

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-20/19
Appellant:	Tarra Ann Swift
Respondent:	State of NSW (NSW Police Force)
Date of Decision:	19 September 2019
Citation:	[2019] NSWCCMA 135

Appeal Panel:	
Arbitrator:	Ms Deborah Moore
Approved Medical Specialist:	Dr Michael Hong
Approved Medical Specialist:	Dr Julian Parmegiani

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 7 June 2019, Tarra Ann Swift lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Brian Parsonage, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 15 May 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).

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 no request was made, and we consider that we have sufficient evidence to enable us to determine the appeal.

Fresh evidence

8. 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.
9. The appellant seeks to admit the following evidence:
 - a. A statement from the appellant dated 3 June 2019.
10. The appellant submits that the evidence is relevant because it “responds” to a number of comments made by the AMS. The appellant submits that the evidence was not available and could not reasonably have been obtained because the MAC was not available before the statement was obtained.
11. The respondent objects to this evidence, adding:

“The fresh evidence of the appellant does not meet the criteria outlined in section 328(3) of the 1998 Act, and could have reasonably [been] obtained by the appellant before the MAC. The matters addressed in her supplementary statement and her descriptions of her functioning were within her knowledge prior to the date of the AMS assessment and she could have filed and served her supplementary statement with her Application to Resolve a Dispute. The appellant herself says [the] supplementary statement is "commentary" on the AMS assessment, which is not permitted under the legislation and which does not form a proper basis for the admission of new evidence.”
12. The Appeal Panel accepts the respondent’s submissions: the statement is not admissible, and should not be received on the appeal.

EVIDENCE

Documentary evidence

13. 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

14. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
15. In summary, the appellant submits that the AMS erred in his assessment with respect to a number of the PIRS categories.
16. In reply, the respondent submits that no errors were made, and that the MAC should be confirmed.

FINDINGS AND REASONS

17. 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.

18. 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.
19. The appellant was referred to the AMS for assessment of whole person impairment (WPI) in respect of a primary psychological condition resulting from a deemed date of injury of 24 October 2013.
20. The AMS took a detailed history of the appellant's work with the respondent between 2000 and October 2013. She was exposed deceased people on a number of occasions throughout her employment. She was medically retired on 26 March 2015.
21. During her career as a Police Officer she had to attend a number of fatal motor vehicle accidents. She also told the AMS that "she had also been affected by mistreatment/lack of support by superior officers but she indicated that dealing with deceased individuals was her largest source of distress."
22. She received treatment over the years from a psychologist, her general practitioner, Dr Kamerman, and later a psychiatrist, Dr Smith. Dr Smith had prescribed Avanza, sertraline, temazepam, Endep and Seroquel.
23. Present treatment was described as follows:

"Mrs Swift was no longer seeing a psychologist regularly after her previous psychologist stopped taking WorkCover referrals and the replacement psychologist went on maternity leave. She was still seeing her GP regularly. She hadn't seen her psychiatrist, Dr Smith for more than two years. She had a referral to see him again but it was difficult to arrange care of her two year old daughter..."
24. Present symptoms were reported as follows:

"As had been the case since 2013 Mrs Swift experienced episodes where she would relive incidents, such as fatal car accidents in which she would "watch it happen again". A variety of triggers could trigger such episodes, such as particular smells.

She tried not to think about those incidents and if possible would avoid driving past places where accidents had occurred.

She reported her general outlook had changed: "I used to be fun now I exist." She reported persistent high levels of anxiety and reduced interest in general social contact. She reported that she was easily frustrated and when she was out she would be vigilant and would position herself so she could look around the room. She reported having difficulty concentrating and falling and staying asleep.

Mrs Swift reported persistent feelings of depression more often than not over at least the last six years. When she felt depressed her appetite would generally be reduced. She experienced low self-esteem and feelings of hopelessness but she had not tried to harm herself since 2014."
25. The AMS noted that the appellant had experienced a subsequent incident, stating that:

"After she left the Police Force she married for the second time after meeting that husband in 2015. Not long after her daughter was born Mrs Swift's husband was killed in a single vehicle motor accident. Mrs Swift saw reports of an accident on Facebook and went to the scene of the accident... She reported that her husband had sustained severe, disfiguring

injuries but she said that that “didn’t matter because he was mine.” Mrs Swift reported she was sad and upset and sought extra treatment from her psychologist and GP and focused on her then 11 week old daughter. She reported that while her symptoms of PTSD and depression continued to fluctuate somewhat, overall they did not substantially change after her husband died.”

26. As regards her social activities and ADL’s, the AMS said:

“Prior to joining the Police Mrs Swift was living at home with her mother and stepfather studying to be a Police Officer. She was exercising and training to maximise her chances of being accepted into the Police Force which was something she had wanted to do since she was a child. She was single and had a number of friends from school.

Currently Mrs Swift was living on a 10 acre property...on the New England tablelands. She was a widow and lived with her two year old daughter. She received workers compensation and income protection payments.

Mrs Swift reported that she cleaned her house extremely thoroughly, for example, washing the carpets on a daily basis. She was the sole carer for her daughter and did all the cooking. They ate regular meals. Mrs Swift looked after her personal hygiene adequately but she took less care with her appearance than she had done before she became unwell.

Mrs Swift’s interest had recently changed from physical training which she had undertaken with enough intensity to lose weight from 110kgs before she gave birth to 55kgs currently. Since moving from Bendemeer in November last year because it was close to the scene of her husband’s fatal motor vehicle accident, she had taken up interest in horse riding, in particular dressage. She had bought a new horse and twice a week drove two hours to have riding lessons to improve her dressage skills and to have a ride with two other people who attended the riding school. She had a hobby of breeding Labradors and through that had made some friends. Last weekend she had attended the Highland Festival at Glen Innes and had met up with two of her friends. She planned to go to a show in the next ten days to display her horse. She reported that she did lots of activities with her daughter including taking her to dance classes and doing painting and craft together.

Mrs Swift reported that she was a very careful driver and, while anxious, she was able to drive long distances, for example, to Sydney by herself...

Mrs Swift reported that she had lost some previous friendships but she had made other friendships through her dog breeding and kept in touch with them regularly. She reported that she had a reasonable relationship with her brother who also had PTSD and she was closer to her sister. She reported that she tolerated her mother as she always had and she regarded her stepfather as “lovely.” She had seen them more often since her husband had died. She had a reasonable relationship with her mother-in-law who was looking after her daughter while Mrs Swift attended this appointment.

Mrs Swift reported that she was able to do tasks such as building a shed on her property and build a back verandah but she no longer had the desire or ability to persist with more intellectually demanding tasks, such as reading books. Whereas previously she had been able to sew without difficulty she now had difficulty following anything more than a basic pattern. She had tried to do a counselling course a few years ago but was not able to manage it.

Mrs Swift had five cattle she was breeding on her property and she was raising pigs to sell in addition to her dog breeding. She received an income protection and workers compensation payments and had had no paid work since leaving the Police Force.”

27. Following his interview, the AMS said:

“Mrs Swift understood the purpose of the interview and was cooperative. She appeared moderately anxious and depressed and was on the verge of tears on a number of occasions during the one and a half hour examination. She displayed no psychomotor agitation or retardation. She was able to give a coherent, detailed history which was consistent with her presentation and the documentation. She had no signs or symptoms of psychosis nor was there evidence of gross cognitive impairment.”

28. The AMS diagnosed a Post-traumatic Stress Disorder and Persistent Depressive Disorder. He assessed 7% WPI. He added:

“Mrs Swift’s husband had died in a motor vehicle accident in 2017. This caused understandable distress and grief but did not cause a further unrelated injury.

Mrs Swift’s persistent and largely stable symptoms of PTSD and depression and her level of functioning over the last two years, during which time she has been able to raise her daughter by herself after the tragic loss of her husband last year. She has been living independently and has been able to undertake healthy practices to lose weight. She has been able to run a small property single-handedly and has pursued new interests and made new friendships.

I made no adjustment for the effects of treatment because while treatment had been of some benefit in reducing her symptoms there has been no substantial change in her level of impairment, which certainly has not been substantially or totally eliminated.”

29. In commenting upon other medical opinions, the AMS said:

“My diagnoses are similar to those of Dr Smith, Synnott and Mrs Swift’s general practitioner.

My assessment of permanent impairment is in line with the last assessment of permanent impairment which was conducted by Dr Synnott in 2017.

Dr Smith’s assessment of impairment occurred over three years ago. His assessment was based on ratings of impairment which included a moderate impairment of Social and Recreational Activities which does not reflect her current level of functioning. He also rated her as having a Class 3 impairment of Social Functioning on the basis of her dissolving her relationship with her mother and losing friends. Mrs Swift told me that her relationship with her mother had been difficult for a long time but she currently tolerated her mother and had a good relationship with her stepfather. Not long after Dr Smith’s assessment Mrs Swift met and married her husband and she has formed new friendships.

I note that Mrs Swift’s GP certified her as having no current work capacity for any employment. He had certified her as being fit for 40 hours work on 04.09.2018 but on 27.04.2018 [sic?] he reviewed her and considered that she was not fit for work after she became distressed after spending six days without her daughter.

Mrs Swift is in receipt of workers compensation and disability payments, she has a two year old daughter and she lives by herself on an isolated property. These factors would make it difficult for Mrs Swift to return to work but I did not consider that she had no capacity to work at all. She is able to live independently and raise her daughter single-handedly and attend riding lessons on a regular basis a considerable distance from her house, keep her house particularly clean, breed dogs, cattle and pigs for sale and make new friends. Taking into account her presentation at interview and the fact that she dealt with being involved in a car accident just before the examination in a calm and sensible way gives me confidence that she would have some capacity to work, although I consider that her capacity for employment was severely impaired.”

30. The appellant submits that the AMS erred in his assessment with respect to four of the PIRS categories, namely social and recreational activities, travel, social functioning and employment.
31. As regards social and recreational activities, the appellant submits that the AMS should have assessed her as a Class 3, rather than Class 2 as assessed by the AMS. The reasons for this are that "In comparison to pre-injury the claimant has limited social activities. Riding horses is part of her therapy and this is the only regular social activity. She sees two friends occasionally and speaks to her sister by phone."
32. Class 3 is described as "Moderate impairment: Rarely goes to social 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."
33. The comprehensive history taken by the AMS of the appellant's activities is completely consistent with his Class 2 rating. The reasons put forward by the appellant for a Class 3 rating in this category are inconsistent with the history obtained by the AMS, and we cannot see any error with his assessment.
34. As regards travel, we again are not persuaded that the AMS erred in assessing a Class 1 rating. The appellant submits that a Class 2 rating is appropriate because she has "avoidance behaviour whilst driving and will avoid certain roads [and] she does not use public transport."
35. The numerous social and recreational activities the appellant is currently involved in, as described by the AMS, involve regular driving, such as his history that she "twice a week drove two hours to have riding lessons." In addition, the numerous activities she carries out with her daughter, and her farming and dog breeding activities, would in our view all involve a degree of driving. We also note that the AMS said that "Mrs Swift reported that she was a very careful driver and, while anxious, she was able to drive long distances, for example, to Sydney by herself..." She had been involved in a minor car accident just prior to her appointment with the AMS, and he noted that she had coped well with that situation.
36. Class 2 is described as "Mild impairment: Can travel without support person, but only in a familiar area such as local shops, visiting a neighbour."
37. The history obtained by the AMS is simply not consistent with a Class 2 rating.
38. The appellant also takes issue with the assessment with respect to social functioning.
39. The AMS assessed a Class 2 impairment, described as "Mild impairment: Existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships."
40. The appellant submits that a Class 3 rating is appropriate. The reasons proffered are as follows:

"The claimant has lost friends and speaks to only two of her friends. Whist the relationship with her mother has improved she is not frequently in contact with her mother and communication is still rare. She will speak to her sister."
41. Again, these statements are completely inconsistent with the history obtained by the AMS. He noted that the appellant "had a reasonable relationship with her mother-in-law who was looking after her daughter while Mrs Swift attended this appointment." He also said: "she had lost some previous friendships but she had made other friendships through her dog breeding and kept in touch with them regularly."

42. The assessment made by the AMS is consistent with the history he obtained about the appellant's social functioning, and no error has been demonstrated.
43. Finally, as regards employability, the AMS assigned a Class 4 impairment. The appellant submits that it should have been a Class 5 for the following reasons:

"The claimant's problems are her anxiety and depression. She can generally function around the house and do things such as go horse riding. However it is always on 'her terms'. When she goes out to a social function she has the option to leave and she has the option to not attend at all if she is having a bad day. Even in circumstances where she knows the people and the place, if she gets uncomfortable she will need to withdraw.

In any job that she can think of doing, she would have to attend on a regular basis and have some interaction with people which inevitably leaves her to anxiety and not perform work. This is likely to occur even in an understanding environment.

The claimant does not suggest that she sits at home and does not go out and do things. However when she does those things that she once found enjoyable for relatively short periods of time, it is not something that she could do for weeks at a time.

More generally, she has poor sleep due to nightmares and does not wake up well. She does not know how she could regularly go to work to start with.

The claimant cannot work due to her difficulty in maintaining concentration and difficulty remembering things. She has difficulty getting words out and has difficulty remembering what she doing. She will often start a task and forget. She has trouble word finding and if she feels under pressure she is forgetful."

44. The AMS in our view gave thoughtful and cogent reasons why he considered that the appellant had some, albeit limited, capacity to work. He summed up his reasons by stating that "Taking into account her presentation at interview and the fact that she dealt with being involved in a car accident just before the examination in a calm and sensible way gives me confidence that she would have some capacity to work..."
45. We do not consider that the AMS erred in his assessment in this category.
46. The appellant's submissions in general, and particularly in this PIRS category, are not evidence based. In our view, they simply reflect dissatisfaction with the outcome of her assessment. The reasons proffered in the Appeal suggest to us an attempt to further plead her case. They do not address any "demonstrable error" by the AMS, merely a difference of opinion as regards his assessment.
47. That is not a proper basis for appeal.
48. As the respondent pointed out, "the reasons provided by AMS indicate he properly applied the relevant Guidelines and his assessment was not affected by the application of incorrect criteria or demonstrable error."
49. We agree.
50. It is noteworthy that Dr Smith's assessment of impairment occurred over three years ago. This was the principal evidence relied upon by the appellant. As the AMS noted: "His assessment was based on ratings of impairment...which does not reflect her current level of functioning."
51. An AMS is required to make an assessment on the day of examination. It is clear from all the evidence that the appellant's circumstances had changed significantly since she saw Dr Smith in October 2015.

52. We note that Dr Smith provided a further report dated 8 November 2018, but he does not appear to have examined the appellant, but wrote a report following “review of Ms Murray's [Swift] recent statement.” He added:

“She reported on the events related to the death of her husband on 11 July 2017. She witnessed her husband who had been involved in a significant motor vehicle accident. The events related to the death of her husband in my opinion resulted in the development of a traumatic bereavement reaction. I would regard the incident involving her husband as quite separate from the events she was exposed to during her work with the NSW Police Force...

The events related to her husband's death have not caused me to modify in any way the opinions I have previously expressed in my earlier reports.”

53. The AMS was of a similar view, such that the report adds little to the overall evidence.
54. In our view, the MAC was thorough and comprehensive, and the AMS did not err in any aspect of his assessment.
55. For these reasons, the Appeal Panel has determined that the MAC issued on 15 May 2019 should be confirmed.

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

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

