

WORKERS COMPENSATION COMMISSION

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

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| Matter Number: | M1-3685/19 |
| Appellant: | Rural Co Holdings Pty Ltd |
| Respondent: | Bruce Anthony Moore |
| Date of Decision: | 3 March 2020 |
| Citation: | [2020] NSWCCMA 37 |

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| Appeal Panel: | |
| Arbitrator: | Marshal Douglas |
| Approved Medical Specialist: | Dr Julian Parmegiani |
| Approved Medical Specialist: | Dr Douglas Andrews |

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 20 December 2019, Rural Co Holdings Pty Ltd (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr A P McClure, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 9 December 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,
 - 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 *Workplace Injury Management and Workers Compensation Act 1998* (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).

RELEVANT FACTUAL BACKGROUND

6. Bruce Moore (the respondent) commenced employment with the appellant in July 1999 and thereafter worked in various roles. As a consequence of the work the respondent did for the appellant, the respondent suffered a psychological injury that is deemed to have occurred on 20 July 2018.

7. The respondent claimed the appellant was liable to pay him weekly payments of compensation for an incapacity he had resulting from his injury, compensation for costs he incurred in receiving treatment for his injury and compensation for a permanent impairment he said resulted from his injury. The appellant's insurer issued a notice under s 78 of the Act on 14 March 2019 denying liability to pay compensation to the respondent. The insurer advised in that notice that that it considered the respondent's injury was wholly or predominantly caused by reasonable action the appellant had taken or had proposed to take with respect to transfer and performance appraisal of the respondent.¹ Section 11A(1) of the *Workers Compensation Act 1987* provides that no compensation is payable if a worker's injury is wholly or predominantly caused by such a circumstance.
8. The respondent thereupon registered an Application to Resolve a Dispute (ARD) with the Commission seeking determination of his claims for compensation. The matter was referred to Arbitrator Mr Paul Sweeney.
9. On 27 September 2019, with the consent of the parties, the arbitrator directed that the respondent's claim with respect to compensation for permanent impairment be remitted to the Registrar so that it could be referred to an AMS for assessment of the respondent's degree of permanent impairment from his psychological injury. The arbitrator also noted that the respondent had discontinued his claims for weekly compensation and compensation for medical expenses and that the parties had agreed that the appellant would pay the respondent's weekly payments of compensation and compensation for medical expenses in accordance with what was noted in a Certificate of Determination the arbitrator issued on that date.
10. Thereafter, a delegate of the Registrar referred the medical dispute regarding the degree of the respondent's permanent impairment resulting from his injury to the AMS to assess.

PRELIMINARY REVIEW

11. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.
12. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the respondent to undergo a further medical examination. The Appeal Panel notes that neither party requested the Appeal Panel to re-examine the respondent. Further, the Appeal Panel lacks the power to require the respondent to undergo a further medical examination. This is because the Appeal Panel came to the view, for reasons set out below, that, firstly, the MAC did not contain a demonstrable error and, secondly, the AMS had applied the correct criteria to assess the medical dispute that had been referred to him. Accordingly, the Appeal Panel was not required to reassess the medical dispute and indeed had no need or power to require the respondent to submit to a further examination.²

EVIDENCE

13. 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

14. The AMS recorded within part 4 of the MAC that the respondent's present symptoms were as follows:

¹ Page 13 of the Application to Resolve a Dispute.

² *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792

The applicant continues to experience fluctuating anxiety levels. He also has, by the sound of it, discrete panic attacks on a regular basis. He experiences intense fear, dry mouth, tremor, palpitations, hyperventilation (sometimes with faintness and distal paraesthesiae) and occasional vomiting. He usually manages to control these symptoms by using the breathing techniques the psychologist has taught him, or distracting himself by doing something active. If none of this works, he has a 'Valium.' There is constant worry and rumination. The applicant wonders why this happened to him. He is frustrated, wondering why he cannot 'beat this,' recover and move on. He 'replays' the interactions with managers. He has lost 'faith in humanity.' There is a sense of grief and loss. He had worked for 'Rural Co' for 20 years and had enjoyed his job.

Sometimes anxiety levels are such that Mr Moore does not feel 'safe' left alone, even at home. He in fact asked his son and his son's partner to move in with him for this reason.

Even with the hypnotic agent, sleep is disrupted. Often Mr Moore sleeps in 'stretches' of two hours. He is fatigued and sleepy during the day and may take naps. The hypnotic agent also has a 'hangover' effect.

The applicant does not describe any specific pattern of dreams.

There is a depressed mood associated with regular thoughts of suicide but no specific plans. Mr Moore says that he loves his children too much to kill himself. He is capable of limited enjoyment, e.g. spending time with his family and achieving things at home, however he 'struggle(s) doing anything' on his own. His son encourages him. He finds this very helpful.

He attempts to walk but this does not improve his sense of fatigue. Sometimes he comes home and has to have a sleep. On occasions he has had to stop during his walk and take a break because of his anxiety levels.

Mr Moore limits his time out of the house. He goes shopping only once a week, and then only if he feels calmer. He says that he does not socialise and will not even answer the phone. There has been little contact with friends. He wants to avoid his friends' questions about his condition. There is great shame about being unemployed. In addition many of his friends are also friends of his ex-partner. The relationship broke down in February, largely because Mr Moore became distant from her. He also lost his sex drive. He was 'not interested in going anywhere or doing anything,' whereas his partner is quite a social woman. She 'took it personally.'

This gentleman struggles with complex tasks. Nothing is as easy as it was. Writing his statement took him several days. He had to take regular breaks. He can read for no more than half an hour and often loses his 'focus.' He gets frustrated by jigsaws. He had been renovating his house and most of this work is finished, but currently he cannot even motivate himself to pick up a paintbrush.

Much of his day is spent watching television or wildlife documentaries on his iPad. Often, however, Mr Moore 'wanders off' and loses his focus. He avoids watching anything 'gruesome.' Nature documentaries, on the other hand, are a kind of meditation.

The applicant rarely does any cooking. He relies on his son or his son's partner. He may buy his own meals and they are 'not always healthy.' He has gained weight, he believes."

15. The AMS recorded in part 5 of the MAC making the following findings from his examination of the mental state of the respondent:

“Mr Moore was a somewhat truncally-obese man, wearing dark, casual clothing. He was variably anxious (moderately to severely) throughout the hour-long interview. He occasionally hyperventilated.

The applicant cooperated in attempting to give a detailed history, however he often lost his ‘focus’ and many of his answers were incomplete. This was evidence, in my opinion, of a cognitive deficit.

Mood was depressed. Mr Moore’s affect (minute-to-minute objective emotional state) was moderately to highly anxious and mildly depressed, with reduced range. Only rarely was a ‘positive’ affect displayed, and that happened while we were ‘off topic.’

I could not elicit any symptoms or signs of psychosis.”

16. The AMS in part 7 of the MAC provided a summary of the respondent’s injury and his diagnoses of that injury in these terms:

“Mr Moore has symptoms of anxiety throughout the day, varying in severity. He worries and ruminates. He also has discrete panic attacks. These generally occur without obvious precipitant.

The applicant also has a strong sense of loss. His mood is depressed most of the time and he has relative anhedonia (inability to experience pleasure). He tends to feel ‘unsafe’ when alone. There are regular thoughts of suicide, but no current intent. He is fatiguable with low energy and has a sleep disturbance. His motivation is poor. He does very little around the house and often cannot be bothered exercising.

Based on the relevant diagnostic criteria set forth in DSM-5 (APA, 2013), the applicant’s diagnoses are:

- Generalised Anxiety Disorder.
- Panic Disorder.
- Major Depressive Episode”

17. In accordance with [11.11] of the Guidelines, the AMS assessed the behavioural consequences of the respondent’s psychiatric disorder by reference to the six scales listed within [11.11]. His assessment of that, as recorded in the MAC, was this:

| PIRS Category | Class | Reason for decision |
|------------------------------------|-------|--|
| Self care and Personal Hygiene | 2 | Mr Moore has lost motivation to do housework and to cook for himself. He relies on his son and son’s partner. Occasionally he will buy ‘ready-made’ meals but he is not eating healthily, exercises irregularly and has gained weight. He has a history of elevated cholesterol. He is casually-dressed and adequately groomed in the interview setting. |
| Social and Recreational Activities | 3 | The applicant keeps to himself (though when particularly anxious he needs the company of his son). He avoids answering phone calls. He has minimal contact with friends. He does not want to answer their questions about his condition. He feels great shame at being unemployed. He is unmotivated to go out and is often anxious in any |

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| | | case. He prefers only to go shopping when he feels calm, otherwise he will leave the shop in a flustered state. He devotes little time to hobbies, pastimes etc. He mostly watches documentaries at home. |
| Travel | 2 | The applicant is anxious when travelling, particularly over long distances. He prefers to bring a support person when he does. |
| Social Functioning | 3 | A relationship broke down in February this year, largely as a result of Mr Moore's psychiatric symptoms. He has minimal contact with friends. He does, however, feel close to his children, lives with his son and has regular contact with his daughter, his mother and his siblings. |
| Concentration, Persistence and Pace | 3 | Mr Moore does not persist at tasks. He reports readily losing focus after only a few minutes and this was evident in the interview setting today where many of his responses were incomplete and he tended to 'lose track' of his train of thought. He presented as having at least a subtle cognitive deficit. He says that he can read for no more than half an hour and readily 'wander(s) off' while reading or while watching TV programmes. |
| Employability | 5 | Because of his anxiety levels, reluctance to drive and high anxiety in interpersonal situations, Mr Moore would not currently cope with paid employment or voluntary work. At home, in fact, he rarely completes allocated tasks and has little motivation for any. |

18. The AMS observed that the median of those scores is 3 and that the aggregate is 18. Based on that, and in accordance with [11.18] of the Guidelines, the AMS assessed the respondent's whole person impairment (WPI) from the respondent's injury as 22%.
19. The AMS said that in assessing the respondent's WPI to be 22% he had taken into account the respondent's described symptoms (which the AMS considered to be consistent with the diagnosis that he had made of the respondent's injury and consistent with the "reports on file"), the respondent's self-report of his symptoms, and his observations of the respondent's of the respondent's objective level of cognitive functioning and self-care. The AMS said he had followed "the methodology currently prescribed by SIRA". The AMS's reference to the methodology prescribed by SIRA clearly is a reference to the Guidelines. The "various reports on file" to which the AMS referred is, in the Appeal Panel's view, clearly a reference to the reports of other doctors and health practitioners who had either treated the respondent or assessed the respondent for the purpose of providing forensic medical legal reports. Insofar as the AMS considered those reports were relevant, he summarised the content of them within 10c of the MAC.
20. The AMS noted in the MAC that the Commission had provided him with several documents for his assessment of the respondent's permanent impairment. Those documents included documents attached to applications to admit late documents. The AMS said, with respect to the documents attached to those applications, that "none of the attached documents is relevant to the work of an AMS psychiatrist". Those documents included copies of statements the respondent's bank had provided detailing transactions the respondent had made with his account in the period 1 July 2019 to 21 August 2019 with the bank. The Appeal Panel observes that the crux of the appellant's appeal against the MAC relates to the AMS's treatment of those bank statements.

SUBMISSIONS

21. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
22. In summary, the appellant submits that the AMS “clearly failed to properly consider the respondent’s bank records”. The appellant submits that “a forensic analysis of these records... would have demonstrated inconsistencies with the complaints made by the respondent”. The appellant noted that the bank statements showed that between 1 July 2019 to 21 August 2019 the respondent:
 - attended fast food outlets and restaurants on 21 times,
 - attended grocery stores and retail stores almost daily,
 - withdrew \$200 at Windsor RSL Club on one day, was in Griffith, Leeton and Ardlethen between 5 August and 9 August 2019 (which is six hours drive from the respondent’s home) and attended a bowling club and Italian restaurant in that time,
 - attended the Bligh Tavern on 14 August 2019.
23. The appellant submits that the respondent doing that is “entirely inconsistent with the respondent’s contentions about his capacity and social engagements, in particular that he limited his time out of the house, that he shopped only once a week and that he was reluctant to drive”. The respondent submits that the AMS failed to explain, or failed to explain sufficiently, why the bank records were irrelevant.
24. In reply, the respondent submits that the AMS considered the records of the respondent’s bank transaction. This is because the AMS made reference to within 10c of the MAC to the attachments to the applications to admit late documents, and the bank statements were within those documents. The respondent submits that the fact that the AMS considered them not to be relevant does not constitute demonstrable error. The respondent submits that the transactions revealed within the bank records are not inconsistent with the history the AMS recorded, and moreover are consistent with the history insofar as they confirm he rarely cooks or makes his own meals. The respondent submits that the reference to shopping once a week must be read as being distinct from his purchases at fast food outlets. The respondent submits that the travelling he did as revealed by the bank records is consistent with the history the AMS obtained in that the AMS noted that he is anxious when travelling particularly over distance and prefers to have a support person.

FINDINGS AND REASONS

25. 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.
26. 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.
27. The appellant does not say what analysis the AMS ought to have done of the records of the respondent’s bank transactions for the period 1 July 2019 to 21 August 2019, other than to infer that the AMS ought to have done a “forensic analysis”. It is clear, in the Appeal Panel’s view, that the AMS considered the records and this is because the AMS said within 10c of the MAC that they were not relevant to his assessment of the respondent’s impairment from the respondent’s injury. In other words, in order that the AMS to come to the conclusion that certain documents are not relevant to his assessment of the respondent’s impairment, the AMS must necessarily have considered those documents.

28. In the Appeal Panel's view, the detail contained within the statements of the respondent's bank transactions for the period 1 July 2019 to 21 August 2019 provide virtually no context, such that it would have assisted the AMS in his assessment of the respondent's impairment from the respondent's injury. Whilst the detail within the statements reveals that the respondent made purchases at fast food outlets, supermarkets and the like and reveal the approximate location where those purchases were made, no other context is provided by the detail. Moreover, the detail that is contained within the statements is not inconsistent, in the Appeal Panel's view, with the history the AMS obtained. The AMS obtained that history by means of interviewing the respondent and by reference to the other documents that the AMS did consider relevant to his assessment of the respondent's impairment. Those other documents included the respondent's written statement and the histories recorded in various clinical reports and medical legal reports that the Commission provided to the AMS for the assessment.
29. The history the AMS obtained included that the respondent purchased ready-made meals that were not healthy for him. The Appeal Panel observes that the bank records revealed numerous transactions were made seemingly from fast food outlets and also numerous transactions of small amounts from supermarkets which may also be purchases of ready-made meals. Certainly, there is no evidence to the contrary such that it is demonstrated from the MAC that the AMS made an error with respect to the history he obtained in this regard.
30. The Appeal Panel also agrees with the respondent's submission that the AMS's reference to the respondent going "shopping only once a week" must be understood as distinct from the respondent's fast food purchases. Indeed, the Appeal Panel's view is confirmed by the reasons the AMS provided for his rating of the respondent's impairment in social and recreational activities as being 3, wherein the AMS said that the respondent "prefers only to go shopping when he feels calm, otherwise he will either shop in a flustered state". In other words, the AMS when considering the respondent's impairment in this area of functioning, has considered that the relevant point is that there is some impairment in the respondent's capacity with respect to shopping in that he can only do it when he feels calm and may have to leave a shop if he feels flustered.
31. Even if the Appeal Panel is wrong on this point, such that the MAC does contain a demonstrable error in terms of the correct history being that the respondent goes "shopping" on more than one occasion a week, then the Appeal Panel does not consider that the AMS's assessment of the respondent's functioning with social and recreational activities as moderate, is wrong. This is because what the bank transactions reveal is the respondent making relatively numerous purchases from food outlets and supermarkets for items of relatively modest amounts. That does not indicate, in the Appeal Panel's view, that the respondent's shopping provides him with any real social or recreational activity. When regard is had to the other matters pertinent to the assessment of the respondent's function in this area of activity, such as avoiding answering the phone, minimal contact with friends, limited time being provided to hobbies and pastimes, then the AMS's assessment that the respondent's impairment in this area of activity is moderate, is sound. Indeed, the Appeal Panel would have assessed the respondent's impairment to be same.
32. In any event, as said, the Appeal Panel considers that there is no error demonstrated from the face of the MAC that reveals it contains a demonstrable error as a consequence of the respondent "shopping" at fast food outlets and supermarkets on more than one occasion a week.
33. Similarly, the Appeal Panel does not consider that what the records of the respondent's bank transactions reveal is inconsistent with the history the AMS obtained with respect to the respondent's functioning in the area of travel. The history the AMS obtained is that the respondent is anxious when travelling long distances and prefers to have a support person when he does. The fact that the respondent's bank transactions reveal that the respondent has ventured to places that may be six hours from his place of residence, is not inconsistent with that history.

34. The Appeal Panel, in short, does not consider that the AMS's conclusion that the records of the respondent's bank transactions were irrelevant to his assessment of the respondent's impairment to be wrong. Insofar as other examiners may have considered they had some relevance, the relevance would have been minor, for the reasons indicated by the Appeal Panel. The transactions must be read in context of the other evidence and the respondent's report of symptoms to the AMS during examination. As said, in the Appeal Panel's view what is revealed by the respondent's bank transactions is not inconsistent with the context revealed by other evidence.
35. In the Appeal Panel's view, the AMS has obtained a proper history that is not inconsistent with anything revealed in the records of the respondent's bank transactions. The Appeal Panel discerns no error with respect to the AMS's clinical judgment of how the respondent's symptoms from his injury affect the respondent's functioning in the relevant behaviours that must be rated to assess the respondent's permanent impairment. The Appeal Panel can discern no error from the face of the MAC. The Appeal Panel considers that the AMS has applied the correct criteria to assess the respondent's permanent impairment from his injury and has applied those criteria correctly to do so.
36. In any event, and as indicated above, if the Appeal Panel is wrong on that, then the Appeal Panel would have rated the respondent's impairment the same as the AMS has done. Specifically, the Appeal Panel would have rated the respondent's impairment in the area of social and recreational activities as being moderate. The Appeal Panel would also have rated the respondent's impairment in the area of self-care and personal hygiene and in travel as being mild, and in social functioning, concentration and persistence and pace as being moderate, and in employability as being total, for the same reasons that the AMS provided in the table attached to the MAC.
37. For these reasons, the Appeal Panel has determined that the MAC issued on 9 December 2010 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.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

