

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-743/20
Appellant:	Bush Biotherapies Pty Ltd
Respondent:	Gabriela Stapleton
Date of Decision:	10 June 2020
Citation:	[2020] NSWWCCMA 100

Appeal Panel:	
Arbitrator:	Marshal Douglas
Approved Medical Specialist:	Dr Michael Hong
Approved Medical Specialist:	Professor Nicholas Glozier

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 28 April 2020 Bush Therapies Pty Ltd (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Wayne Mason, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 23 April 2020.
2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):
 - the assessment was made on the basis of incorrect criteria,
 - the MAC contains a demonstrable error.
3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.
4. The WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the WorkCover Medical Assessment Guidelines.
5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment*, 4th ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. Gabriela Stapleton (the respondent) suffered a psychological injury due to her employment with the appellant. On 12 September 2019 the respondent's solicitors notified the appellant that the respondent claimed she had 19% whole person impairment from her injury. She relied on reports of psychiatrist Associate Professor Michael Robinson dated 2 August 2019 who assessed the degree of her impairment to be 19% whole person impairment.

7. The appellant's insurer then arranged for the respondent to be examined by psychiatrist Dr Ben Teoh. Dr Teoh did so on 18 October 2019 and provided a report to the insurer on 25 October 2019. Dr Teoh was of the view that because the respondent could benefit from further treatment, including psychological therapy and anti-depressant medication, she had not attained maximum medical improvement with respect to her injury. Relying on Dr Teoh's report, the insurer then advised the respondent it did not accept her claim for compensation for 19% whole person impairment.
8. The respondent thereupon registered with the Commission an Application to Resolve a Dispute seeking determination of her claim against the appellant for compensation for 19% whole persons impairment she said resulted from her injury. Because there was a medical dispute between the parties, regarding whether the respondent's permanent impairment was fully ascertainable, a delegate of the Registrar referred the matter to the AMS on 27 February 2020. The referral was in the following terms:

"MEDICAL DISPUTE REFERRED FOR ASSESSMENT (s319 1998 Act)

- the degree of permanent impairment of the worker as a result of an injury (s319(c))
- whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion (s319(d))
- whether impairment is permanent (s319(f))
- whether the degree of permanent impairment of the injured worker is fully ascertainable (s319(g))

Date of Injury: 12 September 2019

Body part/s referred: Psychiatric/psychological

Method of assessment: Whole person impairment"

PRELIMINARY REVIEW

9. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.
10. As a result of that preliminary review, the Appeal Panel determined that it would not require the respondent to undergo a further medical examination. This is because the Appeal Panel considers, for reasons explained below, firstly that the MAC does not contain a demonstrable error and secondly, that the AMS based his assessment of the degree of the respondent's permanent impairment on correct criteria. Accordingly, the Appeal Panel does not need to reassess the medical dispute and consequently no point is served by examining the respondent again. Moreover, absent the MAC containing a demonstrable error or the AMS basing his assessment on incorrect criteria the Appeal Panel lacks the power to require the respondent to submit to a further examination.¹

EVIDENCE

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

¹ *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792

MEDICAL ASSESSMENT CERTIFICATE

12. The AMS set out the history he obtained in part 4 of the MAC. That included the circumstances that occurred during the respondent's employment that led to her injury. The AMS noted that the respondent reported a deterioration of her psychiatric health during her employment and that she consulted her GP but no therapy was at that stage recommended. The AMS noted that following the respondent ceasing her work in September 2018 she again consulted her GP who then referred her to a psychologist for treatment. The AMS noted that the respondent had been seeing a psychologist in the 12 months preceding his examination of the respondent.
13. The AMS noted within the history he obtained that the respondent's GP commenced the respondent on the antidepressant escitalopram but this resulted in significant side-effects to the respondent. The AMS further noted that, following that, the respondent was referred to psychiatrist Dr Taggart Lidbury, whom the respondent has been consulting monthly. The AMS noted that Dr Lidbury changed her medication to sertraline and then to venlafaxine, but the respondent developed multiple side-effects such as headaches, drowsiness, nausea, vomiting, diarrhoea and dizziness and was unable to persist with these medications. The AMS noted that one week prior to his examination of the respondent, Dr Lidbury had prescribed the melatonergic antidepressant Valdoxan for the respondent. The AMS noted that Dr Lidbury had discussed with the respondent the possibility of psychiatric hospitalisation and using EMDR. The AMS noted that the respondent had said that the appellant would not fund these treatments, and it is implicit from the MAC that the respondent has not yet been admitted into a psychiatric hospital nor commenced using EMDR.
14. The AMS provided the following description of the respondent's functioning with social activities and has activities of daily living:

"I asked her to describe her current routine and she said she does a lot of sleeping and stares at walls for much of the time. She said she does not involve herself with the children. If she attempts to help her daughter with her homework she finds she drift off and doesn't pay attention to what her child is doing.

Self-care and personal hygiene: Ms Stapleton said she showers once or twice weekly, usually when her husband or son tell her that she is malodorous. She said her husband tells her to change her clothes. He usually does the laundry but occasionally will ask her to turn on the washing machine. In the recent past her parents had visited and helped with domestic chores but this has stopped because of coronavirus. Her husband and son now do the laundry and the cooking. She said her weight has gone up because she was eating takeaway food and chocolate. She said if her husband wasn't there she would probably just give up and die. She is moderately impaired.

Social and recreational functioning: Ms Stapleton said she has not seen any of her friends for a number of years. She will not accept visitors. She avoids any invitation which involves seeing other people. When forced by her husband she will go with the family to watch the children play soccer. Her only visitors were her parents when they were able to come to help. She does not do any hobbies or pastimes. She is moderately impaired.

Travel: Ms Stapleton said she does not feel up to driving and has not driven anywhere for a few months. She had a telephone conversation with her psychologist prior to the coronavirus lockdown. She said she has not used public transport for over one year; she could not use the bus because she was afraid of people. There has been no air travel. She had previously been able to drive in the local area but no longer feels capable of doing this. She will not leave home without a support person. She is moderately impaired.

Social functioning: Ms Stapleton said things have been tense with her husband and he has wanted to leave on a few occasions but cares too much for her to do that. She said the entire extra load of looking after the family is on his shoulders and he is not happy. There is no intimate relationship between them. She is functioning poorly as a mother. She said her own mother phones her each day to see how she is. She is mildly impaired.

Concentration, persistence and pace: Ms Stapleton said she was unable to watch a movie and cannot read anything. She said her treating professionals have encouraged her to do so but she can't get past the first sentence. She said her husband does the finances. She said if she is pushed by her husband she can put the dishwasher on but forgets many tasks he asks her to do. Severe cognitive difficulties were evident during the interview in that she kept saying she could not remember and would give various estimates of when a certain event happened. She is severely impaired.

Employability. In her current state, Ms Stapleton is not capable of working at all. She is totally impaired.”

(Bold as per original)

15. The AMS provided this “summary of injuries and diagnoses”:

“Ms Stapleton was subjected to repeated harassment, bullying and denigration in the workplace by a number of people. Her psychological functioning deteriorated to the point where at interview she presented with DSM-5 symptoms of a major depressive disorder. She has depressed mood most of the day every day, there is markedly diminished interest or pleasure in all activities, she has gained significant weight, she suffers from insomnia including early morning wakening, psychomotor retardation was evident, she was anergic, she felt worthless, her ability to concentrate and make decisions was impaired and she had passive suicidal thoughts. She has received appropriate treatment from a psychologist and a psychiatrist, but reported that the insurer would not support psychiatric hospitalisation.”

16. The appellant in its submissions noted that its appeal against the MAC is limited to the AMS’s conclusion that the respondent has achieved maximum medical improvement. With respect to that matter, the AMS, in response to a standard question within the form used for the MAC, “have all body parts/systems stabilised/reach maximum medical improvement?”, the AMS answered:

“Yes. Although she remains significantly symptomatic she has received appropriate evidence-based treatment from a psychiatrist and a psychologist. While her intolerance of antidepressant medication to date has been a confounding factor, it is unlikely her condition will improve by more than 3% in the next 12 months.”

SUBMISSIONS

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

18. As mentioned, the appellant challenges only the AMS's conclusion that the respondent had reached maximum medical improvement. In summary, the appellant submits on that matter that the AMS applied the wrong test to determine whether the respondent had reached maximum medical improvement, with the correct test being as stipulated in the Guidelines "that maximum medical improvement is reached" when a worker's condition is well stabilised and unlikely to change substantially in the next year with or without medical treatment". The appellant submits that the respondent's condition cannot be regarded as well stabilised in circumstances, where firstly, the evidence reveals that there has been a substantial recent deterioration in her condition and secondly, the respondent "is still in the process of finding a medication that she can tolerate, with the latest change being made only a week prior to the AMS's examination". The appellant submits that that situation "is reinforced" by the fact that Dr Lidbury's recommendations regarding treatment "have not been fully actioned".
19. In reply, the respondent submits that the appellant has failed to identify how any supposed error regarding the application of the test to determine whether she has reached maximum medical improvement altered the AMS's assessment with respect to the issue of "stability". The respondent submits that the AMS acknowledged the change in her medication, and said the change was a consequence of the development of side effects. The respondent submits that the AMS used his clinical expertise in drawing the conclusion that her condition is unlikely to improve and that the AMS's conclusion is "perfectly consistent with the test cited by the appellant to the effect the condition is quite unlikely to change substantially in the next year".

FINDINGS AND REASONS

20. The procedures on appeal are contained in s328 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.
21. 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.
22. The Appeal Panel does not accept the appellant's submission that there has been a substantial recent deterioration in the respondent's condition. There was a significant deterioration in her condition over the course of her employment up to the end of her employment in September 2018. What emerges from the material before the Appeal Panel is that since then the respondent has remained unwell with a slowly deteriorating illness that has been non-responsive to extensive psychological treatment and psychotropic medication. Despite evidence of significant intolerance of the latter the respondent persisted with these for some time but the side effects outweighed any benefit. It is probable, based on the evidence, the respondent will not get better, no matter what treatment. The respondent nevertheless continues with evidence based treatment under the care of her psychiatrist.
23. The Appeal Panel observes that the history that Dr Teoh obtained and set out in his report of 25 October 2019 described the respondent's symptoms as including being tearful, and having become irritable, experiencing insomnia, being socially isolated, lacking motivation and finding it hard to do normal things, not enjoying activities that she used to like, and feeling depressed and tired. Dr Teoh noted that the respondent had reported becoming "quite depressed".
24. Dr Teoh's mental state examination of the respondent revealed that she was tearful and distressed and anxious when talking about her employment. He noted that the respondent felt lethargic and avoided social contacts and was preoccupied with negative thoughts and lacked motivation and interest in her usual activities.

25. In the Appeal Panel's view Dr Teoh's brief record of the respondent's symptoms and function and his findings from his mental state examination is consistent with how the respondent described her function in her statement of 6 January 2020. Further, it also consistent with the fuller record the AMS provided in the MAC with respect to the respondent's symptoms and functioning, some seven months later.
26. The Appeal Panel observes that the AMS said that he found it difficult to reconcile Dr Teoh's findings with his assessment of the respondent and the AMS speculated that it was possible there had been a significant deterioration in the respondent's condition since Dr Teoh had examined her. But, when read in context, it seems to the Appeal Panel that the AMS was referring to certain of Dr Teoh's findings rather than her overall condition, e.g. that the respondent was able to work in suitable duties. In other words, given the presentation of the respondent at the time of the AMS's examination of her, the AMS was of the view that the respondent would be unable to work in any employment and hence insofar as Dr Teoh found otherwise, the AMS speculated that possibly that was due to a significant deterioration in the respondent condition. In the Appeal Panel's view however, having regard to Dr Teoh's brief description of the respondent's symptoms and functioning in his report, it is questionable that, based on what Dr Teoh described, the respondent would have been able to work in any employment at the time Dr Teoh examined her.
27. The Appeal Panel does not accept that, based on the material before it, there was a significant deterioration in the respondent's condition between the time Dr Teoh examined her on 18 October 2019 and the AMS's examination of the respondent.
28. The Guidelines at [1.15] read as follows:

“Assessments are only to be conducted when the medical assessor considers that the degree of permanent impairment of the claimant is unlikely to improve further and has attained maximum medical improvement. This is considered to occur when a worker’s condition is well stabilised and is unlikely to change substantially in the next year with or without medical treatment.”
29. The AMS has said in the MAC that the respondent has reached maximum medical improvement. In the Appeal Panel's view, although not using the words of the last sentence in [1.15] of the Guidelines, the AMS was of the view that the respondent's condition was well stabilised and was unlikely to change substantially in the next year irrespective of what treatment she would receive. This is so, because the AMS noted that the respondent had received “appropriate evidence based treatment from a psychiatrist and a psychologist” but nevertheless remained significantly symptomatic. The AMS noted the respondent's intolerance to anti-depressant medicines and said that the respondent's condition was unlikely to “improve by more than 3% in the next twelve months”. In the Appeal Panel's view the AMS has clearly and cogently explained that regardless of the respondent's medical treatment, which would include whatever medication she would be taking, her condition was unlikely to change substantially in the next year because it was unlikely to alter by more than 3%.
30. Moreover, those members of the Appeal Panel who are psychiatrists, agree with the AMS's assessment on this issue. As said, what emerges from the material is the respondent's condition is proving intolerant to treatment, but she nevertheless has continued with evidence based treatment since the conclusion of her employment. The Appeal Panel agrees that it is unlikely that the respondent's condition will significantly alter within the 12 months. The Appeal Panel considers that in those circumstances the respondent's condition is rightfully considered to be stabilised.
31. The MAC does not contain an error. The AMS applied the correct criteria to assess the degree of the respondent's permanent impairment.

32. For these reasons, the Appeal Panel has determined that the MAC issued on 23 April 2020 should be confirmed.

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

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar

