

# WORKERS COMPENSATION COMMISSION

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

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<b>Matter Number:</b>	<b>M1-3601/19</b>
<b>Appellant:</b>	<b>Robert John Henderson</b>
<b>Respondent:</b>	<b>Secretary, Department of Education</b>
<b>Date of Decision:</b>	<b>27 November 2019</b>
<b>Citation:</b>	<b>[2019] NSWCCMA 175</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Jane Peacock</b>
<b>Approved Medical Specialist:</b>	<b>Dr Patrick Morris</b>
<b>Approved Medical Specialist:</b>	<b>Dr Douglas Andrews</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 24 September 2019 Mr Robert John Henderson (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Christopher Bench, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 28 August 2019.
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, and
  - 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, 4<sup>th</sup> ed* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> ed* (AMA 5).

### PRELIMINARY REVIEW

6. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.
7. As a result of the Appeal Panel's preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination.

## EVIDENCE

### Documentary evidence

8. 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

9. 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

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

## FINDINGS AND REASONS

11. 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.
12. 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.
13. The matter was referred by the Registrar to the AMS as follows:

“The following matters have been referred for assessment (s 319 of the 1998 Act):

- Date of injury: 27 March 2017 (deemed)
- Body parts/systems referred: Psychiatric and Psychological Disorders
- Method of assessment: Whole Person Impairment”

14. The AMS issued a MAC certifying as follows:

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)
1. Psychiatric and psychological disorders	27 March 2017 (deemed)	Chapter 11, pages 54 – 60, paragraphs 11.1 to 11.20	n/a	9%	One-tenth	8%
<b>Total % WPI (the Combined Table values of all sub-totals)</b>					<b>8%</b>	

15. The assessment was based on an assessment by the AMS conducted under the permanent impairment ratings scale (PIRS), as set out in the following table:

**Table 11.8: PIRS Rating Form**

Name	Rodney John Henderson	Claim reference number (if known)	770519140701
DOB	22 January 1948	Age at time of injury	69
Date of Injury	27 March 2017 (deemed)	Occupation at time of injury	Teacher
Date of Assessment	23 August 2019	Marital Status before injury	Married

Psychiatric diagnoses	1. Persistent Depressive Disorder with anxious distress with intermittent major depressive episodes	2.
	3.	4.
Psychiatric treatment	Psychiatric supervision Dr Brian Parsonage	Current medications sertraline 150mg daily.
Is impairment permanent?	Yes	

PIRS Category	Class	Reason for Decision
Self-Care and personal hygiene	2	The applicant is living on an independent basis in South Kempsey. The applicant noted in fact having had the home relocated from another location such that it is in the process of being hooked up to the utilities and the like. He stated, "it's more like camping in the house" noting he does not have mains electricity, water or sewerage at the current time. He noted in this context, he has fashioned some "bush plumbing" such that he has freshwater in the house. He is utilising a generator. He lives on one and a half acres. He noted he has a gas-powered camping water heater. When asked as to how often he is showering he noted, "I'm trying for daily". However, he is in fact showering anyway from every three to four days. When at his friend's home prior to moving to his own home four weeks ago, he reported he was showering every two or three days. He is somewhat remiss with his dental hygiene. He changes his underwear "every day"; however, only changes his outer clothes "whenever I go out". He will do some chores, such as washing up. He is not doing any cleaning at the moment as the house is not in a fit state. When at his friend's home, he would do vacuuming. He reported he is cooking two out of three days; however, he regularly misses meals. As such, it is evident the applicant is able to live independently. This is most consistent with mild impairment.
Social and recreational activities	2	The applicant noted he spends the majority of his time renovating his art deco house. He noted the plumbing "sort of works". He is spending a lot of time currently securing the house. He takes the dog for a walk every one to two days for 15 to 60 minutes. Occasionally, he will take the dog to the beach. He goes to a meal at the Crescent Head Bowling Club on an independent basis approximately monthly. He does not watch television.

		He is currently reading a detective story. He has read two of the four stories and has just started the third. The applicant occasionally attends social outings on an independent basis. As such, this is most consistent with mild impairment.
Travel	1	The applicant noted the farthest he has travelled on an independent basis in recent times is the four-hour trip from Crescent Head to Central Coast, "I go backwards and forwards to the Central Coast. I was coming down every couple of weeks" in order to visit friends and family. As such, there is no evidence of impairment.
Social functioning	3	The applicant noted his daughter lives in Redhead. They have a "good relationship". He sees her approximately every six weeks. His son lives in Tuggerah. They have a "good" relationship. On the other hand, he sees him "not often enough" such as every two to three months. On the other hand, they text message every other day. He has a number of friends on the central coast who he has maintained friendships with for many years. He reported the loss of some of his work friendships. He also has a couple of friends in Crescent Head. With regard to his relationship with Frances "I have cut Frances off". In elaboration, he noted, "she always downloads on me ... she is very intelligent". As such, excluding any contribution of his wife's to the marital separation and taking into account that there had been longstanding marital discord, it is the evaluator's opinion this is most consistent with a moderate impairment in that they have now separated once and for all, which likely was contributed to by the work injury. This is most consistent with moderate impairment.
Concentration, persistence and pace	2	The applicant noted he reads his detective stories for "an hour or so". He noted he will play solitaire for "fifteen to twenty minutes ... sometimes for hours". He noted his renovations around the home do not require following any building plans. As such, it is evident the applicant would be able to complete a standard course or a basic retraining course at a slower pace. Such is most consistent with mild impairment.
Employability	4	The applicant does not have a current work certification. When asked if he has any other life roles, he noted being a father - he has maintained such a role. He is completing renovations around the home in the vicinity of three to five hours on a daily basis, anywhere from four to seven days per week. He noted if he is not renovating, he will often be out buying supplies and hardware, such as fittings for the stove or gas heater. As noted above, the applicant is post-retirement age. Utilising his other roles, including his capacity to work on his house for three to five hours per day and his maintenance of the role of father and friends for many years. Such is no more than a severe impairment.

Score

Median Class

1	2	2	2	3	4
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=2
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Aggregate Score Impairment

Total

%

+	+	+	+	+
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14	7
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Aggregate: 14

Whole Person Impairment: 7%

16. The AMS then adjusted the resultant 7% WPI for the effects of treatment by 2% WPI and then deducted one-tenth under s 323 as set by the AMS as follows:

“Whole Person Impairment: 7%  
 Less Pre-Existing Impairment = 0.7% (one-tenth of 7 = 0.7)  
 Adjustments % for effects of treatment: 2%  
 Final Whole Person Impairment = 8% (8.3% rounded down)”

17. The worker appealed.

18. The complaints on appeal concern the assessments made by the AMS under the Permanent Impairment Rating Scale (PIRS) in respect of all categories to reach an overall impairment assessment of 7% WPI. There was no complaint by either party on appeal about the adjustment of 2% WPI made by the AMS for the effects of treatment. Similarly, there was no complaint on appeal by either party about deduction of one-tenth made by the AMS under s 323.

19. In summary, the appellant submitted that the AMS erred as follows:

- In his assessment of class 2 for self-care and personal hygiene
- In his assessment of class 2 for social and recreational activities
- In his assessment of class 1 for travel
- In his assessment of class 3 for social functioning
- In his assessment of class 2 for concentration, persistence and pace
- In his assessment of class 4 for employability.

20. In summary the Secretary, Department of Education (the Respondent) submitted that the AMS did not apply incorrect criteria nor did he make a demonstrable error and that the MAC should be confirmed.

21. The assessments by the AMS in respect of all of the categories under PIRS were complained about on appeal.

22. The role of the AMS is to conduct an independent assessment on the day of examination. The AMS is required to take a history, conduct a mental state examination, make a psychiatric diagnosis and have due regard to other evidence and other medical opinion that is before the AMS. The AMS must bring his clinical expertise to bear and exercise his clinical judgement when making an assessment of impairment under the PIRS categories. The assessment is not to be based upon self-report alone. An appeal panel cannot disturb ratings under the PIRS scale for mere difference of opinion but must be satisfied as to error.

23. The Panel notes that the AMS has taken a detailed history of injury which is consistent with the other evidence that was before him.
24. The AMS has taken a detailed history of the workers self-reported present symptoms as follows:

“The applicant reports he has been fully compliant with his medication. There were no side effects elicited.

The applicant described his recent mood as “the last two weeks have been stressed because I knew I was coming here”. He noted that his mood two weeks ago was “pretty good”. He denied having had any diurnal mood variation. He reported he has six to eight hours of “very broken” sleep. He frequently naps during the day. He is able to enjoy some activities such as doing some renovations around the home. He noted “since I've been working, it (his energy levels) improved a bit”. He noted his libido was “quite reasonable for someone of my age”. His appetite was somewhat erratic. His weight is up some 5kg since his work injury. He reported being easily frustrated at times. He last experienced suicidal ideation 10 weeks ago when he had passive suicidal ideation such as “is it worth it ... I'm sick of being broken”. He adamantly denied any active suicidal ideation, plan or intent. He stated, “I won't ever do it again”.

He noted his anxiety has been problematic for the last two weeks in preparation for the current employment. At times, he has difficulties with distractibility and butterflies in his stomach. There were no other physiological symptoms or arousal identified.”

25. The AMS took a detailed history of self-reported impact on ADLS as follows:

“The applicant has two older sisters in the Blue Mountains “we are close ... we haven't seen much of each other for a while because of the distance”. However, there are frequent text messages and phone calls. His parents are both deceased. He denied any adverse events or experiences during his childhood or adolescence. He completed year eleven at Scots Grammar School in Bathurst; however, he did not pass his leaving certificate. He noted having to repeat year six secondary to his young age. He denied any history of special education. He denied any suspensions or expulsions.

The applicant has been married on three occasions. He was married to Deborah in 1972. They separated after three years. The couple have no children. There was no domestic violence. He was married to Jennifer for ten years. The couple have three children: Laura aged twenty-seven, Perry aged twenty-nine and Miles who died in May 2016 at the age of twenty-nine from the complications of neurofibromatosis. He denied there being any domestic violence in the relationship. The defendant was married to Frances for twenty years. They separated once and for all twelve months ago. They had been living separately; however, maintained a relationship for the previous three years. He noted “I became less communicative ... We just kind of grew apart”. The applicant is single. He is living on an independent basis in South Kempsey in his own home. He is currently renovating the house.

The applicant noted having engaged in some conduct-disordered behaviours as a child or adolescent, such as running away from home a few times and shoplifting. He denied any history of arrests. He denied any placement in juvenile justice centre or history of incarceration.

The defendant's mother suffered a “nervous breakdown”. He had no further knowledge with regard to the precise nature of such. His sister has been treated with an antidepressant for unclear reasons. He denied any history of substance abuse or suicide.

The applicant started drinking alcohol in his mid-thirties. He denied having ever been a daily drinker. He is "more of a binge drinker ... not very often", at which times he will have six nips of vodka. He reported having been intoxicated twice in his life. He denied any history of alcoholic blackouts or arrests for driving under the influence of alcohol. He commenced using cannabis in the mid-1970s. He denied having ever used cannabis on a daily basis. He has used cannabis twice in the past twelve months when offered to him by a friend. He denied the abuse of any other illicit, synthetic or prescription drugs. He denied any participation in detoxification or rehabilitation. He denied any history of pathological gambling.

With regard to his activities of day living, the applicant is living on an independent basis in South Kempsey. The applicant noted in fact having had the home relocated from another location such that it is in the process of being hooked up to the utilities and the like. He stated, "it's more like camping in the house" noting he does not have mains electricity, water or sewerage at the current time. He noted in this context, he has fashioned some "bush plumbing" such that he has freshwater in the house. He is utilising a generator. He lives on one and a half acres. He noted he has a gas-powered camping water heater. When asked as to how often he is showering he noted, "I'm trying for daily". However, he is in fact showering anyway from every three to four days. When at his friend's home prior to moving to his own home four weeks ago, he reported he was showering every two or three days. He is somewhat remiss with his dental hygiene. He changes his underwear "every day"; however, only changes his outer clothes "whenever I go out". He will do some chores, such as washing up. He is not doing any cleaning at the moment as the house is not in a fit state. When at his friend's home, he would do vacuuming. He reported he is cooking two out of three days; however, he regularly misses meals.

The applicant noted he spends the majority of his time renovating his art deco house. He noted the plumbing "sort of works". He is spending a lot of time currently securing the house. He is looking into options such as putting a studio on the block such that he will rent the house in order to supplement his aged pension. He takes the dog for a walk every one to two days for 15 to 60 minutes. Occasionally, he will take the dog to the beach. He goes to a meal at the Crescent Head Bowling Club on an independent basis approximately monthly. He does not watch television. He is currently reading a detective story. He has read two of the four stories and has just started the third.

The applicant noted the farthest he has travelled on an independent basis in recent times is the four-hour trip from Crescent Head to Central Coast, "I go backwards and forwards to the Central Coast. I was coming down every couple of weeks" in order to visit friends and family.

The applicant noted his daughter lives in Redhead. They have a "good relationship". He sees her approximately every six weeks. His son lives in Tuggerah. They have a "good" relationship. On the other hand, he sees him "not often enough" such as every two to three months. On the other hand, they text message every other day. He has a number of friends on the central coast who he has maintained friendships with for many years. He reported the loss of some of his work friendships. He also has a couple of friends in Crescent Head. With regard to his relationship with Frances "I have cut Frances off". In elaboration, he noted, "she always downloads on me ... she is very intelligent".

The applicant noted he reads his detective stories for "an hour or so". He noted he will play solitaire for "fifteen to twenty minutes ... sometimes for hours". He noted his renovations around the home do not require following any building plans.

The applicant does not have a current work certification. When asked if he has any other life roles, he noted being a father - he has maintained such a role. He is completing renovations around the home in the vicinity of three to five hours on a daily basis, anywhere from four to seven days per week. He noted if he is not renovating, he will often be out buying supplies and hardware, such as fittings for the stove or gas heater.”

26. The AMS has not based his assessment on self-report alone. The AMS has clearly had regard to the other evidence that was before him which he refers to in some detail as follows (emphasis in original):

“The Statement in the matter of Rodney Henderson, dated 25 October 2017, was duly read and noted. He reported a background history of treatment of depression for past four or five years, but noted it was controlled before the injury. It was noted he had a previous psychological workers’ compensation claim approximately five years ago. He noted before the onset of his medical condition, relevant to the injury claim, he had a variety of leisure pursuits including surfing. (*Comment: The applicant in fact noted he has not gone surfing in more than five years*). He provided an account of the workplace injury highly in accord with that present during the clinical evaluation, including having trouble dealing with the performance improvement plan. He reported having been diagnosed with depression and Adjustment Disorder after his suicide attempt. He noted the death of his son in May 2016. He noted his son's illness was a long one, “I can say that it was a slow process and sum of the grieving occurred before he went”.

The Confidential Report of Dr Ash Takyar, dated 28 February 2019 was duly read and noted. Dr Takyar noted he struggled to provide a coherent history due to circumstantial thought form. (*Comment: Such was not the case during the present clinical evaluation*). It was noted he had a history of previous depression with the present episode of depression commencing around 2014. He noted having had increasingly severe symptomatology during the last six months in 2016. It was noted his son's health had been deteriorating and he had to take a lot of leave in order to act as a carer for his son. He provided various accounts of alleged bullying and harassment that he felt he was subjected to. Dr Takyar attained a history of depressive illness dating back to 2008, which was possibly work-related with a further episode in 2012, for which he was being treated with Sertraline. He was subsequently restarted on antidepressant medication in 2014 “he stated that his work difficulties began in around March 2015 and significantly worsened in March 2016”. It was noted he had been diagnosed with Attention Deficit Hyperactivity Disorder for which he had been treated with Ritalin. It was noted he was generally bathing everyday but occasionally would miss baths once a month if he was particularly stressed. He was missing meals most days. It was noted he prepares his own meals and showers without prompting. It was noted he had no hobbies but wanted to return to previous hobbies of painting, surfing and drawing. It was noted he can go social events but more briefly and rarely and is anxious whilst there. It was noted he was travelling to the Newcastle area every six months to see a psychiatrist and general practitioner occasionally. It was noted there was a breakdown in his marriage of 22 years because of irritability and worsening withdrawal as a result of his psychiatric illness. It was noted the relationship broke down three months ago and had not reconciled. It was noted he was unable to read more than a paragraph and then he had to re-read it. It was noted he could not multitask “realistically he does not present with a capacity to return to work on the open and competitive labour market for any role for which he has training, skill or experience”. Dr Takyar diagnosed Major Depressive Disorder and Generalised Anxiety Disorder. He opined with regard to permanent impairment “roughly 50% pertains to the Generalised Anxiety Disorder and 50% to Major Depressive Disorder, of which around 50% pertains to the death of his son, which he described in the context of a chronic condition that his son had it from



the age of fourteen years". *(Comment: As noted above, it is the evaluator's opinion such an assessment of Dr Takyar is a best estimate. It is the evaluator's opinion there is no medical or scientific evidence to apportion on this or any other basis. As noted above, the applicant was specifically questioned with regard to Dr Takyar's assessment. He noted "most of this (impairment) is due to this (workplace injury)... he (Brent Walker) continued this all the way through". In elaboration, he noted in spite of his Principal's knowledge that his son was seriously ill and died, Brent Walker continued to engage in bullying and harassment throughout the period of time.)*

Dr Takyar completed an assessment of whole person impairment of 22%. *(Comment: Dr Takyar has rated a mild impairment in Travel. On the other hand, from his own description, he notes that he is able to travel from Crescent Head to Newcastle independently. This is clearly inconsistent with a mild impairment. Dr Takyar assessed a severe impairment in Social Functioning noting the breakdown of the marital relationship. As noted in the body of the report, the applicant and his wife had longstanding marital discord pre-dating the work injury. Moreover, he acknowledged that they had periods of separation pre-dating the work injury including being separated under the same roof for twelve months. At the time of the work injury, although remaining married, they were living in separate houses because of the marital discord. Furthermore, the applicant noted his wife's own personality contributed to a significant degree to the interpersonal dysfunction and ultimate marital separation. As such, taking such into account and excluding factors unrelated to the applicant's work injury, it is the evaluator's opinion this is no more than a moderate impairment. Dr Takyar assessed a moderate impairment in Concentration, Persistence and Pace. Such was inconsistent with the history during the clinical evaluation. He noted he was able to read novels for up to 60 minutes at a stretch. He will play solitaire on a regular basis for 20 minutes but sometimes for hours at a time. He is completing some renovations around his home. He is able to maintain his attention whilst driving for up to four hours. He is able to persist in tasks for hours at a time when doing renovations around the home. Such is inconsistent with a moderate impairment. Dr Takyar assessed the applicant as being incapacitated for employment. However, the applicant is in fact post-retirement age from his own reports. It is the evaluator's opinion, Dr Takyar has failed to take into account his other roles and functions. It is noted he is doing renovations around the home for anywhere from three to five hours, four to seven days a week. He reported in spite of the distance, he has maintained his role as a father. There is some evidence of applying himself to work-like activities. As such, it is the evaluator's opinion such would be considered no more than a severe impairment.)*

There were extensive records from Dr Russell Hinton psychiatrist presented for review. In a letter, dated 10 May 2018, Dr Hinton noted the applicant had diagnoses of Adjustment Disorder with depressed mood and Attention Deficit Hyperactivity Disorder. *(Comment: for the reasons noted above, I would not agree with the diagnosis of an Adjustment Disorder)*. Dr Hinton noted the applicant appeared to have made a reasonably good recovery from the workplace bullying and harassment. It was noted his mood was euthymic (within normal limits) and no evidence of recent self-harm.

In a letter, dated 24 October 2017, Dr Russell Hinton noted the applicant described being bullied by the principal at his school he was working at. It was noted he had also suffered the death of his son at aged twenty-nine from neurofibromatosis in March [sic] 2016. He reported having previously seen a psychologist and been diagnosed with Attention Deficit Disorder. It was noted he had been married three times and described a supportive relationship with his wife although they were not living together. It was noted he suffered from an Adjustment Disorder with depressed mood in the context of a number of stressors including alleged bullying at work and the death of his son. It was noted he increase his sertraline to 150mg daily and provided him some self-report questionnaires to assess Attention Deficit Hyperactivity Disorder.

It was noted in a MH-SOP LM Mental Health (Mental Health Service For Older People Lake Macquarie Mental Health), dated 20 September 2017, the applicant had a number of stressors including alleged workplace bullying and performance management, death of his son eighteen months previously and a recent marital separation. It was noted he had cluster B personality traits, Mild Attention Deficit Disorder and depression having been diagnosed in 2008. It was noted he had separated from his wife four years ago but had a good relationship. *(Comment: As noted above, there appears to be some discrepant history with regard to the relationship with his wife. On the other hand, they are certainly separate once and for all now).* He was diagnosed with depression and mild Attention Deficit Disorder, impulsive self-harm and cluster B personality traits.

Dr K F Foo noted in the referral letter, dated 19 September 2017, the applicant had an Adjustment Disorder as a result of alleged workplace bullying. It was noted he is under WorkCover.

Dr Foo noted in a letter, dated 24 October 2013, "he recently reduced his work hours as he found it stressful to do more. He appears to be more comfortable working three days a week".

Dr P Thorogood noted in response to facsimile questionnaire, dated 12 August 2010, "accumulated stressors over the last five months. Employment-related stressors are only reported contributing factor". He diagnosed the applicant with an Adjusted Disorder.

It was noted in the handwritten records of Brighter Horizons (records of Frank Van de Mortel), dated 29 November 2017, "last year was difficult because we had so many difficult classes". It was noted he had some difficulties with procrastination. He alleged being bullied in the workplace as a schoolteacher with vexatious complaints being encouraged by the principal. Mr Van de Mortel diagnosed an Adjustment Disorder.

The Patient Health Summary of The Heights Medical Practice printed 25 June 2018 were duly read and noted. The records commenced on 8 December 2017. On this date, Dr Gregory Peck noted the applicant had moved up from Terrigal. It was noted he was being bullied in the workplace by a school principal for two years. It was noted he was married to Frances but they were not living together "Rodney suggested Frances can be abusive of him and he could no longer cope hence the move ... A son of his died two years ago of NF2 at age 29 ... He is quite devastated obviously ... Symptomatically, he now comes very anxiety-prone". It was noted he had also been diagnosed with Attention Deficit Disorder.

On 23 January 2018, Dr Peck noted, "he stated today things were a lot worse at work prior to the DSH. He was finding work very difficult and resorted to procrastination ... as the pressure increased, 'I became worse at my job'." On 9 February 2018, Dr Peck noted the claimant had scored 90 on the ACE-R which was nonspecific for a dementing process and more consistent with attentional deficits. He was again diagnosed with an Adjustment Disorder.

In response to a facsimile Dr Gregory Peck noted on 7 May 2018 "my opinion is that Rodney's ADD diagnosis, his associated stress, lack of insight and resultant poor social functioning, preclude him from RTW as a teacher".

Dr Gregory Peck noted in a WorkCover NSW - Certificate of Capacity, dated 31 May 2018, the applicant had a diagnosis of an Adjustment Disorder as a result of "alleged bullying and harassment in the workplace". It was noted he had no work capacity from 2 June 2018 to 29 June 2018.

It was noted in a Wyong Hospital Mental Health Discharge / Transfer Summary, the applicant was admitted on 31 March 2017 and discharged on the 2 May 2017. It was noted he had been referred under Section 22 (schedule) after serious deliberate self-harm with a longitudinal cut to his wrist at school where he is a teacher “he had been contemplating suicide over the last three months precipitated by alleged ongoing workplace stress and work improvement program. He has a previous diagnosis of Major Depressive Disorder diagnosed five years ago”. (*Comment: As noted above, the applicant was adamant that such was an impulsive suicide attempt.*) It was noted coincidentally he had separated from his wife, living apart and was experiencing uncertainty over the renovation and sale of his home. It was further noted “the entrenched personality structure which precluded him from contemplating alternative explanations to the current episode added to his frustrations during the hospitalisation. There was also history of impulsivity and difficulty in resolving conflicts. His personal history also indicated risk factors contributing to his maladaptive coping mechanisms”. He was discharged with diagnosis of Adjustment Disorder with disturbance of mood and conduct, Cluster B personality traits with impulsivity and poor coping strategies and Attention Deficit Disorder mild. (*Comment: For the reasons noted above, I would not agree with the diagnosis of an Adjustment Disorder.*)

A doctor from Erina Fair Medical Centre (unknown name) noted in a WorkCover NSW – Certificate of Capacity, dated 2 November 2015, the applicant had suffered a psychological injury. It was noted there was no date of injury or mechanism of causation. It was noted he was unfit to work from 2 November 2015 to 30 November 2015.

...

The Patient Health Summary from Erina Fair Medical Care, dated 8 August 2017, was duly read and noted. The records commenced on 20 November 2008. The first mental health notation is on 2 November 2009 when Dr Paul Thorogood noted “has a history of recurring depression over ten to eleven years - has been on and off meds e.g. Zoloft. Zoloft caused some loss of libido, has been off meds for three months - started to go down a month ago”. It was noted he had thoughts of self-harm. There was no specific diagnosis made. He was commenced on the antidepressant Efexor. There are a number of further mental health notations in the record such as on 3 March 2010 when it was noted the applicant had ceased Efexor due to lethargy and became more irritable with occasional rages and insomnia. It was noted his energy and libido were improved however had labile mood. He was commenced on the antidepressant Avanza. Dr Thorogood made a diagnosis of an Adjustment Disorder on 10 August 2010, with regard to accumulative stress over the past five months. He placed him on a WorkCover Certificate and being unfit until 20 August 2010. Dr Foo noted on 24 October 2013 “this year because of increased stress at work, he has electively reduced his workload to three days per week, had been warned about swearing in class. It would appear that the principal was not in agreement and wants to increase his workload back to five days a week. This has already caused an increase in anxiety and insomnia. Rodney is on the verge of retirement but is awaiting the sale of his property”. On 21 October 2015, Dr Foo noted “stressed out with his work as a teacher, states that he has some difficult students to deal with, no backup from the school principal, other stresses: financial, his son's illness”. The reason for visit was noted to be stress. On 4 January 2016, Dr Foo noted his workers' compensation claim had been rejected by Allianz. It was noted the applicant felt rested and would like to resume normal duties at the commencement of the first school term of 2016. On 1 June 2016, Dr Kshirsagar noted “some students have accused him of swearing when he did not. Students can get revengeful. Principal called him-he did not believe his story ... Fleeting thoughts of self-harm – loves his family, has two children – one died recently”. He declined a referral for psychotherapy. It was noted he was diagnosed with work stress and suggested he takes Zoloft 100mg on alternate days. On 16 December 2016, Dr Johannes De Kock noted “he presented with work-related stress-workplace

harassment, he could not attend work". He was adjudged unfit from 15 December 2016 till 16 December 2016. On 21 February 2017, Dr Foo noted "another under stress at home and at work, on the verge of selling his property, separated from his partner and has planned to go O.S. for a caravan holiday". He was diagnosed with depression. On 10 May 2017, Dr Foo noted "attempted self-harm diagnosed with Adjustment Disorder ... reason for visit: depression ... Main issue is his dysfunctional workplace. He has excellent relationship with his partner although they live apart finally putting his property on the market making plans to have an extended (? six months) holiday in Bali. Thereafter a campervan tour through Europe".

On 13 November 2018, Dr Hinton noted "he reports his mood as being significantly improved. He is still having problems with memory and concentration and so I have increased his Ritalin LA to 40mg mane".

Dr Adam Martin noted in a report, dated 31 August 2017, there was an account of the workplace largely in accord with that presented during the clinical evaluation. Dr Martin diagnosed Major Depressive Disorder. Dr Martin noted "workplace stress as noted above probably has contributed to his deterioration leading up to a suicide attempt and hospital admission. Obviously, the loss of his son would also be a major contributor to his depressive condition ... I cannot comment on whether this is or is not the case, but certainly presents as a genuine historian who believes this. I think it is probable that employment stress exacerbated and worsened his depressive symptoms to the point that he became unable to cope and became frankly suicidal requiring hospital admission".

In a supplementary report, dated 10 November 2017, Dr Martin noted his workplace injury should be seen as an aggravation to a pre-existing condition.

Dr Martin noted in a report, dated 7 December 2018, he and his wife are living separately having had an ongoing relationship. It was noted he had been diagnosed and treated for Attention Deficit Hyperactivity Disorder. Dr Martin opined, "in short, I suspect the work-related problems precipitated the exacerbation of his underlying depressive condition to the point that he has not been able to return to work ... I would not regard work as being an enduring aggravating factor and I think his impairment probably reflects an underlying depressive disorder as I have indicated in my early reports". Dr Martin noted the applicant had plans to retire by the end of 2018.

Dr Martin noted in a report, dated 16 May 2019, he was living in a share house on the Mid- North Coast planning to move to Kempsey. It was noted he was separated from his wife and no longer in an intimate relationship. It was noted he remained in contact with his two children who live on the Central Coast and Newcastle. It was noted he is hopeful of being able to engage in artwork and surfing in the future. He was spending a day and half in total per week preparing his property for the move. It was noted this was fairly heavy and manual work. He had recently bought a new surfboard in anticipation of returning to surfing. He reported problems with disorganisation, concentration and memory. It was noted he rarely goes to social events and does not attend social events without prompting or company. *(Comment: It was noted during the clinical evaluation this was not the case. He noted he attends the Crescent Head Bowling Club on an independent basis for a meal on a monthly basis.)* Dr Martin opined that he had no capacity for employment. He opined he reached maximum medical improvement. He assessed a moderate impairment in Social and Recreational Activities. *(Comment: As noted above, the applicant reported he is able to go out for a meal on an independent basis on a monthly basis at Crescent Head Bowling Club. Such is more consistent with mild impairment.)* Although Dr Martin noted the applicant was totally impaired for employment, it is noted that he is post-retirement age and this has not been taken into consideration when assessing other roles and functions, and for the reasons above, I would rate this as a severe impairment."

27. The AMS conducted a mental state examination and recorded his findings as follows:

“With regard to the *Mental State Examination*, the applicant presented as an aged male, casually dressed appropriate to the weather. He was balding. He was bearded. He had a couple of hearings. His front teeth bridge was loose. At times, such impeded his flow of speech, however, his speech was of normal rate, rhythm and volume. His thought processes were logical, relevant and coherent throughout. He described his recent mood as “for the last two weeks, I have been stressed because I knew I was coming here”. On the other hand, prior to two weeks ago, he was “pretty good”. His observed emotional tone was of broad range, reactive and stable with appropriate humour and laughter at times. There was no overt delusional material elicited. He was appropriately preoccupied with matters at hand. He denied any auditory or visual hallucinations. He denied any suicidal ideation.”

28. The AMS summarised the injury and his diagnosis as follows:

“The applicant meets diagnostic criteria in the Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition for Persistent Depressive Disorder with anxious distress with intermittent major depressive episodes. The applicant reported having a history of anxiety and depression dating back to 1998. He reported having typical symptoms of depression including depressed and anxious mood, irritability, lethargy, insomnia, lack of libido, erratic appetite, feeling more isolative and withdrawn, inability to enjoy activities and suicidal ideation. It is evident the defendant has been depressed on an ongoing and consistent basis for the last two years, as evidenced in the extensive collateral presented for review. On the other hand, it is further noted the defendant would appear to have had superimposed episodes of more severe depression. It is noted such has been adjudged to be an Adjustment Disorder in the context of the work injury. It is the evaluator’s opinion the DSM-V would preclude such a diagnosis as it would be superseded or overridden by the diagnosis of a more serious depressive illness, that being a major depressive episode in the context of a Persistent Depressive Disorder.

It is noted the applicant has been adjudged to have suffered a work injury. The work injury was thus causative of his Persistent Depressive Disorder with anxious distress. It is noted the applicant has a couple of significant stressors that were contemporaneous with the onset of his symptomatology, especially with regard to the death of his son in May 2016 after a long illness with neurofibromatosis and the discordant marital relationship pre-dating the work injury. It is the evaluator’s opinion such have likely also contributed and exacerbated his depressive illness.”

29. The panel, after careful review, can discern no error in the ratings ascribed by the AMS to each of the categories complained about on appeal. There was no application of incorrect criteria. Each of the ratings were open to the AMS in accordance with the correct application of the criteria in the Guides. The AMS has given reasons for each rating. He has given a clear and reasoned explanation, that is based on the application of his clinical expertise, for the difference in the workers’ presentation and impairment as at the date of examination as compared to previous points in time, including his presentation to Dr Takyar, the independent medical expert (IME) qualified on behalf of the appellant.
30. The appellant’s submissions seek to ascribe error to the AMS and submits that each of the classes should be increased. Indeed, the appellant seeks an increase even in the categories where the AMS assessed the same class as Dr Takyar, the IME qualified on behalf of the appellant, for example, in the categories of Self-care and personal hygiene and Social and recreational activities.

31. In respect of the AMS assessment of class 2 for self-care and personal hygiene, the appellant submitted the AMS erred and firstly submitted that the assessment should be class 3 and later submitted it should be class 4. The appellant contends that the AMS erred in this assessment, despite the class 2 assessment being in accordance with that assessed by Dr Takyar, the IME qualified on behalf of the appellant. This submission cannot be made out particularly in the context of the AMS having given detailed reasons for this assessment and the assessment was made in accordance with the correct criteria. The panel can discern no error.
32. In respect of the AMS assessment of class 2 for social and recreational activities, the appellant submitted the AMS erred and that he should have assessed class 3. The appellant contended that the AMS erred in this assessment, despite the class 2 assessment being in accordance with that assessed by Dr Takyar, the IME qualified on behalf of the appellant. This submission cannot be made out particularly in the context of the AMS having given detailed reasons for this assessment and the assessment was made in accordance with the correct criteria. The panel can discern no error.
33. In his assessment of class 1 for travel, the appellant contended that the assessment should have been class 2 in accordance with Dr Takyar's assessment. The AMS in fact explained why his assessment differed from that of Dr Takyar as follows:
- "Takyar has rated a mild impairment in Travel. On the other hand, from his own description, he notes that he is able to travel from Crescent Head to Newcastle independently. This is clearly inconsistent with a mild impairment".
34. The AMS has given a clear explanation for his assessment of impairment for travel, particularly noting the distances that the appellant is regularly able to travel unaccompanied.
35. In respect of his assessment of class 3 for social functioning, the appellant submitted that the AMS erred and the assessment should have been class 4 in accordance with the assessment of Dr Takyar. Again, the panel can discern no error in the assignment by the AMS of class 3. He has exercised his clinical judgment on the day of examination by reference to the correct criteria. Moreover, the AMS gave a very clear explanation of why his assessment differed from that of Dr Takyar as follows:
- "Dr Takyar assessed a severe impairment in Social Functioning noting the breakdown of the marital relationship. As noted in the body of the report, the applicant and his wife had longstanding marital discord pre-dating the work injury. Moreover, he acknowledged that they had periods of separation pre-dating the work injury including being separated under the same roof for twelve months. At the time of the work injury, although remaining married, they were living in separate houses because of the marital discord. Furthermore, the applicant noted his wife's own personality contributed to a significant degree to the interpersonal dysfunction and ultimate marital separation. As such, taking such into account and excluding factors unrelated to the applicant's work injury, it is the evaluator's opinion this is no more than a moderate impairment."
36. In respect of the assessment of class 2 for concertation, persistence and pace, the appellant submitted that class 3 should be assigned in accordance with Dr Takyar's assessment of a moderate impairment. The AMS has given a clear explanation of the reason for this assignment. He has specifically explained the reasons why his assessment has differed from Dr Takyar as follows:

“Dr Takyar assessed a moderate impairment in Concentration, Persistence and Pace. Such was inconsistent with the history during the clinical evaluation. He noted he was able to read novels for up to 60 minutes at a stretch. He will play solitaire on a regular basis for 20 minutes but sometimes for hours at a time. He is completing some renovations around his home. He is able to maintain his attention whilst driving for up to four hours. He is able to persist in tasks for hours at a time when doing renovations around the home. Such is inconsistent with a moderate impairment.”

37. The AMS must make an independent assessment on the day of examination. In assessing concentration, persistence and pace, the AMS in conducting a thorough mental state examination is best placed to clinically evaluate concentration, persistence and pace. Class 2 as assigned by the AMS accords with the results of the mental state examination conducted on the day of assessment and has due reference to the appellant’s self-report of his capacity in this regard and the panel can discern no error.

38. In his assessment of class 4 for employability, the appellant submitted the AMS should have assigned class 5 in accordance with Dr Takyar’s assessment. The AMS clearly explained why his assessment differed from that of Dr Takyar as follows:

“Dr Takyar assessed the applicant as being incapacitated for employment. However, the applicant is in fact post-retirement age from his own reports. It is the evaluator’s opinion, Dr Takyar has failed to take into account his other roles and functions. It is noted he is doing renovations around the home for anywhere from three to five hours, four to seven days a week. He reported in spite of the distance, he has maintained his role as a father. There is some evidence of applying himself to work- like activities. As such, it is the evaluator’s opinion such would be considered no more than a severe impairment.)”

39. The AMS’ reasons for assigning class 4 are clearly explained and the class 4 is assigned in accordance with correct criteria. The panel can discern no error.

40. The ratings the AMS has ascribed in each class accord with the criteria in the Guides. The panel cannot disturb these ratings absent error by the AMS which the Panel cannot discern. The ratings for each category class are well-reasoned, not based on self-report alone and have had due regard to the extensive history taken by the AMS, the mental state examination conducted by him, and having due regard to the other evidence that was before him. The AMS has exercised his clinical judgment on the day of examination and the Panel can discern no error.

41. For these reasons, the Appeal Panel has determined that the MAC issued on 28 August 2019 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

