WORKERS COMPENSATION COMMISSION

Decision

This Decision is issued pursuant to section 327(4) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)

Matter No:	**M1-806/20**
Appellant:	**Monica Neal**
Respondent:	**Secretary, Department of Education**
Date of Decision:	**28 July 2020**
Citation:	**[2020] NSWWCCR 4**

1. The Medical Assessment Certificate (MAC) of Dr Patrick Morris, an Approved Medical Specialist (AMS), was issued on 28 May 2020.

2. On 15 June 2020 the appellant lodged an Application to Appeal the Decision of the AMS on the ground that the MAC contains a demonstrable error (section 327(3)(d)).

3. As of the date of this decision, the respondent has not lodged a Notice of Opposition to Appeal Against Decision of Approved Medical Specialist. However, a Certificate of Service has been lodged by the appellant confirming service on the respondent's insurer. Accordingly, the matter is ready for consideration under section 327(4) of the 1998 Act.

4. Section 327(4) of the 1998 Act provides that an appeal is not to proceed unless the Registrar is satisfied that, on the face of the application and the submissions made to the Registrar, at least one of the grounds of appeal as specified in subsection 327(3) of the 1998 Act has been made out.

5. On the face of the application and submissions made, I am not satisfied that a ground of appeal as specified in section 327(3) is made out.

Issues on appeal

6. The issue on appeal concerns the AMS's opinion that Ms Neal had not reached maximum medical improvement. It is submitted that the following demonstrable errors were made by the AMS:

   (a) it is not the role of the AMS to recommend treatment;

   (b) it is not the role of the AMS to assume that a worker is obliged to follow treatment recommendations made by the AMS;

   (c) the AMS failed to consider that due to the age of the injury and the Ms Neal's age, the respondent is no longer liable for medical treatment;

   (d) the AMS did not appreciate that whilst the deemed date of injury is 12 April 2019, the injury arose in 2014, and medical treatment has ceased in accordance with "the Act" [presumably the *Workers Compensation Act* 1987 (the 1987 Act)], and

   (e) there is no provision under "the Act" that permits further medical treatment payable by the insurer, nor is there any proposal or plan for further treatment by Ms Neal's health providers.

7. In support of these submissions, the appellant attaches a statement of Ms Neal, although the submissions do not have reference to that statement.

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8. My role and powers in making this decision are exercised under section 327 of the 1998 Act. They have been described as those of a "gatekeeper": *Marina Pitsonis v Registrar of the Workers Compensation Commission & Anor* [2008] NSWCA 88. In *Kolundzic v Quickflex Constructions Pty Ltd* [2014] NSWSC 1523, Campbell J at [51] provided the following summary of the role of the Registrar:

> "As has been said, the Registrar performs a gatekeeper function: *Campbelltown City Council v Vegan* [2006] NSWCA 284; 67 NSWLR 372 at [8] and [82]. His or her power is to determine whether on the face of the application and any submissions made 'at least one of the grounds of appeal specified in subsection (3) has been made out'. This is a precondition to an appeal involving an evaluative decision that at least one ground, on its face, is 'valid and apparently credible': *Vegan* at [8]."

9. In *Ballas v Department of Education (State of NSW)* [2020] NSWCA 86 (*Ballas*) the process of the Registrar in considering whether a ground of appeal is "made out" was considered by Bell and Payne JA, stating:

> "This process does not involve the Delegate in assessing the correctness of the argument but simply that what has been put forward is arguable."

10. For the following reasons, I do not consider the grounds of appeal relied on by the appellant present an arguable case of error.

Maximum medical improvement – relevant considerations

11. The appellant's submissions are general and broad, and no reference is made to any portions of the MAC, any evidence, or the *NSW workers compensation guidelines for the evaluation of permanent impairment 4th edition* (the Guidelines). They more closely resemble grounds of appeal identifying errors, which would generally be accompanied by more expansive submissions. However, I will deal with them as they appear.

12. An aspect of the medical dispute referred to the AMS for consideration under section 319(g) was "whether the degree of permanent impairment of the injured worker is fully ascertainable". This is also a matter that is "conclusively presumed to be correct" under section 326(1)(e) of the 1998 Act.

13. An AMS is required to assess a worker "in accordance with" the Guidelines (section 322(1) of the 1998 Act). The Guidelines contain specific criteria for the consideration of maximum medical improvement:

> "**1.15** 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 the worker's condition is well stabilised and is unlikely to change substantially in the next year with or without medical treatment.
>
> **1.16** If the medical assessor considers that the claimant's treatment has been inadequate and maximum medical improvement has not been achieved, the assessment should be deferred and comment made on the value of additional or different treatment and/or rehabilitation – subject to paragraph 1.34 in the Guidelines."

14. Paragraph 1.34 of the Guidelines, referred to above, provides:

> "**1.34** If the claimant has been offered, but has refused, additional or alternative medical treatment that the assessor considers likely to improve the claimant's condition, the medical assessor should evaluate the current condition without consideration of potential changes associated with the proposed treatment. The assessor may note the potential for improvement in the claimant's condition in the evaluation report, and the reasons for refusal by the claimant, but should not adjust the level of impairment on the basis of the claimant's decision."

The AMS's reasons

15. The AMS discusses Ms Neal's functioning and treatment at various points throughout the MAC. On page 2, he records:

> "Ms Neal said her GP, Dr Zeltzer commenced her on the antidepressant medication Escitalopram 20mg daily and the dose was increased to 40mg daily about four months ago. He also referred her to a Psychologist, Lauren Adams but Ms Neal has not seen her for 12 months as she could not afford the cost of the sessions. Ms Neal said that her GP had wanted her to see a psychiatrist and be admitted to a private hospital for treatment of her depression but she could not afford this treatment...
>
> Ms Neal takes the antidepressant medication Escitalopram 40mg in the morning. She sees her GP about every fortnight."

16. On page 3, when considering Ms Neal's present symptoms, he records:

> "Ms Neal is drinking a bottle of red wine every day. She starts drinking alcohol at around 5pm each day.
>
> Ms Neal said her symptoms have worsened over the last 12 months. On the scale from 0 to 10 when zero is the worst she could imagine feeling and 10 is how she was feeling when she was working at Boronia Park Public School, she said she feels somewhere between 0 and 3 on a daily basis."

17. The AMS provided a diagnosis of "Major Depressive Disorder with Anxious Distress and a co-morbid Alcohol Use Disorder". The AMS then answered specific questions concerning Ms Neal, relevantly for this appeal being:

> "**Have all body parts/systems stabilized/reached maximum medical improvement?**
>
> No.
>
> Ms Neal's condition is not well-stabilised. She reports her psychiatric symptoms having worsened over the past 12 months. She has not had any psychological therapy for about 12 months and has not been assessed by a psychiatrist. Although she is taking a high dose of Lexapro antidepressant medication, she has not been tried on alternative medications despite this medication not appearing to be effective in controlling her depressive symptoms.
>
> Ms Neal is also drinking alcohol excessively which would be exacerbating her depressive symptoms.

If not, please list those injuries not yet stable/at maximum medical improvement:

Major Depressive Disorder with Anxious Distress and Alcohol Use Disorder.

If stabilisation/maximum medical improvement, of any or all injuries has not been reached, when, in your opinion, will this occur?

I would recommend re-assessment in nine months' time after at least six months of intensive psychiatric treatment for her Major Depressive Disorder with Anxious Distress and Alcohol Use Disorder, as well as intensive psychological therapy for these conditions."

Consideration of the appeal

18. The appellant's submissions are outlined at [6], almost word for word as they appear in the application. To ensure completeness, I will address each ground in turn.

The role of the AMS to recommend treatment

19. The appellant submits that it is not the role of the AMS to recommend treatment.

20. I do not accept that this alleged demonstrable error is arguable. Whilst there exists a separate and distinct jurisdiction concerning medical treatment (both past and future), for which an AMS can provide an opinion (see section 60(5) of the 1987 Act, for example), the existence of that jurisdiction does not mean that what the AMS's conclusion in this MAC was in excess of his jurisdiction.

21. As highlighted above, the 1998 Act and the Guidelines require consideration of the question of whether a worker's condition is fully ascertainable, and/or has reached maximum medical improvement. Paragraph [1.15] of the Guidelines expressly requires the AMS to consider the stability of the worker's condition, whilst [1.16] provides what should occur where the AMS considers that treatment has been inadequate.

22. Reading the MAC as a whole, it is clear that this is what the AMS has done. He discusses the worker's history, including the pharmacology previously and presently undertaken, as well as how often Ms Neal engages with her psychological health providers. The AMS reports Ms Neal's worsening psychological functioning over the previous 12 months, as well as her current functioning.

23. The above are all relevant considerations consistent with [1.16] of the Guidelines. The AMS has "recommended treatment" only in the sense that he was addressing a question asked of him, namely, when stabilisation would occur. This was expressed to be nine months after six months of intensive psychiatric treatment.

24. It is not arguable, to the standard of a gatekeeper, that this ground of appeal is made out. The AMS has advised when maximum medical improvement might be reached based on his recommended treatment. This is a relevant consideration under the Guidelines and the 1998 Act.

The AMS assumed the applicant is obliged to follow recommendations

25. The appellant submits that it is not the role of the AMS to assume that an applicant is obliged to follow recommendations of the AMS.

26. This submission does not point to any text in the MAC, making it difficult to understand where the AMS has made this alleged assumption. I have discussed the role of the AMS in considering treatment above. It is a relevant consideration as outlined in the Guidelines.

27. I can see no evidence, from a fair reading of the MAC, that the AMS has assumed that Ms Neal is obliged to follow his treatment recommendation. This submission seems to suggest that the AMS was not aware of his role or the scope of his jurisdiction. An AMS cannot provide treatment, and his or her role is limited to the terms of the legislation. However, the 1998 Act makes it clear that that role includes the question of whether the degree of impairment is "fully ascertainable".

28. I am not satisfied that it is arguable that the AMS proceeded on the basis of the assumption alleged in the appellant's submission.

Whether the respondent is liable for medical treatment

29. There are two submissions addressing this "ground" that I have identified, but are essentially the same issue – the AMS failed to consider that the respondent is no longer liable for medical treatment for the appellant (on the basis of the age of Ms Neal and the date of injury).

30. The appellant does not point to any judicial authority or section of the Guidelines that supports this submission.

31. I presume (given, as discussed above, the bareness of the submissions provided) that these submissions, going to the date of injury, are in reference to section 59A of the 1987 Act. Neither the 1998 Act nor the Guidelines provide that this is a relevant consideration when determining whether a worker has reached maximum medical improvement.

32. The only relevant proviso to the considerations outlined in [1.15] and [1.16] of the Guidelines is contained in [1.34], concerning the refusal of treatment. I have quoted that paragraph of the Guidelines above. However, the appellant's submissions are not predicated on treatment offered and refused, but rather on the basis that the insurer is not liable to not pay for any further treatment.

33. On the basis that the Guidelines do not make this a relevant consideration, and the appellant points to no other authority to suggest that it is, I am not satisfied that it is arguable that this ground of appeal is made out.

There is no plan or proposal for any further medical treatment

34. This is a compound submission. I have addressed the submission that there is no provision in "the Act" that permit further medical treatment payable by the insurer above. There is no need to reiterate those reasons here.

35. The appellant's final submission is that there is no plan or proposal for any further medical treatment by Ms Neal's medical health providers. For a number of reasons, I do not accept that this submission presents an arguable case of demonstrable error.

36. Firstly, no medical evidence or correspondence from Ms Neal's health providers is attached to the application, for example indicating that Ms Neal has exhausted all treatment options and does not wish to engage in any further treatment. That kind of evidence would provide some support for the submission made.

37. Secondly, the absence of any updated plan, including the static nature of Ms Neal's treatment, was one of the reasons why the AMS concluded that she had not reached maximum medical improvement:

> "Although she is taking a high dose of Lexapro antidepressant medication, she has not been tried on alternative medications despite this medication not appearing to be effective in controlling her depressive symptoms."

38. Thirdly, whilst this is part of the AMS's consideration of the issue, he also considered the fact that Ms Neal's condition had worsened over the previous 12 months, the same period in which she had not had any psychological therapy:

> "She reports her psychiatric symptoms having worsened over the past 12 months. She has not had any psychological therapy for about 12 months and has not been assessed by a psychiatrist."

39. Finally, it cannot be said that the provisions of [1.34] of the Guidelines are engaged. As discussed above, there is no evidence (nor are the submissions presented in this way) that supports that treatment has been offered but refused by Ms Neal.

The appeal statement of Ms Neal

40. Attached to the application is a statement provided by Ms Neal signed 4 June 2020. The appellant has not indicated that she relies on section 327(3)(b) of the 1998 Act, nor referred to section 328(3) to allow the material to be admitted as fresh evidence before an Appeal Panel (should the appeal proceed to such stage).

41. Given that there are no submissions addressing section 327(3)(b) of the 1998 Act (for example, addressing the requirement that evidence could not be obtained prior to the assessment), I am unable to consider this as a ground of appeal. To the extent that Ms Neal's statement could be considered additional submissions (rather than evidence), for the same reasons as given in each of the headings above, I would not be satisfied that it is arguable that the MAC contains a demonstrable error.

Further conduct of the matter

42. It should be noted that my decision does not finally determine the dispute between the parties, in terms of the claim for lump sum compensation. The AMS has not completed an assessment of permanent impairment. In due course, a Certificate of Determination will be issued by the Commission, granting the appellant liberty to restore once maximum medical improvement has been reached. Of course, medical evidence will be required addressing the concerns of the AMS and should be attached to any application to restore proceedings.

Conclusion

43. As I am not satisfied that it is arguable that at least one of the grounds of appeal as specified in section 327(3) has been made out, the appeal is not to proceed.

Parnel McAdam
Principal Lawyer

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE DECISION ISSUED BY PARNEL McADAM, REGISTRAR'S DELEGATE, WORKERS COMPENSATION COMMISSION.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar