

# WORKERS COMPENSATION COMMISSION

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

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**Matter Number:** M1-3938/20  
**Appellant:** Secretary, Department of Education  
**Respondent:** Jennie Zugajev  
**Date of Decision:** 1 February 2021  
**Citation No:** [2021] NSWCCMA 18

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**Appeal Panel:**  
**Arbitrator:** Ross Bell  
**Approved Medical Specialist:** Professor Nicholas Glozier  
**Approved Medical Specialist:** Dr Julian Parmegiani

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 12 November 2020, Secretary, Department of Education (appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr John Baker an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 21 October 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 Workers compensation 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 Workers compensation 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*, 4<sup>th</sup> ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5<sup>th</sup> ed (AMA 5).

## RELEVANT FACTUAL BACKGROUND

6. The AMS provides a useful summary of events including the history of the injury at Part 4,

“Brief history of the incident/onset of symptoms and of subsequent related events, including treatment.

Mrs Zugajev reported that she became a full-time teacher in March 1987 with the NSW Department of Education (DET). Mrs Zugajev then in 1989, completed the DET retraining course and was accredited as a fully qualified Careers Advisor. She pursued a career as a Career Advisor and worked fulltime in this role from 1989 until the onset of this work-related injury. She had worked in different schools in Greater Western Sydney. She said she had worked in Whalan, Colyton, and Crestwood High Schools prior to moving to Penrith Academic Selective School (PAS). Mrs Zugajev reported having been the focus of severe bullying at PAS from October 2014 until May 2015. She said she was forced out of her primary substantive role at PAS. She was asked to attend an unfamiliar school with an unfamiliar Principal. She became too anxious and overwhelmed to commence her employment at the Merrylands school.

Mrs Zugajev reported that she felt intimidated and threatened by various levels of her management. She said he was too fearful of returning to her employment. She said she had lost her self-esteem. Her confidence was poor. She would become agitated and depressed in her mood. She first developed depressive symptoms. Her concentration and energy levels were low. She developed anxious distress. Mrs Zugajev stated that she ‘had lost all motivation for anything’. She was experiencing in relation to her total loss of motivation. Mrs Zugajev stated that for the first time in her life she had lost her capacity to concentrate and persist at complex tasks. She had lost interest in the initiation of tasks. She would become depressed and anxiously distressed when her sustained attention lapsed, prior to her completion of a task. She stated she had made too many errors when trying to complete tasks she had previously experienced as easy. She lost interest and her motivation to persist failed. When she tried to re-engage her anxious distress would become acutely symptomatic and prevent her from being able to travel or be involved with unfamiliar people and places. She attended her general medical practitioner. She attended a clinical psychologist.

Mrs Zugajev continued her routine medication Of Thyroxine 50 mcg, five evenings per week with 100mcg on Saturday and Sunday. She also takes iron and Vitamin C supplements. She said that she had been prescribed antidepressants however she suffered from substantial weight gain. The antidepressant was ceased after four months. She had never been referred to psychiatric hospital.

Mrs Zugajev reported that she had developed the following psychiatric symptoms after the onset of her work-related injury. At the time of this assessment she met DSM 5 Criteria for Persistent depressive disorder with anxious distress Code 300.4. Her symptoms include:

- Depressive intrusive ruminations of ‘shame and guilt’ for not being an income provider to her family
- Ruminations about being ‘betrayed by my employer’ causing anxious distress
- Increased weight of 7 kgs whilst suffering recurring depressed mood
- Loss of her capacity to experience pleasure from music
- Poor sleep with middle insomnia
- Increased irritability and agitation
- Increased anxiety in groups and whilst driving

- Loss of her capacity to enjoy socialising which had resulted in her becoming anxious and isolated from her colleagues, peers and friendship circle
- Poor concentration with loss of persistence and a slower pace of completing complex tasks
- Loss of interest in her grandchildren with her having loss of interest in their sport, hobbies or activities
- Intrusive distressing depressive ruminations of hopelessness and worthlessness
- Loss of libido
- Low energy
- Loss of interest in her self-care and personal hygiene
- Poor concentration with inability to concentrate for periods of about a few minutes
- Increased fatigue
- Increased avoidance of large groups resulting in avoidance of church and its larger gatherings
- Low self-esteem and increased tearfulness when thinking about her inability to sustain a career
- Panic attacks when having to leave the house alone”

## **PRELIMINARY REVIEW**

7. 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.
8. 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 the grounds of appeal can be addressed without recourse to re-examination.

## **EVIDENCE**

### **Documentary evidence**

9. 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**

10. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

## **SUBMISSIONS**

11. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel and are briefly summarised below.

### **Appellant**

12. The appellant employer submits that the AMS has erred in failing to make an apportionment between the injury referred for assessment on 1 June 2015 (deemed) and a subsequent psychological injury on 18 July 2016 (deemed).
13. In the alternative, the AMS erred in failing to consider the contribution of the injury on 18 July 2016 (deemed) to the respondent worker’s presentation when assessing the degree of whole person impairment (WPI). The assessment was therefore based on incorrect criteria.

14. It is clear from the evidence that the respondent suffered a separate psychological injury to the one referred for assessment, yet the AMS found no subsequent injury.
15. The injury of 18 July 2016 (deemed) occurred when the respondent worker was advised by email that she would be returning to work at her original workplace before receiving another email stating she was to be transferred to a different workplace, and she lodged a further workers compensation claim in relation to that event.
16. The injury of 18 July 2016 should be excluded from the assessment of the referred injury of 1 June 2015 and 50 per cent of the assessment of the AMS should be deducted for the subsequent injury.
17. The MAC should be revoked and an assessment of 10% WPI substituted.

### **Respondent**

18. The respondent worker submits that there is no demonstrable error or use of incorrect criteria. The referral of the one injury of 1 June 2015 (deemed) is consistent with the determination of the Arbitrator on 6 January 2020 in matter 5454/19 that there had been no new injury in or around September 2017, and that the incapacity arose from the 2015 injury, with only an aggravation in September 2017. The Arbitrator rejected a submission that there should be a deduction applied to weekly payments for the September 2017 aggravation.
19. The referral for assessment in this matter was by consent and the deemed date of injury was 1 June 2015. It would be contrary to the determination of the Arbitrator for any deductions to be made for subsequent injury as submitted for the appellant.
20. By implication, the respondent submits that the MAC should be confirmed.

### **FINDINGS AND REASONS**

21. 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.
22. 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.

### **Issue – Failure to exclude from the assessment impairment due to subsequent injury (Part 8(7) of the MAC)**

23. The Referral to the AMS was for psychological injury with a deemed date of 1 June 2015.
24. At Part 4, under “Details of any previous or subsequent accidents, injuries or condition”, the AMS records (correction added),

“Mrs Zugajev said that she had never had any prior motor accidents. She had never had any public liability claims. She reported that she had [not had] any previous or subsequent accidents, injuries or conditions.”

25. Part 8(7) of the MAC asks the AMS to,

“Indicate whether there has been any further injury subsequent to the subject work injury. If this injury has caused any additional impairment this should not be included with the assessment of impairment due to the subject work injury.”

26. As the appellant notes, the AMS responded in the negative.

27. As extracted from Part 4 of the MAC the history of the injury includes,

“She pursued a career as a Career Advisor and worked fulltime in this role from 1989 until the onset of this work-related injury. She had worked in different schools in Greater Western Sydney. She said she had worked in Whalan, Colyton, and Crestwood High Schools prior to moving to Penrith Academic Selective School (PAS). Mrs Zugajev reported having been the focus of severe bullying at PAS from October 2014 until May 2015. She said she was forced out of her primary substantive role at PAS. She was asked to attend an unfamiliar school with an unfamiliar Principal. She became too anxious and overwhelmed to commence her employment at the Merrylands school.

Mrs Zugajev reported that she felt intimidated and threatened by various levels of her management. She said he was too fearful of returning to her employment.”

28. Dr Teoh, in his report of 25 May 2020, records a history of events beginning in October 2014 at the Penrith Academic Selective High School (PAS) and notes the effect of her subsequent dealings with the Department of Education.

29. Dr Young for the respondent in his two reports, also refers to the dealings with the Department after becoming incapacitated from 1 June 2015 as adding further to the distress for Ms Zugajev.

30. The statement of Ms Zugajev at paragraph 4 refers to the technicalities as to how there were apparently three dates of injury recorded by the insurer.

31. As she says however, the various injurious events are all part of the 1 June 2015 injury as the AMS has summarised it above, and there has been only one psychiatric condition since that time. In these circumstances it was open to the AMS to consider the events subsequent Ms Zugajev leaving PAS as manifestations of the original injury because they were all related, rather than constituting new injuries.

32. It is well known law that in cases of s 66 of the *Workers Compensation Act 1987* lump sum compensation claims the Commission constituted by an Arbitrator is charged with determining injury, but it is a matter for an AMS to determine any impairment arising from the injury.<sup>1</sup>

33. It is common for psychological injuries to develop over a period with a deemed date set by the legislation. Such was the case for Ms Zugajev. The Panel notes that in the absence of a determination by an Arbitrator limiting the period over which the psychological condition was contracted, or other instructions in the Referral limiting the period, it was open to the AMS to find the series of stressful interactions with the employer’s management after Ms Zugajev left PAS as part of the same injury. The findings of the AMS are consistent with the date of injury referred, 1 June 2015 (deemed).

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<sup>1</sup> *Haroun v Rail Corporation New South Wales* [2008] NSWCA 192; *Greater Taree City Council v Moore* [2010] NSWCCPD 49.

34. Both Dr Young and Dr Teoh include the whole sequence of events including the issues around return to work in the history and did not note any subsequent injury or consider that these events resulted in any new psychiatric condition. This is consistent with the conclusion of the AMS that there was no subsequent injury, and that the sequence of stressful events dealing with the appellant employer over returning to work were part of the injury referred.

### **Findings**

35. The Panel discerns no demonstrable error on the face of the Certificate. The AMS has used the correct criteria for psychological injury and assessed the injury in accordance with the Referral to him.
36. For these reasons, the Appeal Panel has determined that the MAC issued on 21 October 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

