

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1- 214/20
Appellant: Jordan Starcic
Respondent: McDonalds Australia Limited
Date of Decision: 21 January 2021
Citation No: [2021] NSWCCMA 15

Appeal Panel:
Arbitrator: R J Perrignon
Approved Medical Specialist: Dr Julian Parmegiani
Approved Medical Specialist: Professor Nicholas Glozier

BACKGROUND TO THE APPEAL

1. The appellant worker, Ms Starcic, appeals from the Medical Assessment Certificate of Approved Medical Specialist Dr Hong dated 15 April 2020.
2. The appellant suffered psychological injury on 3 July 2017 (deemed date) as a result of events at work. She claimed compensation for whole person impairment, and was referred for assessment by Dr Hong.
3. By his Medical Assessment Certificate dated 15 April 2020, Dr Hong assessed a 7% whole person impairment (psychological), from which he deducted 1/10th to account for a pre-existing condition, yielding a 6% whole person impairment. Under the Psychiatric Impairment Rating Scale (PIRS), he assessed *Concentration persistence and Pace* as being within a class 2 or 'mild' impairment.
4. The appellant alleges that the assessment of *Concentration persistence and Pace* demonstrated error, and the application of the incorrect criteria. Her grounds of appeal do not include an allegation that her condition has deteriorated since assessment.
5. She seeks leave to rely on the following fresh or additional evidence:
 - (a) Her statement dated 13 May 2020, to the effect that she had completed an online traineeship as a requirement of her part-time employment as a receptionist, but that it was undemanding and took her the maximum of two years to complete.
 - (b) Supplementary report of Dr Selwyn Smith dated 14 September 2020, in which he notes that the appellant has progressed to full-time employment as a medical receptionist, and confirms his earlier assessment of a class 3 impairment in respect of *Concentration, persistence and pace*, because she:
 - (i) 'is working in a sheltered or safe working environment',
 - (ii) 'still cannot attend to perform the more complex type of work for which a university degree qualifies her', and

(iii) 'took it on because she was swayed by the job's low degree of difficulty and that there would be scope to take some required additional leave'.

(c) The appellant's further statement dated 2 September 2020, describing the nature of her full-time employment as a receptionist, and the reasons for her obtaining that employment.

(d) Certificate of capacity dated 11 July 2017.

6. For its part, the respondent also seeks leave to rely on email correspondence which confirms that in August 2020 the appellant commenced full-time as a receptionist at a different medical practice.
7. On 23 June 2020, the Registrar by his delegate was satisfied that the ground of demonstrable error was made out, and referred the matter to this Appeal Panel for determination.
8. On 29 July 2020 and 26 November 2020, the Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the *NSW workers compensation guidelines for the evaluation of permanent impairment (Guidelines)*.

Submissions

9. The Appeal Panel has had regard to the written submissions filed by both parties. It is unnecessary to set them out in full, but they may be summarised as follows.
10. With respect to *Concentration persistence and Pace*, the appellant worker submits as follows:
 - (a) The approved medical specialist reasoned that the worker attracted a class 2 impairment because she was able to complete a training course. That made the precise circumstances of that course and its completion relevant, with the result that she is entitled to rely on the statement dated 13 May 2020.
 - (b) The worker's impairment is not mild, but attracts a class 3 (or 'moderate') impairment, because 'she has gone from being an avid reader to a non-reader who cannot concentrate on audio books, [and] from consistently displaying a high level of intellectual functioning during long hours of high pressure work to becoming a part-time receptionist'.
11. In summary, the respondent submits as follows:
 - (a) The appellant's statement of 13 May 2020 ought not be admitted on appeal because its contents were within the appellant's knowledge before the assessment and could reasonably have been given then.
 - (b) The supplementary report of Dr Smith should likewise not be admitted because its contents could reasonably have been obtained prior to the examination by the approved medical specialist.
 - (c) In assessing *Concentration persistence and Pace*, the approved medical specialist relied on the history given by the appellant as he was entitled to do, exercised his clinical judgment in selecting a level of impairment, and properly applied the criteria in the *Guides*.

12. In correspondence with Registry dated 17 September 2020, the respondent indicated that it was 'content for the further statement of the appellant to be provided to the appeal panel', presumably for the purpose of determining whether it was admissible, but objected to the report of Dr Smith being considered.

Reasoning of the Approved Medical Specialist

13. Dr Hong examined the worker on 7 April 2020 by video. He took a history at [4] that she had been bullied by fellow workers after completing a managerial course in February 2017, and of her subsequent psychiatric symptoms and treatment. He also drew her attention to entries in the notes of her treating general practitioner to the effect that she had taken psychotropic medication as early as 2016 after the death of her grandmother, and had continued to take it since.
14. He took a history that, after ceasing employment with the respondent, Ms Starcic worked as a receptionist in a medical practice and recently completed a traineeship, at the conclusion of which she received a certificate in customer service. Due to stress, she found it difficult to work more than 20 hours per week (2 days for 8 hours, one day for four hours), compared with a 38-hour week in the employ of the respondent. No concerns had been raised about her work performance.
15. Dr Hong noted at [5] that the appellant finds it hard to read books. He noted that the history as given was coherent with reasonable detail, and that Ms Starcic 'responded to long and complex questions with considered answers'.
16. He diagnosed at [7] chronic Adjustment Disorder or Major Depressive Disorder, preferring the former diagnosis. He considered that her condition had improved with treatment, but that her symptoms and impairment had not remitted.
17. He made detailed reference at [10c] to her statement of 12 March 2019, noting that she:

"finds it hard to focus and she could not tolerate doing photography. She could not work on a computer for very long because she gets fidgety and distracted. Ms Starcic used to enjoy reading books but cannot concentrate even on audio books or podcasts. She believes she would struggle doing long reports in the medical practice. In her new employment she does not do accounting. She only schedules appointments and processes Medicare."
18. He noted the assessments of Dr Whetton and Dr Selwyn Smith and gave reasons for reaching a different assessment.
19. In the PIRS Table, Dr Hong gave the following reasons for assessing a class 2 impairment with respect to *Concentration persistence and Pace*:

"Ms Starcic reported reduced concentration and difficulties with reading.

No performance problems at work.

She has completed her traineeship."

Fresh or additional evidence

20. Fresh or additional evidence may not be given on appeal unless it 'was not available to the party before that medical assessment and could not reasonably have been obtained by the party before that medical assessment': section 328(3), *Workplace Injury Management and Workers Compensation Act 1998*.

21. The appellant argues that her additional statement of 13 May 2020 has become relevant because of Dr Hong's reliance on her completion of the traineeship. Even if that is so, its contents were within her knowledge prior to the assessment, and could reasonably have been obtained by her. It does not satisfy the requirements of section 328(3).
22. The same can be said of the certificate of capacity dated 11 July 2020. There is no evidence to establish that it could not have been obtained prior to examination.
23. As section 328(3) is not satisfied, the appellant cannot rely on the additional statement or the certificate of capacity.
24. For the benefit of the parties, we indicate that it would make no difference to the outcome even if it were admitted into evidence. The contents of the statement neither contradict nor add materially to the history taken by the approved medical specialist. The fact that the traineeship took a long time to complete, and that its requirements were undemanding in the appellant's view, does not contradict the fact that she was nevertheless able to complete the course successfully.
25. The additional statement of 2 September 2020, and the supplementary report of Dr Selwyn Smith, both address an event which occurred after Dr Hong's examination - namely, the appellant's progression to full time work in August 2020. Because that event occurred after the examination, the contents of both documents cannot have been known to the appellant prior to examination, and neither document was available to her. In our view, both documents satisfy the requirements of section 328(3). While noting the objections of the respondent, we have regard to both documents.
26. For the same reasons, the email correspondence relied on by the respondent satisfies the requirements of section 328(3), and we have regard to it also.

Concentration, persistence and pace - whether error or application of incorrect criteria

27. Before the Panel can make its own assessment of the appellant's level of impairment, the Panel must first be satisfied of demonstrable error or the application of incorrect criteria as alleged by the appellant.
28. The appellant alleges that her symptoms were more consistent with a class 3 impairment than class 2 as assessed. The *Guidelines* set out the following descriptors for each of these classes.

“Class 2 Mild impairment: can undertake a basic retraining course, or a standard course at a slower pace. Can focus on intellectually demanding tasks for periods of up to 30 minutes, then feels fatigued or develops headache.

Class 3 Moderate impairment: unable to read more than newspaper articles. Finds it difficult to follow complex instructions (eg operating manuals, building plans), make significant repairs to motor vehicle, type long documents, follow a pattern for making clothes, tapestry or knitting.”

29. In assessing a class 2 impairment, the approved medical specialist expressly took into account the appellant's reported difficulties with concentration and reading. He reasoned that, as the worker was capable of employment for 20 hours per week as a receptionist, experienced no problems at work and was able successfully to complete a traineeship in customer service, her symptoms best fit within a class 2 impairment.

30. In our view, that conclusion was well open to Dr Hong on the evidence. The descriptors in each of the impairment classes are not prescriptive. Provided that the characteristics relied on by the approved medical specialist are relevant to *Concentration, persistence and pace*, as they were, it was the task of the approved medical specialist to determine in which category the symptoms of the appellant best fitted. This is what he did. The mere fact that Dr Smith holds a different opinion, with reasons given, would not compel a finding that the approved medical specialist was in error in reaching a different conclusion.
31. Absent demonstrable error or the application of incorrect criteria, it is not the function of the Appeal Panel to substitute its own opinion as to the appropriate class of impairment.
32. In any event, we consider that the evidence does not justify a class 3 impairment, because the evidence does not go so far as to demonstrate an inability to read more than newspaper articles. The completion of the online traineeship in customer service, even if over a long period, suggests the contrary. There is also insufficient evidence to conclude that the appellant is incapable of following complex instructions. The successful performance of her duties as a receptionist in a medical practice which, on the appellant's history to Dr Wong, included 'talking to the patients, following up the patients, taking instructions from the doctors and following up pathology results' is not evidence of any such incapacity.

Conclusion

33. We consider that the selection of a class 2 impairment was well open to the approved medical specialist on the evidence. His assessment demonstrates neither error nor the application of incorrect criteria.
34. The Medical Assessment Certificate dated 15 April 2020 is 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 Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar

