WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-1337/19**
Appellant:	**Vishal Mehta Bay of India**
Respondent:	**Weidong Han**
Date of Direction:	**15 August 2018**
Citation:	**[2019] NSWWCCMA 115**

Appeal Panel:	
Arbitrator:	**Gerard Egan**
Approved Medical Specialist:	**Dr Patrick Morris**
Approved Medical Specialist:	**Professor Nicholas Glozier**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 17 June 2019, Fujitsu General Pty Ltd (the appellant, and/or the employer) made an application to appeal against a medical assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission). The medical assessment was made by Dr Bradley Ng, an Approved Medical Specialist (the AMS) in a Medical Assessment Certificate dated 20 May 2019 (the MAC).

2. The respondent to the Appeal is Weidong Han (the worker) and a Notice of Opposition was lodged on 28 June 2019.

3. 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.

4. 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.

5. 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.

6. 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).

EVIDENCE

Documentary evidence

7. The Panel has before it all the documents that were sent to the AMS for the original assessment and has taken them into account in making this determination. These include:

    (a) The Referral to the AMS;
    (b) File sent to original AMS (the Application to Resolve a Dispute (ARD); and the Reply);
    (c) Original Medical Assessment Certificate (MAC);
    (d) Appeal Form;
    (e) Notice of Opposition, and
    (f) The Decision of the Registrar pursuant to s 327 of the 1998 Act

8. The Opposition attached correspondence regarding aspect of a social media report of M&A Investigations dated 4 January 2019 (the social media report) containing an advertisement. This correspondent goes to the knowledge of the worker regarding the existence or content of, or involvement with the advertisement.

9. The appellant employer has by email dated 13 August, the appellant consented to the Panel considering this additional material. The Panel is satisfied that is relevant, and additional material within the realm of s 328(3) of the 1998 Act.

GROUNDS OF APPEAL: SUBMISSIONS

10. Both parties made written submissions, attached to the Application to appeal and the Opposition respectively.

11. The grounds of appeal, subject to falling within one of the categories in s 327(3) of the 1998 Act are the grounds restricted to those specified in the submissions accompanying the appeal: *New South Wales Police Force v Registrar of the Worker Compensation Commission* [2013] NSWSC 1792 (*Police Force v Registrar)* Davies J at [49]). This was confirmed by His Honour in *The UGL Rail Services Pty Ltd (formerly United Group Rail Services Pty Ltd) v Attard* [2016] NSWSC 911; see also *Wilkinson v C & M Leussink Pty Ltd* [2015] NSWSC 69.

12. The submissions will be dealt with below, but the grounds of appeal by the employer are the AMS applied incorrect criteria and that the MAC contains a demonstrable error because the AMS failed to consider relevant material before him, particularly the social media report. This is argued to have caused erroneous assessments in the psychological functioning categories (Psychiatric Impairment Rating Scale, or PIRS) of social and recreational activities, social functioning and employability/adaptability. It is submitted that proper consideration of these would have led the AMS to arrive at a lesser rating, and ought to have been assessed at Class 1 (nil impairment).

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 WorkCover Medical Assessment Guidelines.

Further medical examination by a Panel Member

14. The appellant submits that the MAC ought to be revoked and a fresh MAC issued based on an assessment in accordance with the PIRS taking into account the whole of the available evidence, including the social media report. However, it is not argued that a further examination by an AMS Panel member is appropriate. The respondent defends the appeal, but says if the social media report is considered relevant, and a ground of appeal is established upon it, procedural fairness would require re-examination by the AMS or an AMS Panel member.

15. In the preliminary review the Panel concluded that for reasons expressed below, further examination is not necessary to deal with the appeal.

Hearing on the papers

16. The appellant does not seek an oral hearing before the Appeal Panel. The worker, however, asserts, that a hearing cannot be decided on the Papers, but provides no submissions on that matter.

17. On the basis of the preliminary review, the Panel determined that there is sufficient evidence in the materials before the AMS and the Panel and the written submissions identify the alleged errors and grounds of appeal with sufficient detail to allow the Panel to deal with the appeal without such a hearing in accordance with the Registrar's Guideline: Appeal Against Medical Assessment.

RELEVANT FACTUAL BACKGROUND

18. The worker worked at the respondent's restaurant as a kitchen hand. In his statement to Police on 30 October 2014 he describes an altercation on 17 October 2014 with the chef, during which he was stabbed. He said: "I look down, and see stab wound to my left side. I also see lots of blood, and some fat coming out of wound." He began to feel "really thirsty", no energy and a lot of pain. He was in John Hunter Hospital for five days, during which time the chef visited him. He says he was scared of him, and the chef was questioning the worker about what he intended to say to the Police.

Social media report of M&A Investigations dated 4 January 2019 (the social media report)

19. There is a social media report attached an online advertisement, posted on 4 April 2018, citing the worker's phone number. It was provided to the worker together with the dispute notice dated 13 March 2019 (the dispute notice). The text of the advertisement referred to "two girls new 50 one hour massag just arrived this afternoon 28. Age: 28" [sic]. The location was Newcastle. The product was clearly escort/sex services.

20. The post, expressed in the first person, says "we only stay in Newcastle one day".

The worker's statement dated 18 March 2019

21. Relevant to the history provided to the AMS, and therefore to the appeal, in the worker's latest statement he says he is "unable to concentrate on a task for more than 5-10 minutes before intrusive thoughts of people wanting to hurt me come into my head and I begin to experience headaches". He says he struggled to continue university nursing studies as he "could not deal with being in hospitals or around sharp objects". He is scared of crowds, has difficulty concentrating, although he is doing a Bachelor of Architecture at the University of Newcastle. He has failed two examinations. He is driven to and from lectures by a friend. The worker also describes continuing nightmares which commenced during the hospital admission causing him to "wake with heart beating fast, breathing rapidly, tremulous and sweating". If this happens, he says he "stays in bed for the next day".

22. The worker describes a fear of dark people with beards, saying he felt "constantly scared almost everywhere", frightened of sudden movement and is hypervigilant.

23. He says he rarely leaves his house alone but goes to the shops alone sometimes “if it is going to be quick”. He frequently misses meals, does not cook if it involves using knives. He says he is reclusive and ruminates about why he was stabbed. He doesn’t go out and his friends and about once per week they visit him and bring food. He avoids discussing the incident because he becomes frightened, agitated, and sweaty. He says he has avoided treatment because of this.

24. He does not comment on the social media report.

The proceedings

25. Various treating practitioners over time refer to the worker’s social isolation and ongoing fear.

26. On 25 October 2018, the worker claimed lump sum compensation based on an assessment of 17% whole person impairment (WPI) in a medico legal report by Dr Leonard Lee dated 7 August 2018.

27. Dr Lee assessed the worker within the PIRS categories set out in Chapter 11 of the Guidelines as follows:

    (a) Table 11.1: Self Care and Personal Hygiene: Class 2 – “Frequently misses meals”

    (b) Table 11.2: Social and Recreational Activities: Class 3 – “Cannot socialise outside his home”

    (c) Table 11.4: Travel: Class 2 – “Can only travel without a support person in familiar areas”

    (d) Table 11.4: Social Functioning: Class 3 – “He broke up with his partner and is incapable of intimate relationships”

    (e) Table 11.5: Concentration, Persistence and Pace: “Can concentrate on demanding tasks for up to 30 minutes”

    (f) Table 11.6: Employability: Class 4 – “Cannot work more than one or two days at a time, with reduced pace and erratic attendance”

28. Dr Lee determined a mean class score of 3 (Guidelines cl 11.16, p58), and an aggregate (Guidelines cl 11.17, p58) of 16. He applied the conversion Table 11.7, and arrived at 17% WPI. No deduction for impairment due to pre-existing injury or condition was applied.

29. After examination by Dr Graham Vickery on 17 January 2019 the respondent declined the claim based on an assertion that the worker had not reached maximum medical improvement (MMI) in the dispute notice dated 13 March 2019. Dr Vickery diagnosed PTSD and a phobia of large sharpened knives. He gave a positive prognosis. He did not assess the worker’s presenting impairment.

30. Neither Dr Vickery nor Dr Lee referred to the social media report.

31. On 9 April 2019, the respondent's solicitor noted the social media report with the worker's phone number and his possible involvement in the escort services advertisement. She requested "particulars of the worker's) involvement in any escort service or any other related services (including paid or unpaid employment)". This request was followed up several times, including by email on 17 April 2019, noting the upcoming AMS appointment.

32. On 18 April 2019, the worker's solicitor replied:

> "I am instructed that the worker has no prior knowledge of, or involvement with, the advertisement. He otherwise adheres to the particulars provided to Drs Vickery and Lee regarding employment."

33. The AMS examined the worker on 14 May 2019 leading to the MAC dated 20 May 2019 under appeal.

THE MAC FINDINGS

34. In the MAC, the AMS noted the circumstances of the injuries and subsequent treatment. Although the nature of the appellant's challenge is, in one respect, of narrow compass, the submissions are broadly cast, suggesting error or the application of incorrect criteria in three categories of functionality. Accordingly, parts of the MAC to demonstrate the AMS's approach are set out below:

> "Mr Han's family were all in China and he was the only son. He had no family in Australia. He had no brothers or sisters. He had no distant or close relatives in Australia.
>
> Mr Han continued to live in Newcastle. He was not working and had not done so for several years. A friend drove him here today. He did not have a driver's licence. His friend will take him back to Newcastle. He had been living for the last two years in shared accommodation. There were three people in the house, altogether. Mr Han kept to himself. He noted that his flatmates were friendly, but he did not have a lot to do with them.
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> Mr Han paid approximately $140 per week in rent. He stated that he did not cook because he was fearful of entering the kitchen and of using knives. He did not eat often and relied on takeaways. He was able to wash his own clothes. He liked being alone and he ruminated. He did not see his flatmates often nor did he interact with them.
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> Mr Han did not own a television. He did his shopping and groceries on a fortnightly basis. He did this quite quickly as he did not like going out. He was very scared of bearded or people from the Indian sub-continent.
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> Mr Han separated from his girlfriend in 2015 after being together for two years. He had no close friends and no girlfriend at the moment. His parents did not know about his situation and they had never visited. I asked Mr Han how he was explaining this situation, but he was very vague on this. He had not returned to China for some years. I asked him how he was going to explain the situation. I pointed out that he could not continue to be a student forever. He gave no reply.

In terms of his university lectures, Mr Han was attending a one-hour lecture on Tuesdays followed by a tutorial. He did not stay too long in the tutorial: "I get too scared." He did not go to the library. He stated that he had failed his nursing course because he was scared of hospitals. He felt that architecture was a more positive career choice. He wanted to complete his degree, but was very vague on what was going to happen next. He tried to read his lectures, but struggled with poor memory and concentration. There were bad, intrusive thoughts. When I asked him if he was going to try to find a job in Australia or China, he could not give me any indication.

FINDINGS ON PHYSICAL EXAMINATION

Mr Han presented as a quiet young man of Chinese descent in clear consciousness. He was casually dressed and slightly dishevelled. His command of English did not appear to be great and, at times, he struggled to understand my questions. I had to re-phrase them in simpler terms. This did hamper the assessment somewhat, but he was able to give a reasonable history of himself. Nevertheless, sometimes it was difficult to determine whether or not Mr Han understood my question or if he simply did not know and could not provide me with an answer. He appeared jumpy at times, but one could not rule out exaggeration of such anxiety. He was softly spoken. There were no gross motor abnormalities. His mood was a mixture of anxiety and depression. His affect was blunted with little reactivity. There was no formal thought disorder though, at times, he was quite tangential. He was slightly paranoid and suspicious. There were no delusions. He outlined ongoing suicidal ideas or thoughts of deliberate self-harm. His cognition was patchy at times with poor long-term memory. He was inattentive at times. He had to be asked to re-focus at times. His insight was minimal and his judgment was questionable.

…

Summary of injuries and diagnoses:

1. Post-Traumatic Stress Disorder, moderate severity.
2. Major Depressive Episode, chronic, moderate severity."

35. The AMS concluded, given the period under treatment, that maximum medical improvement has been reached, and explained his difference with Dr Vickery in that regard (which is not contested).

36. He said:

> "The facts on which I base my assessment are the assessment history, the clinical examination and perusal of all documents submitted by parties**."**

37. After reviewing other opinions, the AMS said.

> "The above reports highlight some history inconsistencies and one cannot rule out the barrier of English as a second language in collecting an accurate history. This certainly might have affected the calculation of Whole Person Impairment, as noted above. Mr Han, on today's assessment, reiterated that he had not travelled outside of Newcastle and Sydney for a number of years. He was only studying his architecture course part-time, but he was passing. It would appear that he was only doing one or two units per semester".

38. The AMS applied the PIRS as follows:

    (a) Table 11.1: Self Care and Personal Hygiene: Class 2 – "Mr Han has a solitary lifestyle, despite living with flat- mates. He is able to care for himself to a certain degree and is not reliant on outside help. He is able to do his basic chores and attend to personal hygiene, but is reliant on takeaway meals. This overall qualifies for mild impairment".

    (b) Table 11.2: Social and Recreational Activities: Class 3 – "Mr Han described himself as very withdrawn and never going out. He rarely goes out to any enjoyable social occasions. He goes out for university and for errands. This would be consistent with moderate impairment."

    (c) Table 11.4: Travel: Class 2 – "Mr Han does not drive and does not have a driver's license. Nevertheless he was able to attend this appointment in Sydney. There appears to be no anxiety about travel, per se."

    (d) Table 11.4: Social Functioning: Class 3 – "Mr Han noted that he broke up with his partner after the injury and this would suggest a severe impairment. However he is able to live with flat-mates and has been doing so for a number of years. There may be little communication, but the relationship is not strained to the point where he has been asked to leave. He does have friends and was transported by a friend for today's assessment. The above evidence would suggest somewhere between moderate and severe impairment. Given that he is able to rely on friends and flat-mates, overall the social functioning would be more consistent with moderate impairment."

    (e) Table 11.5: Concentration, Persistence and Pace: "Mr Han is attending university, albeit at a slower pace and with a lighter workload. He is able to pass papers. This qualifies as mild impairment. Given his attendance at university and his ability to pass papers, it would not be classed as moderate impairment."

    (f) Table 11.6: Employability: Class 4 – "It was difficult to envision Mr Han working in structured employment on a part-time or full-time basis due to his anxiety symptoms, reclusiveness and avoidance. Technically he might be able to work in some type of casual employment by himself at an erratic pace."

39. On these classifications, the AMS assessed 15% WPI.

FINDINGS AND REASONS

40. The Appeal Panel is obliged to give reasons, the extent of which will vary from case to case: *Campbelltown City Council v Vegan* [2006] NSWCA 284.

41. The power of review is far ranging but nonetheless confined to the matters set out in s 327(2) of the 1998 Act which can be the subject of appeal. The procedure on appeal is one of limited review, as set out in s 328.

42. In this matter the Registrar has determined that at a ground of appeal under s 327(3) is made out.

DEALING WITH THE APPEAL

Some provisions in the Guidelines 4th Ed

43. Clause 1.6 of the Guidelines provides that assessing permanent impairment involves:

> "…. clinical assessment of the claimant as they present on the day of assessment" is required, taking account the claimant's relevant medical history and all available relevant medical information to determine (the relevant matters)"

44. Clause 1.8 makes it clear that: "The degree of permanent impairment that results from the injury must be determined using the tables, graphs and methodology given in the Guidelines and AMA5, where appropriate".

45. Chapter 11 of the Guidelines replaces Chapter 14 of AMA 5 for the assessment of impairment from psychological injury. Assessment is based on behavioural consequences affecting functional impairment: cl 11.11. Tables 11.1 to 11.6 are to be used to assess six different scales of functioning. However, cl 11.12 of the Guidelines makes it clear that the PIRS class descriptors in the Tables are "examples of activities" and "are examples only". The assessing psychiatrist should take account of the person's cultural background. Consider activities that are usual for the person's age, sex and cultural norms.

The appellant's submissions: social and recreational activities, social functioning and employability/adaptability:

46. The appellant employer makes global submissions addressed to all three PIRS categories, of social and recreational activities, social functioning and employability, with no specific assertions as to how the worker's involvement with the advertisement (if accepted) should have been dealt with by the AMS within each PIRS category. The gist of these submissions is simply that the AMS did not consider or deal with the social media report relied upon by the appellant, and attached to its Reply filed in the Commission.

47. The appellant refers to As J Harrison in *Wentworth Community Housing Limited v Brennan* [2019] NSWSC 152, (*Brennan*) (at [72]) for the proposition that a failure by an AMS to take relevant material into account may constitute a demonstrable error.

48. Specifically, regarding a failure to consider the absence of complaint of an alleged condition, when a party had relied upon that absence in the case, the appellant also sets out a passage by Rothman J in *De Gelder v Rodger (No 2)* [2014] NSWSC 1355 (*De Gelder (No 2)*) at [73]:

> "73. As the plaintiff submitted, the panel's statement that it had received and considered particular documents does not preclude a finding that it failed to take it into account. In *Golijan v Motor Accidents Authority of NSW* [2012] NSWSC 1106 Beech-Jones J said at [48]:
>
> "In this case the review panel stated that it had 'considered all the evidence'. A statement to that effect does not preclude a contention such as that made by the plaintiff being accepted.'"
>
> and, later:
>
> "77. Again, given the reliance placed upon the absence of the complaint in the notes of the chiropractor, the letter dated March 23 2012 was a significant piece of evidence and the panel was required to take it into account. If it was to reject the evidence ...it should have articulated why.

> 78. Had it done so it would be easy to accept that the document had been taken into account. I do not accept that it was. Again, oblique reference to the fact that the document was before the panel-amongst literally thousands of pages of material-is insufficient to sustain a conclusion that the document was taken into account. Of course the plaintiff bears a heavy onus given the limited nature of the review and the panel's statements that certain documents were considered. I am satisfied that the letter from the chiropractor was not taken into account.
>
> 79. I accept that there may have been cogent reasons to reject the contents of the letter but I do not accept that it was open to the panel to disregard it altogether."

49. In *Brennan,* Harrison As J said at [73]:

> "73. While *De Gelder (No 2)* concerns the decision of an appeal panel, it is equally applicable to the decision of the AMS in these proceedings.
>
> 74.In this current judicial review, it is fair to say that aside from the general statements in [2] and [9] of his decision, the AMS did not specifically refer to either the surveillance reports dated 27 August 2015 and 11 October 2016, or the social media reports dated 13 July 2015 and 12 September 2016. Nor has the AMS addressed Wentworth's submissions on the inconsistent matters raised in the reports under the 'History Relating to the Injury' heading of the MAC. Wentworth had submitted that the material shown in these reports was inconsistent with what the first defendant stated in her initial statement. In her supplementary statement, the first defendant provided her response as to what was contained in media posts and surveillance. The AMS also did not refer to either the first defendant's supplementary or latter statement in his reasoning. It appears that the AMS overlooked these reports, or failed to consider the relevant and significant material provided by the plaintiff."

50. On the basis of these authorities, it is submitted: the AMS did not consider, or overlooked, the social media report; he did not comment on it or ask the worker about it; it cannot be assumed he did consider it simply because it was in the material before him.

51. The appellant submits that the social media report, posted on 4 April 2018 cites the worker's mobile phone number, the age noted is 28, and location Newcastle" and the post, expressed in the first person, said "we only stay in Newcastle one day". The post is asserted as "sufficient evidence to conclude that the respondent worker is involved in such services", because the "phone number, age and location" match the worker's.

52. It is asserted that the advertisement provides "clear evidence of the worker's involvement in activities which are inconsistent that the history reported" to the AMS and other medical practitioners, Drs Lee and Vickery.

53. It is submitted that the respondent worker did not address this in his statement, nor during the examination before the AMS.

54. The appellant's contention is that any such involvement by the worker is inconsistent with the AMS's assessments made by the AMS within the three PIRS categories identified.

55. None of the descriptors within these classes are addressed, to identify how any such involvement would establish either the application of incorrect criteria, or demonstrable error.

The respondent's submissions: social and recreational activities, social functioning and employability/adaptability:

56. The respondent denies knowledge of the advertisement until disclosed to him by the dispute notice dated 13 March 2019, although it is not stated when that was received.

57. The respondent submits that the advertisement is irrelevant and insignificant for the any of the following reasons:

    (a) It was open to the AMS to find that the advertisement is not "connected" to the worker beyond citing his phone number. This is so because contrary to the appellant's submission that the advertisement cites the worker's phone number, age and location which "match the profile of the respondent worker": the worker was aged 27 at the time that the advertisement was posted, not 28 years, as the appellant asserts; the appellant lived in Waratah West at the time, not Newcastle (conceded to be "a subtle difference); and the content of the advertisement, in the first person, refers to "Kate and Lisa", obviously females.

    (b) Even if the advertisement was "connected" to the worker at the time of posting, it was 13 months prior to the AMS's examination, and it was open to the AMS to "find" that any connection was not present at the time of examination, consistent other histories given to Dr's Lee, Bench and Vickery of generalised social introversion. The appellant does identify any evidence otherwise.

        Even if the worker was (contrary to his instructions) connected to the advertisement at the time of examination, it was open to the AMS to find (and it is obvious that he did) that the advertisement (the Panel reads this as the activities the advertisement implies) did not suggest any increase in functional capacity over that otherwise assessed. All that the advertisement implies is that the worker could create an advertisement and might have received phone calls. The worker has never suggested that he couldn't do so or that he doesn't receive phone calls. The appellant does not make any submissions as to how the advertisement impacts the workers psychological functioning or how the AMS's reasoning is in error.

58. The respondent worker submitted that the appellant's reliance *De Gelder* and *Brennan* is misplaced as the quote at [73] in *De Gelder*, from *Golijan v Motor Accident Authority,* is taken out context to suit the submission. This is because a full reading of what Beech-Jones J said establishes that (in the words of the appellant) before a failure to properly consider a document can give rise to error, it must be established that the document is relevant and significant to the assessment, i.e. consideration of the document would impact upon the outcome of the assessment. If it is irrelevant or only marginally relevant, i.e. consideration of it would not alter the outcome of the assessment, then it need not be specifically referenced.

59. Thus the relevance and significance of the report must be addressed before an error can be made out, even if, as the respondent disputes, the AMS did fail to look at it.

60. The whole of paragraph [48] in *Golijan* (only partially quoted in the appellant's submissions) is as follows:

> "48. In this case the review panel stated that it had "considered all of the evidence". A statement to that effect does not preclude a contention such as that made by the plaintiff being accepted. However the principal difficulty with the plaintiff's contention is that it misstates Dr Duckworth's reports. He did not advance a "thesis ... that the cause of the wasting of the Plaintiff's shoulders was due to neurological injuries to the cervical spine". I address below the effect of Dr Duckworth's reports but, at its highest, he only speculated that there was some connection between his neck injury and shoulder wasting which might be "neurological in nature" (see [18] above). Of present relevance, Dr Duckworth stated that the radiological reports for 2007 and 2010 did not explain the deterioration of his condition (see [21] above). No other medical practitioner, including a neurologist, attributed any significance to the radiological reports.
>
> 49. Given the marginal relevance of the radiological reports, no relevant form of error can be inferred from the absence of any specific reference to them in the review panel's report."

61. That is, in *Brennan* and *De Gelder* (No 2) the material not considered by the Panel (or AMS) was relevant and significant. In *Brennan* and *Gelder* (No 2) the information was obviously about the worker. In *Brennan* the evidence was inconsistent with what the worker stated in her initial statement. In *De Gelder* (No 2) the overlooked early report of injury was relevant to the occurrence of injury.

62. The respondent also raises the issue of procedural fairness as the worker has denied any involvement with the advertisement in correspondence between the parties solicitors, and would continue to do so if called upon.

The Panel's conclusions: social and recreational activities, social functioning and employability/adaptability

63. The starting point is the correspondence between the legal representatives in April 2019 regarding the worker's involvement in the activities depicted in the advertisement. On 18 April 2019, the worker's solicitor clearly responded to a request for particulars about the matter. That response was a denial that the worker had any "prior knowledge of, or involvement with, the advertisement", and he adhered to the histories recorded by Dr Lee and Dr Vickery regarding employment.

64. It is true that the worker does not address the issue with direct evidence in his statement dated 18 March 2019. This was signed five days after the date of the dispute notice. Although that notice was addressed to the worker's solicitor by email, there is no evidence as to when it was sent. Assuming it was sent on the date of the notice (13 March 2019), the absence of evidence in the statement may, by itself, be inferred to be a tacit acceptance of the implication the advertisement contains.

65. However circumstances do not allow such an inference. The worker, via his solicitor, has explicitly denied any knowledge of or involvement in the advertisement. That being so, the advertisement is immaterial, or irrelevant to the AMS's task.

66. The appellant's submissions, in effect, suggest the AMS should have disbelieved the appellant's denial, or at the least noted it in the MAC.

67. The first option was, on the face of the material, and in consideration of the submissions made by the worker in this appeal, not open to the AMS. The second would make no difference to the AMS's conclusions at all.

68. The Panel accepts each of the respondent's submissions, although it is not necessary to do so to dispose of the appeal.

69. The details regarding the age and gender in the post are different to the worker's details, and it is insufficient to implicate the worker in any activities regarding the escort services. This is reinforced by the denial on the worker's behalf.

70. Even if the AMS (or this Panel) accepted that the worker had some involvement with the services offered in the advertisement, it was 13 months prior to the AMS's examination. Clause 1.6 of the Guidelines makes the required approach clear that: "clinical assessment of the claimant as they present on the day of assessment" is required. There is no suggestion hat the AMS has not done that. Further, there is no suggestion that the AMS has not complied with cl 1.6, by taking into account "the claimant's relevant medical history and all available relevant medical information", in his reasoning.

71. Further still, even if the AMS (or this Panel) were to disbelieve the worker's denial of any involvement with the escort service, it is accepted that there is no implication available from the post to suggest the worker was involved in anything but receiving phone calls. The appellant makes no submissions to the contrary, and is probably unable to do so because the evidence is unlikely to support any such contention. The information in the advertisement does not contradict the AMS PIRS reasoning of the worker being able to "go out for university and for errands" in Social and Recreational Activities, that "he is able to rely on friends and flat-mates" in Social Functioning, and he can "work in some type of casual employment by himself at an erratic pace" in Employability,

72. That being so, the Panel accepts that while the failure to openly consider relevant information may be an error (*Brennan*), the information must be material, such that it would, or could, affect the outcome. In this case, the Panel is not of the view that the advertisement would have any affect on an assessor's clinical judgement regarding the worker's presentation: *Golijan*.

73. Even if the information could have affected such judgement, and it is assumed that the AMS should have considered it explicitly in the MAC, the Panel would, if obliged to revoke the MAC, conclude that there are "cogent reasons to reject the (information)" *De Gelder (No 2).*

74. As the worker submits, the post does not imply that the worker has less impairment over that otherwise assessed.

75. The appeal is dismissed.

DECISION

76. For the reasons set out in this statement of reasons, the decision in this matter is that the Medical Assessment Certificate given in this matter should be confirmed.

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

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar