication. That conditon abated and the circumstances of the injury was the subject of a confidentiality agreement which precludes me from speaking about the circumstances of the injury or for whom I was working at the time the injury occurred…"

35. In his supplementary statement of 17 March 2019, Mr Marks said:[8]

> "5. Prior to the subject injury, I have suffered from a case of Post-Traumatic Stress Disorder. I am not at liberty to discuss the details of this due to a gag order put in place by the NSW court system. However, I cannot state strongly enough this condition has not only resolved, but is completely irrelevant to my current injury. Prior to commencing employment with the Office of the Sherriff of NSW, I was required to complete rigorous psychological testing which I passed without issue."

36. Mr Marks also said in a further statement dated 31 January 2020 that he had recovered from his PTSD by August 2012.[9]

A/Prof Robertson

37. Mr Marks retained A/Prof Professor Michael Robertson as his medico-legal referee. A/Prof Robertson reported on 10 April 2019. He noted that Mr Marks' treating psychiatrist, Dr Nagesh, had recorded a previous history of PTSD which had been diagnosed "in 2001." A/Prof Robertson also noted Mr Marks' statement that he was "prohibited from discussing this" because of "some form of gag order". Under "Past Psychiatric History" A/Prof Robertson said[10]:

> "As noted, Mr Marks was reluctant to discuss previous diagnosis of PTSD. He stated that he did not have psychotropic treatment at the time through a counselor [sic]. He believed these injuries have been stable over the last 18 years prior to his difficulties in the Sheriff's office."

38. In discussing Mr Marks's employment history, A/Prof Robertson was told by Mr Marks that he had worked at Nock and Kirbys hardware chain as a locksmith for many years, and that he had worked for Fire and Rescue NSW for 10 years, During his time with Fire and Rescue, he had been exposed to "traumatic stress." A/Prof Robertson theorised that Mr Marks was alluding to his previous employment as a fire fighter. Mr Marks withheld from A/Prof Robertson that he had been employed by the Police Force. A/Prof Robertson noted[11]:

> "[Mr Marks] stated that he was unable to discuss the matter further."

[7] Appeal papers page 55.
[8] Appeal papers page 65.
[9] Appeal papers page 277.
[10] Appeal papers page 92.
[11] Appeal papers page 93.

39. In his assessment A/Prof Robertson said[12]:

> "In the final analysis, the nature and conditions of Mr Marks' employment with the Sheriff's office in the Liverpool Court was the primary cause of the current presentation. The diagnosis is either an adjustment disorder with anxiety and depressed mood with some cross-cutting features of PTSD. It is also possible that this presentation is an exacerbation or recrudescence of the previous (presumed) PTSD which was sustained in circumstances ostensibly unrelated to this employment."

40. In considering the question of causation and when asked to comment on the relationship between the injuries sustained and the condition found on examination, A/Prof Robertson said[13]

> "Accepting the premise there was a previous PTSD (the nature of which is unclear) employment with the Sherriff's office likely exacerbated this pre-existing condition, either through the emergence of an adjustment disorder or possibly the recrudescence of previous PTSD. The apparent exacerbation is severe and likely permanent."

41. When asked to consider whether Mr Marks' employment was the main contributing factor to his injury, the AMS said[14]:

> "There is some conjecture on this particular point as to whether this is a new injury or an exacerbated previous injury."

42. Dr Robertson stated further[15]:

> There is 22% WPI, although one-tenth should be deducted for the presumed effects of Mr Marks' previous presumed PTSD, which rounded down is 20% WPI….

43. A/Prof Robertson thought that 1/10th should be deducted for the presumed effects of Mr Marks' previously presumed PTSD.

Contemporaneous material

Dr Arain

44. Mr Marks first attended his general practitioner Dr Asma Arain at Park Central Family Practice on 1 May 2018.[16] Dr Arain took the following history:

> "[Mr Marks] suffers from an anxiety disorder, has a history of PTSD – over 17 years ago, and over recent months has been having problems in his workplace with bullying…"

Dr Nagesh

45. Dr Arain referred Mr Marks to psychiatrist Dr Abishek Nagesh, who on 17 May 2018 took a history as follows[17]:

> "[Mr Marks] works as an NSW Sheriff, he has been in his current job for the last three years. He presented to me with depressive and anxiety symptoms in the context of multiple psycho-social stresses, namely stress at work. He reports

[12] Appeal papers page 94.
[13] Appeal papers page 95.
[14] Appeal papers page 95.
[15] Appeal papers page 98.
[16] Appeal papers page 173.
[17] Appeal papers page 127. This report was lodged twice. The earlier reference is at page 103.

> feeling stressed and anxious for the last 15 years which has been worse lately where he finds it difficult to handle. He has been sleeping poorly, he has lost weight in one month. He worries all the time, he worries about everything. He is tired all day. He is not motivated. He has been taking Fluoxetine 40mg marne for which he reports no improvement…"

46. Dr Nagesh took a history that Mr Marks had been diagnosed with PTSD 17 years before. He also noted under "Personal History"[18]:

> "David gave a history of his parents separating very early when he was only 8 or 9 years of age, his mother was an alcoholic and was physically abusive and sexually abusive to him as a child. He saw a Psychologist years ago. He was significantly bullied at school."

47. The clinical notes from Dr Nagesh's practice were produced. In the entry dated 17 May 2018 Dr Arain recorded[19]:

> "Feeling depressed and anxious for the last 15 years, cannot handle stress, poor sleep, lost weight in one month, worrying all the time, worries about everything…."

Dr Bisht

48. The appellant employer retained the services of Dr Yajuvendra Bisht, Psychiatrist for medico-legal purposes.

49. In his first report of 1 November 2018 Dr Bisht recorded the past history given to him as follows:[20]

> "David said that he was diagnosed with PTSD about 10 years back, he said that he couldn't reveal the context of the diagnosis, due to legal stipulations. He had psychotherapy for a few months and he recovered."

50. In a second report dated to July 2019, Dr Bisht recorded the following past history:[21]

> "David said that he was told that he may have PTSD, about 10 years back. He said that he couldn't reveal the context of the diagnosis, due to legal stipulations. He said that he had psychotherapy for a few sessions. He said that there was no impact of that incident on his mental state and he only engaged in the psychotherapy because he was told to.
>
> I mentioned to him that the report by Dr Robertson mentions PTSD as a preexisting diagnosis. He said that he was not sure why this would be the case, as he had given Dr Robertson the same information that he was providing to me."

51. The documents referred to above were all included in the referral from the commission to the AMS, and were the basis of his MAC of 24 October 2019.

[18] Appeal papers page 128.
[19] Appeal papers page 233.
[20] Appeal papers page 155.
[21] Appeal papers page 253.

Mr Marks' further statement of 31 January 2020

52. Following Arbitrator Harris's Order of 1 January 2020, the respondent issued an Application to Admit Late Documents (ALD) on 31 January 2020 containing a supplementary statement of the same date by Mr Marks. Mr Marks explained[22] that he was involved in a workplace incident and sustained PTSD on 24 September 2009. We note Mr Marks still did not identify the employer at the time. Mr Marks said that he saw a psychologist, Ms Anna Katarina in late 2009 and Dr Selwyn Smith, Psychiatrist in January 2010. He said that he saw Dr Smith once a month for six months and Ms Katarina on and off for about 12 months. He said that his previous workers compensation common law claim finalised in or about 2011.

53. He said that in August 2012 he began work as a handyman at the public school where his wife was working. He did general maintenance work such as lawn mowing and cleaning roof gutters.

54. Mr Marks concluded his statement by saying:[23]

> "When I first started working at the Department of Justice, I felt like I was in a great place in life, and had moved on a recovered from the 2009 workplace incident [sic]. I stopped receiving any psychological treatment and/or medication in 2012 and did not suffer from any relapse. I feel like I made a full recovery".

The further referral to the AMS

55. On 28 February 2020, an amended referral was made to the AMS. The face of the document stated:

> "The brief provided to the Approved Medical Specialist includes:
>
> 1. the Application and attached documents;
> 2. the Reply and attached documents;
> 3. further statement of the applicant dated 31 March 2020 attached to Application to Admit Late Documents dated 31/01/20;
> 4. documents produced by EML filed by respondent attached to Application to Admit Late Documents dated 3/2/20;
> 5. the Certificate of Determination – Orders dated 10/01/20;
> 6. the Medical Assessment Certificate dated 24/10/19."

56. As indicated, when the AMS came to reconsider his original assessment, he had before him the additional material which he described as "GP Records, Hospital Records." We note that no more precise description was made in the index to the ALD that was lodged by the appellant employer on 3 February 2020. The index to the application described the documents as "Documents produced by EML in answer to direction for production." The author and date of the documents produced were described as "various."

57. Far from being mere clinical records, they consisted of, inter alia:

- the pre-filing statement dated 18 February 2011 in the action Mr Marks brought against the Police Force[24]
- the draft statement of claim and statement of particulars in that action which alleged, inter alia, that Mr Marks was unable to work until at least 65 years of age because of the injury[25]

[22] Appeal papers page 277.
[23] Appeal papers page 278.
[24] Appeal papers page 282.
[25] Appeal papers page 295.

- records from the NSW police Force
- MAC dated 17 January 2011 by Dr Lana Kossoff certifying Mr Marks as having a WPI of 22%[26]
- medico legal report by Dr Klaas Akkerman dated 6 May 2010 which assessed a WPI of 19%[27]
- report of treating GP dated 25 January 2010 noting Mr Marks had been taking Effexor since 16 December 2009.[28]

58. Amongst the clinical notes were entries that were relevant to the issue of a pre-existing condition:
    - entry in Dr Sivagnanapragasam's notes from General Practice for Children & Young Families at Campbelltown recording symptoms of anxiety whilst working for the Fire Brigade dated 18 November 2008, and prescribing Lovan[29]
    - the prescription of Effexor at increased dose 17 March 2010.[30]

Previous MAC dated 17 January 2011

59. The common law claim followed a MAC issued by Dr Lana Kossoff on 17 January 2011. Dr Kossoff described the incident as occurring at Government House. Mr Marks's supervisor, Special Constable Tucker had been yelling at one of his colleagues and Mr Marks intervened when Special Constable Tucker became angry and put his hand on his weapon. Mr Marks thought he would be shot.

60. Dr Kossoff found that Mr Marks was suffering from a PTSD and she found a WPI of 22%. Her findings were set out inTable 11.8:[31]

"**WORKERS COMPENSATION COMMISSION**

Table 11.8 PIRS Rating form

Name	**David Marks**	Claim reference number	**770519063827**
DOB	**22 March 1962**	Age at time of injury	**47**
Date of injury	**24 September 2009**	Occupation at time of injury	**Constable**
Date of assessment	**16 December 2010**	Marital status before injury	**Married**

Psychiatric diagnoses	**Post-Traumatic Stress Disorder**
Psychiatric treatment	**Antidepressant and anxiolytic medication** **Psychiatric and psychological counselling**
Is impairment permanent?	**Yes**

[26] Appeal papers page 307.
[27] Appeal papers page 315.
[28] Appeal papers page 317.
[29] Appeal papers page ?364? – The numbers are overwritten.
[30] Appeal papers page 377
[31] Appeal papers page 307

Category	Class	Reason for Decision
Self-Care and personal hygiene	2	Whilst Mr Marks misses meals and stopped picking up his children from school, he does spend the day on his own when his wife and children are at work and school such that I believe he could live independently, although is likely to neglect himself looking unkempt occasionally and sometimes missing meals.
Social and recreational activities	3	Mr Marks rarely socialises only in the company of his wife or if his family come to visit. He has lost interest in most Sporting activities.
Travel	3	Mr Marks now cannot travel away from his own residence without the company of family because of his excessive anxiety and because of his concentration problems affecting his ability to drive.
Social functioning	2	Whilst his family remain supportive there is strain in the relationship with his wife and he is having some difficulties in the relationship with his children.
Concentration, persistence and pace	3	Mr Marks doesn't read more than newspaper article and lost his train of thought throughout the interview. He had a near miss accident because of concentration problems.
Employability	5	I believe Mr Marks is not fit for any remunerative employment.

Class in Ascending Order: **Median Class**

2	**3**	**3**	**2**	**3**	**5**	**= 3**

Aggregate Score Impairment: **Total %**

2+	**2+**	**3+**	**3+**	**3+**	**5**	**18** **= 22%**

Whole person impairment:

22%

It is not appropriate to make an adjustment for the effect of treatment as the WorkCover Guides to the Evaluation of Permanent Impairment allow for an adjustment for the effect of treatment only if there is substantial or total elimination of the Claimant's permanent impairment but this is not the case in Mr Marks."

The second MAC

61. In his second MAC, the AMS said:[32]

> "I have noted the section 78 notice by QBE, disputing entitlement to permanent impairment lump sum compensation.
>
> I have noted the medical report provided of Dr Bisht, dated to July 2019. I have provided my opinion in relation to Mr [sic] Bisht's report in the initial MAC.

[32] Appeal papers page 16.

> I note the email correspondences from Moray & Agnew Lawyers to Law Partners Personal Injury Lawyers.
>
> I have noted the supplementary statement of Mr Marks, commented on the previous condition of Post – Traumatic Stress Disorder. Mr Marks confirms that he had stopped receiving treatment since 2012, and was not in receipt of any psychiatric treatment, or experiencing psychiatric symptoms, in the months or years prior to his nominated injury.
>
> I have noted other documents from 2009 – 2010.
>
> I have noted GP records spanning the period 2000 – 2010."

62. The AMS said that the available documentation (presumably including the additional documentation) confirmed that Mr Marks had suffered a PTSD in the past and been treated for it. He said:

> "There is no evidence to suggest the experience of psychiatric disturbance or receipt of psychiatric treatment in the years preceding nominated work injury."

SUBMISSIONS

63. The appellant employer set out the history of this case including the application for the AMS to reconsider his decision in the light of the orders of the Commission dated 10 January 2020.

64. The appellant employer submitted that the reasons given in the reconsideration by the AMS for confirming his first MAC were inadequate. It submitted that the failure by the AMS to engage with the historical medical evidence including the earlier MAC of Dr Kossoff tainted his assessment, because the history he based it on was incomplete.

65. A further failure alleged was that the AMS failed to delineate "with any degree of clarify or at all" the symptoms found to have arisen from the prior PTSD considered by Dr Kossoff, let alone compare them with the behavioural consequences that the AMS found to arise from the subject PTSD. The appellant employer noted that the 2011 MAC was conclusively presumed to be correct pursuant to s 326 of the 1998 Act. It was contended that this failure represented a failure to provide adequate reasons.

66. We were referred specifically to Table 11.8 of each MAC, that is to say the 2011 MAC of Dr Kossoff and the first MAC.

67. Table 11.8 is the template for the summary of the findings by an AMS when assessing psychiatric and psychological disorders. Tables 11.1 to 11.6 set out the categories of the Psychiatric Impairment Rating Scale (PIRS). These summaries, it was argued, bore a close resemblance, and the failure by the AMS to engage with this clear evidence of a pre-existing psychiatric illness of the same type being considered by him, constituted a demonstrable error and, properly considered, must have resulted in a deduction pursuant to s 323 of the 1998 Act.

68. The appellant employer conceded that the test for the application of s 323 was that set out in *Cole v Wenaline Pty Ltd*[33] and cases following but nonetheless submitted[34]:

> "…..it is submitted that it is simply inconceivable, in light of the history and observations recorded by Dr Kossoff in her earlier MAC and the disabilities recorded by each AMS in Table 11.8, that a s323 deduction was not warranted on the evidence."

[33] [2010] NSWCA 78 (*Cole*).
[34] Appeal papers page 13.

69. A re-examination was accordingly sought to obtain a more detailed history from Mr Marks, taking into account all of the evidence that is now before the Appeal Panel.

THE RESPONDENT

70. The respondent's submissions were prepared by counsel, Mr B G McManamey. Mr McManamey noted that the material contained in the ALD from the respondent showed that Mr Marks developed PTSD whilst working as an officer in the NSW Police Force, provoked by an incident on 24 September 2009. Mr McManamey noted that Dr Kossoff had issued a MAC and that the claim had ultimately resolved on 19 May 2011 as a Work Injury Damages settlement.

71. Mr McManamey submitted that the material relied upon by the appellant employer was "broadly" consistent with the original history taken by the AMS in the first MAC. It was submitted that the clinical notes showed that no treatment had been administered after 11 May 2010. He acknowledged that at the time of Dr Kossoff's MAC, Mr Marks was involved in an out-patient PTSD course.

72. Mr McManamey referred to Mr Marks' further statement of 31 January 2020, which confirmed that treatment for his PTSD had ceased at about the time of the examination by Dr Kossoff.

73. Mr McManamey referred to the subsequent work history by Mr Marks. The evidence showed that Mr Marks maintained a healthy diet, made friends, attended work functions and would occasionally join his work colleagues for a drink at the local club. He was able to pass an extensive medical examination for the purpose of joining the Department of Justice when he started his present job.

74. He further referred to the evidence that it was not until Mr Marks was transferred to Liverpool in 2017 that he had any difficulty in performing his duties.

75. Mr McManamey submitted that the response by the AMS to the application for reconsideration was in accordance with the evidence that was before him, and accordingly he had no reason to change his opinion.

76. Mr McManamey submitted:

> "14. When fully read, the significant part of the reasoning of the AMS was that whilst the Respondent had previously suffered from Post-Traumatic Stress Disorder, the evidence before him established that there had been a recovery after 2012 and well before the subject injury."

77. It was not necessary, Mr McManamey submitted, for the AMS to refer to every piece of evidence in determining whether a s 323 deduction should be made.

78. Mr McManamey referred to the allegation that a demonstrable error had been made and submitted that however the appellant employer did not explain how the material that it was relying on could lead to any different result. The crucial part of the reasoning by the AMS was that there had been a recovery from the 2011 PTSD. There was no reference to any material which disputed the nature and the extent of the recovery. None of the material that was relied on, Mr McManamey submitted, would lead to a conclusion that Mr Marks had not made a full recovery in the face of the evidence that he had been working for some six years prior to suffering the current work injury.

79. It was submitted that the appellant employer had not related the medical evidence regarding the earlier psychiatric condition to the test to be applied when making a s 323 deduction.

80. There had been no submission from the appellant employer, it was argued, that the AMS had been wrong to conclude that there had been a full recovery from the prior condition.

81. Mr McManamey referred to Chapter 11.10 of the Guides regarding the method to be adopted regarding a s 323 deduction.

82. Mr McManamey concluded that on a fair reading of the evidence, the respondent had made a full recovery at the time of his current injury.

DISCUSSION

83. Section 323 of the 1998 Act provides relevantly:

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

84. Mr McManamey relied upon the provisions of Chapter 11.10 of the Guides, which provide[35]:

> "11.10 To measure the impairment caused by a work-related injury or incident, the psychiatrist must measure the proportion of WPI due to a pre-existing condition. Pre-existing impairment is calculated using the same method for calculating current impairment level. The assessing psychiatrist uses all available information to rate the injured worker's pre-injury level of functioning in each of the areas of function. The percentage impairment is calculated using the aggregate score and median class score using the conversion table below. The injured worker's current level of WPI% is then assessed, and the pre-existing WPI% is subtracted from their current level, to obtain the percentage of permanent impairment directly attributable to the work-related injury. If the percentage of pre-existing impairment cannot be assessed, the deduction is 1/10th of the assessed WPI."

85. However, there are some conceptual difficulties in the application of Chapter 11.10 when considered against the terms of s 323. They were considered in *Broad-spectrum (Australia) Pty Ltd v Wills*[36]. The Appeal Panel in that case said:

> "58. The method set out in Chapter 11.10 of assessing pre-existing condition is contrary to the development of the principles applicable to the application of s323..… Those principles require that the first enquiry is as to whether there is any whole person impairment caused by the injury, the second is as to its extent or degree, the third is as to whether a pre-existing condition relevantly has contributed to that impairment, and the fourth is the quantification of the contribution. Such a condition does not have to be symptomatic and may contribute to the level of impairment caused by the subject injury even if it were asymptomatic. In such situations, a clear explanation is required. Assumption or hypothesis is not sufficient, and there must be a reference to the relevant evidence to show the path of reasoning by which the assessment was reached.

[35] 55.
[36] [2019] NSW WCC MA 13 *(Wills)*

> 59. Chapter 11.10 on the other hand would seem to have an outcome that is at odds with those principles..…. Chapter 11.10 is entitled 'Pre-existing impairment' which gives an indication of the limitations the exercise required by the guideline illustrate. In the present situation…. there is no evidence supporting a pre-existing impairment, although there was at least one pre-existing condition. In these circumstances, the exercise of using the same method of calculating pre-existing condition as is set down for the calculating of the current impairment is an unhelpful task. It stands to reason that if a worker has not suffered an injury at the outset of his/her employment, it may very well be that he/she is not suffering from any impairment. It may be, as in the present case, that the person is functioning with a pre-existing condition, but if it is asymptomatic then the result of the exercise will be that at the time just before injury the injured worker had no whole person impairment that was due to his/her pre-existing condition.
>
> 60. Although the last sentence of chapter 11.10 mandates a finding of 1/10th if the percentage of pre-existing impairment could not be assessed, in the case of a worker carrying a pre-existing condition which was asymptomatic the percentage of pre-existing impairment can easily be assessed. In the present case, the assessment would be nil. In all the categories of the Psychiatric Impairment Rating Scale, Ms Wills would be assessed as a class I value, that is to say, prior to the subject injury, she had either no deficit, or a minor deficit attributable to the normal variation in the general population. The logical application of that method would be that Ms Wills is entitled to the full assessment, without deduction.
>
> 62. Having complied with the requirement that we measure the WPI due to a pre-existing condition as mandated by Chapter 11.10 and then subtract this from the current WPI, we decline to apply it to the present circumstances, as it would produce an anomalous assessment contrary to the principles we have above referred to."

86. Meagher J considered the Panel's approach to Chapter 11.10 on appeal, noting that no challenge was made as involving any reviewable error on that Panel's understanding of the task required by s 323(1).[37]

87. As was the case in *Wills*, an application of Chapter 11.10 to Mr Marks' case would also give a nil assessment, as the predominance of the evidence shows that he was asymptomatic when he began work with the appellant employer. As is pointed out in the above extract however, whether a claimant was asymptomatic or not when he commenced his employment is but one of the factors that have to be considered in the context of s 323.

88. There were two cases regarding *Wills* in the Supreme Court. The first case overturned the decision of the Panel, and the second confirmed the determination of the reconstituted Panel.

89. In the first *Wills*[38] case Harrison AsJ said:

> "Both parties referred to *Ryder v Sundance Bakehouse Pty Ltd* [2015] NSWSC 526 … where Campbell J stated at [45]:

[37] *Broad-spectrum (Australia) Pty Ltd v Wills* [2019] NSWSC 1797 at [19].
[38] [2018] NSWSC 1320.

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

90. In *Elcheikh v Diamond Formwork (NSW) Pty Ltd (In Liq)*[39] Schimdt J said at [91]:

> "…the fact that the pre-existing condition had been asymptomatic did not preclude it from contributing to the impairment being assessed. Nor, however, could it be assumed that an asymptomatic condition did contribute to the impairment. Whether or not there had been any contribution had to be determined on the evidence, which included the competing specialist opinions on that matter, as well as various other evidence."

91. We note that the first contemporaneous record regarding the subject injury was that contained in the clinical notes of Mr Marks' GP, Dr Arain, on 1 May 2018. He noted that Mr Marks suffered from an anxiety disorder, and had a history of PTSD over 17 years ago.

92. It is not clear whether Dr Arain recorded a wrong history, as the evidence shows that Mr Marks' earlier PTSD was suffered nine years before, whether Mr Marks misled him, or whether there was in fact an earlier PTSD in about 2001. The clinical notes produced by Dr Arain's practice commenced on 3 December 2003.

93. However, the treating psychiatrist, Dr Nagesh, also recorded in his notes of 17 May 2018 that Mr Marks had been feeling depressed and anxious for the past 15 years and was unable to handle stress. Dr Nagesh also noted in his report to Dr Arain that Mr Marks had an unfortunate childhood and that he was bullied at school. He also saw a psychologist at that time. Dr Nagesh recorded Mr Marks' complaints that he had been stressed and anxious for the past 15 years "which had been worse lately where he finds it difficult to handle."

94. Whereas some caution needs to be taken when considering the clinical notes of health professionals,[40] such as the entry in Dr Nagesh's notes of 17 May 2018, when it also appeared in a considered report from Dr Nagesh, who was Mr Marks' expert treating psychiatrist, the history of 15 years of anxiety and stress assumes more relevance.

95. Mr McManamey was at pains to stress that there was no evidence that Mr Marks was suffering from a psychological condition since 2012, and we accept that over that period Mr Marks was not having treatment for that condition. However, the evidence from Dr Arain and Dr Nagesh strongly suggests that Mr Marks himself considered that he had been depressed, stressed and anxious for at least 15 years, and that he was unable to handle stress.

[39] [2013] NSWSC 365.
[40] See eg *Qannadian v Bartter Enterprises Pty Limited* [2016] NSWWCCPD 50 at [35].

96. More importantly perhaps, that evidence was before the AMS and was relevant to the question of whether any deduction pursuant to s 323 should be made. We agree with Mr McManamey that an AMS is not required to refer to every piece of evidence that is before him, but in the context of Mr Marks' refusal to discuss his prior PTSD, the question arises as to whether more than one conclusion was open to the AMS in determining whether any previous injury, pre-existing condition or abnormality existed which contributed to the impairment caused by subject injury. The evidence of the treating practitioners raised that possibility and accordingly the AMS had an obligation to give reasons as to why he disregarded it.

97. The evidence from the treating practitioners Dr Arain and Dr Nagesh ought to have sounded a warning to the AMS that Mr Marks' version of events should be treated with some caution.

98. Similarly, Mr Marks' response to Dr Bisht that he only had psychotherapy "because he was told to" is a statement that did not sit well with the past history recorded by the treating practitioners.

99. The evidence that was lodged in the ALD regarding the reconsideration was compelling in its detail. The failure by the AMS to contemplate a change in his opinion as to the application of s 323 flies in the face of the report of Dr Kossoff and the evidence contained in the particulars of continuing disabilities alleged in his action against the NSW Police Force. Mr Marks alleged that the following behavioural consequences were occurring following his 2009 injury:[41]

> "(i) Inability to work.
> (ii) Whole person impairment.
> (iii) Restricted mobility and agility.
> (iv) Inability to participate in many social, domestic and recreational activities.
> (v) Insomnia.
> (vi) Nervousness anxiety and depression,.
> (vii) Deterioration of relation with family and friends.
> (viii) Loss of enjoyment of life.
> (ix) Headaches
> (x) Necessity to take medication on a regular basis.
> (xi) Sexual incapacity."

100. Dr Kossoff found Mr Marks to be affected by a 22% WPI as a result of his PTSD in January 2011. She referred to evidence from Dr Akkerman, psychiatrist, Dr Selwyn Smith, psychiatrist, Dr Brian Potter, psychiatrist, and Dr Sivagnanpiragas, none of whom were retained in Mr Marks' present action.

101. Dr Kossoff noted that Mr Marks had been referred for treatment to Dr Selwyn Smith, whom he saw once or twice a month. Dr Kossoff related that Dr Smith had wanted to admit Mr Marks to the St John of God hospital. Dr Kossoff noted that Mr Marks was prescribed Lovan 20mg per day in place of Efexor which had been causing side effects.

102. Dr Sivagnanapragasam worked at a different practice from Dr Arain, namely General Practice for Children & Young Families at 23 Chamberlain St Campbelltown, whereas Dr Arain practices from Park Central Family Practice at 1 Centennial Drive Campbelltown.

[41] Appeal papers page 294.

103. Clinical notes from Dr Sivagnanapragasam were lodged with the ALD dated 3 February 2020 covering the period from 3 December 2003 to 2 July 2010.[42] The entries of 30 October 2008 and 18 November 2008 recorded symptoms of mild depression and the prescription of Lovan whilst Mr Marks was working for the Fire Brigade. An entry of 16 December 2008 showed that Mr Marks was tolerating Lovan well, and an entry for 22 December 2008 showed that he was continuing to take Lovan.[43] Some handwritten notes dated 3 March 2000 - 24 March 2004 were also lodged, presumably from the same practice. The entry of 3 March 2003 indicated attendance for a stress related condition.

104. The refusal by Mr Marks to give any details regarding his previous injury kept from the AMS both the details of the actual trauma and the subsequent medical treatment and opinions. The AMS elided any discussion as to whether the past history of PTSD caused any impairment that contributed to the impairment caused by the subject injury by saying that Mr Marks' mental health was "seemingly" stable prior to the subject injury.

105. In taking that approach the AMS has applied the wrong test. Whether or not a claimant was asymptomatic prior to the occurrence of an injury is not, as the AMS appeared to believe, determinative of whether any deduction should be made. An AMS is required to consider all the relevant evidence. As he was faced with a claimant who refused to supply relevant history, the AMS did not have relevant evidence with which to decide whether the previous PTSD had created an impairment that contributed to the impairment caused by the subject injury or not.

106. A/Prof Robertson's view in his report of 10 April 2019 was not dependent upon what Mr Marks told him, but rather on what Mr Marks did not tell him. He suspected some cross-cutting features of PTSD and speculated that the presentation might be an exacerbation or recrudescence of the previous (presumed) PTSD.

107. Accordingly, we are satisfied that the AMS has made a demonstrable error in failing to give adequate reasons for not making a s 323 deduction. The extent of the deduction is not difficult to determine, as there was medical evidence before the AMS upon which a more precise assessment could be made than the statutory assumption provided by s 323(2).

108. The available evidence shows that Mr Marks has experienced anxiety of varying degrees from time to time. Dr Nagesh recorded that he saw a psychologist years ago in the context of his childhood experiences, he was prescribed Lovan for his anxiety symptoms whilst working for the Fire Brigade in 2008 and he suffered a PTSD with the NSW Police Force in 2009. He has managed to work without seeking medical treatment since, and indeed passed a psychological test in order to commence work with the appellant employer in 2014. Mr Marks was able to work as a handyman at various public schools between 2012 and 2014, and has not received medical treatment since 2012.

109. We note too, the similarity of the situations in the Police Force and the Sherriff's Office, in that Mr Marks' PTSD was triggered by some-one in authority whom Mr Marks perceived was bullying him. In the case of the Police Force it was Special Constable Tucker , and with the Sherriff's office it was Sergeant Baroudi, and then Sergeant Khaoula.

110. The history regarding his bullying by Sergeants Baroudi and Khaoula, coming as it did in written form from Mr Marks, was before the AMS but was not incorporated into his reasons, as we have noted. It may be that the AMS did not consider Mr Marks' own written account was relevant, but again he made no explanation as to why that was so, and his failure to give adequate reasons in that regard is also a demonstrable error.

[42] Appeal papers pages 360 – 377.
[43] Appeal papers page 364.

111. We regard that history as being the cause of Mr Marks' decompensation. Firstly, Mr Marks himself described his experiences with both Sergeants as constituting the "Circumstances of claim" in his statement of 27 July 2018, when he described from paragraphs 45 to 71 the inter-actions he experienced with both employees. Secondly, although in his statement he referred to the risk of violent or aggressive confrontations with clients at Liverpool Court and said that the exposure to risk there contributed to his sense of anxiety, it was the perceived harassment by Sergeant Khaoula that caused Mr Marks not to want to go to work any more.[44] Thirdly, whilst Mr Marks complained to A/Prof Robertson in April 2019 that he ceased work after he had been the subject of death threats from members of the public he helped to eject at Liverpool Court, no such event was described in his statement. Mr Marks said that It was Dr Nagesh who "convinced" him that the threat of violence and the harassment at the hands of Sergeant Khaoula were work related.[45]

112. We observe that in the circumstances of the trauma Mr Marks experienced with the Police Force, the situation which Mr Marks found himself in with Special Constable Tucker went beyond mere perception. The fact that Special Constable Tucker was behaving in an intimidating and offensive manner was corroborated by a witness, Probationary Special Constable David Paull.[46] That Special Constable Tucker also placed his hand on his weapon whilst so behaving we accept would have caused significant trauma to Mr Marks.

113. The similarity of the two causes of Mr Marks' PTSD we regard as being of some moment. We accept that the circumstances of the subject injury have been affected by Mr Marks' prior experiences with the Police Force, as they show that he was traumatised by his superior officer. His subsequent decompensation when he perceived he was being bullied by his senior officers was contributed to by that earlier experience.

114. The appellant employer argued that Table 11.8 in the MACs of Dr Kossoff and the first MAC were of such similarity that the determination of the AMS as to application of s 323 gave rise to more than one conclusion, and that accordingly the AMS should have given reasons as to why he made no such comparison.

115. The PIRS has not altered between 2011 and the present day. The fact that the Guides have not changed make the description of the behavioural consequences in each category of evidentiary value. The descriptors given for each category in each MAC bear a close resemblance, and we are satisfied that the AMS has fallen into error by failing to explain why the earlier behavioural consequences did not contribute to the impairment that he found for the injury he was assessing.

116. Although the AMS said that he "noted other documents from 2009 – 2010" his failure to specifically refer to them regrettably leads to the conclusion that he failed to consider the content of those documents and their implications regarding s 323 of the 1998 Act.

117. The similarity in the symptoms described by Dr Kossoff and the AMS are quite marked, and indicate similarities with Mr Marks' earlier PTSD when his current injury manifested itself. Without his earlier injury we are satisfied that his ability to cope with the perceived problems at his workplace in 2018 would not have been as compromised and the degree of impairment would have been significantly lessened.

118. We indicated at the outset of these reasons that a re-examination was not called for. To question Mr Marks about matters of record would not have assisted our deliberations. The relevant evidence was before us and our clinical assessment was based on a comparison of the evidence before the AMS that impinged on the application of s 323 and the reasons he gave for his determination. Mr Marks' subjective interpretation of either the evidence or the reasons was not a matter that would have assisted us.

[44] Appeal papers page 12 at [62-63].
[45] Appeal papers page 13 at [71].
[46] Appeal papers page 353.

119. The evidence before the AMS at the time of his reconsideration demonstrated that there were other causes for the impairment caused by the psychiatric injury suffered by Mr Marks whilst employed with the appellant employer. Those other causes were both the prior psychiatric injury suffered when Mr Marks was employed by the NSW Police Force, and the pre-existing depressive state that Mr Marks was from time to time subject to. We are satisfied that the degree of impairment caused by the subject injury would not have been as great but for these matters.

120. The AMS has accordingly made a demonstrable error and the MAC will be revoked.

121. As we have indicated, the evidence is sufficient to make more than the statutory deduction of 1/10. We note that there appeared to have been a psychological reaction to the work that Mr Marks was doing for the Fire Brigade in 2008, but the evidence regarding that episode was contained only in clinical notes. We find that Mr Marks was prescribed Lovan in 2008 so that to that extent it is apparent that he had a pre-existing psychological condition. The evidence does not allow any further conclusions to be drawn in that regard.

122. The medical experts on the Panel concur that a previous injury such as the PTSD suffered by Mr Marks is a significant factor in assessing the WPI caused by a further PTSD. We agree with A/Prof Robertson, who did not have the details available and therefore quite properly applied the statutory 1/10th deduction, that the impairment caused by the prior PTSD contributed to that caused by the subject injury.

123. Whilst the impairment caused by the earlier PTSD abated with the passage of time, such an injury would make a substantial contribution to impairment arising from a new injury. In some cases it might be mostly responsible for impairment which develops after a relatively minor incident. We do not however agree with A/Prof Robertson that the present PTSD is a recrudescence of Mr Marks' earlier PTSD. They are separate injuries, and A/Prof Robertson was of necessity speculating when he made that comment, as Mr Marks had declined to tell him the details of his earlier injury. The PTSD caused by the subject injury would have occurred had Mr Marks been in normal health, but the damage he sustained is greater because of aggravation caused by the earlier PTSD with the Police Force.

124. As we have indicated, the source of Mr Marks' current PTSD was his distress at the way he perceived he had been treated by Sergeants Baroudi and Khaoula, as he averred in his statement. Although reference was made to his having faeces thrown at him on one occasion, the detail was given by A/Prof Robertson, who described the incident as one occasion when a woman threw her baby's excretia at him.[47] We do not consider that such an event would have caused a person with usual psychological fortitude to develop a psychiatric condition, and neither do we think that the bullying he perceived at the hands of his two superiors would have caused such an extreme psychological reaction without that earlier trauma. His previous experience at the hands of Special Constable Tucker would have acted as a trigger to re-introduce those behavioural consequences which had been identified by Dr Kossoff when she assessed a similar WPI to that which was given by the AMS. The contribution to the present impairment is accordingly significant.

125. We consider that these matters would substantially contribute to the degree of impairment caused by the subject injury. However, in accordance with the above authorities, it is necessary to consider all the evidence in making such an assessment, and we note that, after doing a handyman job for two years without any necessity for Mr Marks to seek treatment, he then had to undergo psychological tests in order to obtain his employment with the appellant. We also note that Mr Marks worked for a further four years before again ceasing work.

[47] Appeal papers page 41.

126. Taking those matters into account, we consider that a deduction of 1/4 should be made pursuant to s 323.

127. Having revoked the MAC, we are required to consider whether the Guides have been properly applied in other respects.[48]

128. As indicated, the AMS made a determination that his assessment should be increased by a further 2% for the effects of treatment. In making that finding, the AMS was employing the provisions of Chapter 1.32 of the Guides, which provides:[49]

> "1.32 Where the effective long-term treatment of an illness or injury results in apparent substantial or total elimination of the claimant's permanent impairment, but the claimant is likely to revert to the original degree of impairment if treatment is withdrawn, the assessor may increase the percentage of WPI by 1%, 2% or 3%. This percentage should be combined with any other impairment percentage, using the Combined Values Chart. This paragraph does not apply to the use of analgesics or anti-inflammatory medication for pain relief."

129. It can be noted that this modifier is only available where there has been effective long-term treatment that has resulted in "apparent substantial or total elimination" of the relevant impairment. We do not agree that Mr Marks' permanent impairment has achieved either substantial or total elimination by virtue of his treatment. The test is not whether treatment has resulted in an improvement in mental health or even a significant reduction in impairment. To qualify for this additional WPI it must be shown that the treatment has resulted in a substantial or total elimination of the WPI that is apparent. Mr Marks is suffering from an impairment of 19% WPI. Whether the treatment has resulted in a significant reduction in impairment or not, it nonetheless is not apparent that the impairment has been either substantially or totally eliminated.

130. Accordingly, the 2% WPI for the effects of treatment will also be revoked.

131. It follows that the assessment of the MAC will be confirmed in the WPI found by the AMS in Table 11.8, that is to say 19% WPI. A deduction to that amount of 1/4 results in an entitlement of 14% WPI.

132. For these reasons, the Appeal Panel has determined that the MACs issued on 24 October 2019 and 14 April 2020 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 Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar

[48] *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC 1053 at [61] per Garling J: *Mercy Connect Limited v Kiely* [2018] NSWSC 1421 at [103] per Harrison AsJ.
[49] Guides page 6.

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **4986/19**
Applicant: **Secretary, Department of Communities and Justice**
Respondent: **David Marks**

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 Wasim Shaikh 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 WorkCover Guides	Chapter, page, paragraph, figure and table numbers in AMA 5 Guides	% WPI	Proportion of permanent impairment due to pre-existing injury, abnormality or condition	Sub-total/s % WPI (after any deductions in column 6)
Psychological	6 February 2018		PIRS	19%	1/4	14%
Total % WPI (the Combined Table values of all sub-totals)					**14%**	

John Wynyard
Arbitrator

Dr Julian Parmegiani
Approved Medical Specialist

Dr Michael Hong
Approved Medical Specialist

13 August 2020

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

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar