WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-743/19**
Appellant:	**Ross Leon Donaldson**
Respondent:	**State of New South Wales**
Date of Decision:	**28 October 2019**
Citation:	**[2019] NSWWCCMA 151**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr Michael Hong**
Approved Medical Specialist:	**Dr Julian Parmegiani**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 7 August 2019, Ross Leon Donaldson lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Patrick Morris, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 24 July 2019.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - the 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).

RELEVANT FACTUAL BACKGROUND

6. It is convenient to extract the history reported by the AMS at Part 4 of the MAC,

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:
> Mr Donaldson said that he was attested as a NSW Police Officer in May 2007 after training in the Goulburn Police Academy. He then had a placement at the Maroubra Local Area Command for two and a half years. He then worked at the Police Community Crime Centre located at Central for two years which involved working in public transport. He then took 12 months of leave without pay from 2013 to 2014 and worked in his father's business. In 2014, he returned to the Police Transport Command where he worked until 2016. He was then transferred to the Public Order and Riot Squad based at Olympic Park where he worked until he stopped working on 30 January 2018.
>
> Whilst working at the Maroubra Local Area Command he attended drownings, deaths, a man shot at a hotel and child abuse incidents. He attended a woman who had severely self-harmed in Randwick. He also had to give people news of their dead relatives.
>
> Whilst working in the Community Crime Unit and the Police Transport Command Mr Donaldson said he witnessed numerous rail fatalities including dismembered bodies. He also had to intervene in many fights. He attended an incident at Belmore Park where he said an assailant was spitting at him and Mr Donaldson covered the man's mouth with his bleeding hand. He said he found out later that the assailant was HIV-positive and he needed to be tested which was a time of great anxiety for him. In the Public Order and Riot Squad Mr Donaldson said he attended riots, domestic violence incidents, incidents involving biker gangs and witnessed the dead body of a horse. He said he was also frequently threatened by criminals.
>
> In January 2018 Mr Donaldson said he was doing long arm training at Singleton when he felt very distressed and anxious as the exercise was occurring during severe heat. He felt faint and collapsed. He said it was a potentially dangerous situation then as he had a loaded firearm in his hands. He needed paramedic assistance and required rehydration. Mr Donaldson said he did not return to work after this incident.
>
> Mr Donaldson said that he started feeling increasingly agitated, angry, tense in crowds, hypervigilant and was drinking alcohol more heavily in around 2013. During the 12 months, he was not working in the police and was working with his parents he felt better.
>
> After returning to police work in 2014, Mr Donaldson said his agitation, anger and tension and drinking worsened. He had sleep disturbance but no nightmares at that time. He was getting frequent intrusive traumatic memories of experiences he had gone through in the NSW Police Force. He lost interest in previously enjoyed activities like going to the gym. He felt sad and depressed and found it difficult to feel close to people. He avoided social activities.

Mr Donaldson said he saw his GP Dr Mustafa Jamnagarwalla around 2013-14 and was referred to a psychologist who he saw on about two occasions. He said that he saw his GP Dr Mustafa Jamnagarwalla again around 2014 who commenced him on Zoloft at a dose of 50mg a day which had gradually been increased to 200mg daily and which he had been on for the last six months. He was also referred to a Psychologist, Tony Georginis in May 2018 and had been seeing him on a weekly to fortnightly basis since then. Mr Donaldson said he was referred to a Psychiatrist, Dr Smith in early 2018 and he had seen him on about a monthly basis since then. He said that Dr Smith had commenced him on the medication, Dexamphetamine 30mg daily for Attention Deficit Hyperactivity Disorder for the past six weeks. Mr Donaldson said that he believes this medication has helped calm him down a little and helped him concentrate better."

PRELIMINARY REVIEW

7. 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.

8. 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 for the reasons given below.

EVIDENCE

Fresh evidence

9. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.

10. The appellant seeks to admit the following evidence:

    (a) Statement of the appellant, Mr Ross Donaldson dated 26 July 2019;
    (b) Report – Tony Georginis, psychologist, dated 5 August 2019.

11. The appellant submits that the supplementary statement of Mr Donaldson is relevant to establishing that the AMS took an incorrect history; and the report of Mr Georginis is relevant because it gives comment on the MAC and provides the correct history which would alter the assessment.

12. The respondent submits that the new material should not be admitted because it would be an inappropriate application of section 328(3) of the 1998 Act to admit material comprising a response to the MAC.

13. Section 328(3) of the 1998 Act sets out the conditions for the admission of new evidence on appeal:

> "(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."

14. In *Lukasevic v Coates Hire Operations Pty Limited* [2011] NSWCA 112 (*Lukasevic*). Hodgson JA, in the majority, says (at 78),

> "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 or flimsy grounds. Having regard to the matters I have set out, in my opinion it would be reasonable for an AP [Appeal Panel] 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."

15. In *Petrovic v BC Serv No 14 Pty Limited and Ors* [2007] NSWSC 1156 (*Petrovic*) Hoeben J said,

> "In my opinion, the words "availability of additional relevant information" qualify the words in parentheses in s327(3)(b) in a significant way. The information must be relevant to the task which was being performed by the AMS. That approach is supported by subs 327(2) which identifies the matters which are appealable. They are restricted to the matters referred to in s326 as to which a MAC is conclusively taken to be correct. In other words, "additional relevant information" for the purposes of s327(3)(b) is information of a medical kind or which is directly related to the decision required to be made by the AMS. It does not include matters going to the process whereby the AMS makes his or her assessment. Such matters may be picked up, depending on the circumstances, by s327(3)(c) and (d) but they do not come within subs 327(3)(b)."

16. The supplementary statement of Mr Donaldson dated 26 July 2019 comprises commentary on the history taken and the findings of Dr Morris. The report of Dr Georginis of 5 August 2019 repeats his earlier history and opinion before going on to express opinions on the findings of the AMS. The materials are in the same category as that at issue in *Lukacevic*.

17. The application for the report to be admitted also does not satisfy s 328(3) of the 1998 Act because the opinions in the report have either been provided in Mr Georginis' report of 25 June 2018 that was before the AMS or could have been obtained prior to the assessment. To the extent the opinions concern the findings of the AMS, they are merely differences of clinical opinion on the PIRS Category ratings, which is not a basis for appeal in the absence of a demonstrable error on the face of the Certificate.

18. The AMS reports the history he took and explains the reasoning for the rating in each appealed Psychiatric Impairment Rating Scale (PIRS) Category. The additional materials that disagree with these findings do not have "substantial *prima facie* probative value, in terms of its particularity, plausibility and/or independent support." (*Lukacevic*).

19. For these reasons, the Appeal Panel determines that the additional material should not be received on the appeal because it does not satisfy section 328(3) of the 1998 Act or the relevant authorities.

Documentary evidence

20. 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

21. The parts of the medical certificate given by the AMS are set out, where relevant, in the body of this decision.

SUBMISSIONS

22. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.

Appellant

23. In summary, the appellant submits that the AMS has erred in his assessment of the Psychiatric Impairment Rating Scale (PIRS) Categories of Social and recreational activities; and of Employability.

24. The AMS took an incorrect history as to the restrictions on social and recreational activities; and had he taken a correct history should have assigned Class 3 to this Category.

25. Had the AMS adopted a more balanced view of the facts in relation to Employability he would have assigned Class 4 for Employability.

Respondent

26. The conclusions reached by the AMS in each of the appealed categories accord with the history taken and the clinical findings.

27. It is not an error for the AMS to reach a different conclusion to other assessors, in the absence of any internal inconsistency or omission within the MAC itself. The MAC should be confirmed.

FINDINGS AND REASONS

28. 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.

29. 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.

PIRS Category - Social and recreational activities

30. The AMS says at Table 11.8 for “Social and recreational activities”,

> “Mild impairment.
> Mr Donaldson is able to go to a gym to do boxing training by himself about three times a week. He can visit his mother and father by himself and also visits his sister by himself to look after her children. He travels by himself to New York to visit friends where he mostly stays at home with them but occasionally will go out by himself. He generally remains quiet and withdrawn at home and does not frequently go out with his wife or with his friends.”

31. The above is consistent with the reported history taken and the clinical findings. The Supreme Court noted in *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140,

> "In *Ferguson v State of New South Wales* [2017] NSWSC 887 at [23], Campbell J cited with approval *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36 ("*Wark*"), where it is stated at [33]:
>
> "…the pre-eminence of the clinical observations cannot be understated. 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. …"
>
> 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]).

32. The Court said, finding the Panel in that matter had erred in equating a difference of opinion with a demonstrable error [at 70],

> "To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence."

33. The PIRS Category at issue was different to those here, but the AMS in *Parker* took a similar approach to Dr Morris in this matter. The Court described the process as,

> "The AMS took the history from Mr Parker and conducted a medical assessment, the significance or otherwise of matters raised in the consultation is very much a matter for his assessment. It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ. Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error. The material before the AMS, and his findings supports his determination that Mr Parker has a Class 3 rating assessment for impairment for self care and hygiene, that is to say, a moderate impairment of self care and hygiene."

34. Dr Morris has adhered to the Guidelines in making the assessment. The Guidelines give the examples for Class 2 and Class 3 at Table 11.2:

> "Class 2
> Mild impairment: occasionally goes out to such events eg without needing a support person, but does not become actively involved (eg dancing, cheering favourite team).
>
> Class 3
> Moderate impairment: rarely goes out to such events, and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn."

35. The AMS explains in detail where and why he differs from Dr Smith's assessment of Social and recreational activities at Part 10.c., including why he arrived at Class 2 rather than Dr Smith's Class 3. As the authorities demonstrate, a difference of opinion is not a basis of appeal in the absence of a demonstrable error on the face of the Certificate.[1]

36. There is no error discerned by the Panel. It was open to the AMS on the history taken, the findings on examination, and the other medical opinions to conclude that Class 2 is the applicable rating. The AMS addresses the history taken and his clinical findings in arriving at his conclusion.

PIRS Category - Employability

37. The principles from the authorities discussed above are also relevant for this ground of appeal.

38. The AMS summarises at Table 11.8 for Employability,

> "Moderate impairment.
> Mr Donaldson would not be able to work at all as a Police Officer. He would be able to work for less than 20 hours per week in a less stressful position, such as working for himself from home."

39. The appellant submits that "a more balanced view of the facts" concerning Mr Donaldson's desire to work in the family business would have resulted in a finding higher than Class 3. The Panel is of the view that this submission concerns a difference of opinion without a demonstrable error, as discussed above.

40. The Guidelines at Table 11.6 give the following examples,

> "Class 3
> Moderate impairment: cannot work at all in same position. Can perform less than 20 hours per week in a different position, which requires less skill or is qualitatively different (eg less stressful).
>
> Class 4
> Severe impairment: cannot work more than one or two days at a time, less than 20 hours per fortnight. Pace is reduced, attendance is erratic."

41. The history taken and the clinical findings are consistent with Class 3 and it was open to the AMS to arrive at this conclusion.

42. The AMS is not required to adopt the findings of other assessors. The Panel discerns no demonstrable error on the face of the Certificate.

Findings

43. For these reasons, the Appeal Panel has determined that the MAC issued on 24 July 2019 is confirmed.

[1] See also *Mahenthirarasa v State Rail Authority of New South Wales & Ors* [2007] NSWSC 22: "A demonstrable error would essentially be an error for which there is no information or material to support the finding made – rather than a difference of opinion."

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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar