WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1415/19**
Appellant:	**Robert Graham Baxter**
Respondent:	**State of New South Wales**
Date of Decision:	**14 October 2019**
Citation:	**[2019] NSWWCCMA 145**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr Julian Parmegiani**
Approved Medical Specialist:	**Professor Nicholas Glozier**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 20 June 2019 Robert Graham Baxter (Mr Baxter/the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Bradley Ng, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 24 May 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):

    - availability of additional relevant information (being additional information that was not available to, and that could not reasonably have been obtained by, the appellant before the medical assessment appealed against),
    - 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 grounds of appeal on which the appeal is made.

4. 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.

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 limited portions of the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. After completing high school Mr Baxter undertook various TAFE courses and then commenced training at the Police Academy, graduating as a police officer in mid-2000.

7. In the course of his duties as a police officer Mr Baxter was exposed to a number of stressful situations which affected his mental state leading him to seek medical assistance. Mr Baxter commenced treatment with a psychiatrist, Dr Scurrah, in January 2016. In December 2016 Mr Baxter was examined by a psychiatrist, Dr Katz at the request of the respondent. Dr Katz agreed with Dr Scurrah that Mr Baxter was unfit for duty as a police officer or other employment at that time. Dr Katz felt that Mr Baxter had not reached maximum medical improvement at that time.

8. Mr Baxter was discharged from the Police Force as medically unfit in February 2017. His last day of work on non-operational duties was about October 2016.

9. Mr Baxter's treating psychiatrist, Dr Scurrah, provided a diagnosis and assessment of whole person impairment resulting from psychiatric injury in reports dated 15 July 2018.

10. Based on Dr Scurrah's reports Mr Baxter's solicitors made a claim for lump-sum compensation in respect of psychiatric injury pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) as well as a claim pursuant to section 67 of the 1987 Act for compensation in respect of pain and suffering.

11. The extent of the claim was disputed. An Application to Resolve a Dispute was filed in the Commission and ultimately the dispute was referred, by consent, to an AMS to assess whole person impairment of psychological injury deemed to have happened on 14 December 2015.

12. The consent orders detailed the material to be supplied to the AMS and excluded certain earlier medical reports obtained by the respondent.

13. Mr Baxter was assessed by the AMS, Dr Ng, on 20 May 2019. Dr Ng assessed Mr Baxter as suffering from "Post-Traumatic Stress Disorder, chronic, Major Depressive Disorder, chronic and Alcohol Use Disorder, currently in partial remission". He assessed whole person impairment of 9% inclusive of 2% impairment added for treatment effect.

PRELIMINARY REVIEW

14. 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.

15. 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 sufficient information was available to the Panel to enable the Panel to determine the appeal by way of review of the original medical assessment in the light of the available evidence.

16. The appellant sought re-examination of Mr Baxter. However, re-examination cannot be performed to determine if a ground of appeal is made out and can only be used after error on the face of the record is established.[1] For the reasons set out below the Panel is satisfied that no appealable error has been identified.

[1] New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales [2013] NSWSC 1792 at [33].

Fresh evidence

17. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in additional to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.

18. The appellant seeks to admit the following evidence:

    (a) Statement of Rachel Louise Baxter (Mrs Baxter) dated 7 June 2019, and
    (b) report of Dr Scurrah dated 17 June 2019.

19. The appellant submits that the evidence is relevant to the issue of whether the AMS correctly recorded and/or applied the evidence relating to the behavioural consequences of psychiatric disorder and which form the basis of his assessment. The appellant submitted that "The statement and report forms the foundation of the appeal."

20. The appellant submits that the statement of Mrs Baxter and the report of the treating doctor:

    > "were not, and could not have been, reasonably available before the assessment as they only came into being as a result of the assessment by the AMS and is of such probative value that it is reasonably clear that it would change the outcome of the case (*Ross v Zurich Workers Compensation Insurance* [2002] NSWWCCPD 7)".

21. The respondent objects to the admission of the statement and report. The respondent submits that in so far as the statement of Mrs Baxter details matters that could be considered "behavioural consequences of psychiatric disorder", that information could reasonably have been obtained by the appellant before the medical assessment. The further report of Dr Scurrah does not add additional relevant information which was not available prior to the assessment but simply draws attention to the points of disagreement between the AMS and Dr Scurrah.

22. The Panel is satisfied that the statement of Mrs Baxter does not provide "additional relevant information" which was unavailable prior to the assessment and which could not have been obtained by the appellant before the medical assessment. Mrs Baxter states that she works on a part-time basis so as to be able to help Mr Baxter with management of the household. She described the limited role played by Mr Baxter in the cleaning of the household and also his clothing. She said that Mr Baxter needs urging to attend to his grooming and that he had be unable to travel overseas by himself and recent trips to Japan and Melbourne had been extremely stressful as Mr Baxter had been highly agitated. She commented on Mr Baxter's ability to concentrate and his distractibility. There is no basis demonstrated as to why this material was unavailable prior to the assessment.

23. In the report by Dr Scurrah which the applicant sought to have admitted Dr Scurrah notes that he had been asked:

    > "to provide your opinion as to whether the report [the MAC]:
    >
    > a) Applies incorrect criteria in respect of the assessment of our client's impairment, and
    >
    > b) Contains any demonstrable errors and why".

24. The report contains no additional information that was not available prior to the assessment. Dr Scurrah contrasts his own conclusions with those of the AMS and explains why he disagrees with the categorisation of the assessment of the areas of function which form the basis of the overall assessment.

25. In *State of New South Wales v Ali*[2] *(Ali)*, Harrison J said:

> [32] First, the information contained in the later surveillance reports is neither additional nor relevant as properly understood. The expression 'additional relevant information' contemplates or anticipates a qualitative addition to the information otherwise previously available. It is not concerned with the information being merely quantitatively different, in the sense that there is more of the same. That is made plain by the words in parentheses, which emphasise that the additional relevant information must also qualify as information that could not reasonably have been obtained before the medical assessment appealed against. As a matter of plain language, that does not mean or refer to something that could not have been obtained simply because it came later in time. Everything that occurs later than an earlier event is by definition additional in a temporal sense. That is obviously so in the present case, in which the so-called additional relevant information consists of the investigation reports, which uncontroversially "could not reasonably have been obtained ... before".

26. In *Lukacevic v Coates Hire Operations Pty Limited*[3] Handley AJA said:

> "[97] The threshold questions are whether the new evidence fell within s 328(3), and if so whether the Panel had a discretion to reject that evidence, and whether its exercise of that discretion was vitiated by patent legal error, or was irrational. That was how Lord Diplock characterised Wednesbury unreasonableness in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411.
>
> [98] The applicant's statement contains lengthy details of his activities and habits before and after his work injury. In so far as this adds to the history and his statement of 2 April 2008, or the histories in the medical reports before the AMS, it was available and could reasonably have been obtained before the assessment and was not admissible.
>
> [99] In so far as the statement repeats information in the earlier statement or in the medical reports it was not evidence 'in addition to ... the evidence received in relation to the medical assessment', and was not admissible."

27. As noted by the respondent, the opinion evidence of Dr Scurrah contained in the later report takes the matter no further than to re-argue the basis upon which Dr Scurrah had formed his original assessment set out in his second report dated 15 July 2018. That Dr Scurrah came to a different conclusion in July 2018 from that assessed by the AMS in May 2019 is not additional relevant evidence (as explained in *Ali*).

28. The Panel determines that the evidence should not be received on the appeal because, to the extent that the statement and the report contain evidence of facts relevant to the assessment of impairment, they are matters that were available to the appellant before the medical assessment and could have been obtained by the appellant prior to that assessment. Dr Scurrah in his report does no more than comply with the request of Mr Baxter's solicitors to provide an opinion as to the contents of the MAC report.

29. To the extent that the additional report comments upon the conclusions of the AMS, they can and will be regarded by the Panel as forming part of the submissions made on behalf of the appellant.

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[2] [2018] NSWSC 1783
[3] [2011] NSWCA 112

EVIDENCE

Documentary evidence

30. 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

31. The AMS in accordance with the Guidelines assessed Mr Baxter by reference to the criteria set out in Chapter 11 of the Guidelines. Clause 11.11 directs assessment in six areas of behavioural consequences of psychiatric disorder. Clause 11.12 provides:

> "Impairment in each area is rated using Class descriptors. Classes range from 1 to 5, in accordance with severity. The standard form must be used when scoring the PIRS. The examples of activities 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."

32. The AMS noted the history of injury and the duties undertaken by Mr Baxter during his time of service as a police officer. He noted the deterioration of Mr Baxter's mental state up to October 2015 and the physical symptoms which attended his condition.

33. The AMS noted that Mr Baxter consulted Dr Scurrah and a psychologist with regular follow-up. He noted improvement and an attempt to return to work which was unsuccessful. After ceasing work Mr Baxter was recorded as continuing to consult a psychiatrist on a regular basis. He was noted to be taking an antidepressant, Fluvoxamine which helped with his mood.

34. The AMS recorded current symptoms of irritability with low moods at time and poor motivation as well as low levels of patience and tolerance. Mr Baxter was reported as being "not happy" but enjoyed spending time with his children. The AMS noted "there were suicidal ideas but nothing serious and no serious attempts." The AMS recorded ongoing anxiety issues and concerns about physical health.

35. The AMS recorded that Mr Baxter had trouble falling asleep with nightmares about his employment most nights which would wake him.

36. The AMS recorded activity including helping the children to get ready for school in the mornings, taking his 14-year-old daughter to the bus stop and driving his 10-year-old son to school. The AMS noted that Mr Baxter's relationship with his wife was strained at times because of his irritability but there had been no periods of separation.

37. The AMS recorded that at home during weekdays Mr Baxter would do some housework and was able to cook. He noted that a cleaner came once a fortnight. Mr Baxter was noted as being able to do laundry and cleaning. The AMS recorded "He sometimes watched television or listened to music. He tried to read biographies but spent anywhere between five to thirty minutes reading, maximum." The AMS also noted that Mr Baxter was able to collect the children from school or the bus stop and would then prepare dinner.

38. Mr Baxter was able to drive himself to the examination venue and was able to shop. The AMS recorded:

> "Once every 3 to 4 weeks he would catch up with a friend for coffee…. He did admit that he was losing friends and he had become increasingly more reclusive. He did not want to hear workplace stories. Until recently he went to the gym because that had been paid for by the insurance company."

39. The AMS noted other activities including sporting commitments for the children, mowing lawns and playing baseball. He had travelled with his family to Japan in April 2019 which he found enjoyable. He also travelled to Melbourne to visit his parents.

40. The AMS assessed Mr Baxter in respect of the six areas as follows:

PIRS Category	Class	Reasons for Decision
Self-care and personal hygiene	1	Mr Baxter is able to run a household and care for his children. His wife is working full-time. He is able to attend to housework. There was no deficit on hygiene on today's mental state examination.
Social and recreational activities	2	Mr Baxter can attend sporting events by himself and plays baseball. I do note there is some reclusiveness and he does not have a full range of everyday activities. However, his able to holiday with his family. I have erred on the side of caution undersigned mild impairment.
Travel	1	No deficit was described. Mr Baxter might be avoidant of certain places, given his psychiatric problems, but is able to drive. He can travel, including interstate and overseas.
Social functioning	3	Mr Baxter still maintains a relationship with his wife and children, though it is strained, which would suggest mild impairment. Conversely his lost friendships due to his increased anxiety and withdrawness which might suggest severe impairment. I have therefore equated this to moderate impairment.
Concentration, persistence and pace	2	No deficit was seen on today's mental state examination. Mr Baxter was able to attend throughout the entire assessment. He can focus for relatively good periods of time, as noted in the description of his functioning, up to half an hour at times reading and was able to watch television.
Employability	4	Mr Baxter certainly cannot return as a police officer which merely qualifies him for moderate impairment. However, given his anxiety and irritability, and not be confident of him working in regular employment. This would be consistent with severe impairment.

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41. The AMS noted that Dr Scurrah had diagnosed “chronic Post-Traumatic Stress Disorder, chronic Depressive Disorder and excessive alcohol intake.” He noted that Dr Scurrah had assessed Mr Baxter:

    Self-Care and Personal Hygiene – Class 2

    Social and Recreational Activities – Class 3

    Travel – Class 2

    Social Functioning – Class 3

    Concentration Persistence and Pace – Class 3

    Employability – Class 5.

SUBMISSIONS

42. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.

43. In summary, the appellant submits that, in respect of five of the areas, the AMS had incorrectly assessed Mr Baxter on the basis of the evidence. The appellant addressed each of the relevant areas of function asserting in each case that the evidence supported a conclusion of a higher level of impairment than that assessed by the AMS. It was submitted that the additional evidence sought to be admitted would give rise to a higher assessment of impairment.

44. The appellant also submitted that the AMS had failed to give reasons as to why his opinion differed from that of other medical opinions and in particular that of Dr Scurrah.

45. In reply, the respondent submitted that the statement of Rhonda Baxter and the report of Dr Scurrah were not "fresh evidence" as considered by Deputy Pres Fleming in Ross v *Zurich Workers Compensation Insurance*[4]. The respondent submitted that the statement and additional report were a “competing assertion” insufficient to demonstrate error in a MAC relying on *Pitsonis v Registrar of the Workers Compensation Commission and Another*[5]. The respondent submitted that the AMS was not obliged to explain why he had reached a different view to that contained in the material before him and no error was based on the failure to do that.

46. The respondent submitted that it was not open to the Panel to carry out an assessment of the appellant in order to determine whether the AMS had fallen into error. The appropriate course was to review the evidence to determine whether it was open to the AMS to arrive at the conclusion expressed in the MAC. The AMS was entitled to rely on his own clinical assessment in the light of the material supplied. The respondent addressed each of the disputed areas of function submitting that, in each case, the assessment of the AMS was open to him in the exercise of his clinical judgement.

FINDINGS AND REASONS

47. The procedures on appeal are contained in section 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.

[4] [2002] NSWWCCPD seven
[5] [2007] NSWSC 50

48. In *Campbelltown City Council v Vegan*[6] 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.

49. For the reasons set out above under the heading 'Fresh Evidence', the ground of appeal pursuant to section 327(b) of the 1998 Act cannot succeed. The additional material has not been admitted into evidence and there is no "additional relevant information" which would persuade the Panel that a fresh assessment was required. As noted above the material, so far as it contains evidence of facts relevant to the assessment of impairment, was available to the appellant and could reasonably have been obtained prior to the assessment. The grounds of assessment are clearly set out in the Guidelines and there is no reason why the evidence relevant to the assessment should not have been provided prior to that assessment.

50. To the extent that the additional material expresses opinions based on consideration of the MAC, such evidence would not be admitted by the Panel in the exercise of its discretion, even if admissible under section 328(3) of the 1998 Act. The principle of finality in litigation is an important one and the admission of such evidence would require the respondent to consider whether further evidence was required to meet the additional opinion and this procedure could not easily be accommodated within the framework of appeals pursuant to section 327.

51. The appellant presents his submissions with respect to the grounds of incorrect criteria and demonstrable error together by reference to each of the areas of activity referred to in the Guidelines. It is convenient to follow that course rather than to consider the issues of demonstrable error and incorrect criteria separately although they are separate grounds of appeal.

52. In *Glen William Parker v Select Civil Pty Limited*[7] (*Parker*) Harrison AsJ said.

> "[33] In terms of what is to be determined as "incorrect criteria" the Minister for Police, who moved the second reading of the Bill (NSW Legislative Assembly, Hansard, 19 June 2001, p 14772) indicated that:
>
> > 'It should also be noted that the appeal on the grounds of incorrect criteria does not allow appeals to challenge or overturn the guidelines. It is designed to cover circumstances where the guides themselves have been incorrectly applied'.
>
> [34] In *Campbelltown City Council v Vegan* [2004] NSWSC 1129, Wood CJ at CL adopted the above passage. At [59] his Honour stated:
>
> > 'Although the highlighted passage is somewhat oblique, it tends to suggest that the "criteria" upon which assessment is to be based are to be found in any relevant guides, including guides issued by Workcover which have been issued for the assessment of impairment and that appeal lies where they have been incorrectly applied.'

[6] [2006] NSWCA 284
[7] [2018] NSWSC 140

[35] As to what is meant by 'demonstrable error' has been discussed in cases such as *Merza v Registrar of the Workers Compensation Commission*[8], where Hoeben J said at [39]:

> '39 I do not propose to, nor is it necessary, that I define what is "demonstrable error" for the purposes of s327 of the Act in an exhaustive way. It is sufficient for the purposes of this matter that I conclude that "demonstrable error" is an error which is readily apparent from an examination of the medical assessment certificate and the document referring the matter to the AMS for assessment.'"

53. It is appropriate to review the evidence and assessment in respect of each area of function, bearing in mind that Harrison AsJ in *Parker* went on to say (at [65]-[66]):

> "[65] In *Ferguson v State of New South Wales* [2017] NSWSC 887 (*Ferguson*) at [23], Campbell J cited with approval *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36 ('Wark'), where it is stated at [33]:
>
> > "...the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face. ..."
>
> [66] In relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense. (*Ferguson* [24])". (Her Honour went on to discuss the Appeal Panels findings and reasoning).

Self-Care and Personal Hygiene

54. The applicant submitted that the AMS had fallen into demonstrable error in concluding that Mr Baxter was "able to run a household and care for his children. His wife is working full-time. He is able to attend a housework. There was no deficit on hygiene on today's mental state examination."

55. The appellant's statement provides little assistance with regard to the issue of self-care and personal hygiene. His only comment is "I don't care as much about my appearance." Dr Scurrah reported in July 2018 "He will present unshaven. In the context of his mood symptoms he will skip meals and showers" and "He generally presents unshaven, dressed in clean, casual clothes." Neither of Dr Scurrah's reports of 15 July 2018 deal with his role as parent or homemaker and the AMS was entitled to rely on the history given to him at the time of his examination.

56. The appellant submits that the conclusion of the AMS with respect to the area of self-care and personal hygiene; "There was no deficit on hygiene on **today's** mental state examination" [emphasis as in submission] did not appropriately address the descriptor provided in Table 11.1 of the Guidelines for Class 2: "although may look unkempt **occasionally**; sometimes misses a meal or relies on takeaway food." [emphasis as in submission].

57. It was submitted that the AMS "doesn't appear to have made any enquiries about how he presents on other days in terms of his appearance. He focuses solely on the mental state examination and incorrectly applies his own history to the PIRS scale".

[8] [2006] NSWSC 939

58. The Guidelines note that the examples of activities provided are “examples only” and the assessing psychiatrist has to take account of the whole of the evidence. The example provided for Class 2 assessment is “Mild impairment: able to live independently; looks after self adequately, although may look unkempt occasionally; sometimes misses a meal or relies on takeaway food.”

59. The evidence recorded by the AMS establishes that Mr Baxter cooks for his family and does some housework. There is no indication that he could not live independently without regular support or that he needs prompting to wear clean clothes. The Panel is satisfied that the AMS has made an assessment on the whole of the evidence available to him. The only suggestion that Mr Baxter occasionally is unkempt is found in the report that he presents unshaven to his treating psychiatrist. This may be a matter that goes to motivation but, in the opinion of the Panel, it does not go to hygiene and overall is of little significance in assessing self-care.

60. Based on that history recorded by the AMS on examination in May 2019 read in the light of the other available evidence, it was open to the AMS to come to the conclusion that, with regard to self-care and personal hygiene, Mr Baxter suffered a minor deficit compatible with normal variation in the general population.

61. There is no demonstrable error nor adoption of incorrect criteria in the opinion of the Panel. The criteria applied by the AMS has correctly identified as that set out in Chapter 11 of the guidelines and in the light of the limited evidence as to this area of function, it was open to the AMS to rely on the history provided to him on examination in arriving at his assessment of Class 1.

Social and Recreational Activities

62. The Guidelines provide descriptors for assessment within Class 1 (no deficit, or minor deficit attributable to normal variation in the general population), Class 2 (Mild impairment) and Class 3 (Moderate impairment):

> “Class 1: No deficit: regularly participates in social activities that are age, sex and culturally appropriate. May belong to clubs or associations and is actively involved with these.
>
> “Class 2 Mild impairment: occasionally goes out to such events. E.g. without needing a support person, but does not become actively involved (e.g. dancing, cheering favourite team).
>
> Class 3 Moderate impairment: rarely goes out to such events, and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn.”

63. The appellant’s submissions referred to the statement by Mrs Baxter which was not admitted into evidence which provided a comment with regard to Mr Baxter’s emotional state during the holiday in Japan. That comment would not alter the fact that Mr Baxter has been able to travel overseas with his family.

64. The appellant also noted the comment by Dr Scurrah in his longer report dated 15 July 2018 which noted that Mr Baxter would not attend a social occasion unless prompted and accompanied by his wife and exhibiting marked irritability/anxiety in social situations. The doctor also noted that Mr Baxter had stopped mountain bike riding and no longer had an interest in model cars.

65. The AMS recorded a history of family interaction on weekends with Mr Baxter attending to "a variety of errands and sport commitments". He noted that Mr Baxter reported that, after taking the children to various activities, Mr Baxter would have coffee or breakfast with his wife. He noted that Mr Baxter was able to drive by himself and was able to meet up with friends for coffee.

66. The AMS noted that Mr Baxter belong to a baseball club and played baseball having attended three out of every four games. The AMS recorded:

> "Mr Baxter can attend sporting events by himself and plays baseball. I do note there is some reclusiveness and he does not have a full range of everyday activities. However, he is able to holiday with his family. I have erred on the side of caution and assigned mild impairment."

67. Mr Baxter's statement notes depressed mood, anxiety, particularly around people, daytime tiredness, irritability and heightened anger as well as "socially withdrawn".

68. Dr Scurrah in his report dated 15 July 2018 recorded "Mr Baxter's overall enjoyment of life is reduced, he rarely undertakes leisure activities and his sporting pursuits are intermittent." The appellant submits that the AMS said that he had "erred on the side of caution and assigned mild impairment" which "suggests that he has fallen into demonstrable error".

69. The Panel does not accept that submission. Accepting that Mr Baxter is able to go out to meet with friends, and participate regularly in sporting events, it was open to the AMS to assess Mr Baxter as within Class 2 in respect of social and recreational activities. The AMS' suggestion that he "erred on the side of caution" in fact implies he considered the alternative assessment was of a Class 1 "No impairment". This common phrase is not an admission that he has actually made an "error".

Travel

70. The appellant noted the following descriptors from Table 11.3 of the Guidelines:

> "Class 1: No deficit, or minor deficit attributable to normal variation in the general population; can travel to new environments without supervision.
>
> Class 2: Mild impairment: can travel without support person, but only in a familiar area such as local shops, visiting a neighbour."

71. The appellant noted the provisions of AMA 5 at paragraph 14.3 e with regard to the meaning of the words "none" and "mild". However, Chapter 11 of the Guidelines provides "AMA 5 Chapter 14 is excluded and replaced by this chapter." It is not appropriate to have regard to the suggested paragraph of AMA 5.

72. The AMS recorded "No deficit was described. Mr Baxter might be avoidant of certain places, given his psychiatric problems, but he is able to drive. He can travel, including interstate and overseas."

73. The appellant referred to the comment by Dr Scurrah:

> "Dr Ng has commented that Mr Baxter does avoid driving to certain places. Correctly Dr Ng has advised of a problem in travel. Consequently, Dr Ng cannot fulfil the criteria for Class 1 which is 'no deficit or minor deficit attributable to normal variation in the general population'".

74. Dr Scurrah went on to state what he believed to be the "consensus amongst examiners" and his own opinion as to the appropriate class. The Panel accepts the first two sentences quoted above as submissions in support of the appeal. Dr Scurrah sets out his reasons for assigning Class 2 to 'travel' noting; "He will avoid the sites that exacerbate his post-traumatic stress disorder. He will still drive on his own."

75. The AMS has accepted, on the basis of history obtained, that Mr Baxter can travel independently by vehicle and can travel interstate and overseas. The AMS accepted that Mr Baxter was avoidant of certain places but the Panel does not accept that that restriction alone would prevent assessment within Class 1, as this minor deficit does not limit him in his day-to-day life. Mr Baxter drives to take his son to school, for shopping and social outings as well as undertaking interstate and overseas travel. He had been attending a gym. Assessment within Class 1 was open to the AMS on the evidence.

76. No demonstrable error or adoption of incorrect criteria is established in respect of this area of function.

Social Functioning (Relationships)

77. The AMS assessed Mr Baxter as having a moderate impairment (Class 3) and the appellant did not dispute that assessment.

Concentration, Persistence and Pace

78. The appellant noted the following descriptors contained in the Guidelines (Table 11.5):

> "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 a period 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 (e.g. operating manuals, building plans), make significant repairs to motor vehicle, type long documents, follow a pattern for making clothes, tapestry or knitting."

79. The appellant again referred to paragraph 14.3 c of AMA 5 which, for reasons noted above, do not assist in the assessment which is to be undertaken pursuant to Chapter 11 of the Guidelines.

80. The AMS assessed Mr Baxter as falling within Class 2. He recorded:

> "No deficit was seen on today's mental state examination. Mr Baxter was able to attend throughout the entire assessment. He can focus for relatively good periods of time, as noted in the description of his functioning, up to half an hour at times reading and was able to watch television."

81. Dr Scurrah in his assessment of the areas of function recorded "in the context of his mood symptoms, he will now infrequently read. He will struggle to complete reading a newspaper article" and assessed Mr Baxter as falling within Class 3.

82. Mr Baxter in his statement noted impaired concentration but did not quantify this or provide a comparison with his pre-injury functioning.

83. The appellant referred to comments by Dr Scurrah in his report dated 17 June 2019 which seek to raise a factual dispute as to the level of Mr Baxter's ability to read. That evidence has not been admitted and does not constitute a submission.

84. The comments of Justice Campbell in *Ferguson* noted above as to the importance of clinical observation are taken into account. Based on the history recorded by the AMS, which is not contradicted by any of the evidence that was available to him in the material supplied, it was open to the AMS to assess Mr Baxter as falling within Class 2 in respect of the area of concentration, persistence and pace.

85. No error or adoption of incorrect criteria has been made out in respect of this area of function.

Employability.

86. The appellant noted the following descriptors from Table 11.6 of the Guidelines:

> "Class 4: Severe impairment: cannot work more than one or two days at a time, less than 20 hours per fortnight. Pace is reduced, attendance is erratic.
>
> Class 5: Totally impaired. Cannot work at all."

87. Dr Scurrah in his assessment placed Mr Baxter within Class 5, recording:

> "In the context of his broad mood symptoms and in particular his irritability, sleep disturbances, impaired concentration, anxiety and lowered mood, he is not able to return to work as a New South Wales Police Officer. I doubt he would be able to obtain and maintain open market employment on a part-time or full-time basis."

88. The appellant noted the comments of Dr Scurrah in his report dated 17 June 2019 which amount to a submission that the facts accepted by the AMS should place Mr Baxter within Class 5 in respect of employability.

89. The respondent submits that there is no evidence that Mr Baxter is wholly unable to work and accordingly was suitably assessed as falling within Class 4.

90. The evidence of capacity to function noted by the AMS includes the preparation of meals for Mr Baxter's family, mowing the lawn and participating in sport. That evidence does not suggest that it would not be possible for Mr Baxter from time to time to apply his physical capacity to simple manual tasks in return for payment although not on a regular or full-time basis.

91. The Panel is satisfied that it was open to the AMS to assess Mr Baxter as falling within Class 4 given the evidence accepted by the AMS as to his ability to function in other areas of his life.

92. No demonstrable error or adoption of incorrect criteria is established in respect of this area of function.

Further Grounds.

93. The appellant submitted that the AMS had failed to give reasons as to why he disagreed with the opinion of Dr Scurrah expressed in Dr Scurrah's reports of 15 July 2018.

94. Although the AMS does not explicitly set out his reasons it is clear that the AMS was reliant upon the history that he obtained in May 2019 upon his examination of Mr Baxter and, on the basis of that history and his examination he came to a view that the appropriate assessment following that examination differed from that of Dr Scurrah taken in July 2018.

95. The AMS was entitled to rely upon his own examination and the history he obtained. In *State of New South Wales (NSW Department of Education) v Kaur*[9] Campbell J said at [25]:

> "My reasons for concluding that the Approved Medical Specialist did not fall into the error of law in this regard are slightly different to those expressed by the Panel. In *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; 252 CLR 480, the High Court of Australia dealt with the nature of the jurisdiction exercised by a medical panel under cognate Victorian legislation. The legislation is not entirely the same but it is broadly similar in purpose. Allowing for some differences, the High Court said at page 498 [47]:
>
> > 'The material supplied to a medical panel may include the opinions of other medical practitioners, and submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed in those opinions. The Medical Panel may choose in a particular case to place weight on the medical opinion supplied to it in forming and giving its own opinion. It goes too far, however, to conceive of the functions of the panel as being either to decide a dispute or to make up its mind by reference to completing contentions or competing medical opinions. The function of a medical panel is neither arbitral or 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 perform and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.'
>
> [26] Not all of this, as I have said, is apposite in the context of the New South Wales legislation. In particular it is obvious that approved medical specialists are required to decide disputes referred to them by the process of medical assessment. Even so, it is not necessary that approved medical specialists should sit as decision makers choosing between the competing medical opinions put forward by the parties. Essentially, the function is the same as that described by the High Court in Wingfoot Australia. That is to say, their function is in every case to form and give his or her own opinion on the medical question referred by applying his or her own medical experience and his or her own medical expertise. It is sufficient, as their Honours pointed out at [55], that:
>
> > 'The statement of reasons... explain the actual path of reasoning in sufficient detail to enable the Court to see whether the opinion does or does not involve any error of law.'
>
> [27] Bearing that requirement in mind, the Medical Appeal Panel were correct to decide that the Approved Medical Specialist's statement of his reasons for the certificate he provided disclosed no error of fact or of law."

96. The "medical panel" referred to in the extract from the High Court's judgment in *Wingfoot* performs more or less the same function as an AMS in this State. The Panel accepts that the AMS, in assessing Mr Baxter, was giving his opinion on the medical question referred to him by applying his own medical experience and medical expertise. The Panel does not accept that the lack of express reasons for arriving at a different conclusion to Dr Scurrah constitutes demonstrable error or adoption of incorrect criteria.

[9] [2016] NSWSC 346

97. The appellant submitted that the AMS had fallen into error in diagnosing "alcohol use, currently in partial remission". The appellant submitted:

> "The AMS states that the appellant is drinking 3-4 vodkas or beers per night. Accordingly, the appellant is not abstaining from alcohol and is not in remission. Furthermore, the AMS does not quantify the size (standard drink or otherwise) of the vodka or beers Mr Baxter is consuming each night."

98. Dr Scurrah noted:

> "Alcohol intake has varied with time. There have been periods of zero alcohol intake, other periods of excess intake on an intermittent basis, and other periods of excessive alcohol intake on a daily basis. Intermittent intake of excess alcohol constitutes Alcohol Abuse and in the past, reached a level of excess alcohol intake on a daily basis which constituted Alcohol Dependence. It is currently infrequent and constitutes Alcohol Abuse."

99. The AMS was informed that by the end of 2015 Mr Baxter was consuming six to eight beers each evening whereas he was currently recorded as drinking three to four vodkas or beers per night. Dr Scurrah noted that the abuse of alcohol was intermittent with periods of alcohol dependency. Given the decrease in consumption from six to eight beers per night to three to four vodkas or beers it was open to the AMS to conclude that alcohol abuse was currently in partial remission.

100. Whether that description be accurate or not the Panel is satisfied that it does not bear upon the ultimate assessment of impairment. Neither travel, social and recreational activities or social functioning are said to be affected by alcohol.

101. The Panel does not accept that the description of Mr Baxter as suffering alcohol abuse "in partial remission" represents demonstrable error or adoption of incorrect criteria.

102. The appellant submits that the AMS fell into error in stating that Mr Baxter had "suicidal ideas but nothing serious." The appellant submitted that "any suicidal ideation is serious and should not be discounted as anything otherwise".

103. The significance of this submission is unclear. It does not bear upon the assessment in accordance with the Guidelines. The comment of the AMS that there was nothing "serious" about suicidal thoughts on the part of Mr Baxter is borne out by the report of Dr Scurrah who noted "There have been periods of suicidal ideation consisting of ambivalence for life without suicidal plan/attempts." No hospitalisation or increase in medication appears to have followed and the treating psychiatrist appears to have treated it simply as a feature of Mr Baxter's presentation.

104. The appellant does not submit that the view of the AMS in this regard has impacted in any way upon the assessment. The Panel does not regard this as demonstrable error or the application of inappropriate criteria.

105. The appellant further submits:

> "It is clear that the AMS failed to consider all of the relevant evidence that was admitted into evidence in the proceedings that was relevant to the outcome of the assessment. The failure to consider all relevant evidence has resulted in a practical injustice to the appellant and undermines integrity of the assessment. It is admitted that the AMS has fallen into appealable error."

106. The allegation of "failure to consider" was considered by the Court of Appeal in *Allianz Australia Insurance Limited v Cervantes*[10] in the context of a case concerning damages for personal injury arising out of the motor accident. Basten JA (with whom McColl and McFarlane JJA agreed) said:

> "[15] Because the precise nature of the ground was not adequately spelled out, the submissions tended to elide a number of key concepts. First, to describe evidence as 'relevant' to the case of one party is not to identify a 'relevant consideration' for judicial review purposes. All evidence is (or should be) 'relevant' in the broad sense identified in s 55 of the Evidence Act 1995 (NSW), namely that, if accepted, it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue. (It is of no consequence for present purposes that the Evidence Act did not apply to the assessment in its own terms and was expressly not adopted: Motor Accident Authority of NSW Claims Assessment Guidelines, as amended on 1 October 2009, ('the Guidelines') par 16.1.) The reference to a 'relevant consideration' in judicial review is a reference to a factor which, by law, the decision-maker is bound to take into account: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 39 (Mason J). This ground required that the appellant identify the legal obligation on which it relied to identify what were mandatory factors to be taken into account for the purposes of the assessment.
>
> [16] Secondly, the obligation is, as stated in Peko-Wallsend, to take a consideration 'into account'. How it is to be taken into account and what weight it is to be accorded in all the circumstances are matters within the authority of the decision-maker. Thus, assuming for present purposes that the assessor was bound to take into account the particular statement set out above, he could do so by dismissing it, by giving it little weight, or by giving it decisive weight.
>
> [17] Thirdly, the appellant needed to establish on the balance of probabilities that the assessor did not take the identified material into account."

107. No particular piece of the evidence is pointed to. The AMS based his assessment upon "the assessment history, the clinical examination and perusal of all documents submitted by parties". The AMS took into account the reports of Dr Scurrah and Dr Katz. The Panel is unable to identify any relevant aspect of the evidence not considered by the AMS.

108. No demonstrable error is established by way of a failure to consider all the evidence.

109. The Panel is satisfied overall upon review of the evidence that the MAC does not disclose demonstrable error nor the adoption of incorrect criteria and the second and third grounds of appeal must also fail.

110. For these reasons, the Appeal Panel has determined that the MAC issued on 24 May 2019 should be confirmed.

[10] [2012] NSWCA 244 at [15] – [17]

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.

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar