

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-4293/19
Appellant: Brodie Jennifer Fiscalini
Respondent: Third Sector Australia Ltd
Date of Decision: 8 May 2020
Citation: [2020] NSWCCMA 86

Appeal Panel:
Arbitrator: Ms Deborah Moore
Approved Medical Specialist: Dr Lana Kossoff
Approved Medical Specialist: Dr Doug Andrews

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 11 February 2020, Brodie Jennifer Fiscalini lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Wasim Shaik, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 15 January 2020.
2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):
 - availability of additional relevant information (being additional information that was not available to, and that could not reasonably have been obtained by, the appellant before the medical assessment appealed against),
 - the assessment was made on the basis of incorrect criteria,
 - 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 (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 before us 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) Statement of Peter Tucker dated 6 February 2020;
 - (b) Supplementary Statement of Brodie Fiscalini dated 10 February 2020
10. The appellant submits that the evidence of Mr Tucker is relevant to “the appellant’s rating on the PIRS scale and which the appellant submits could change the outcome of the case” as regards the category of Travel .Further ,the evidence “addresses matters which were not included as part of the history taken by the AMS in the MAC, but which were known to the AMS at the time of the assessment, were not included in the MAC and were relevant to the AMS’ assessment.”
11. The appellant submits that the evidence was not available and could not reasonably have been obtained because “it addresses matters which arose in the hours immediately before the AMS assessment on 10 January 2020.”
12. As regards the further statement of Ms Fiscalini, the appellant makes the identical submissions.
13. The respondent opposes the admission of this evidence for the following reasons:
 - “The worker’s own evidence is that she provided details of her drive to attend the AMS appointment to the AMS. To that extent her statement does no more than reflect the history the appellant says she already provided to the AMS. The respondent submits the statement of the worker addressing her travelling to the AMS appointment is not “additional relevant information”.
 - The statement of Mr Tuck [sic] does no more than confirm what the appellant says she told the AMS. As such it is not ‘additional relevant information’.
 - The statement of the appellant makes allegations in relation to the conduct of the AMS examination. The statement appears to be aimed at impugning the conduct of the AMS examination. The AMS is not in a position to respond to those allegations. In any event, evidence of that kind is not ‘additional relevant information’ for the purpose of section 327(3)(b): *Petrovic v BC Serv No 14*, [2007] NSWSC 1156.”

14. The Appeal Panel determines that the evidence should not be received on the appeal because we agree with the respondent's submissions not only that the evidence is not "fresh evidence" but also because it does no more than re-state the evidence the appellant provided to the AMS.

EVIDENCE

Documentary evidence

15. 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

16. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
17. In summary, the appellant submits that the AMS erred in his assessment of a number of the PIRS categories, namely Self-care and personal hygiene; Travel; Social functioning; and Concentration, persistence and pace CPP). He also erred with regard to the effects of treatment.
18. In reply, the respondent submits that no errors were made, and the assessments were consistent with the evidence.

FINDINGS AND REASONS

19. 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.
20. 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.
21. The appellant was referred to the AMS for assessment of whole person impairment (WPI) in respect of a psychological injury on a deemed date of injury of 1 November 2018.
22. The AMS obtained the following history:

"Ms Fiscalini experienced emotional complaints secondary to exposure to adverse events whilst employed as a community support worker with Third Sector Australia. Her concerns relate to the inappropriate behaviour of the parents of one of her clients. Her history dates back to 2015... There is a history of an assault by a work colleague in 2016... Ms Fiscalini advises that whilst her symptoms dated back to 2015, including low mood, sleep disturbances, and anxiety, these symptoms worsened in 2018. She ceased work in November 2018...

In late 2018, with symptoms of low mood, impaired concentration, lack of motivation, and reduced socialisation, she was referred to Shane Flaherty, psychologist. She has since been under his care, whilst also being prescribed psychotropic medications by her general practitioner."

23. After documenting the appellant's treatment, the AMS then set out her present symptoms as follows:

"Ms Fiscalini is currently resident in private rental accommodation in Coolangatta. This has been for 18 months, during which time she has had roommates.

She reports that her current symptoms include low mood, as well as anxiety. She has previously had episodes of being teary, 'I am past that point now'. Her anxiety is consistent, with periods of worsening, most recently when she saw the particular client's parent in public. She can experience sleep disturbances. Her energy levels are fluctuant, but she tries to go for a walk most days. She denies the presence of panic attacks. She denies the presence of consistent flashbacks or nightmares. She notes that she has had passive suicidal thoughts, but no plans towards self-harm.

In relation to her self-care and personal hygiene, she does not shower regularly, but does so when she has to attend appointments. She reports that her appetite has reduced, and she has lost about 12 kg in weight. More recently, she has put on some weight, 'I'm not sure how'. She prepares meals herself, 'I like cooking'. She is capable of living independently, and has done so at varying points in the last 18 months.

In relation to social and recreational activities, Ms Fiscalini advises that much of her time is spent at home. She does go for a drive in the morning on most days. She goes out for a walk. She does not attend to social events. She has been to movies with her friend and in the last two months attended to a movie by herself. She meets her friend two times a week, and otherwise maintains contact via telephone. She likes going to Northern New South Wales for drives.

In relation to travel, she drives herself. She was capable of driving from Coolangatta to Brisbane for the assessment. She likes going for a drive in the mornings. She does not like using public transport.

In relation to her social functioning, she advises that she was not in a relationship in 2015, when her workplace issues commenced. Her last relationship prior to this was in 2012. She commenced a relationship in 2016 with a female work colleague, and this went on for about a year. More recently, in the beginning of 2018, she entered a relationship with a male person and this went on for approximately four months...She is no longer dating.

In relation to her concentration, she notes that this has been impacted. She can focus whilst watching a movie. She can focus whilst undertaking craft projects, such as macramé or weaving. She likes following Pinterest. She likes reading books on world happenings, and follows the news on her phone. She can focus on crafts for about an hour "depending on my mood". She manages her own finances, with some help from her mother who is a payroll officer. She could focus on driving, when travelling from Gold Coast to Brisbane.

In relation to her work ability, she has not returned since October 2018. She has been certified as being fit to work for 8-10 hours a week, but does not see herself as having this ability. She struggles to trust other people and reports that anxiety can be an issue. She has had some thoughts of working with her crafts, but lacks motivation. She does not see herself returning to disability services."

24. The AMS added:

“There is some reference to a potential history of attention deficit disorder. Ms Fiscalini stated that she experienced some low mood and attended to a counsellor after a traumatic bereavement in 2009. There is no other past history of mental illness.

Ms Fiscalini experiences chronic pain, and reports that she has been diagnosed with fibromyalgia. She has suffered spondylosis since age 15. She has been on various pain relief treatments, although has recently tried to get rid of her analgesic medications...”

25. On examination, the AMS said:

“Ms Fiscalini was casually dressed for the appointment. There was evidence of decent self-care. She could provide a fluent history. There was flatness in her affect. She was not teary. There was some apprehension. She did not engage in the use of humour. Her concentration appeared to be good. She responded appropriately, and had decent recall, including of dates. Questions did not have to be repeated. Her insight and judgment were fair. She denied immediate ideations towards self-harm. There were no psychotic symptoms or obsessive phenomena.”

26. The AMS diagnosed “a Major Depressive Disorder, with comorbid Anxiety.” He added: “There was reasonable consistency in presentation, although I did note an element of suggestibility.”

27. The AMS assessed 7% WPI.

28. He then commented on the report of IME Associate Professor Robertson as follows:

“I agree with Associate Professor Robertson in that there is evidence to suggest depressive and anxiety phenomena. I disagree with [his] impairment ratings.

- In the category of self-care and personal hygiene, he discusses an impairment of Class 3, which is applicable in situations where a person is not involved in cooking, and is not able to live by themselves – this does not apply to Ms Fiscalini, who cooks herself, and has been capable of living independently.
- In the category of travel, Associate Professor Robertson rates a Class 2, noting that she can only travel independently in areas where she is familiar. Ms Fiscalini can travel independently and was capable of travelling from Coolangatta to Brisbane for the assessment by herself, negating this view.
- In terms of social functioning, Associate Professor Robertson rated d a Class 3, noting that the relationship she was in at the time was going downhill. A Class 3 rating applies to situations where “existing” relationships were getting strained. Ms Fiscalini was not in a relationship at the time of her experienced work troubles. She has subsequently been capable of being involved in relationships, including one lasting a year. She shares a great relationship with her mother, as well as with her close friend. I do not believe a rating of Class 3 is applicable.
- In terms of the category of concentration, Associate Professor Robertson provides a rating of Class 3, noting she is unable to read beyond a paragraph without losing focus, and she is forgetful. Ms Fiscalini engages in craft activities for up to an hour. She follows the news and Pinterest.

She can focus whilst watching a movie. She can focus whilst driving for a reasonable length of time. She could focus well during the assessment. This does not indicate a Class 3 impairment.

- In terms of her employability, Associate Professor Robertson provides a Class 4 rating. With her decent concentration, I do believe Ms Fiscalini is capable of working for more than 10 hours a week, with her impairment therefore being not more than Class 3.”

29. Turning firstly to the issue of Self-care and personal hygiene, the AMS assessed a Class 2, stating:

“Mild Impairment - she does not shower regularly, but does so when she has to attend appointments. She was well presented for the assessment. She reports that her appetite has reduced, and she has lost about 12 kg in weight. More recently, she has put on some weight, ‘I’m not sure how’. She prepares meals herself, ‘I like cooking’. She is capable of living independently, and has done so in the last 18 months.”

30. The appellant submits that the AMS erred by “taking a history which was more consistent with Class 3.”

31. The descriptors in the Guidelines for a Class 2 rating are: “Mild impairment: Able to live independently, looks after self adequately, although may look unkempt occasionally, sometimes misses a meal or relies on takeaway food.” Class 3 is described as: “Moderate impairment: can’t live independently without regular support. Needs prompting to shower daily and wear clean clothes. Does not prepare own meals, frequently misses meals. Family member or community nurse visits (or should visit) 2-3 times per week to ensure minimum level of hygiene and nutrition.”

32. The appellant summarised the findings made by the AMS then set out what the AMS “should have considered” when making his assessment. These include the following:

“The Appellant submits that she was prompted to shower by her imminent attendance at the AMS appointment. This is consistent with the history taken by the AMS that the Appellant showers when she has to attend appointments.

The Appellant further submits that a loss of 12 kilograms in weight is not consistent with a person who looks after herself adequately. The Appellant submits that the weight she has put on recently is no more than 500 grams.

In her statement...she said that she struggles to make herself cook, although she did comment to the AMS that she ‘likes cooking’. This evidence combined with her substantial weight loss since her injury is not consistent with a person observing a minimum level of nutrition, and further suggests that a family member or community nurse should visit to ensure that the Appellant has a minimum level of nutrition. The appellant’s evidence in her statement is that she misses meals daily and ‘now I only normally eat one meal.’ This evidence is not consistent with a mild impairment...and is more consistent with a moderate impairment as the appellant ‘frequently misses meals.’”

33. The appellant has focussed on the statement in the Class 3 descriptor of “frequently misses meals.” However, the descriptors should be read as a whole, and the evidence simply does not support a finding of a Class 3 rating. She is clearly capable of living independently, looking after herself *adequately* (our emphasis) and preparing her own meals as she told the AMS.

34. In addition, the appellant's submissions set out above misinterpret the statement in the Class 3 descriptor that "Family member or community nurse visits (or should visit) 2-3 times per week..." In other words, such visits actually occur, irrespective of their frequency. The appellant's submission above is nothing more than a suggestion on her part as to what she considers should occur, and does not demonstrate any error by the AMS.
35. It is perhaps timely to set out the task of an Appeal panel as stated in *Ferguson v State of New South Wales* [2017] NSWSC 887 where Campbell J said:
- [23] By reference to *NSW Police Force v Daniel Wark* [2012] NSWCCMA 36, the Appeal Panel directed itself that in questions of classification under the PIRS: '... the pre-eminence of the clinical observations cannot be underrated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face'.
- [24] The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.
- [25] The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides 'the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment'...
- [37] The descriptors, or examples, describing each class of impairment in the various categories are 'examples only'..."
36. In our view, there was simply nothing in the AMS' assessment with respect to self-care and personal hygiene that could be regarded as "glaringly improbable" nor was there anything to suggest a flawed reasoning process.
37. Turning now to the issue of Travel, the AMS assessed a Class 1 rating, stating: "No Impairment - she drives herself. She was capable of driving from Coolangatta to Brisbane for the assessment. She likes going for a drive in the mornings."
38. The descriptor for a Class 1 rating is: "No deficit, or minor deficit attributable to the normal variation in the general population: can travel to new environments without supervision."
39. The appellant submits that the AMS erred by "placing undue weight on the appellant's ability to travel to the AMS appointment for the assessment." He also concluded that she had "no assessable impairment as 'she drives herself.'"
40. The appellant submits that a Class 2 rating is appropriate.
41. A Class 2 impairment is defined as: "Mild impairment: can travel without support person, but only in a familiar area such as local shops, visiting a neighbour."
42. The appellant's submissions on this issue are lengthy and make numerous references to the additional evidence the appellant sought to adduce.

43. In summary, the appellant submits:
- (a) Going for a drive in the morning is local travel;
 - (b) Her comment to the AMS that she liked to drive to northern NSW was in the context of her imminent move to that area;
 - (c) That area is familiar to her as Coolangatta is a short drive from the NSW border;
 - (d) She was required to drive to Brisbane for the AMS appointment “to advance her case through the Commission;” it was “a requirement of her legal proceedings over which she had no control;”
 - (e) She explained the events in the additional evidence to the AMS and why she attended alone and also that she had a panic attack en route which the AMS failed to take into account;
 - (f) The AMS appointment was substantially delayed by the Christmas holiday period and the appellant “persevered in her attendance based upon the belief that if she did not, the matter would be further delayed or unable to be resolved.”
44. The appellant concedes that she told the AMS of the matters referred to above, and although not specifically addressed by him, we have no reason to believe that he did not accept what he was told.
45. In addition, the appellant herself stated that she liked to drive and did not like to use public transport, which suggests to us that she was comfortable in driving generally.
46. It is not uncommon in cases such as this for a person to fall between the various class ratings, and while there is some evidence to suggest that the appellant generally drives in familiar areas, there is equally evidence to suggest that she does not require a support person in her general driving and is a regular driver.
47. In these circumstances, we are not persuaded that the AMS erred in his assessment with respect to Travel.
48. The appellant next challenges the AMS’ assessment with respect to social functioning.
49. The AMS ascribed a Class 2 rating, stating:
- “Mild Impairment - she advises that she was not in a relationship in 2015, when her workplace issues commenced. Her last relationship prior to this was in 2012. She commenced a relationship in 2016 with a female work colleague, and this went on for about a year. More recently, in the beginning of 2018, she entered a relationship with a male person and this went on for approximately four months, until June. They met on Tinder. She reports that the ending was not good for the relationship as “he did not make much contact – his father had cancer”. She is no longer dating. She has not had strain in “existing” relationships.”
50. The descriptor for a Class 2 rating is: “Mild impairment: existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships.”
51. The appellant submits that a Class 4 rating is appropriate and consistent with the evidence.

52. The descriptor for this Class is: "Severe impairment: unable to form or sustain long term relationships. Pre-existing relationships ended (eg lost partner, close friends). Unable to care for dependents (eg own children, elderly parent)."
53. Again, the appellant's submissions on this issue are lengthy and again, tend to address what the AMS "should have done" rather than identifying any specific error.
54. In summary, the appellant submits that she has been unable to sustain a long-term relationship since her injury, and that her pre-existing relationships with close friends have ended.
55. This is not consistent with the evidence. Although the appellant may have had some difficulties with some relationships, the most recent one was essentially due to the man in question, not her own mental state, as she explained to the AMS. The AMS also observed that she "shares a great relationship with her mother, as well as with her close friend."
56. For these reasons, again, we cannot see any error in the assessment as regards social functioning.
57. Finally, the appellant takes issue with the assessment of CPP.
58. The AMS assessed a Class 2, adding:

"Mild Impairment - she notes that this has been impacted. She can focus whilst watching a movie. She can focus whilst undertaking craft projects, such as macramé or weaving. She likes following Pinterest. She likes reading books on world happenings, and follows the news on her phone. She can focus on crafts for about an hour 'depending on my mood'. She manages her own finances, with some help from her mother who is a payroll officer. She could focus on driving, when travelling from Gold Coast to Brisbane. She was capable of focussing well for the assessment."
59. The appellant submits that the AMS should have ascribed a Class 3 rating.
60. The descriptor for Class 3 is: "Moderate impairment: unable to read more than newspaper articles. Finds it difficult to follow complex instructions...type long documents, follow a pattern for making clothes, tapestry or knitting."
61. The appellant makes the following submissions:
 - (a) She advised the AMS during the examination that she had suffered an anxiety attack whilst driving to the examination, and further that she had struggled to get to the appointment once she realised she would need to drive herself. The AMS has failed to consider or take account of this history in the MAC;
 - (b) The reference by the AMS to her ability to focus well during the AMS assessment ought to have included the period of time over which the assessment took place. The appellant submits in accordance with her statement of 10 February 2020 that while her appointment was scheduled to commence at 10:00 AM, she did not enter the examination room until 10:40 AM, and then left the examination room at 11 AM. Allowing for the appellant to be seated and situated before the examination began, the appellant submits that the examination was for no longer than 15 - 20 minutes;

- (c) In accordance with her statement dated 10 February 2020, the Appellant further submits that the history provided to the AMS was that she can engage in crafting activities for up to an hour approximately every three months 'depending on her mood'...
 - (d) The Appellant here repeats her submissions in respect of the reliance of the AMS upon her ability to travel to the AMS appointment...
 - (e) The history provided to the AMS that she follows the news on her mobile phone is consistent with an inability to read more than newspaper articles, as the news she views through an app on her mobile phone does not generally constitute full newspaper articles and is more like a condensed version of an article.
62. To begin with, most of these submissions refer to the supplementary statement made by the appellant which we declined to admit, since it did no more than comment on the MAC and reflected an attempt to amplify what was recorded by the AMS at the time of his assessment.
63. If the appellant had any concerns about the conduct of the examination, the assessment, or any issues as regards procedural fairness, she should have raised it with her legal representative or the Commission.
64. Equally, she could have requested a re-examination which she did not.
65. In any event, as the respondent correctly pointed out:
- “The [supplementary] statement appears to be aimed at impugning the conduct of the AMS examination. The AMS is not in a position to respond to those allegations. In any event, evidence of that kind is not ‘additional relevant information’ for the purpose of section 327(3)(b): *Petrovic v BC Serv No 14*, [2007] NSWSC 1156.”
66. Excluding then the appellant’s “commentary” on the MAC, it is clear that the appellant demonstrated reasonable CPP, consistent with a Class 2 rating as found by the AMS.
67. It is mere speculation by the appellant that news articles she may read are “condensed.” In any event, she told the AMS that she “likes reading books on world happenings” in addition to following the news.
68. The AMS’ assessment in this category was in our view thorough and detailed, and entirely consistent with the evidence.
69. We see no error as regards this category.
70. The appellant’s submissions do not in our view identify any error by the AMS, but merely amount to commentary on the MAC with a clearly expressed dissatisfaction with the outcome.
71. Mere disagreement with the findings of an AMS is not a proper basis for appeal.
72. Indeed, we might add that all the appellant’s submissions merely emphasise what the AMS should have done, or considered, when making his assessment, rather than any clear expression of error, when the AMS had provided strong reasons for his assessment of each class of the PIRS in the MAC.
73. In this case, we are not persuaded that any categorisation was glaringly improbable, or that the AMS was unaware of significant factual matters, or that a clear misunderstanding could be demonstrated, or an unsupportable reasoning process could be made out.

74. Finally, the appellant submits that the AMS erred by stating: "I do not believe an addition is required for treatment effect, as treatment has not proven to substantially eliminate the impairment."
75. Paragraph 1.32 of the Guidelines provides as follows:
- "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%..."
76. This section requires "substantial or total elimination" of impairment.
77. The AMS, having identified a degree of impairment in a number of categories, clearly found that the appellant's treatment had failed to "substantially eliminate the impairment." This finding was consistent with the evidence, and in line with that evidence, he could not satisfy the criteria set out in Paragraph 1.32.
78. For these reasons, the Appeal Panel has determined that the MAC issued on 15 January 2020 should be confirmed.

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

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

