WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-671/19**
Appellant:	**Samir Batshon**
Respondent:	**Sydney Trains**
Date of Decision:	**30 August 2019**
Citation:	**[2019] NSWWCCMA 130**

Appeal Panel:	
Arbitrator:	**Paul Sweeney**
Approved Medical Specialist:	**Dr Julian Parmegiani**
Approved Medical Specialist:	**Dr Douglas Andrews**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 July 2019, Samir Batshon (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Michael Hong, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 12 June 2019.

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 limited to the grounds of appeal on which the appeal is made.

4. The Workers compensation medical dispute 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 dispute 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. It is accepted by the parties that the appellant suffered a primary psychological injury as a result of his employment as a construction manager with Sydney Trains (the respondent) prior to 17 December 2015. He was initially diagnosed by his treating psychiatrist, Dr Selwyn Smith, as suffering from an adjustment disorder. Dr Smith expressed the opinion that this condition was resistant to treatment and deteriorated, so that by 17 May 2018 he diagnosed a major depressive disorder. At that date, he assessed the appellant as suffering from 24% whole person impairment (WPI).

7. Dr Smith's assessment of permanent impairment is markedly different to that of Dr Stephen Allnutt, a psychiatrist who assessed the appellant on 10 November 2015, at the request of his former solicitor and of Dr Doron Samuell, a psychiatrist who provided a report to the respondent. Dr Allnutt expressed the opinion that the appellant suffered 4% WPI. He stated that this was not permanent at the time of his assessment. Dr Samuell expressed the opinion that the appellant did not suffer from a psychological condition caused by his employment. That view, of course, is inconsistent with the respondent's acceptance of injury.

8. The differing views as to the extent, if any, of permanent impairment as a result of the injury gave rise to a medical dispute as defined by s 319 of the 1998 Act. The delegate of the Registrar referred the dispute to Dr Michael Hong. He certified that the applicant suffered 8% whole person impairment as a result of injury. It is from that assessment that the appellant brings this appeal.

PRELIMINARY REVIEW

9. The panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.

10. As a result of that preliminary review, the panel determined that it was unnecessary for the worker to undergo a further medical examination. The panel was unable to establish that there was any error in the assessment or certification by the AMS, which would provide the foundation for a further medical examination.

EVIDENCE

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

Medical Assessment Certificate

12. The parts of the MAC which are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

13. Both parties made written submissions. They are not repeated in full but have been considered by the panel.

14. The appellant submitted that the AMS failed to comply with clause 11.4 of Chapter 14 of the Guidelines, which requires the impairment rating to be based upon a psychiatric diagnosis in accordance. He submitted that the AMS had failed to provide any reason for preferring the diagnosis of Adjustment Disorder over Major Depression. Further, he asserted that he failed to give reasons or specify the diagnostic criteria upon which his preferred diagnosis is based.

15. The appellant relied upon the reasoning in *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 to the effect that an AMS must provide brief reasons for his determination. The appellant continued:

> "It is submitted that as there are consequences which flow from which diagnosis is preferred it is incumbent on the AMS to provide an explanation for preferring the diagnosis of adjustment disorder".

16. The appellant does not identify what those consequences are in the circumstances of this case.

17. The second ground relied upon by the appellant is more obscure. It takes issue with the cognitive assessment of the appellant by the AMS in the MAC. The appellant states:

> "It is submitted that the AMS fell into error by carrying out these tests as pursuant to Item 11.6 of the Guidelines only appropriate psychometric testing performed by a qualified psychologist should be used in assessing the impairment rating".

18. The appellant then submitted that as he was "assessed based on an incorrect diagnosis" he should be reassessed by an AMS who is a member of the panel.

19. The respondent submitted that it was open to the AMS to conclude on the material before him that the appellant suffered from an adjustment disorder with anxiety and depressive symptoms. It noted that the AMS accepted "the differential diagnosis of major depressive disorder to be equally valid." The diagnosis was based upon a detailed psychological history, the complaints of the appellant, the findings of the AMS on physical and cognitive examination, and a consideration of other medical opinion, including the opinions of three psychiatrists.

20. The respondent referred to Chapter 14.2 of the Guidelines which requires the discussion of differential diagnoses if there is uncertainty about the exact diagnosis. It submitted that he had carried out this task and "correctly discussed the differential diagnoses and applied his opinion as to which he prefers". He had provided "ample reasoning for why he … preferred a diagnosis of 'adjustment disorder'."

21. Secondly, the respondent submitted that the conclusion of the AMS as to the appropriate diagnosis only entitled the appellant to be assessed for WPI and did not impact upon the extent of the assessment. It argued:

> "Regardless of which diagnosis is applied, it has no impact on the extent of the whole person impairment assessment.
>
> The diagnoses themselves do not attract a specific assessment of WPI. The requirement of providing a clear and justified diagnosis is to determine whether the individual is entitled to be assessed for WPI under the PIRS classifications."

22. Finally, the respondent submitted that the AMS was appropriately qualified to undertake the limited psychometric testing that he carried out on examination to assist in his assessment of the appellant's psychiatric impairment.

GUIDELINES

23. In so far as it is relevant, Chapter 11 of the Guidelines is as follows:

> "**11.4** The impairment rating must be based upon a psychiatric diagnosis (according to a recognized diagnostic system) and the report must specify the diagnostic criteria upon which the diagnosis is based. Impairment arising from any of the somatoform disorders (DSM IV TR, pp 485–511) are excluded from this chapter.

> **11.6** It is expected that the psychiatrist will provide a rationale for the rating based on the injured worker's psychiatric symptoms. The diagnosis is among the factors to be considered in assessing the severity and possible duration of the impairment, but is not the sole criterion to be used. Clinical assessment of the person may include information from the injured worker's own description of his or her functioning and limitations, and from family members and others who may have knowledge of the person. Medical reports, feedback from treating professionals and the results of standardised tests – including appropriate psychometric testing performed by a qualified clinical psychologist and work evaluations – may provide useful information to assist with the assessment. Evaluation of impairment will need to take into account variations in the level of functioning over time. Percentage impairment refers to whole person impairment (WPI)."

FINDINGS AND REASONS

24. Section 328(2) of the 1998 Act provides that an 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. This section was considered by Davies J in *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 (11 December 2013). Davies J considered that the form of the words used in s 328(2) of the 1998 Act, 'the grounds of appeal on which the appeal is made' was intended to convey that the appeal is confined to those particular demonstrable errors identified by a party in its submissions. The panel has only considered those grounds specifically raised by the appellant in his application.

25. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation. However, in *Versace v Australia Best Tyres & Auto Pty Limited* [2016] NSWSC 1540 (2 November 2016) Schmidt J, held that the section did not permit the panel to review the determination of the AMS without first identifying error.

26. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the 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 detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

27. Though the power of review is far ranging it is nonetheless confined to the matters which can be the subject of appeal. Section 327(2) of the 1998 Act restricts those matters to the matters about which the AMS certificate is binding.

28. In this matter, the Registrar has determined that he is satisfied that at least one of the grounds of appeal under section 327(3) is made out. The panel has accordingly conducted a review of the material before it and reached its own conclusions as to whether there is error in the MAC.

29. In considering the submissions of the appellant, it is necessary to bear in mind the nature of the statutory obligation of the AMS to provide reasons. It is evident from reasoning of the High Court of Australia, in *Wingfoot Australia Partners Pty Limited v Kocak 88 ALJR 52*, that it is only necessary for the MAC to explain the actual path of reasoning of the AMS in sufficient detail to enable a court or an appeal panel to determine whether there is error in its findings. In *Wingfoot,* it was said that:

> "The function of a medical panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise."

30. The reasoning in *Wingfoot* has been applied to medical assessments under the NSW Workers Compensation legislation: see, for example *El Masri v Woolworths Ltd* [2014] NSWSC 1344 (26 September 2014).

31. The panel does not accept the appellant's contention that the AMS failed to provide any reasons for preferring Adjustment Disorder over Major Depressive Disorder as the diagnosis in this case. It must be borne in mind when considering this contention that the AMS did not reject the diagnosis of Depressive Disorder. Rather, as the quotation from the MAC contained in the appellant's submissions makes clear he thought that it was an "equally valid diagnosis."

32. In attempting to establish a diagnosis the AMS took a careful history, carried out a physical and mental state examination, recorded the appellant's complaints and considered the medical evidence tendered by the parties, including the reports of three psychiatrists. On this foundation, the AMS expressed the opinion that the applicant suffered a recognisable psychiatric condition, which was best characterised as an adjustment disorder but which may also fit within the diagnostic criteria for Major Depressive Disorder.

33. To adopt the language of the High Court in *Kocak*, the "actual path" by which the AMS reached this conclusion is perfectly clear. He applied his knowledge and expertise as a psychiatrist to the information which he had obtained from the applicant and other sources and reached an opinion as to diagnosis. He expressed the opinion that the correct diagnosis sat between Adjustment Disorder and Major Depressive Disorder, although he preferred Adjustment Disorder with Depressed Mood.

34. Plainly, psychiatric diagnoses are not always capable of rigid classification. The diagnostic criteria overlap. This is the case here. Both diagnoses require the presence of significant depressive symptoms. In those circumstances, it was undoubtedly open to the AMS to reach one diagnosis but concede that another may be "equally valid".

35. Thus, the AMS has sufficiently complied with his obligation imposed by Chapter 11.42 to establish a psychiatric diagnosis. The diagnostic criteria upon which the diagnosis or diagnoses is based is set out in the body of the MAC. Without setting out all the relevant findings, which relate to the criteria of Adjustment Disorder, the AMS recorded that:

> "Mr Batshon described variable and reactive emotions with elements of being anxious, depressed and angry.
> He has reduced enjoyment and motivation.
> He has reduced concentration and memory.
> Mr Batshon has recurring suicidal thoughts and had almost attempted suicide in December 2018.
> Mr Batshon reported having disrupted and poor quality sleep.
> He reported being irritable.
> Mr Batshon described binge eating, then not eat for a few days. Overall, he estimated having gained a small amount of weight recently."

36. Further, the panel accepts the submission of the respondent that, in the circumstances of this case, the preference of the AMS for the diagnosis of Adjustment Disorder with Depressed Mood over Major Depressive Disorder has not influenced the assessment of permanent impairment. The classifications of the AMS, recorded in Table 11.8, would have been the same, irrespective of which diagnosis the AMS accepted. Placing the appellant in a particular PIRS category does not depend on the precise identification of the depressive disorder which he suffers.

37. The appellant did not specify what adverse consequences may flow from the diagnostic preference of the AMS in this case. That may be because he was unable to conceptualise such an error. Neither can the panel. Accordingly, on the assumption (which the panel does not accept) that the AMS erred in respect of diagnosis, the error has not influenced the certification in the MAC.

38. The second ground of error raised by the appellant concerns the cognitive assessment performed by the AMS as part of his physical examination of the applicant. This contention misunderstands Chapter 11.6. It does not preclude a psychiatrist from carrying out a cognitive assessment.

39. Chapter 11.6 permits the AMS to consider a wide range of standardised tests at his discretion. It does not prohibit the psychiatrist from performing tests which are relevant to his speciality. A psychiatrist may be trained to carry out psychometric testing. A psychiatrist is certainly trained to carry out basic cognitive testing. Chapter 11.6 permits the AMS to consider psychometric testing performed by a qualified psychologist. That may prelude him from relying on psychometric testing carried out by a person other than a qualified psychiatrist.

40. In assessing the worker, the AMS is entitled to employ the entire range of tests for which he has been trained. These undoubtedly include cognitive testing. The AMS did not fall into error by employing a test that is clearly relevant to his assessment.

41. For these reasons, the Appeal Panel has determined that the MAC issued on 12 June 2019 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*.

H Mistry

Heena Mistry
Dispute Services Officer
As delegate of the Registrar