WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-8/20**
Appellant:	**Kids OT Pty Ltd**
Respondent:	**Young Ho Bae**
Date of Decision:	**5 August 2020**
Citation:	**[2020] NSWWCCMA 130**

Appeal Panel:	
Arbitrator:	**Catherine McDonald**
Approved Medical Specialist:	**Dr Douglas Andrews**
Approved Medical Specialist:	**Prof Nicholas Glozier**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 1 June 2020 Kids OT Pty Ltd (Kids OT) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Julian Parmegiani, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 5 May 2020.

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

    - the assessment was made on the basis of incorrect criteria,
    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out, being that in s 327(d). The Appeal Panel has conducted a review of the original medical assessment but limited to the grounds 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. Mr Bae was employed by Kids OT Pty Limited as the head instructor in its martial arts program. He also undertook administrative duties in the business.

7. Mr Bae came to Australia to study exercise and sports science in 2006 after his discharge from the South Korean army. He met his wife at university and began working part time at Kids OT, which is his wife's business in 2007, teaching martial arts.

8. On 21 October 2017, Mr Bae was alerted that one of the students in the martial arts program was threatening to harm himself with a knife. Mr Bae managed the situation and waited with the student until his mother arrived. After the incident, Mr Bae developed severe headaches and his mental state deteriorated. He suffered nightmares and flashbacks. He has been diagnosed with post-traumatic stress disorder and major depression (PTSD) and there is consensus in the medical evidence about the diagnosis of PTSD.

9. Mr Bae has been hospitalised on several occasions since 2018 and was an inpatient in a psychiatric clinic when he was examined by the AMS.

10. The AMS assessed 24% whole person impairment (WPI) and did not make any deduction in respect of pre-existing condition or abnormality under s 323.

PRELIMINARY REVIEW

11. 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.

12. 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. The only error made by the AMS was the failure to make a deduction under s 323 of the 1998 Act. It is unlikely that it would be possible to obtain a history from Mr Bae about his level of impairment arising from any pre-existing condition, noting the extent of medication prescribed, recurrent hospitalisations undertaken since the injury. Further, given the consistency of the history provided by Mr Bae to treating and assessing clinicians, any further examination is unlikely to provide any more information than that contained within the contemporaneous notes in the evidence.

13. There is sufficient medical information in the file which pre-dates the injury to allow the appeal to be determined.

EVIDENCE

14. 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.

15. 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

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

17. In summary, Kids OT relied on four grounds of appeal:

    (a) the AMS failed to identify evidence supporting the presence of a pre-existing condition resulting from exposure to traumatic events during military service and due to marital conflict before the injury;

    (b) the AMS failed to make a deduction under s 323 of the 1998 Act for the impairment arising from that pre-existing condition;

    (c) the AMS inaccurately considered Mr Bae was a consistent historian, and

    (d) the AMS failed to consider the entirety of the evidence.

18. Kids OT made detailed submissions about s 323 and in respect of the AMS's failure to address and consider significant medical and other evidence, particularly with respect to the report of Dr A Khan, its independent medical examiner. It submitted that the AMS failed to consider inconsistencies in Mr Bae's evidence and relied on Mr Bae's subjective reporting (which was unreliable) rather than the objective evidence on which Kids OT relied.

19. Kids OT submitted that the AMS did not comment on or address the "objective online profile and surveillance evidence" and that there was no basis for the AMS to accept the evidence from Mr Bae and his wife that Dr Khan had misinterpreted that evidence.

20. Kids OT sought that Ms Bae be reassessed. It did not make any submissions as to the appropriate deduction under s 323. It submitted that Mr Bae would be more appropriately assessed in a lower class for social functioning.

21. In reply, Mr Bae, through his counsel, Mr Moffet, submitted that the AMS took proper account of the evidence which Kids OT said he overlooked. He submitted that the AMS set out his reasoning with respect to s 323, explaining the role of the injury in producing symptoms from previous trauma. The AMS was aware of the pre-injury history of marriage problems.

22. Mr Bae submitted that ground three was an argument as to his credit which should have been argued at arbitration. That did not occur and Kids OT conceded injury rather than seeking to cross examine. Mr Bae submitted that the allegation that the AMS did not consider the documentary evidence and, in particular, Dr Khan's report was false.

FINDINGS AND REASONS

23. 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.

24. 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.

The MAC

25. The AMS set out the circumstances of the injury:

> "On 21 October 2017, two students called Mr Bae because of another student was threatening to hurt himself. Mr Bae found the 14-year-old student kneeling down, pointing a kitchen knife towards his abdomen. Mr Bae thought the student would stab himself. The student had tried to hang himself a year earlier. Mr Bae shouted at the student to put the knife down. The student complied and Mr Bae rushed towards him. He then took the knife away.
>
> Mr Bae initially felt okay. He was driving home two days later, when he experienced a severe headache. His mental state deteriorated shortly afterwards. He could not sleep, and he continued ruminating about the incident. He suffered repetitive nightmares about the student stabbing himself or Mr Bae.
>
> Mr Bae also began to experience nightmares about the past. He was in the South Korean Special Forces for a period of five years. During this period he was part of a rapid response team, and his work included frequent incursions into North Korea. Some of the actions involved killing others, and witnessing members of the South Korean military being injured or killed. On one occasion, he attended a helicopter crash where a number of people died.

> Mr Bae left the military in 2005, and did not dwell on these incidents until the event of 21 October 2017.
>
> Mr Bae became depressed, irritable and emotionally labile after October 2017. He drank large amounts of alcohol, until his first admission to a psychiatric hospital in January 2018. He now rarely drank. Mr Bae slept poorly, and his energy decreased. He became forgetful and he misplaced personal belongings. He gained 15kg in weight, due to the combination of inactivity, excessive drinking and side effects of medication. Mr Bae felt useless and hopeless about his future. His marital relationship deteriorated. Mr Bae suffered frequent panic attacks and he fainted at times."

26. The AMS took a history of Mr Bae's present symptoms:

> "Mr Bae continued to suffer nightmares twice per week, and flashbacks every day. He slept poorly, and his energy was low. He was hypervigilant, and hypersensitive to noise. His temper was poor. Mr Bae lacked concentration and he felt dissociated from his external environment. Mr Bae told me he was admitted to Northside Cremorne in March, because he discovered he was under surveillance by the workers compensation insurer. He told me this was the worst thing an insurer could do to a military veteran, as it markedly exacerbated his anxiety. Mr Bae stopped cooking, because he avoided using knives. He often left food on the stove and he worried about causing a fire."

27. The AMS took a history of previous psychological treatment:

> "Mr Bae and his wife saw a psychologist in 2012, as this was required by their church before committing to one another. Mr Bae recalled seeing another psychologist in 2017, about two months before the work injury. Mr Bae explained that they had two young children, and his wife was pregnant with their third child. Mr Bae went to Korea to present at a conference, and returned after two weeks. His wife found it difficult to cope alone with the children and work. They had a number of arguments, and he lost his temper. He recalled seeing a psychologist a few times, to discuss adaptive ways of coping with married life. Mr Bae was not prescribed psychotropic medication."

28. The AMS diagnosed chronic PTSD, secondary major depressive disorder and alcohol use disorder (in remission). He considered that Mr Bae's condition has reached maximum medical improvement. Even though he had been admitted to a psychiatric unit on repeated occasions, his symptoms did not improve so that his condition could be considered stabilised.

29. The ASMS did not consider that any proportion of impairment was due to a pre-existing injury, abnormality or condition. He said:

> "No. Mr Bae witnessed an incident on 21 October 2017, when a student threatened to stab himself. Mr Bae decompensated psychologically after the incident. It is likely that his experiences in the South Korean military left him psychologically vulnerable. In essence, he was left with the psychiatric equivalent of an eggshell skull. These experiences did not cause psychiatric symptoms before 21 October 2107. Mr Bae did not suffer repetitive nightmares or flashbacks of his military service before 21 October 2017. He did not seek psychiatric or psychological treatment, and he was not prescribed psychotropic medication. He was able to cope with migrating to a new country, completing a tertiary course, working fulltime, marrying and starting a family."

30. The AMS considered the reports of Dr R Rastogi, qualified on behalf of Mr Bae and Dr Khan. Dr Rastogi rated Mr Bae's impairment at 41%. The AMS clearly explained the areas in which he disagreed with Dr Rastogi's assessment. It is appropriate to set out his comments with respect to Dr Khan's report in full. He said:

> "Dr Khan assessed Mr Bae at the request of the workers compensation insurer's solicitors. Dr Khan's report focused on causality. He found that Mr Bae 'was voluntarily exaggerating symptoms'. Dr Khan added, 'it seemed apparent during the independent medical examination that Mr Bae had a secondary internal gain, that his abnormal illness behaviour and fostering of the sick role to obtain sympathy from his wife with whom he has longstanding marital conflicts, which possibly indicate a comorbid factitious disorder'.
>
> Dr Khan added on page 8, 'the clinical and non-clinical documentation provided, including information from treating practitioners and social media, indicated a clear incongruence between Mr Bae's subjective reported level of functioning and his apparent level of functioning'.
>
> Dr Khan nevertheless concluded, 'I agree with Dr Rastogi's diagnosis of Post-Traumatic Stress Disorder, which is in accordance with the DSM-5 diagnostic criteria'. He added, 'there is also the possibility of a comorbid factitious disorder given Mr Bae's abnormal illness behaviour with an apparent aim to assume the sick role. I do not agree with Dr Rastogi's diagnosis of major depression'.
>
> Dr Khan wrote on page 10 of his report, 'there is a proportion of Mr Bae's permanent impairment that is due to pre-existing psychological conditions stemming from longstanding marital conflicts'. Dr Khan also considered an online investigation report commissioned by GIO. I have read the statement of Mr Bae dated 19 December 2019, and the statement of his wife Amanda dated 19 December 2019. Both Mr Bae and his wife explain why Dr Khan misinterpreted the information contained in the surveillance report. In view of Mr Bae's psychiatric history, and his presentation on the day of assessment, I accept that the information relied upon by Dr Khan did not portray an accurate picture of Mr Bae's functioning."

31. The AMS provided his reasons for assessing each of the categories in the Psychiatric Impairment Rating Scale (PIRS).

Deduction under s 323

32. The AMS gave his reasons for not making a deduction under s 323.

33. Kids OT submitted that a deduction was required because Mr Bae sought treatment as a result of conflict with his wife and because of the impact of events during military service, indicative of the presence of a pre-existing condition.

Pre-injury treatment

34. There is enough medical evidence in the file to determine that Mr Bae suffered at least an adjustment disorder before the injury which warrants a deduction under s 323. The cause of that condition appears to be marital discord.

35. There are no references to a clinically manifest PTSD until after the injury, despite the occurrence of numerous potential Criterion A stressors during his military service (which are summarised in the history taken by the AMS).

36. On 16 August 2017, Mr Bae saw Dr Annelisse Williams. Her notes record:

> "Requesting MHCP
> Going through a difficult time with wife currently
> Has 2 children and one on the way
> states his wife is constantly nagging, criticising
> She will continue repeating things that he has done that she is not happy about and finds this relentless
> He went to Korea for work a few weeks ago, came back wife told him she was able to look after the kids better when he was away - this really upset him
> There was an episode where wife was criticisng him and In sheer frustration he banged his head on the table - this was in front of the kids -this has triggered his wife stating that he needs to see a psychologist
> He has already seen a psychologist - had an appointment yesterday, requesting MHCP today
> States other than his wife and kids there is nothing else keeping him in Australia and would prefer to be closer to his family in Korea
> Since returning from his work trip he has been feeling low."

37. Dr Williams prepared a mental health care plan for Mr Bae in which she summarised the cause of the need for treatment:

> "Recent marital issues - constant verbal fighting with wife. Young-Ho states wife has been relentless and pushy towards him. He has been trying to help but nothing he does Is good enough. Has 2 children and another on the way.
>
> From Korea originally, does not have any family supports here. Episode of hitting head on table When wife yelling at him In front of kids during verbal argument with wife."

38. Dr Williams described Mr Bae's relevant problems as "low mood/depression."

39. On 14 and 28 August 2017, Mr Bae saw Jun Mo Jeong, a Korean speaking psychologist. Some of his notes are in Korean and a translation appears in the Reply. The notes describe the conflict between Mr Bae and his wife. Mr Jeong circled words on a standard list of symptoms which included reduced energy, muscle tension, difficulty concentrating, meaningless [sic], lowered self-esteem, feeling sad, restless and tearful."

40. On 28 August 2017, Mr Jeong wrote to Dr Williams and said that Mr Bae suffered elevated levels of stress and depressive symptoms precipitated by marital conflicts. He recommended cognitive behavioural therapy and said that he would report again when Mr Bae had finished six treatments.

41. The notes from Dr Williams' practice do not record any further attendances between 16 August and 24 October 2017.

42. Mr Bae came under the care of Dr Graeme Altman when he was first admitted to a psychiatric clinic in January 2018. In a report to Mr Bae's solicitor dated 25 November 2019. Dr Altman recorded a history provided by Mr Bae's wife rather than himself with respect to treatment before the injury:

> "In terms of why Mr Bae saw a psychologist in approximately July 2017, Amanda stated 'I went for approximately ten minutes) to express my concern – 90-99% of the time our marriage was good - but once or twice a year Young would lose his temper and in mid 2017 he hit the coffee table with his fist in front of the children and I was pregnant with our third child and I made him go to the psychologist to discuss that temper outburst because he had never before behaved that angry in

from of the kids. I think he was stressed - we had just bought a house , I was pregnant, I was worried that Young was stressed and that he needed to talk to someone. I am proactive in seeking that sort of help because I am in the field – a pediatric OT - concern for him and our children. We always get things cleared and screened for everyone in our family.' Therefore, the real reason that Mr Bae saw the psychologist in July was not due to them having significant marital problems. Mr Bae saw the psychologist on approximately two occasion. – Mr Bae stated 'I couldn't connect with him - we came from different parts or Korea' ".

43. Mr Bae's general practitioner from November 2017, Dr Catriona Davies, prepared a report to Mr Bae's solicitors dated 10 December 2019. She said:

> "The patient has acknowledged consultation with a psychologist prior to his workplace incident, for issues pertaining to his marital relationship. With regards to this, I would like to make the following points :
> - There was no evidence that the patient was suffering from symptoms suggestive of post-traumatic stress disorder … prior to the workplace injury date
> - It has been suggested that the patient has displayed inconsistent responses, in relation to events one would expect him to recall clearly, such as attending psychological services prior to his injury date. It has been inferred that the patient may have been trying to conceal this information. Young has never tried to hide this fact, and has always been very open about the marital issues he was facing at that time, and those he faces now. I suspect his response related more to confusion or misunderstanding at the time of that interview, due to both the nature of the interaction and the content of it, compounded by his difficulty in concentrating and processing information when anxious. The patient recalls feeling very confronted and nervous during that interaction, and felt that he was not able to think or respond clearly,
> - Emphasis has been placed on long-standing marital conflicts as being a significant contributor. There had been no documentation of long-standing conflict, nor had this ever been observed. The patient had raised this issue shortly prior to his workplace injury, in the context of having returned from 2 weeks away, whilst his wife was trying to cope with 2 young children and work, whilst enduring her third pregnancy. The patient does not reflect upon this time as a period of mental instability or ill health. The marital issues that have ensued since the workplace injury, however are more clinically relevant…"

44. Mr Bae and his wife have seen a psychologist, Sonya Zando, since the injury for marital therapy.

45. Dr R Rastogi, psychiatrist, saw Mr Bae at the request of his solicitors and reported on 4 July 2019. She did not record any relevant history of marital discord nor that Mr Bae had sought treatment but the history with respect to Mr Bae's "pre-morbid personality" was provided by Mr Bae's wife.

46. Dr Khan said that when Mr Bae was asked "why he was engaging in psychological therapy prior to his work-related stressor, [he] was unable to recall the reason." Dr Khan noted that the file revealed that he had been referred to a psychologist because of depression due to recent marital issues. Dr Khan did not consider that any proportion of Mr Bae's permanent impairment was a result of his time in the South Korean military. He considered that a proportion of his permanent impairment was due to "conditions stemming from long-standing marital conflicts." Dr Khan said:

> "Based on Mr Jeong's clinical documentation, Mr Bae's pre-Injury mental state was consistent with a chronic adjustment disorder with mixed anxiety and disturbance of conduct, which is in accordance with the DSM-5 diagnostic criteria."

47. Dr Khan assessed 7% WPI and attributed all of it to the non-work-related issues. Despite that, he agreed with Dr Rastogi's diagnosis of PTSD.

48. Mr Bae suffered symptoms which led to him seeking clinical treatment before the injury. The descriptions of symptoms recorded by Dr Williams and Mr Jeong are consistent with an adjustment disorder. Mr Bae had seen Mr Jeong on only two occasions in August 2017. Mr Jeong recommended six further sessions of cognitive behavioural therapy. It is unclear if he attended those sessions. The temporal connection between that proposed treatment and the injury is sufficient to establish the presence of a pre-existing condition that might require a deduction under s 323.

49. As part of its submissions in respect of s 323, Kids OT said:

> "The fact that the AMS acknowledges that 'longstanding marital conflict' may represent 'a co-morbid factitious disorder' (MAC p. 7 at part 10(c)) suggests that he ought to have made a deduction under s323 for that element, at the very least, which he did not do."

50. The AMS did not express that opinion – he was setting out Dr Khan's opinion. The summary in the submissions is inaccurate because marital conflict is not of itself a factitious disorder though "abnormal illness behaviour and fostering of the sick role obtain sympathy from his wife" may be.

51. The AMS noted Dr Khan's opinion that Mr Bae was exaggerating symptoms and he did not agree. On the basis of the material in the file, the AMS was correct to disagree that Mr Bae suffered a factitious disorder.

The extent of the deduction

52. Dr Khan sought to make an assessment in the manner set out at paragraph 11.10 of the Guidelines which requires the assessing psychiatrist to rate the worker's pre-existing level of functioning using the PIRS. In this case, it would be difficult to make that assessment accurately, considering the extent of pharmacological and hospital treatment which Mr Bae has undergone. The reports of Dr Altman and Dr Rastogi, who obtained some details from Mr Bae's wife, illustrate their difficulty in obtaining a proper history.

53. Section 323(2) provides:

> "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."

54. This is a case in which it would be difficult to apply paragraph 11.10 to determine the extent of the deduction required for Mr Bae's pre-existing adjustment disorder. Mr Bae's work-related injury has been consistently diagnosed as PTSD and the impairment described by the AMS arises primarily from the symptoms of that disorder. It is apparent from the clinical notes that Mr Bae demonstrated no apparent impairment in the categories of self-care, travel (flying trans-continentally), employment (working full-time) and continued his primary recreational activity of martial arts prior to the work injury. Any pre-existing WPI arising from potential mild impairments in the other PIRS categories would be minimal. Conversely there are repeated mentions of ongoing marital difficulties in the clinical notes, indicating a long term contribution of the adjustment disorder and its cause, to his current whole person impairment. The evidence shows that this proportion is minor. A deduction of one-tenth is appropriate

PTSD

55. On 24 October 2017, after the injury, Mr Bae saw Dr Jonathan Adams, who practised at the same surgery as Dr Williams. Mr Bae's wife also attended the consultation. His notes record:

> "They are seeking guidance today re: how to manage this event both personally end from an organisational point of view
> …
> I have recommended that Young seek psychology himself In order to debrief
> He already has an active MHCP
> He did not get on with the last psychologist he saw
> I have written a letter to Simon Turmanis locally"

56. The letter to Mr Turmanis read:

> "Thank-you for seeing Young-Ho for psychological counselling . Young worked in the Military - he was in the Korean Special Forces for 5 years - and has had some exposure to traumatic events in the past. He now runs a child and adolescent Occupational Therapy course in Maria! Arts. Recently there was an incident whereby a pupil attempted self-harm with a sharp knife. I have recommended that Young seek counselling to help him debrief this event. Thank you for seeing him for help with this."

57. Mr Bae's military background was not noted in any of the medical reports before that consultation. Dr Khan did not consider that these experiences led to a pre-existing condition that contributed to the current impairment but 'there is a proportion of Mr Bae's permanent impairment that is due to pre-existing psychological conditions stemming from longstanding marital conflicts'.

58. The tenor of the medical evidence is, as the AMS said, that Mr Bae's time in the South Korean military left him with a vulnerability to develop PTSD. It seems clear that is what the AMS meant by his reference to "the psychiatric equivalent of an eggshell skull."
A vulnerability is not the same as a previous injury or pre-existing condition or abnormality and does not, of itself give rise to the need for a deduction. The medical evidence is consistent that Mr Bae did not suffer symptoms of PTSD before the injury. Without an event such as that on 21 October 2017, it is possible that he would not have developed PTSD.

59. In *Cole v Wenaline Pty Ltd*[1] Schmidt J said:

> "Section 323 does not permit that assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will always, 'irrespective of outcome', contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality. The extent that the later impairment was due to the earlier injury, pre-existing condition or abnormality must be determined. The only exception is that provided for in s 323(2), where the required deduction 'will be difficult or costly to determine (because, for example, of the absence of medical evidence)'. In that case, an assumption is provided for, namely that the deduction 'is 10% of the impairment'. Even then, that assumption is displaced, if it is at odds with the available evidence."

[1] [201] NSWSC 78.

60. In *Fire and Rescue NSW v Clinen*[2] Campbell J said[3]:

> "The analysis of Giles JA in *Smart,* to which I have referred, supports a legal distinction between a medical condition and the circumstance giving rise to it. The meaning of 'condition' in ordinary language may extend to include a prerequisite to something else. The worker's exposure to sunlight in his youth, in that broad sense, is a pre-existing condition. But the word 'condition' in the present statutory context, in my judgment, has a more limited meaning. In the context of legal causation, as with the meaning of the phrase 'due to', one may refer to any one of the necessary 'conditions' giving rise to a consequence as a cause, or prerequisite, of it. As a matter of causation, the worker's skin cancer is due to his exposure to sunlight, including during his youth before the commencement of his employment with the employer. But causation is not the presently relevant context.
>
> The context here is provided by s 323 and arises from the juxtaposition of words 'previous injury', with 'pre-existing condition or abnormality'. The natural meaning in that restricted context of "condition" is "medical or like condition" in the sense of a diagnosable, or established, clinical entity c.f. *Simeon Wines Ltd v. Bobos* [2004] NSWCA 342 at [17] per Sheller JA, Santow JA and Young CJ in Eq. (as he then was) agreeing."

61. There is no basis on which to find that Mr Bae suffered diagnosable or established PTSD before the injury such that a deduction for any resulting impairment under s 323 is required in respect of it.

Consideration of other evidence

62. The Guidelines require the AMS to make his own assessment of Mr Bae's condition on the day that he presented for assessment[4] and to exercise his own clinical judgement in making the assessment. The AMS was required to comment on other medical reports to indicate where he agreed or differed but he was not required to accept or reject the opinions contained in them.

63. Campbell J described the task of the AMS in *State of New South Wales v Kaur*:

> "In *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; 252 CLR 480, the High Court of Australia dealt with the nature of the jurisdiction exercised by a medical panel under cognate Victorian legislation. The legislation is not entirely the same but it is broadly similar in purpose. Allowing for some differences, the High Court said at page 498 [47]:
>
> > 'The material supplied to a medical panel may include the opinions of other medical practitioners, and submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed in those opinions. The Medical Panel may choose in a particular case to place weight on the medical opinion supplied to it in forming and giving its own opinion. It goes too far, however, to conceive of the functions of the panel as being either to decide a dispute or to make up its mind by reference to completing contentions or competing medical opinions. The function of a medical panel is neither arbitral or adjudicative: It is neither to choose between competing arguments nor to opine on the correctness of other opinions on that medical question. The function is in every case to perform and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.'

[2] [2013] NSWSC 629.
[3] At [34]-[35].
[4] Paragraph 1.6.

> Not all of this, as I have said, is apposite in the context of the New South Wales legislation. In particular it is obvious that approved medical specialists are required to decide disputes referred to them by the process of medical assessment. Even so, it is not necessary that approved medical specialists should sit as decision makers choosing between the competing medical opinions put forward by the parties. Essentially, the function is the same as that described by the High Court in *Wingfoot Australia*. That is to say, their function is in every case to form and give his or her own opinion on the medical question referred by applying his or her own medical experience and his or her own medical expertise. It is sufficient, as their Honours pointed out at [55], that:
>
> > 'The statement of reasons… explain the actual path of reasoning in sufficient detail to enable the Court to see whether the opinion does or does not involve any error of law.'"

64. The AMS listed the material that he was provided with. He said that his assessment was based on "[t]he clinical examination and perusal of documentation submitted by the parties." He said that he had considered Dr Kahn's report and the statements from Mr Bae and his wife in response to Dr Khan's interpretation of the surveillance and online investigation reports.

65. Kids OT made submissions about the nature of the material that Dr Khan referred Mr Bae to. The reference by the AMS to the surveillance report rather than the on-line investigation is immaterial. It is clear that the AMS considered the material with which Dr Khan confronted Mr Bae at his examination.

66. Importantly, the AMS explained why he accepted what Mr Bae said rather than agreeing with Dr Khan. He accepted Mr Bae, based on his psychiatric history and his presentation on the day of the assessment.

67. The AMS said that he had reviewed the documents in the file. He did not list each one, nor was he required to. Even if he had not said that he had reviewed all of the documents, the presumption of regularity in respect of an administrative decision maker would allow the Panel to draw the conclusion he did, particularly because he noted and set out his disagreement with Dr Khan's opinion.

68. In *Bojko v ICM Property Service Pty Ltd*, Handley AJA said:

> "The worker has therefore failed to establish either ground of appeal. Both involved a hyper-critical approach to the reasons of the Panel which is contrary to authority and ignores the presumption of regularity which attends administrative action. The correct approach is that mandated by the joint judgment in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6, 185 CLR 259, 272 which approved the following statement of principle in a decision of the full Federal Court:
>
> > '… a court should not be concerned with looseness in the language nor with unhappy phrasing of the reasons of an administrative decision-maker. … the reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.'"

69. The AMS was not required to respond to both of Dr Khan's reports.

70. Kids OT described the online material as "objective". The report is a summary of material gleaned from the internet, setting out the conclusions which the author drew from that material. The material is limited in scope and merely shows limited interaction between Mr Bae and his family and in photographs posted to his own and the Kids OT Facebook page after 22 September 2017, being a month before the date of injury. The date on which the photographs were taken is not disclosed. The report has little value in the assessment of Mr Bae's condition and it was open to the AMS to draw the conclusions that he did.

71. The submissions appear to have been made without a careful reading of the MAC. Kids OT noted that the AMS considered it significant that surveillance had been undertaken, resulting in him being hospitalised in March 2020. Kids OT suggested there was no evidence that was the case. The AMS clearly set out in the MAC that Mr Bae had last been admitted in March 2020 and that he remained an inpatient at the date of the examination by the AMS.

PIRS

72. Kids OT also raised issues about the application of some of the PIRS categories, arguing that Mr Bae "would be more appropriately assessed at a lower class for the category of social functioning" and that Mr Jeong's notes include reports of impaired concentration.

73. In *Parker v Select Civil Pty Ltd*[5] (*Parker*) Harrison AsJ said[6]:

> "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.
>
> 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..."

74. The AMS undertook an appropriate assessment and determined a rating on the basis of the material in the file, the history he took and the observations he made. The fact that another assessor may have made a different assessment does not mean that the assessment was in error.

75. Based on his examination and all of the material available to him, the assessment in the PIRS categories made by the AMS do not disclose an error.

Conclusion

76. A deduction of one tenth under s 323 was warranted. The Appeal Panel has therefore determined that the MAC issued on 5 May 2020 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

[5] [2018] NSWSC 140.
[6] At [70]-[71].

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

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **8/20**
Applicant: **Young Ho Bae**
Respondent: **Kids OT Pty Limited**

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 Julian Parmegiani and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - Whole Person Impairment (WPI)

Body Part or system	Date of Injury	Chapter, page and paragraph number in the Guidelines	Chapter, page, paragraph, figure and table numbers in AMA 5 Guides	% WPI	Proportion of permanent impairment due to pre-existing injury, abnormality or condition	Sub-total/s % WPI (after any deductions in column 6)
Psychological	21 October 2017	Chapter 11, pp 55 – 60		24%	One tenth	22%
Total % WPI (the Combined Table values of all sub-totals)						**22%**

Catherine McDonald
Arbitrator

Dr Douglas Andrews
Approved Medical Specialist

Prof Nicholas Glozier
Approved Medical Specialist

5 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar