WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3722/19**
Appellant:	**Matthew Thomas Licovski**
Respondent:	**Smartstone Australia Pty Limited**
Matter Number:	**M2-3722/19**
Appellant:	**Smartstone Australia Pty Limited**
Respondent:	**Matthew Thomas Licovski**
Date of Decision:	**25 March 2020**
Citation:	**[2020] NSWWCCMA 62**

Appeal Panel:	
Arbitrator:	**John Isaksen**
Approved Medical Specialist:	**Dr Julian Parmegiani**
Approved Medical Specialist:	**Professor Nicholas Glozier**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 16 January 2020, Matthew Thomas Licovski (Mr Licovski) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Wasim Shaikh, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 19 December 2019.

2. Mr Licovski relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 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 grounds of appeal on which the appeal is made. The appeal brought by Mr Licovski bears matter no. M1-3722/19.

4. On 6 February 2020 Smartstone Australia Pty Limited (Smartstone) lodged an Application to Appeal Against the Decision of Approved Medical Specialist.

5. Smartstone relies on the following grounds of appeal under s 327(3) of the 1998 Act:

    - the assessment was made on the basis of incorrect criteria,
    - the MAC contains a demonstrable error.

6. The Registrar is satisfied that there was an administrative oversight by the Commission whereby the MAC was only initially provided to Mr Licovski (on 19 December 2019) but not provided to Smartstone until 16 January 2020. The Registrar is satisfied that due to this oversight Smartstone was deprived of the opportunity to lodge an appeal within the statutory timeframe.

7. The Registrar is otherwise 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 grounds of appeal on which the appeal brought by Smartstone is made. The appeal brought by Smartstone bears matter no. M2-3722-19.

8. 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.

9. 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

10. Mr Licovski sustained fractures to the ribs and sternum and right wrist on 23 July 2014 when he was crushed by some cedar stone slabs whilst in the course of his employment with Smartstone. The appellant was 19 years old at the time.

11. Mr Licovski also sustained a primary psychological injury as a result of the injury.

12. The matter was referred to the AMS, who assessed Mr Licovski as having 15% whole person impairment, but then deducted one-tenth pursuant to section 323 of the 1998 Act for a pre-existing condition or abnormality, which resulted in an assessment of 14% whole person impairment resulting from the injury.

PRELIMINARY REVIEW

13. 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.

14. 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 there was sufficient information in the file to deal with the appeal.

EVIDENCE

Documentary evidence

15. 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

16. The AMS records a history that following the injury on 23 July 2014, Mr Licovski experienced emotional disturbances, anxiety, impaired concentration, low energy and sleep difficulties (including nightmares).

17. The AMS records that Mr Licovski's ongoing symptoms include low motivation, easy agitation, and procrastination, and that his sleep disturbances have continued and there are ideations of self-harm.

18. The AMS records that Mr Licovski commenced employment as a night stacker with Woolworths in May 2016 and resigned in February 2017 due to him not being allocated regular shifts. The AMS records that Mr Licovski had an eight month hiatus from work and then worked as a general handyman with Tony Hilton Handcrafted Furniture. The AMS records that Mr Licovski has not returned to work since August 2018, identifying psychological restrictions, and that his last employment was with Ubeeco Packaging.

19. The AMS records that Mr Licovski considers himself to be hesitant in returning to work and lacks motivation, and he believes he would struggle with completion of tasks.

20. The AMS places Mr Licovski in Class 3 for the PIRS category of Employability and states:

> "From a psychiatric perspective, his emotional lability, anxiety and impaired concentration may have an impact. However, he has been capable of demonstrating an ability to work, including full-time hours, until 2018. He should be capable of alternative employment for approximately 10-20 hours a week."

21. In regard to details of previous injuries or conditions, the AMS records:

> "Mr Licovski denied a formal past history of mental illness, but there is evidence to suggest significant life stressors, including the murder of an uncle in the months preceding the index event, as well as other family losses post the index event."

22. In answer to the question as to whether any proportion of whole person impairment is due to a previous injury, pre-existing condition or abnormality, the AMS responds:

> "There is evidence to suggest pre-existing psychiatric dysfunction, in response to the murder of his uncle. There is evidence to indicate that he experienced emotional distress as a consequence. It is difficult to accurately assess his pre-existing impairment, but I do believe there was a pre-existing component. I therefore have undertaken a 1/10 deduction."

23. The effect of that one tenth deduction is that the assessment of 15% whole person impairment that is made by the AMS is reduced to 14% whole person impairment.

SUBMISSIONS

24. Both parties made written submissions in respect of the appeal lodged by Mr Licovski. No submissions were filed by Mr Licovski and none were sought by the Appeal Panel on the appeal lodged by Smartstone in light of the decision reached by the Appeal Panel on that particular appeal. The submissions are not repeated in full, but have been considered by the Appeal Panel.

25. In regard to the appeal brought by Mr Licovski, he submits that the AMS did not identify a diagnosable or established clinical entity when making a deduction pursuant to section 323. There is no complaint on appeal about the overall level of impairment that was assessed by the AMS for Mr Licovski's psychological injury. Mr Licovski's submissions are limited to the deduction made by the AMS under section 323 of the 1998 Act.

26. Mr Licovski submits that the AMS referred to "psychiatric dysfunction" without identifying the dysfunction and the evidence which was relied upon to establish the dysfunction, and also referred to emotional distress without identifying it.

27. Mr Licovski refers to the decision of Garling J in *Periera v Siemens Ltd* [2015] NSWSC 1133 (*Pereira*), which sets out the evaluative steps to be undertaken in the consideration of section 323:

> "81. The assessment required by s 323 is one which must be based on fact, not assumptions or hypotheses: *Elcheikh v Diamond Formwork (NSW) Pty Ltd (In Liq)* [2013] NSWSC 365 at [89]; *Matthew Hall Pty Ltd v Smart* [2000] NSWSC 284 at [33]*; Ryder v Sundance Bakehouse* [2015] NSWSC 526 at [40].
>
> 82. The process encompassed by s 323 requires the application of each of the following steps before reaching the ultimate conclusion of the existence of a pre-existing injury which has an impact on the assessment of the injury the subject of the worker's claim.
>
> 83. The first step requires a finding of fact that the worker has suffered an injury at work which has resulted in a degree of permanent impairment which has been assessed pursuant to s 322 of the 1998 Act: see *Elcheikh* at [125].
>
> 84. The second step which needs to be addressed is, assuming such an injury has been sustained and impairment has resulted, what is the extent of that impairment expressed as a percentage of the whole person: see *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [38]; *Elcheikh* at [126].
>
> 85. The third matter to be addressed is whether the worker had any previous injury, or any pre-existing condition or abnormality. The previous injury does not have to be one in respect of which compensation is payable under the 1998 Act. If the phrase 'pre-existing condition or abnormality' is to be relied upon, then such condition or abnormality must be a diagnosable or established clinical entity: *Fire & Rescue NSW v Clinen* [2013] NSWSC 629.
>
> 86. A finding of the existence of a previous injury can be made without the presence of symptoms, but there must be evidence which demonstrates the existence of that pre-existing condition: *Mathew Hall* at [31]-[32].
>
> 87. The pre-existing injury or condition must, on the available evidence, have caused or contributed to the assessed whole person impairment: see *Matthew Hall* at [32]; *Cole* at [29]-[31]; *Elcheikh* at [88] and *Ryder* at [42].

88. It cannot be assumed that the mere existence of a pre-existing injury means that it has contributed to the current whole person impairment: *Clinen* at [32]*; Cole* at [30]; *Elcheikh* at [91]. What must occur is that there must be an enquiry into whether there are other causes of the whole person impairment which reflect a difference in the degree of impairment: *Ryder* at [45].

89. Next in dealing with the application of s 323, the extent of the contribution, if any, of the pre-existing condition to the current impairment must be assessed in order to fix the deductible proportion. If the extent of the deductible proportion will be difficult or costly to determine, an assumption is made that the deductible proportion will be fixed at 10%, unless that is at odds with the available evidence: s 323(2) of the 1998 Act.

90. Each of these steps, and considerations, is a necessary element of a determination that an assessed whole person impairment is to be reduced by a deductible proportion by virtue of the application of s 323 of the 1998 Act."

28. Mr Licovski submits that the approach in *Periera* requires an evidence-based analysis. Mr Licovski submits that the AMS simply states that he "believes" that Mr Licovski's reaction to the murder of his uncle in the months preceding the injurious event contributed to the current impairment without explaining why the AMS held such a belief, or referring to any evidence of continuing emotional distress or psychiatric dysfunction in respect of the murder of the uncle until the present time.

29. Mr Licovski submits that the failure by the AMS to carry out a proper analysis of the asserted pre-existing impairment is contrary to the requirements of clause 11.10 of the Workers Compensation Guidelines for the Evaluation of Permanent Impairment 4th Edition.

30. Mr Licovski submits that there was no evidence before the AMS that there was any pre-existing condition or abnormality that would qualify as a diagnosable or established clinical entity and that emotional distress as a result of bereavement does not qualify as such.

31. Mr Licovski submits that the AMS has incorrectly based his assessment on assumption and speculation and has failed to properly carry out his statutory function.

32. Mr Licovski submits that there is no evidence to support a deduction pursuant to section 323 and the MAC should be revoked and a new MAC issued providing an assessment of whole person impairment that is made in accordance to law, being 15% whole person impairment without any deduction.

33. In reply, Smartstone submits that there is clear evidence to show Mr Licovski suffered a pre-existing psychiatric dysfunction in response to the murder of his uncle.

34. Smartstone refers to the record made by Dr Westmore, who assessed Mr Licovski in a report dated 30 October 2016, wherein Mr Licovski "said that an uncle had been murdered in June 2014 and that Mr Licovski indicated that he had been affected by his uncle's death "pretty badly, we were pretty close"."

35. Smartstone also refers to part of the opinion of Dr Westmore that:

> "Mr Licovski also acknowledges having experienced a number of losses including the murder of an uncle to whom he was very close and the death of a grandfather. He acknowledges that both of these events affected him psychologically."

36. Smartstone also refers to the record made by Dr Roberts, in a report dated 15 June 2015, that Mr Licovski commented:

> "…the Macedonian community had reacted in a hysterical manner to his uncle's murder, of being shot in the head; that Mr Licovski's uncle had he said been moving stuff that shouldn't be moved".

Dr Roberts records that the appellant said the "stuff" was drugs.

37. Smartstone submits that a pre-existing condition can be asymptomatic before the injury, providing the evidence establishes that the condition existed before the injury and it forms part of the impairment.

38. Smartstone submits that a one-tenth deduction is appropriate in the circumstances.

39. In regard to the appeal brought by Smartstone, it submits that the AMS has erred and applied incorrect criteria in assessing Mr Licovski as Class 3 for Employability, whereas Class 2 is the more appropriate class given the history taken by the AMS and the available evidence.

40. Smartstone refers to the last Certificate of Capacity in the ARD, which is dated 7 September 2015, and certifies that Mr Licovski has capacity for some type of employment for eight hours per day for five days per week.

41. Smartstone also refers to Mr Licovski's own statement that: "I have been applying for jobs but there is a limited number of things I can do given my past experience, my qualifications and my abilities and training."

42. Smartsone refers to the report from Mr Licovski's treating psychiatrist, Dr Farrar, dated 28 August 2018, who opines that: "Matthew should aim to return to work, in alternate employment to factory work or consider study or training options."

43. Smartstone refers to the Schedule of Earnings in the ARD which states that Mr Licovski's average earnings between 14 March 2018 and 29 August 2018 were $625.30 per week. Smartstone submits that this coincides with his period of employment with Ubeeco Packaging and his earnings were double than what he earned with Woolworths and Tony Hilton Handcrafted Furniture.

44. Smartstone submits that there is no evidence before the AMS to suggest Mr Licovski cannot work in full time employment in a different environment to his pre-injury duties should he be willing to work, notwithstanding his limited educational background and qualifications and transferable skills.

45. Smartstone submits that the MAC contains a demonstrable error in that the AMS was not able to specify on what basis Mr Licovski was limited to alternate employment of approximately 10-20 hours per week.

FINDINGS AND REASONS

46. 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.

47. 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.

The appeal lodged by Mr Licovski

48. In regard to the appeal lodged by Mr Licovski, the Appeal Panel is of the view that the AMS fell into error in making a deduction for a pre-existing condition or abnormality when the evidence does not disclose there was such condition or abnormality.

49. Mr Licovski informed those psychiatrists who examined him for the purposes of assessing his permanent impairment that he did experience some distress from events prior to his work injury, in particular the murder of his uncle some months before the work injury, however there is no evidence that any of those events were the cause of a condition, abnormality or diagnosable psychological disorder which pre-dated the psychological injury caused by the incident at work on 23 July 2014.

50. The Appeal Panel considers that people do not live in a vacuum and are exposed to difficult events in their life, which will include the loss of persons close to them. However, there is no evidence to support a finding that those stressful events described by Mr Licovski either constituted, or caused, a pre-existing condition or injury.

51. The Appeal Panel considers that the stressful events described by Mr Licovski may have made him more vulnerable to the psychological effects upon him of the work injury but there is no evidence that there was an actual psychological condition or abnormality which existed at a time prior to the work injury.

52. Campbell J in *Fire & Rescue NSW v Clinen* [2013] NSWSC 629 said of the term ‘condition’ as it applied to section 323 of the 1998 Act at [35]:

> “The natural meaning in that restricted context of “condition” is “medical or like condition” in the sense of a diagnosable, or established, clinical entity.”

53. The AMS uses the terms “pre-existing psychiatric dysfunction”, “pre-existing component” and “pre-existing psychiatric complaints” but does not identify any diagnosable or established clinical entity. The Appeal Panel considers that the AMS has erred in making a deduction of Mr Licovski’s impairment without the identification of that diagnosable or established clinical entity.

54. Further, the Appeal Panel considers there was no proper enquiry undertaken by the AMS of other causes of the impairment caused by the work injury (see Campbell J in *Ryder v Sundance Bakehouse* [2015] NSWSC 526 at [45]). The AMS states that he does “believe” that there is a pre-existing component but does not explain how that belief causes a deduction in Mr Licovski’s impairment or makes a difference to the outcome in terms of the degree of impairment resulting from the work injury. The

Appeal Panel considers that a belief on the part of the AMS that there is a pre-existing component or condition does not constitute proper enquiry without there being any further explanation.

55. In respect of this appeal, the MAC that has been issued should be revoked, and Mr Licovski be assessed as having 15% whole person impairment as a result of the injury sustained on 23 July 2014.

The appeal lodged by Smartstone

56. In regard to the appeal lodged by Smartstone, the Appeal Panel is not satisfied that the MAC contains a demonstrable error, or that the assessment made by the AMS was made on the basis of incorrect criteria, in placing Mr Licovski in Class 3 for Employability, and not Class 2.

57. Firstly, there is no evidence that Mr Licovski has held down a fulltime job since the work injury. The AMS does not record how many hours per week Mr Licovski worked with his post-injury employers but the material made available to the AMS reveals that Mr Licovski worked no more than 17 hours per week with Woolworths (as recorded by Dr Westmore) and worked for two days per week with Tony Hilton Handcrafted Furniture (as from Mr Licovski's own statement).

58. Although Smartstone suggests that Mr Licovski worked longer hours with Ubeeco Packaging because his average earnings were $625.30 per week and that was at least double his earnings with Woolworths and Tony Hilton Handcrafted Furniture, there is no direct evidence to support that argument.

59. Secondly, the AMS, having taken a history of Mr Licovski's post-injury employment and his symptoms since the work injury, makes the clinical judgement that the most suitable category for Mr Licovski for Employability should be Class 3.

60. Thirdly, the certification made by Mr Licovski's general practitioner that he has capacity to work a 40 hour week was made just over 12 months after he sustained the work injury and is at a time, consistent with Mr Licovski's own evidence, when there was a hope that Mr Licovski would be able to return to full time employment. However, what has occurred subsequent to that Certificate being issued is that Mr Licovski has not been able to reach that goal.

61. The AMS acknowledges this when he provides his reasons for placing Mr Licovski in Class 3 by stating that Mr Licovski has been capable of demonstrating an ability to work at full time hours until 2018 but ultimately determines that, at the time of the assessment over a year later, he is capable of alternative employment for approximately 10-20 hours per week. The AMS ultimately makes the clinical judgement from his own assessment of Mr Licovski and the available material that Mr Licovski is to be placed in Class 3 for Employability.

62. The Appeal Panel also notes that the examples of activities in each class are examples only. Ultimately it is for the AMS to determine the most appropriate class based upon clinical judgement of the injured worker on the day they present for assessment. That has been confirmed in decisions of the Supreme Court in *Ferguson v State of New South Wales* [2017] NSWSC 887 (*Ferguson*) and *Parker v Select Civil Pty Limited* [2018] NSWSC 140 (*Parker*).

63. In *Ferguson,* Campbell J cited with approval *NSW Police Force v Wark* [2012] NSWWCCMA 36 (*Wark*), where it is stated at [33]:

> "…the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face…"

64. Having reviewed the available material and for the reasons already outlined, the Appeal Panel considers the AMS has properly applied his clinical judgement to the appropriate class for Employability.

65. The Appeal Panel does not consider that the assessment made by the AMS was on the basis of incorrect criteria or that the MAC contains a demonstrable error. The appeal lodged by Smartstone is dismissed.

Conclusion

66. Mr Licovski has been successful in his appeal in establishing that the MAC contains a demonstrable error in respect of the deduction made by the AMS pursuant to section 323 of the 1998 Act. The MAC issued on 19 December 2019 is revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

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*.

L Golic

Lucy Golic
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **3722/19**
Applicant: **Matthew Thomas Licovski**
Respondent: **Smartstone Australia Pty Limited**

This Certificate is issued pursuant to s 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Appeal Panel revokes the Medical Assessment Certificate of Dr Shaikh and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - Whole Person Impairment (WPI)

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in the Guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA 5 Guides**	**% WPI**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Sub-total/s % WPI (after any deductions in column 6)**
Psychological	23 July 2014	11, pp 54-60		15%	Nil	15%
Total % WPI (the Combined Table values of all sub-totals)					**15%**	

John Isaksen
Arbitrator

Dr Julian Parmegiani
Approved Medical Specialist

Prof Nicholas Glozier
Approved Medical Specialist

25 March 2020

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

L Golic

Lucy Golic
Dispute Services Officer
As delegate of the Registrar