WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3878/20**
Appellant:	**Martin Clark**
Respondent:	**Secretary, Department of Communities and Justice**
Date of Decision:	**1 February 2021**
Citation No:	**[2021] NSWWCCMA 17**

Appeal Panel:	
Arbitrator:	**Catherine McDonald**
Approved Medical Specialist:	**Dr Douglas Andrews**
Approved Medical Specialist:	**Dr Patrick Morris**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 29 October 2020, Martin Clark lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Nicholas Glozier, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 1 October 2020.

2. Mr Clark relies on the ground of appeal in s 327(3)(d) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) – that the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The Workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. Mr Clark was employed by the Department of Family and Community Services as a Senior Client Services Officer. Between 2015 and 2018 he was seconded to the role of Community Development Worker. As the "owner" of that position wished to return in August 2018. Mr Clark was placed in a role at NSW Land and Housing for three weeks then asked to return to his substantive position. He said in his statement that he was "not happy" with either of those transfers. He suffered a psychological injury as a result of his interactions with management from mid-2018.

7. Mr Clark's claim was accepted and he was assisted to find a part time position at the Anzac Memorial in Hyde Park.

8. He made a claim for permanent impairment compensation which was referred to the AMS. The AMS assessed 5% whole person impairment (WPI) as a result of the application of the Psychiatric Impairment Rating Scale (PIRS) and added 2% for the effect of treatment.

PRELIMINARY REVIEW

9. 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.

10. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because the MAC does not disclose an error and there is sufficient information in the file to determine the appeal.

EVIDENCE

11. 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.

12. 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

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

14. In summary, Mr Clark submitted, through his solicitor, that the MAC "in its its entirety paints a picture which is not consistent with the worker's general day-to-day health, activities, social life, and mental wellbeing." He said that on the day of the interview he experienced his usual fairly depressed mood but the AMS made him feel relaxed and upbeat so that he said things which were incorrect. He said that the AMS concentrated on positive things and did not address his mental health concerns.

15. Mr Clark took issue in the submissions with a series of factual matters and set out his response. He took issue with the diagnosis, stating that he suffers PTSD as a result of his injury. He said that the AMS should not have disputed the diagnosis of his treating psychiatrist Dr George Jacobs, whom he has been seeing for 20 years. He said:

> "The worker experiences day to day doubts, fears and anxieties about doing something wrong or not performing etc. Therefore, the worker has had days off and come in late. The worker also often falls asleep at work on his chair as he finds his mental state exhausts him. None of this information was presented to Dr Glozier as the worker was not asked to detail any of this information."

16. In reply, the respondent submitted that the AMS took a detailed history which he cross-referenced to the medical evidence in the file. It noted the authorities (described below) which state that a difference of opinion on matters about which reasonable minds may differ is not an appellable error. It submitted that the assessment was open to the AMS and that he discharged his statutory obligation.

FINDINGS AND REASONS

17. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment but the review is limited to the grounds of appeal on which the appeal is made. An Appeal Panel is limited to determining error as alleged by the appellant and can review the MAC only if error is made out.[1]

18. In *Campbelltown City Council v Vegan*[2] 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

19. The AMS set out a detailed history of Mr Clark's injury and treatment and of his current symptoms. He cross referenced the information provided, such as Dr Jacobs's notes. He said:

> "Dr Jacobs' notes are instructive. At the first assessment in November 2018, the notes are dominated by a range of negative life events Mr Clark experienced over the preceding few years including the 'loss of the love of his life' in 2012, a difficult relationship over the following four years with problematic drug use and sexual behaviour, the death of his mother in 2018 and 'two big accidents' including a motor vehicle accident and a fractured forearm after which 'friends didn't seem to care'. The work issues were initially noted as 'other issues', although quite quickly became focus of their interactions. Dr Jacobs increased his medication yet further, although this had no significant positive effect."

20. We accept that the reference to the death of Mr Clark's mother in 2018 is incorrect and that the reference in Dr Jacobs' notes may be to another person but that mistake does not constitute an appellable error.

21. The AMS noted that Mr Clark is treated by Drs Jacobs and Bosworth and that his antidepressant was changed to Venlafaxine (Efexor) "which, despite being a very close analogue of the previous medication, he says has made him more stable." Mr Clark's submission that the AMS said the change should not have made a difference is irrelevant. The MAC shows that the AMS accepted what Mr Clark said.

22. With respect to present symptoms the AMS said:

> "He does not have a pervasive low mood nor anhedonia. He currently obtains around 6 ½ hours sleep a night. He notes he continues to feel isolated, different, lacks trust in people, and betrayed and shamed by the way he was treated at FACS. He had put on weight because he stopped doing exercise but went back to the gym earlier on this year and lost some of this weight until a hand injury five weeks ago curtailed this. He continued to have some times where he found it difficult to motivate himself and he has to push himself to do such things as go cycling. He feels 'exhausted' by working four days a week such that he does not feel that he can work a fifth day particularly with the appointments he has to fit in. He continues to feel less socially involved. He has been less tolerant of his friends' behaviours for a long time. Although he is not snappy or irritable he gets stressed out and undermined some of their behaviour. He says he is more

[1] *Mercy Connect Limited v Kiely* [2018] NSWSC 1421.
[2] [2006] NSWCA 284.

> self-critical now and continues to worry and ruminate about how he was treated at the Department, not contacted afterwards and feels abandoned. His last anxiety episode was a few months ago in Taylor Square where he said he could not move, he was frozen, tearful and had to leave, although did not describe the physical symptoms required for a panic attack."

23. The AMS described Mr Clarks' previous treatment:

> "He first saw Dr Jacobs some 15 years ago over relationship issues. He did not take any of the prescribed medication at that time. He said the time he was anxious, worried and had a breakdown which lasted for a number of years but had short-term impact on his actual functioning. He was 'very depressed' after his partner died some six or seven years ago and took Pristiq for a year and a half, which helped with the grieving process. His doctor represcribed Pristiq in late 2017 for the issues described by Dr Jacobs in his letter. Of note, although Mr Clark had three potentially Criterion A events whilst on active duty for the British Army in Northern Ireland, there were never any significant psychiatric sequelae. Although Mr Clark identifies as being 'a veteran with PTSD' it does not appear that the events caused the PTSD and certainly none of the recent events constituted Criterion A traumatic events."

24. The AMS set out the history he obtained with respect to Mr Clark's social activities and activities of daily living and the results of his mental state examination. He summarised the injury and his diagnosis:

> "Mr Clark had mood and anxiety related symptoms, representing either a mild depressive episode or chronic adjustment disorder in the context of several years of life stressors that had required the re-prescription of antidepressants in late 2017. The events at work in 2018 caused a significant aggravation of these symptoms and stepwise decline in his functioning. Over time, with treatment and reengaging with a new workplace, his condition has nearly remitted, such that he does not have either cardinal feature of Major Depressive Disorder and left him with fairly low levels of impairment. There appears to have been significant vulnerability in terms of his childhood, background, exposure to events when younger (both of which only constitute a vulnerability) and a previous episode of depression. The most accurate diagnosis for Mr Clark is of a recurrent depressive disorder in near remission, if one were to use standard assessment such as a MADRS."

25. The AMS considered that a proportion of the WPI was due to a pre-existing condition and said:

> "He had had at least one previous episode of Depressive Disorder and had been unwell enough that his G P had put him on antidepressants in late 2017 in the context of numerous life stressors. This work injury caused an aggravation of that pre-existing condition although associated with a marked increase in his impairment. The degree to which that pre-existing disorder contributed to his impairment is fairly minimal given that he continued to work fulltime and have a significant social life and so the evidence is not at odds with a 1/10th deduction under Section 323 given the impossibility of a more accurate determination."

26. The AMS considered the reports of Drs Takyar and Teoh. With respect to Dr Takyar he said:

> "Report of Dr Takyar, consultant psychiatrist for the applicant, date 13 May 2020. This is a much more detailed report with a similar history to that elicited today. In the mental state examination, Mr Clark appears to have been somewhat different then with lower mood compared to that elicited today. Dr Takyar makes the same

> diagnosis, although suggested a comorbid generalised anxiety disorder. I am not convinced Mr Clark has the pervasive worry and associated physical symptoms required for this disorder. Dr Takyar also notes the pre-existing condition. In terms of the PIRS I disagree with a number of classes for the same reasons as above. I further disagree with Dr Takyar's assessment of Class 2 self-care and personal hygiene. Mr Clark reports daily showering, eating well, had gone back to the gym, (only ceasing following a physical injury) and able to fully look after himself and his home, indicative of functioning within the normal range. Dr Takyar's reasons describe a normal level of self-care for the population. Dr Takyar made a 1% apportionment for treatment which is inappropriate at that time but given the substantial elimination of the impairment Mr Clark had some time ago, would currently be warranted and I would suggest requires currently a 2% treatment effect."

27. The AMS gave reasons for the assessments he made in each of the categories of the PIRS.

The Guidelines

28. The Guidelines contain the relevant principles of assessment. First, the AMS was required to assess Mr Clark as he presented "on the day of assessment, taking into account the claimant's relevant medical history and all available medical information."[3]

29. Mr Clark submitted:

> "Dr Glozier has also disputed the diagnosis from of the worker's treating psychiatrist and the previous psychiatric assessment of Dr Takyar. The worker has been seeing his psychiatrist for 20 years and the diagnosis of the longstanding psychiatrist should have been accepted as correct."

30. The AMS was required to come to his own diagnosis before applying the PIRS. The Guidelines provide:

> "The impairment rating must be based upon a psychiatric diagnosis (according to a recognised diagnostic system) and the report must specify the diagnostic criteria upon which the diagnosis is based."

31. The AMS made a diagnosis which was open to him in the exercise of his clinical judgement. The fact that it is different to those made by others is not an error.

32. The AMS gave reasons for his assessment in each of the PIRS categories and the reasons properly support his assessment. The fact that the assessment is different to that made by another assessor on a different date does not constitute error.

33. In *Ferguson v State of New South Wales*[4] Campbell J said:

> "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."[5]

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[3] Paragraph 1.6.
[4] [2017] NSWSC 887 (*Ferguson*).
[5] At [24].

34. Harrison AsJ cited *Ferguson* in *Parker v Select Civil Pty Ltd*[6] (*Parker*) and said that the passage cited above supported the conclusion that "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."

35. Her Honour said[7]:

> "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..."

36. The AMS made an allowance for the effect of treatment. The Guidelines provide:

> "Where the effective long-term treatment of an illness or injury results in apparent substantial or total elimination of the claimant's permanent impairment, but the claimant is likely to revert to the original degree of impairment if treatment is withdrawn, the assessor may increase the percentage of WPI by 1%, 2% or 3%. This percentage should be combined with any other impairment percentage, using the Combined Values Chart. This paragraph does not apply to the use of analgesics or anti-inflammatory medication for pain relief."

37. The treatment Mr Clark underwent in the period between the examination by Dr Takyar in May 2020 and the examination by the AMS in October 2020 would account for some of the difference in the assessments. The allowance for the effect of treatment reflects that.

Other relevant legal principles

38. Mr Clark's essential submission is that the history he provided was incorrect because he was "placed in a false sense of security." He says that the AMS made a demonstrable error.

39. In *Pitsonis v Registrar Workers Compensation Commission*[8], the worker argued that the AMS made errors in the recording and use of aspects of the history recorded at the examination. The Court of Appeal said:

[6] [2018] NSWSC 140.
[7] At [70]-[71].
[8] [2008] NSWCA 88.

> "Those dependent on the applicant showing that the doctor failed to record or to record correctly things she had told him face a double difficulty. They are not demonstrable on the face of the Certificate. And they seek, in effect to cavil at matters of clinical judgment in that matters unrecorded are likely to be matters on which the specialist placed no weight. The same can be said about factual matters recorded in one part of the Certificate that did not translate into the decision favourable to the applicant now contended for."

40. The errors on which Mr Clark relies are not demonstrable errors.

41. In addition, the alleged errors in the history taken by the AMS are presented as submissions rather than evidence. There is no application to admit fresh evidence. However, even if Mr Clark's evidence on those matters appeared in a statement, it would not be admissible.

42. The Court of Appeal considered an appeal panel's decision to decline to permit a worker to rely on additional medical evidence being a statement from a worker about the conduct of the examination by an AMS in *Lukacevic v Coates Hire Operations Pty Limited*[9]*.* Hodgson JA said:

> "A dispute by the worker as to the history set out in the certificate, or the observations made by the AMS, can readily be raised; and it could be raised honestly or dishonestly, on strong or flimsy grounds. Having regard to the matters I have set out, in my opinion it would be reasonable for an AP not to admit evidence raising such a dispute unless that evidence had substantial *prima facie* probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, simply by raising such a dispute, going to a matter relevant to the correctness of the certificate, a worker could put the AP in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of the *WIM* Act."[10]

43. For these reasons, the Appeal Panel has determined that the MAC issued on 1 October 2020 should be confirmed.

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

G De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar

[9] [2011] NSWCA 112.
[10] At [78].