

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-1538/20
Appellant: Ananke Holdings Pty Ltd t/as Sofitel Wentworth
Respondent: Eduardo Sta Juana
Date of Decision: 4 February 2021
Citation No: [2021] NSWCCMA 20

Appeal Panel:
Arbitrator: Ross Bell
Approved Medical Specialist: Dr Wasim Shaikh
Approved Medical Specialist: Dr Patrick Morris

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 26 June 2020, Ananke Holdings Pty Ltd t/as Sofitel Wentworth (appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr AP McClure, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 1 June 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. 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 (SIRA Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. The AMS provides a useful summary of events including the history of the injury at Part 4,
“Brief history of the incident/onset of symptoms and of subsequent related events, including treatment.

The applicant is a 51-year-old divorced father of one surviving son (aged 22), receiving a Disability Support Pension from Centrelink for the last five years. For several years, he has been living alone in a NSW housing department flat in southwestern Sydney near his local railway station. He says that he has not worked nor sought work since going on sick leave from his position at the Sofitel Hotel (where he had worked since approximately 2006) on or about 30 June 2013.

The applicant was employed by the Sofitel Hotel as a minibar attendant. His job was to replenish the minibar in each of the guests' rooms. He was responsible to the director of food and beverage.

According to the applicant, his symptoms began a year or two before the deemed date. He alleges that he was 'bullied' by his supervisors. There had been no previous problems with his work or in previous jobs, he states. He was accused of various 'false' misdemeanours, such as entry at guests' rooms without being invited, skipping rooms and not replacing expired items. He states the problems actually arose from an excessive workload dating to when his section was reduced from three to two employees with 'no proper notice;' when he had complained, management allegedly told him that 'they can't do anything.' He suggested that he and his colleague replenish rooms where guests were checking out. Air crew stayed frequently in large numbers but only overnight. Management allegedly agreed but then allocated 'additional floors,' again with 'no notice.' The problem was known to management but they 'covered up.' His direct supervisor, his manager and the 'human resources' department were all 'lying.'

Shortly before his departure, the applicant was given a formal warning letter. He had to go to a meeting at 'HR' with minimal notice. 'All of them...(were) attacking' him. One of his co-workers had his employment terminated. His current co-worker, a student, had not been there long and did not feel confident enough to complain. After this meeting Mr Sta Juana felt 'emotional...weak...a victim.'

Mr Sta Juana's doctor was already treating him for hypertension. One morning he attempted to rise from his bed but had postural light-headedness and dizziness and fell over. The feeling of falling persisted. The doctor diagnosed 'vertigo' and prescribed medication, prochlorperazine ('Stemetil'), and referred him to a psychologist. Mr Sta Juana says that he was only able to have 10 sessions per year with the psychologist under Medicare provisions. He continues to attend.

The applicant was also linked in with the local mental health team based at the Canterbury Hospital but, according to Mr Sta Juana, their involvement has to be 'renewed' every two years. He no longer sees them.

Lately, Mr Sta Juana has only had contact with his general practitioner, and that by telephone (because of the current coronavirus restrictions). At Canterbury, he saw a 'different doctor all the time' and had various case managers, including a 'multicultural case manager' who would visit regularly. This service has now stopped.

At no stage - according to Mr Sta Juana - was he admitted to a psychiatric unit or psychiatric ward.

The applicant says he was 'nervous (anxious) all the time', particularly in public and at night. He continued to wake from sleep during the night with a fast-beating heart, shortness of breath and 'heaviness' in the chest. On one occasion he reported the symptoms to his GP, who called an ambulance which took him to hospital. He spent two nights there. He had follow-up investigations and a consultation with a cardiologist, Dr David Ramsay, who determined that the chest pain was non-cardiac in origin. He was discharged from Dr Ramsay's care on 17 May 2019. Despite the reassurance Mr Sta Juana has remained fearful of having a 'heart attack.'

Mr Sta Juana began to experience auditory hallucinations of a single 'distracting' and often critical voice which ran him down. There were occasional commands to self-harm. The voice would often distract him and he would lose the 'thread' of his thoughts. Sometimes he would recall what he had been thinking about after an hour or several, but at other times the thought was 'gone,' never to return. He had various trials of medications, including antidepressants and an antipsychotic, and the voice is now infrequent.

Moving into his own rented unit has been a positive change for Mr Sta Juana. He lives two floors up in a quiet area, near the railway station. Prior to that, for some years ('2), he had lived in a single room in a hostel in a nearby suburb with a shared kitchen.

Mr Sta Juana was having regular contact with his older son, who at the time was working as a 'nurse' and also studying healthcare (possibly medicine) at university. He would check on Mr Sta Juana regularly and come and visit. He would take him to church on Sundays. However, Mr Sta Juana's son was found dead at Watsons Bay in suspicious circumstances on 4 April 2017. He was aged 24 at the time (or so the applicant believes - he says he's not sure of his sons' ages). Three years later, the coroner has still come to no conclusions. When Mr Sta Juana was sent the autopsy report, he discussed this with his general practitioner. There were signs of injury, including 'stitches at the back of the head' and some facial scratches, leading Mr Sta Juana to believe his son was murdered. He had spoken to him only a week before he died.

For several months after his son's death, Mr Sta Juana dreamt of him regularly. He has kept photographs of his son but does not have any of his possessions. These are with his ex-wife. He still has occasional recollections and thoughts about his son and tries to keep these out of his head as it is still too painful.

Mr Sta Juana attended his son's funeral at Rookwood and can recall there being 'a lot of people' present. He says he cannot recall any other details. He was 'very emotional' at the time.

After his son's death, Mr Sta Juana's depression worsened and he was referred to a psychologist for grief counselling. His doctors did not change his medications. He says that his social life and activities of daily living have changed minimally since then, compared with prior to his son's death."

PRELIMINARY REVIEW

7. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.
8. As a result of that preliminary review, the Appeal Panel determined that it was necessary for the worker to undergo a further medical examination because the errors found regarding the issue of subsequent injury could not be corrected from the materials before the Panel, as explained in the reasons below.

EVIDENCE

Documentary evidence

9. 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.

Further medical examination

10. Dr Wasim Shaikh of the Appeal Panel conducted an examination of the worker on 2 December 2020 and reported as shown below.

Medical Assessment Certificate

11. 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

12. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel. The appeal relates to the element of subsequent injury and the alleged failure of the AMS to exclude it from the assessment; the Psychiatric Impairment Rating Scale (PIRS) Class for Social and recreational activities; and lack of any adjustment by the AMS for the inconsistency on presentation.

Appellant

13. In summary, the appellant employer submits that the AMS has erred in failing to exclude the impairment related to Ms Sta Juana's subsequent bereavement in April 2017.
14. It is also submitted that the AMS has erred in finding Class 3 for Social and recreational activities because the worker had relatively normal social activities, and the AMS has not taken account of the restrictions imposed generally due to Covid-19. The finding is also incorrect on the basis of the examples at Table 11.2 of the SIRA Guidelines.
15. The AMS also erred in failing to adjust the assessment on the basis of the inconsistency on presentation found on examination.
16. The MAC should be revoked and the impairment related to the subsequent injury excluded from the assessment.

Respondent

17. The respondent worker submits that there are no grounds for revoking the MAC. The appellant has not shown any demonstrable error or incorrect criteria. The AMS has correctly applied s 323 of the 1998 Act which only relates to pre-existing injuries or conditions, and s 65A(3) of the *Workers Compensation Act 1987* Act does not assist the appellant.
18. The AMS has not erred in finding Class 3 for Social and recreational activities. The AMS was not obliged to take into account a global pandemic when making his assessment. There is nothing in the SIRA Guidelines requiring all examples for a Class to be present before it is applied. The examples are examples only.
19. The AMS did not make a finding of malingering, which was seen by him as a possibility he ultimately rejected.
20. An AMS is required to base an assessment on their own clinical judgement and application of the guidelines. There is no evidence to suggest the AMS has not done so.
21. The grounds of appeal are not made out. The MAC should be confirmed.

FINDINGS AND REASONS

22. 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.

23. 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.

Ground of appeal - Subsequent injury

24. The AMS notes at Part 4,

“After his son’s death, Mr Sta Juana’s depression worsened and he was referred to a psychologist for grief counselling. His doctors did not change his medications. He says that his social life and activities of daily living have changed minimally since then, compared with prior to his son’s death.”

25. At Part 8.g. of the MAC the AMS says,

“[Mr] Sta Juana has suffered a significant further psychiatric injury, the death of his son. This represents a significant loss and is likely to have had a negative effect on his chronic psychiatric condition and his associated impairment.”

26. At Part 10.b. the AMS says,

“I am mindful that the death of the applicant’s son three years ago represents a very significant life event. The applicant admits ongoing efforts to keep thoughts of his son out of his mind because he becomes ‘emotional.’ He still has no definitive answers on the cause of his son’s death as the Coronial Inquiry has not been finalised. He reported grief and anxiety to his GP in May 2018 and a month later began waking during the night with difficulty breathing on a regular basis.”

27. The AMS goes on to explain,

“Had the applicant’s bereavement been a pre-injury event, under Section 323 I would have had the option of a fractional deduction from his impairment rating, but this is not available for a post-injury event and therefore I can make no deduction. The applicant’s WPI is 17%.”

28. It is immediately apparent that this comment at Part 10.b. misconstrues the purpose of Part 8.g. of the MAC template against the background of s 319 of the 1998 Act. Part 8.g. specifies, “If this injury has caused any additional impairment this should not be included with the assessment of impairment due to the subject work injury.”

29. As Campbell J noted in *Greater Western Area Health Service v Austin* [2014] NSWSC 604 (*Austin*) [emphasis added],

“An Approved Medical Specialist’s task is to assess the whole person impairment with which the injured worker presents. Whether it be caused by the injury or whether its cause is from an unrelated source, nonetheless the impairment should be recorded. If it is the opinion of the AMS that the losses, or part of them, had been caused for other reasons then an AMS has the power to make an appropriate deduction under s.323 of the 1998 Act, **or to vary his assessment as provided at [8(g)] of the MAC.**”

30. The Panel notes that the process under Part 8.g. of the MAC is quite distinct from the process under s 323 of the 1998 Act, with the critical element being the exclusion of any part of the impairment not caused by the referred work injury which may result in the AMS being obliged to vary the assessment.¹
31. The AMS recognised the subsequent bereavement as potentially part of the impairment but did not proceed to consider whether the Assessment should have been varied on the basis that part of the impairment was not caused by the work injury. He did consider that the bereavement was a significant life event and that Mr Sta Juana had symptoms in 2018 associated with the bereavement including waking at night with difficult breathing.
32. The AMS also noted that the bereavement was “likely to have had a negative effect on his chronic psychiatric condition and his associated impairment” but took it no further because he was apparently under the impression that unless s 323 of the 1998 could be used, there was no means of excluding that element.
33. The Panel notes that the AMS recorded that Mr Sta Juana had grief counselling but, “His doctors did not change his medications. He says that his social life and activities of daily living have changed minimally since then, compared with prior to his son’s death.”
34. From these elements the Panel is of the view that the AMS approached the assessment in a manner that did not clearly exclude potential impairment due to an unrelated cause. This is a demonstrable error of the face of the Certificate.

Grounds of appeal – PIRS Category of Social and recreational activities; and consistency of presentation

35. The Panel notes that the grounds of appeal regarding the PIRS Category of Social and recreational activities; and consistency of presentation are subsumed by the finding of error in relation to the issue of subsequent injury. These grounds have been addressed and determined by the Panel as part of the assessment necessary in accordance with the Guidelines due to the error found in relation to Part 8.g of the MAC.²
36. If a ground of appeal is successfully made out and an error identified, the Panel must correct the error or errors found “applying the WorkCover Guides fully”³
37. The Panel is unable to address the error from the MAC in the circumstances of this matter given the nature of the error without re-examination of Mr Sta Juana.
38. The re-examination report of Panel member, Dr Wasim Shaikh, follows:

**“REPORT OF THE EXAMINATION BY APPROVED MEDICAL SPECIALIST
MEMBER OF THE APPEAL PANEL**

Matter Number:	1538/20
Appellant:	Ananke Holdings Pty Ltd t/as Sofitel Wentworth
Respondent:	Eduardo Sta Juana

Examination Conducted By:	Dr Wasim Shaikh
Date of Examination:	2 December 2020

¹ *Austin*.

² See *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499; *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792.

³ *Wilson*.

1. The workers medical history, where it differs from previous records

Mr Sta Juana, aged 51, is divorced, and was at the time of assessment resident by himself in Department of Housing accommodation in Narrabeen, New South Wales. He has been on a disability support pension for over five years. He has not returned to work in the last seven years.

Mr Sta Juana has an accepted claim of compensation for psychiatric injury, allegedly sustained during the course of his employment as a mini bar attendant with Sofitel Sydney Wentworth.

He experienced emotional symptoms in response to bullying and harassment by his supervisor, in the year or more preceding the deemed injury date. There was also an increased workload. Mr Sta Juana's symptoms included low mood, anxiety, sleep disturbances and physical symptomatology. He described a lack of confidence, and lack of motivation in pleasurable activities. His anxiety symptoms included panic like phenomena. There is evidence to suggest paranoia, and psychotic features, including hallucinations.

Mr Sta Juana has had various forms of psychiatric intervention. These have included psychotropic medications, attendances with psychologists and attendances with psychiatrists.

Mr Sta Juana, at the time of assessment, was consulting with psychiatrist Dr Vladimir Sazhin, in Ashfield. He had seen Dr Sazhin for two appointments. He had previously seen a psychologist but did not have the mental health care plan renewed. He would visit his general practitioner regularly.

His medications included:

Seroquel (antipsychotic sedative) 200 mg a day.

Escitalopram (antidepressant) 15 mg a day.

Allegron (antidepressant) 75 mg a day.

Present symptoms:

Mr Sta Juana described symptoms of mood disturbances, and anxiety. He reported the presence of negative thought patterns, lack of confidence, and low self-esteem. He would not generally be teary. His anxiety presented with chest tightness, difficulties in breathing, and ruminations about the future as well as past. He would struggle to sleep most nights, despite use of sedative medications.

He was describing easy fatigability. He was describing a lack of motivation in usual activities of interests.

He does not shower regularly and reports that he can often go more than a week without a shower. He does not wash his clothes regularly. He reports that he is always exhausted. He does not eat consistently and has lost weight over the past several years. He will often miss meals. He is, however, capable of living independently.

His social engagements are limited. He prefers to stay at home. He will go to his doctor's or to get takeaway food. He is not actively involved in any social attendances, including events, or get together. He no longer socialises with friends. He does not go to any social events.

He denies any concerns in relation to travel and can use public transport.

He has been separated since 1995. He has not since been in a relationship. He notes that he has lost contact with his friends and has limited contact with his surviving son. He does not generally have contact with his family in the Philippines.

He provided several examples of impaired concentration, such as struggling to watch television, and forgetting tasks. He requires the use of reminders. He would struggle with following complex instructions or reading/typing long documents. He can follow simple instructions.

Mr Sta Juana does not see himself returning to work, due to a combination of emotional and anxiety symptoms.

2. Additional history since the original Medical Assessment Certificate was performed

There has been no further accident or injury and no additional history provided.

3. Findings on clinical examination

Mr Sta Juana was interviewed via Skype. There was evidence of decent self-care, but he was not optimally groomed. From the outset, his cognition was seemingly disturbed. He struggled with recall and was distractible. He was low in mood, and teary on one occasion. He appeared anxious, and apprehensive. He was not agitated. There were no psychotic symptoms or obsessive phenomena. He denied ideations of self-harm. His insight and judgment appeared fair. I note that there has been a history of auditory hallucinations.

Mr Sta Juana presents with a history of Major Depressive Disorder as well as Panic Disorder with Agoraphobia, under the DSM classification system.

I note that there has been the presence of psychotic appearing complaints, but these may be construed within the diagnosis of Major Depressive Disorder. I could not ascertain any features reflective of malingering. Despite previous opinions otherwise, I could find no evidence of inconsistency in Mr Sta Juana's presentation.

4. Evaluation of permanent impairment

Mr Sta Juana's condition has reached maximal medical improvement. There is unlikely to be much change in his impairment over the next 12 months. I am unaware of further treatment options which could be of substantial benefit.

There has been a subsequent issue of significance, the death of his son in 2017. The effect of this has not been included in the assessment and calculation of impairment.

I have assessed a 17% whole person impairment.

See the attached PIRS rating table. I do note that there was an appeal in relation to the MAC, particularly in relation to the rating for social and recreational activities. It was my opinion that his functioning reflected a Class 3 impairment, as he never attended social events, and was not actively involved, remaining quiet and withdrawn. He indeed can leave the house by himself, but only for brief periods, and for essentials. His impairment was not in keeping with a Class 2, as he would never go out to social events, or become actively involved.

I was in agreement with the opinions expressed in the previous medical assessment certificate. I have noted the comments in various previous psychiatric reports.

Table 11.8: PIRS Rating Form

Name	Eduardo Sta Juana	Claim reference number (if known)	1538/20
DOB	7 January 1969	Age at time of injury	44 Years
Date of Injury	29 May 2013 (Deemed)	Occupation at time of injury	Room Attendant
Date of Assessment	2 December 2020 (Skype)	Marital Status before injury	

Psychiatric diagnoses	1. Major Depressive Disorder	2. Panic Disorder with Agoraphobia
Psychiatric treatment	Psychiatrist	Medications
Is impairment permanent?	Yes	

PIRS Category	Class	Reason for Decision
Self-Care and personal hygiene	2	He does not shower regularly and reports that he can often go more than a week without a shower. He does not wash his clothes regularly. He reports that he is always exhausted. He does not eat consistently and has lost weight over the past several years. He will often miss meals. He is, however, capable of living independently.
Social and recreational activities	3	His social engagements are limited. He prefers to stay at home. He will go to his doctor's or to get takeaway food. He is not actively involved in any social attendances, including events, or get together. He no longer socialises with friends. He does not go to any social events.
Travel	1	He denies any concerns in relation to travel and can use public transport.
Social functioning	2	He has been separated since 1995. He has not since been in a relationship. He notes that he has lost contact with his friends and has limited contact with his surviving son. He does not generally have contact with his family in the Philippines.
Concentration, persistence and pace	3	He provided several examples of impaired concentration, such as struggling to watch television, and forgetting tasks. He requires the use of reminders. He would struggle with following complex instructions or reading/typing long documents. He can follow simple instructions.
Employability	5	Mr Sta Juana is unlikely to be capable of returning to work, due to a combination of emotional and anxiety symptoms.

Score	Median Class
122335	= 3

AGGREGATE IMPAIRMENT – 17% WPI
 PRE-EXISTING IMPAIRMENT – 0% WPI

FINAL IMPAIRMENT – 17% WPI”

39. The Panel agrees with and adopts the report of Dr Shaikh, including his assessment of 17% WPI.
40. As he states, Dr Shaikh has not included any impairment due to the subsequent bereavement. The Panel notes that the assessment of Dr Shaikh is based on the features of the psychological/psychiatric condition relating only to the work injury.
41. Also, the Panel notes there are no current symptoms resulting from the subsequent bereavement that would vary the PIRS ratings resulting from the long-standing diagnosed condition due to the workplace injury referred to the AMS. This is consistent with the history taken by the AMS that while Mr Sta Juana was referred for grief counselling, "His doctors did not change his medications. He says that his social life and activities of daily living have changed minimally since then, compared with prior to his son's death."
42. The Panel adopts the rating for the PIRS Category of Social and recreational activities of Class 3 found by Dr Shaikh, which is consistent with the other evidence.
43. The Panel notes that Dr Shaikh did not find any evidence of malingering/ inconsistency of presentation upon which to base any adjustment to the assessment.
44. For these reasons, the Appeal Panel has determined that the MAC issued on 1 June 2020 should be revoked, and a new MAC issued. The new Certificate is attached to this statement of reasons.

WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Matter Number: 1538/20
Appellant: Ananke Holdings Pty Ltd t/as Sofitel Wentworth
Respondent: Eduardo Sta Juana

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 A P McClure 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 NSW workers compensation guidelines	Chapter, page, paragraph, figure and table numbers in AMA5 Guides	% WPI	WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
PSYCHIATRIC	29 May 2013	PIRS Chapter 11, pp 55-60	Ch 14 pp 357-372	17	nil	17
Total % WPI (the Combined Table values of all sub-totals)					17	

Ross Bell
Arbitrator

Dr Wasim Shaikh
Approved Medical Specialist

Dr Patrick Morris
Approved Medical Specialist

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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar

