WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3049/20**
Appellant:	**Ivan Frangoff**
Respondent:	**Insight Security Services Pty Limited**
Date of Decision:	**14 January 2021**
Citation No:	**[2021] NSWWCCMA 7**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Michael Hong**
Approved Medical Specialist:	**Dr Nicholas Glozier**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 1 October 2020, Ivan Frangoff, the appellant, 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 3 September 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 WorkCover Medical 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 WorkCover Medical 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). “WPI" is reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. Mr Frangoff was employed as a security guard when on 12 March 2016 he was injured whilst intervening in a fight between two hotel patrons at the Sebel Hotel in Kiama.

7. He injured both shoulders and eventually came to surgery on each in 2017. Before the surgery Mr Frangoff returned to work doing light duties as his left arm was then in a sling.

8. Following the operations, Mr Frangoff stopped working altogether and is deemed unfit for duties. He developed symptoms commensurate with the onset of a psychological condition and gained 10 kg in weight due to the side effects of his medication and reduced physical active.

9. The AMS found a WPI of 6%.

PRELIMINARY REVIEW

10. 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.

11. The appellant requested a re-examination by a Panel AMS. For reasons given below a re-examination was not required.

EVIDENCE

Documentary evidence

12. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

13. 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

14. Both parties made written submissions which have been considered by the Appeal Panel.

FINDINGS AND REASONS

15. 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.

16. 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.

17. Mr Frangoff alleged that the AMS had fallen into error in his assessment of the respective values of named categories of the Psychiatric Impairment Rating Scale (PIRS). Before embarking on a consideration of the submissions, it is convenient to consider the authorities relating to assessment under chapter 11.

The PIRS

18. The PIRS is established as the rating criteria for assessing psychiatric/psychological impairment, by virtue of Chapter 11 of the Guides. Chapter 11 sets out six categories of behaviour to be considered, each being divided into five classes, ranging in seriousness from 1 to 5. Class 1 relates to a situation where there is no psychological deficit, or a minor deficit attributable to the normal variation in the general population. Class 5 pertains to a person who is totally impaired.

19. Chapter 11.12[1] provides:

> "Impairment in each area is rated using class descriptors. Classes range from 1 to 5, in accordance with severity. The standard form must be used when scoring the PIRS. The examples of activities are examples only. The assessing psychiatrist should take account of the person's cultural background. Consider activities that are usual for the person's age, sex and cultural norms."

20. The assessor is required to classify each category, and to apply the resulting scores as set out in Chapter 11[2].

21. The assessment of psychiatric disorder has been considered in a number of cases. In *Ferguson v State of New South Wales*[3] Campbell J was concerned the case where the Medical Appeal Panel had revoked the MAC on the basis that the finding by the AMS had been glaringly improbable. His Honour found that the Panel had fallen into jurisdictional error. He said at [23]

> "By reference to *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 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': Appeal Panel reasons at [37]. The descriptors, or examples, describing each class of impairment in the various categories are 'examples only': see *Jenkins v Ambulance Service of New South Wales*[4]. The Appeal Panel said 'they provide a guide which can be consulted as a general indicator of the level of behaviour that might generally be expected': Appeal Panel reasons at [37]."

22. In *Glenn William Parker v Select Civil Pty Ltd*,[5] another case regarding assessment of psychiatric disorder, Harrison AsJ cited [23] of *Ferguson* with approval at [65]. Her Honour said at [66]:

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[1] Guides 55.
[2] See 11.15-11.21 at Guides p 65 and Table 11.7 at Guides p 66.
[3] [2017] NSWSC 887 (*Ferguson*).
[4] [2015] NSWSC 633 (*Jenkins*).
[5] [2018] NSWSC 140 (*Parker*).

> "In relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense. (Ferguson [24])….."

23. In *Jenkins* Garling J said at [73]:

> "It was a matter for the clinical judgment of the AMS to determine whether the impairment with respect to employability was at the moderate level, as he did, or at some other level. But, in seeking judicial review, a mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to judicial review."

24. It is accordingly necessary for the Panel to be satisfied that the assessment by the AMS in this category was erroneous in one of the following ways (to use the reference by Campbell J in *Ferguson*):

    (a) if the categorisation was glaringly improbable;
    (b) if it could be demonstrated that the AMS was unaware of significant factual matters;
    (c) if a clear misunderstanding could be demonstrated, or
    (d) if an unsupportable reasoning process could be made out.

25. It was alleged the AMS had fallen into error in all the categories except "Travel."

Self-care and personal hygiene

26. The AMS assessed a class 2 impairment rating, whilst the applicant submitted the appropriate rating was class 3. In his PIRS rating form the AMS said:

> "Mr Frangoff lived alone in a Department of Housing unit since 2005. A community organisation delivered hot meals. He was able to purchase takeaway food, and frozen meals from his local supermarket. He did not shower daily. In summary, Mr Frangoff's history indicated that he could live independently with a mild degree of neglect."

27. When discussing Mr Frangoff's mental state examination, the AMS noted that Mr Frangoff presented as a somewhat dishevelled 63-year-old man with long white and grey hair and a long white beard. He had stopped shaving after surgery to his shoulders.

Submissions

28. The appellant submitted that the provisions of the class 3 descriptors were more appropriate because the AMS described many of the examples to which that class applied. Mr Frangoff did not prepare his own meals, did not shower daily, looked unkempt, and would benefit from a family member or community nurse visit to three times per week.

29. The respondent answered that Mr Frangoff had been living independently since 2005, and did not receive assistance from family members or community nurses. The unkempt appearance noted by the AMS was explained by the fact that Mr Frangoff could not use a razor because of his shoulder problems. Whilst conceding that Mr Frangoff was delivered hot meals by a community organisation, the respondent argued that such an arrangement was not exclusive and that Mr Frangoff relied on takeaway and frozen food. The respondent also accurately noted that Mr Frangoff's own medico-legal expert, Dr Clark, also assessed a class 2 in this category.

Discussion

30. The class 2 descriptors are as follows[6]:

> "Class 2 Mild impairment: able to live independently; looks after self-adequately, although may look unkempt occasionally; sometimes misses a meal or relies on take-away food."

31. The class 3 descriptors are:

> "Class 3 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 has shown no more than a disagreement with the assessment by the AMS, about which reasonable minds might differ. Whilst there were elements in Mr Frangoff's case that cross both classes, the AMS was clearly aware of those matters, such as Mr Frangoff's dishevelled state, and that a community organisation delivered hot meals. The AMS acknowledged that there was a mild degree of neglect, and we accept that he chose the word "mild" in contradistinction to "moderate" in acknowledgement of the classes set out in this category in the rating scale. He has exercised his clinical judgement in choosing the lesser impairment, and he has not exhibited any failure to appreciate the relevant factual material; he has shown no misunderstanding, and his reasoning process has been adequately demonstrated.

33. Moreover, whilst other opinions by medico-legal experts constitute further evidence for the AMS to consider, they have no more weight than other evidence before him/her, and an AMS is able to attach to them such significance as he thinks fit. It is however a relevant factor that the class rating for which the appellant contends has not been supported by his own expert. We would note that in this particular case, there are some evidentiary difficulties in accepting the assessments of Dr Clark in his report of 11 June 2019 in any event, which we will discuss presently.

Social and recreational activities

34. The AMS found a class 1 impairment in this category, whilst the appellant argued that the appropriate assessment was a class 2 rating.

35. In the PIRS, the reasons given by the AMS were:

> "Mr Frangoff saw friends weekly. He went to the Collegian's Club weekly, for lunch or dinner. Before the COVID-19 pandemic, he went to a local Men's Shed once per week. He enjoyed making wooden objects, making knives and sharpening tools. He watched movies regularly at a nearby university cinema before the pandemic. The cinema remained closed since the beginning of 2020."

Submissions

36. The appellant submitted that there was error in the reasoning of the AMS, as he referred to Mr Frangoff's relevant activities prior to the pandemic. It was argued that Mr Frangoff's activities had in fact diminished as at the time of the assessment. It is common knowledge that the pandemic has curtailed the activities of the population in general, and that Mr Frangoff is no exception. There is no suggestion anywhere in the evidence that there was any other reason for the cessation of Mr Frangoff's social and recreational activities but the

[6] Guides page 56.

closure of those establishments which he was regularly attending. It is accordingly appropriate to relate the rating to Mr Frangoff's activities at the time of this public emergency.

37. The appellant made a number of speculative submissions, which were totally unsupported by evidence. It was alleged that:

   - The university cinema had reopened but that Mr Frangoff was not motivated to attend because of his ongoing psychological symptoms.
   - Mr Frangoff did not see his friends or attend the Collegian's Club weekly, but only when he was feeling well enough to do so, due to his ongoing psychological symptoms.
   - Although the Men's Shed was not back in operation, Mr Frangoff was uncertain whether he would be able to attend and participate as a result of his ongoing psychological symptoms.
   - Although Mr Frangoff was advised to go for walks to try keep active, his injuries and on-going symptoms did not enable him to fully follow that advice, and that he went for a walk only to buy provisions.

38. The appellant submitted that if the AMS had taken a proper history then a class 2 assessment would have been appropriate.

39. The respondent submitted that the invitation by the appellant to assume a history in the face of the pandemic restrictions should be rejected. Such a method would disrupt the clinical judgement of an AMS.

40. The respondent also submitted that the assumptions relied on by the appellant were not the subject of any evidence before the AMS.

Discussion

41. Table 11.2 of the PIRS provides relevantly as follows:

> "Class 1 No deficit, or minor deficit attributable to the normal variation in the general population: regularly participates in social activities that are age, sex and culturally appropriate. May belong to clubs or associations and is actively involved with these.
>
> Class 2 Mild impairment: occasionally goes out to such events eg without needing a support person, but does not become actively involved (eg dancing, cheering favourite team)."

42. It is fundamental to litigation that allegations of fact are supported by evidence. The appellant has not made any application to admit late evidence, which is provided for by s 328 (3) of the 1998 Act, that would substantiate the allegations made within his submissions. The challenge to this assessment can accordingly be dismissed.

43. We would also observe that submissions as to what Mr Frangoff would have been unable to do in the face of the effects of the pandemic amount to no more than speculation. The social activities that Mr Frangoff admitted to prior to the public emergency show that he was indeed engaging in social activities that were age sex and culturally appropriate. The submissions that Mr Frangoff was unable to do so when some of the activities reopened had no basis in the evidence that was either before the AMS, or before the Panel.

Social functioning

44. The AMS allocated a class 2 impairment rating to this category. The appellant argued that a class 4 was more appropriate.

45. In his rating scale, the AMS said:

> "Mr Frangoff's irritability had a negative impact on his relationships. He was however able to sustain relationships, and he got on well with friends. He met some friends in person, and he kept in contact with others through the Internet. The relationship with his children had broken down many years before his work injury."

46. The AMS noted when considering Mr Frangoff's background that he had married in 1988 but that the marriage ended in 1998 ("after 10 years"). He noted that the separation was acrimonious and that Mr Frangoff no longer had contact with his children.[7]

47. In considering the report of Dr Clark dated 11 June 2019, the AMS noted that he disagreed with the classifications made by Dr Clark for the reasons he had explained in the PIRS. We note that Dr Clark gave no reasons for his assessment.[8]

Submissions

48. The appellant submitted that the AMS had made a factual error in coming to this conclusion. Mr Frangoff conceded that he sustained some friendships, but alleged that his psychological injury had resulted in a "significant negative impact" on his relationships with his family. It was submitted, again without reference to evidence, that the appellant did in fact have a relationship with his children at the time of the subject injury. It was alleged that it was only following the injury that the relationship with his children became severely strained.

49. The appellant conceded that he was single at the time of the injury, but again without reference to any evidence in support, alleged that he had since been unable to form or sustain any long-term relationship with a partner. The AMS had accordingly taken an incomplete, incorrect and improper history at the time of examination.

50. The appellant also relied on the finding by Dr Clark that this category should be ascribed a class 4 impairment.

51. The respondent kindly reproduced the relevant table, 11.4 in Chapter 11 of the Guides. It also drew our attention to the history taken by its medico-legal expert, Dr Matthew Jones on 2 July 2017[9] that he had not seen any of his family for many years, excepting one unsuccessful interaction with his daughter during his brother's funeral in 2019.

Discussion

52. Table 11.4 of the Guides provides the following descriptors for social functioning:

> "Class 1 No deficit, or minor deficit attributable to the normal variation in the general population: No difficulty in forming and sustaining relationships (eg a partner, close friendships lasting years).
>
> Class 2 Mild impairment: existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships.

[7] Appeal papers page 26.
[8] Appeal papers page 51.
[9] Reply page 20.

Class 3 Moderate impairment: previously established relationships severely strained, evidenced by periods of separation or domestic violence. Spouse, relatives or community services looking after children.

Class 4 Severe impairment: unable to form or sustain long term relationships. Pre-existing relationships ended (eg lost partner, close friends). Unable to care for dependants (eg own children, elderly parent)."

53. The appellant, as indicated, failed to refer us to any evidence that would substantiate his allegation that the AMS had made a factual error. The history taken by the AMS related to past events and that was confirmed by Dr Matthew Jones. The submission made by the appellant was contrary to the evidence that was before the AMS, and no attempt was made to produce any evidence to substantiate the allegation.

54. We did not find Dr Clark's opinion to be helpful, as no reasons were given for the classification he made. He simply reproduced each of the classes are set out in Table 11.4 and high-lighted the relevant class without giving any explanation.

Concentration, persistence and pace

55. In this category the AMS assessed a class I impairment, whilst the appellant claimed that the appropriate assessment was class 3. The AMS said in the assessment scale:

> "Mr Frangoff was able to sustain concentration during the interview, which lasted one hour and 40 minutes. He was able to perform tasks that required concentration, including woodwork and metalwork. He was able to provide a detailed history, and recall previous interactions with medicolegal assessors."

56. In considering Mr Frangoff's social activities, the AMS said:

> "…. Mr Frangoff saw friends on average once per week. They went to the Collegian's Club for lunch or dinner. Prior to the COVID-19 pandemic, Mr Frangoff attended the Men's Shed once per week. He enjoyed making knives and sharpening blades. He made cutting boards and other wooden objects. He said, *'I was the co-to man if somebody wanted a chisel sharpened…'"*

Submissions

57. The appellant submitted that the AMS had "failed to note" that:

- Mr Frangoff was no longer "quick off the mark"
- Mr Frangoff had difficulty explaining things
- Mr Frangoff was only able to concentrate on certain tasks such as woodwork and metalwork for short periods of time
- Mr Frangoff found great difficulty with intellectually demanding tasks and often became distressed

58. It was submitted that the AMS had accordingly taken an incorrect and improper history at the time of examination, and that had he done so, a class 3 assessment would have been allocated.

59. Again, the appellant referred to the class 3 assessment in this category by Dr Clark of 11 June 2019.

60. The respondent submitted that the significance of the matters being considered by the AMS were a matter for him, using his clinical judgement as to his observations of Mr Frangoff during the assessment. The respondent referred to *Ferguson*, which we have discussed above.

Discussion

61. The appellant's submissions are rejected. Again, the appellant has relied upon submissions that were not supported by evidence. The matters raised in Mr Frangoff's submissions, which we have encapsulated in the bullet points outlined above, were not the subject of any evidence. There was no reference to them in the evidence before the AMS, and, as we have already indicated, there was no application before us to admit additional evidence on the subject.

62. As also indicated above, Dr Clark simply reproduced the descriptors for the five different classes in the category, and highlighted the class he thought was applicable – in this case, class 3. The appellant did not refer us to any particular part of Dr Clark's report which justified that assessment, and we would observe that such justification would have been difficult to find from our reading of Dr Clarke's report

Employability

63. The AMS allocated a moderate class 3 assessment to this category, whilst the appellant argued for either a severe class 4 or a totally impaired class 5 assessment.

64. In taking the appellant's history, the AMS said:[10]

> "…[Mr Frangoff]…. Felt pressured to return to work, but he felt hopeless about his employment opportunities. He said *'I'm 63, I'm not 21 years old. How do they expect me to find work, when others are losing their jobs?'"*

65. The reasons given by the AMS in his rating scale assessment were:

> "Mr Frangoff was able to work within his physical restrictions until 2017. He was certified unfit to work as a security officer because of his physical injuries. This is not taken into account when rating psychiatric impairment. Mr Frangoff wanted to work but he struggled to find employment because of his age and physical injuries. From a psychiatric perspective, he could work up to 20 hours per week. He would find it difficult to work longer hours due to his inability and lack of motivation."

Submissions

66. The appellant sought to interpret his remarks to the AMS as meaning that although he wished to work, Mr Frangoff ultimately acknowledged that he did not have the capacity. The appellant submitted further that, taking into account his "injuries and ongoing disabilities," the higher classification proposed was more appropriate. As we understood the submission, the ongoing disabilities included a number of the behavioural consequences of his psychiatric condition such as concentration, social functioning and poor hygiene that have been the subject of separate assessments under the rating scale.

67. The appellant also submitted that Mr Frangoff's age, qualifications, experience and training were relevant factors for the consideration of an AMS in considering this category.

68. The respondent submitted that no identifiable submissions had been made relevant to this category.

[10] Appeal papers page 25.

Discussion

69. Chapter 11.11 of the Guides provide that the evaluation of the functional impairment caused by a person's psychiatric injury is to be assessed on the basis of the behavioural consequences of the disorder in the six categories to which we have referred. The AMS, with respect, was correct when he said that a claimant's physical limitations were irrelevant to the psychiatric rating within this category. His task was to assess the behavioural consequences of Mr Frangoff's psychiatric injury relating to its effect on his ability to find work.

70. For the same reasons, the provisions of s 32A of the Workers Compensation Act 1987 (1987 Act) are not applicable to the task of an AMS. Thus questions of a claimant's age, qualifications, experience and training were not relevant unless they were applied within the framework set out within Table 11.6 of the Guides. This provides:

> "Class 1 No deficit, or minor deficit attributable to the normal variation in the general population. Able to work full time. Duties and performance are consistent with the injured worker's education and training. The person is able to cope with the normal demands of the job.
>
> Class 2 Mild impairment. Able to work full time but in a different environment from that of the pre-injury job. The duties require comparable skill and intellect as those of the pre-injury job. Can work in the same
>
> position, but no more than 20 hours per week (eg no longer happy to work with specific persons, or work in a specific location due to travel required).
>
> Class 3 Moderate impairment: cannot work at all in same position. Can perform less than 20 hours per week in a different position, which requires less skill or is qualitatively different (eg less stressful).
>
> Class 4 Severe impairment: cannot work more than one or two days at a time, less than 20 hours per fortnight. Pace is reduced, attendance is erratic.
>
> Class 5 Totally impaired: Cannot work at all."

71. It can be seen therefore that, insofar as Mr Frangoff's age, qualifications, experience and training were relevant to the determination by the AMS, the class 3 assessment was an acknowledgement that the AMS accepted that Mr Frangoff could find some employment that did not require the same skill as was needed for his pre-injury employer. However, it can also be seen that the relevance of the reference to Mr Frangoff's skill was in the context of whether that limitation related to his psychiatric disorder, and not his physical injuries.

72. The appellant also appeared to submit that it was possible to apply an over-all aggregation of the various assessments in other categories into the employability category. The categories set out by Chapter 11.11 of the Guides provide for six separate categories to be assessed. There is no provision for those categories to be combined for the purposes of the classification of any of those individual categories. Indeed, in *Ballas v Department of Education*[11] the Court (Bell P and Payne JA, Emmett AJA agreeing) held that the conduct assessed must be consigned to the correct category (or scale), and failure to do so would result in appealable error.

Summary

73. For these reasons, the Appeal Panel has determined that the MAC issued on 3 September 2020 should be confirmed.

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[11] [2020] NSWCA 86 at [94].

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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar