WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4011/19**
Appellant:	**Broadspectrum (Australia) Pty Ltd**
Respondent:	**Paul Hubbard**
Date of Decision:	**13 March 2019**
Citation:	**[2020] NSWWCCMA 52**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr Lana Kossoff**
Approved Medical Specialist:	**Dr Patrick Morris**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 January 2020, Broadspectrum (Australia) Pty Ltd 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 26 November 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 but limited to the ground(s) 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).

PRELIMINARY REVIEW

6. The Appeal 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.

7. 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 none was requested, and we consider that we have sufficient evidence before us to enable us to determine this appeal.

EVIDENCE

Documentary evidence

8. 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.

SUBMISSIONS

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

10. In summary, the appellant submits that the AMS erred in two respects, namely,

    (a) his assessments with respect to a number of PIRS categories, namely self-care and personal hygiene, travel, social and recreational activities, social functioning and employability, and

    (b) failed to take account or adequately take into account evidence contained in an Application to Admit Late Documents (ATALD) filed by the employer on 20 September 2019 and failed to refer to such evidence in his MAC.

11. In reply, the respondent submits that no errors were made.

FINDINGS AND REASONS

12. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment but the review is limited to the grounds of appeal on which the appeal is made.

13. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

14. The respondent was referred to the AMS for assessment of whole person impairment (WPI) in respect of a primary psychological injury resulting from a deemed date of injury of 25 August 2017.

15. The AMS obtained a detailed history of various events leading up to his ceasing work, noted in paragraph 4 of the MAC.

16. He continued:

> "At the time he stopped work, Mr Hubbard recalled feeling very suicidal and not well. This had been going on for months. At home he started to have pictures in his head about throwing himself off a balcony at work. He then became very fearful of putting himself at heights. He was worried that he might actually do that, given that he had the image in his head. He had middle [sic] insomnia. He woke up with thoughts of suicide. He had pictures of jumping off the balcony. He had dreams about his bosses putting him in a box. He felt worthless… This was despite him putting in quite a lot of effort. He started to experience somatic symptoms such as tunnel vision. He had tachycardia and possible dissociative symptoms. He denied any destructive behaviour such as alcohol or drug mis-use, gambling of violence. There were no other work or personal issues.

After ceasing work, Mr Hubbard saw a general practitioner and psychologist. He saw a psychiatrist for approximately seven sessions until his employment termination in June 2018. He was on Sertraline, 50mg, for one year. He came off this as he was starting to feel better. He had not re-started an antidepressant since. He had seen a psychologist for twenty sessions until about November 2018. He could no longer afford to see her now because of the cost. The sessions were terminated when his employment was terminated with Broadspectrum in June 2018. He continued to see his general practitioner every two to three months.

Initially, Mr Hubbard stated that there was some positivity and optimism. He thought he could see some light and get through this problem. He stated that his employer gave him words of support and proposed part-time work in May 2018. As soon as Mr Hubbard was able to return to some work, he was then told that there was no suitable work for him and he was terminated. This set him back into a deep depression and he then had more suicidal thoughts.

Mr Hubbard started work again in November 2018. He was working for a previous employer before Broadspectrum, a residential building company. He was now working for two building companies on a casual [basis]. He was performing basic labouring including concreting, installing heavy doors, skirting, gyp-rocking and plasterboard fit-out. He was also performing manual labour such as digging. He could not tolerate heights because of his ongoing thoughts of death and throwing himself off heights. He was not allowed to use knives because he had thoughts of cutting his wrists. He denied any previous obsessive, compulsive symptoms or such imagery.

Mr Hubbard noted that his work was erratic. His attendance at work depended on how he felt. He had a lot of support from his employers who were friends. He was a subcontractor with his own ABN. He could work anywhere from zero to forty hours per week, but usually only worked twenty hours per week. How many hours he worked depended on whether or not he had good days or bad days. For example, over the last four weeks he had worked approximately eighty to ninety hours in total and had worked every week, but had Mondays and Fridays off."

17. Present symptoms were described as follows:

"Mr Hubbard continued to experience intrusive images of death, such as cutting himself with a knife or throwing himself off a height. Hence, he avoided those situations. They were quite vivid and weird. Seeing the words death or suicide or being exposed to such a topic made him agitated. There had been no actual attempts at suicide. There had been one incident of work confrontation at his most recent job. A work colleague shouted and became agitated and there was the beginning of a confrontation with him…Mr Hubbard admitted that he had thoughts or fantasies of revenge and retaliation, but had not acted on it...

Mr Hubbard was highly avoidant of friends… He had withdrawn from friends because he was anxious and 'I have no confidence.' He was low in mood. Mr Hubbard noted that his family knew he was struggling. His parents and family in the United Kingdom called him every week. They were supporting him financially. His mother had asked if he would consider returning to the U.K., but he stated, 'I need to deal with this.'

Mr Hubbard reported poor concentration and once drove through a red light. He could drive for short distances, about six kilometres. If the worksite was nearby, he could drive himself. If it was a longer distance, someone else would pick him up. He struggled to maintain focus at work. He stated that he looked forward to going back to bed or to the sofa at home.

In terms of physical symptoms, Mr Hubbard ate a lot of take-away meals, not going to the gym and not doing any cooking. Hence, he had gained a lot of weight. Mr Hubbard had good nights of sleep. He went to bed early, at 7pm. He had used Valium or sleeping tablets and woke up at 5a.m. On bad days he would have marked primary insomnia. He had thoughts of death. You might only obtain two hours of sleep per night with prominent middle insomnia. He had dreams or bad images twice a week."

18. As regards present treatment, the AMS said:

> "Mr Hubbard was not seeing any psychiatrist or psychologist at the moment, stating he could not afford to do so. He sporadically saw his general practitioner. Valium or benzodiazepines were sent over from the United Kingdom and hence he had no active treatment. All mental health treatment was suspended when he was terminated from Broadspectrum. He was still very keen for psychiatric and psychological treatment."

19. The AMS then turned to social activities and ADL's stating:

> "Mr Hubbard was living by himself. It was a rental property and he had been living there for just over a year. Mr Hubbard indicated that he preferred to be alone. He might shower two to three times per week. He did not cook often. He would cook simple meals. The last time he cooked was three weeks ago. He relied on Thai take-away or pizza. Mr Hubbard only ventured outside his home to go to work. He might go for a walk with his friend when he visited. He might watch soccer on television. He had not been to a league game live in years. He described very few other pleasurable activities.
>
> Mr Hubbard avoided public transportation. There had been no overseas travel or interstate travel. He had cancelled an Ashes trip to Perth because of how he was feeling. His cousin gave him a lift into the city for this assessment. It took twenty minutes by car. There were no problems with that.
>
> Mr Hubbard had no family in Australia, apart from one cousin. He saw his cousin once a month. He still had ongoing contact with family in the United Kingdom. He did have a partner since 2013, but they separated after the work issues began. Mr Hubbard admitted that she was supportive, but it was 'emotionally killing her'. Therefore he broke it off. They were occasionally still in touch and might see each other once a month. He had one friend who phoned weekly and might visit once every three weeks. Otherwise he had no other close friends and most of Mr Hubbard's previous friends were from his workplace."

20. On examination, the AMS said:

> "Mr Hubbard presented as a middle aged man in clear consciousness. He was casually dressed with reasonable grooming and hygiene. He was able to give a fair account of himself, but really struggled with dates and sequence of events at times. There were some aspects of his history that he could not recall. His mood was depressed and anxious and his affect was congruent with his mood. There was no formal thought disorder or evidence of psychosis. There were no delusions or hallucinations. There were ongoing visual obsessions. They were intrusive and unwanted. Mr Hubbard appreciated that they were undesired, but nevertheless they altered his behaviour by avoiding certain things such as knives or heights. He himself had no strong suicidal intent. He experienced violent fantasies, but no violent intent. His cognition appeared quite hampered at times, especially with regard to recall and word finding. His insight was fair and his judgment was reasonable."

21. The AMS diagnosed "Major Depressive Episode, chronic, moderate to severe."

22. He added:

> "There was a consistency of presentation with regards to history and mental state examination today. There appears to be consistency over multiple reports. Mr Hubbard has presented with depressive and anxiety symptoms. There was a previous diagnosis of Chronic Adjustment Disorder. I have revised that to a Major Depressive Episode and I note that Mr Hubbard presents with low mood, anhedonia, intrusive thoughts, feelings of worthlessness and low self- esteem, sleep disturbance and occasional suicidal ideas. This presentation qualifies for a revised diagnosis according to DSM IV/V criteria of a Major Depressive Episode."

23. When asked the question: "Have all body parts/systems stabilized/reached maximum medical improvement?" the AMS said:

> "Mr Hubbard is under treated. I do appreciate that he cannot afford treatment given that he claims Broadspectrum are no longer paying for psychiatric or psychologist visits. Therefore, it is difficult to envisage this situation improving, given his circumstances. It has also now been more than two years since he ceased work. In my opinion, maximum medical improvement has been reached. This is certainly not ideal but given his lack of resources and access to health care, it is difficult to envision Mr Hubbard's mental state improving."

24. The AMS assessed 19% WPI. His reasons were as follows:

> "Mr Hubbard had no pre-existing psychiatric injury, but developed significant depressive and anxiety symptoms in the context of workplace difficulties. He had a deteriorating relationship with certain managers who were abusive. He was overwhelmed at work. He stopped work because of stress, anxiety and depressive symptoms. He may have had some treatment with some improvement, but when his employment was terminated, his mental state deteriorated again. Unfortunately he has not received a lot of treatment, but does not have access to treatment. He continues to present with significant depressive and anxiety symptoms and has now reached maximum medical improvement."

25. The AMS then commented upon other medical opinions as follows:

> "Report by Dr Ben Teoh, Consultant Psychiatrist, dated 20 January 2019. The diagnosis was Chronic Adjustment Disorder with depressed mood. The Whole Person Impairment was calculated at 15%.
>
> Report by Dr Phillip Brown, Consultant Psychiatrist, dated 4 June 2019. It was noted that Dr Brown had previously seen Mr Hubbard for two assessments. The diagnosis was an Adjustment Disorder of moderate severity. The Whole Person Impairment was calculated at 4%.
>
> The diagnosis was not in doubt, but the degree of Whole Person Impairment is, as noted in the contrasting reports. I have based my calculations on the history and presentation of Mr Hubbard today."

26. Dealing firstly with the category of 'self-care and personal hygiene' the AMS rated the respondent as a class 2, stating:

> "Mr Hubbard lives alone and is able to care for himself to some degree, but is highly reliant on take-away meals. He is poor with self-care. This qualifies as mild impairment."

27. The descriptor for such a rating is: ""Mild impairment: able to live independently; looks after self adequately, although may look unkempt occasionally, sometimes misses a meal or relies on take-away food".

28. The appellant submits that the respondent should have been rated a class 1 for the following reasons:

    (a) the AMS noted that the worker presented at the examination “casually dressed with reasonable grooming and hygiene”. The AMS did not state that the worker required prompts to shower or is at times unkempt;

    (b) in his statement of 7 August 2019 the Worker makes no reference to difficulty with self-care and hygiene;

    (c) there is no suggestion that the worker is incapable of cooking for himself as a result of a psychiatric condition;

    (d) the worker was attending work so it would be reasonable to conclude that he is exercising self-care and hygiene when at work, and

    (e) both Dr Teoh and Dr Brown assessed the worker as a class 1.

29. The appellant’s submissions on this issue we consider, as does the respondent, a degree of “cherry picking” of the evidence. The AMS in our view carefully considered the respondent’s presentation at the time of his assessment, and his rating is entirely consistent with that presentation.

30. It must be remembered that the PIRS ratings are descriptors only and it is the task of the assessor to make a clinical assessment of the claimant as they present on the day of the assessment (Chapter 1.6 of the Guides).

31. In any event, the AMS ascribed mild impairment consistent with the respondent’s ability to live independently and adequately look after himself.

32. An AMS is not bound by the assessments of other medical examiners and is required to make an assessment on the day of the examination.

33. We also observe that the AMS pointed out on a number of occasions the lack of any effective psychiatric treatment of Mr Hubbard which in our view is a factor to be taken into consideration when considering the assessments the AMS made at the time of his examination.

34. For these reasons we are not persuaded that the AMS erred in his assessment in this category.

35. Turning now to the assessment in respect of travel, the appellant submits that the AMS erred in rating the respondent as class 2.

36. The PIRS descriptor for this category is: “Mild impairment: can travel without support person, but only in a familiar area such as local shops, visiting a neighbour”.

37. The AMS assessed a class 2, stating: “Mr Hubbard is able to drive short distances before losing concentration. Sometimes he is reliant on others for travel. He has become reclusive but is able to visit the local shops. This qualifies as mild impairment.”

38. The appellant submits that a class 1 rating is appropriate for the following reasons:

    (a) in his statement of 7 August 2019, there is no reference by the worker to difficulty with travel;

    (b) Dr Brown assessed no impairment as the worker was able to travel by public transport and in his own car to perform work;

(c) the AMS has not taken account of the contrary history provided by the worker from his own statement or that provided by his lawyers or Drs Brown and Teoh or the fact that he has demonstrated the ability to travel by public transport to medical appointments in assessing the impairment;

(d) Dr Teoh assessed a class 2 on the basis that he is able to travel alone with some apprehension and the AMS assessed that the worker was able to travel short distances before losing concentration. He said he relies on others for travel and has become reclusive but able to travel to the local shops. This assessment under this scale is able to be challenged somewhat based on the fact that the worker is able to drive himself to and from work and can take public transport contrary to what he reported to the AMS.

39. The appellant's submissions focus heavily on the respondent's ability to drive to his work, but this is just one factor to take into account when assessing impairment as regards travel.

40. The AMS noted, as did Dr Teoh, that the respondent had problems with concentration when driving thus only travelled short distances.

41. There is no evidence to suggest that the respondent was required to travel long distances to his work.

42. In any event, as the AMS noted, his attendance at work was "erratic."

43. Both Dr Teoh and the AMS noted that the respondent tended to avoid public transport and relied on others for his travel needs.

44. For these reasons, we are unable to see any error by the AMS with respect to his assessment for travel.

45. The appellant next challenges the assessment with respect to social and recreational activities.

46. The AMS assessed class 3, adding:

> "Mr Hubbard does very little outside of his home. He appears to have minimal enjoyable activities at home. He does not go out on social occasions without a friend or family member. He has avoided holidays and sporting events. This qualifies as moderate impairment."

47. The descriptor for this rating is: "Moderate Impairment: rarely goes out to such events, and mostly when prompted by family or a close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn."

48. The appellant submits a class 2 rating is appropriate for the following reasons:

(a) "In his report of 4 June 2019, Dr Brown noted that the worker travelled to the appointment by bus. As at May 2018, Dr Brown, observed… that the worker did not want to return to work with the appellant employer, was fit for full-time employment with another employer, was doing extra courses, learning new building techniques by watching videos, doing voluntary work and was engaged in soccer coaching (see ARD page 77). Dr Brown assessed the impairment as a class 2 on the basis that the respondent worker was well able to work full days and should be able to leave home alone for recreation and social activities;

(b) Dr Keat Yong notes… that the worker had injured his right ankle a 'few weeks ago' at football…Dr Keat Young also noted a prior Achilles tendon injury "about 2 years earlier which was treated conservatively". Clearly the worker was able to engage in sport during his injury…the worker's physical injury may also be a factor weighing against his continuing involvement in football as opposed to his

psychological condition. This issue is that the AMS makes no enquiry when examining and assessing the worker;

(c) the history recorded by Dr Brown reflects gradual improvement in the worker's condition and a reduction in anti-depressant medication. It also records the worker's use of herbal sleeping tablets to assist his sleep as opposed to Valium which is recorded in the MAC."

49. As regards these submissions, we repeat our comments set out in paragraph 30 above. In addition, many of these submissions address factors more relevant to other PIRS categories such as travel and employability.

50. The nature and extent of medication consumed has little relevance to the respondent's social and recreational activities.

51. The history given to the AMS together with the totality of the evidence in our view clearly support the class 3 rating ascribed by the AMS.

52. The submissions do not disclose error but are little more than commentary on the MAC, and mere disagreement with the findings made by the AMS.

53. That is not a proper basis for appeal.

54. For these reasons, we cannot see any error by the AMS in his assessment in this particular PIRS category.

55. We make similar comments as regards the appellant's challenge to the assessment in respect of social functioning.

56. The AMS assessed a class 4 impairment.

57. The descriptor for this class is: "Severe impairment: unable to form or sustain long term relationships. Pre-existing relationships ended (eg lost partner, close friends). Unable to care for dependants (eg own children, elderly parent)."

58. The AMS said: "Mr Hubbard has broken up with a long-term partner due to his mental state. He has lost friends. He does have one close friend and is in touch with one relative. Overall this would qualify as severe impairment."

59. The appellant submits that the AMS erred for the following reasons:

(a) "Dr Teoh assessed a class 3 on the basis of a strained relationship and irritability;

(b) In respect to the fourth scale, Dr Brown assessed mild impairment on the basis that he [is] able to attend work and work with others and there is no tension;

(c) We refer to the evidence in the notes of Dr C Keat Yong and Dr Brown regarding the respondent engaging in playing and coaching soccer and volunteering work in 2018 onwards until his ankle injury in late April 2018. There is alternative evidence in the material for the workers decrease in social activities and this has not been queries [sic] or considered in the assessment of the rating. It is also noted that the worker remains in contact with his former partner and his family in the UK and is not as limited as the AMS has indicated in the MAC."

60. The last submission above really addresses the category of social and recreational activities.

61. Remaining in contact with a former partner or family members does not of itself indicate mild or even moderate impairment: the respondent's family resides in the UK, and he remains in telephone contact but not in physical contact.

62. Once again, the assessment by the AMS is in our view quite consistent with the evidence and we cannot see any error in his assessment.

63. Finally, the appellant challenges the assessment with respect to employability. This is principally in the context of the ATALD which contained various financial records such as tax returns, clinical notes and correspondence.

64. The AMS assessed a class 3 adding: "Mr Hubbard can no longer work as a 2IC. He is now working as a builder with restricted duties. He is working in a non-managerial and non-supervisory position. He only works part-time. This qualifies as moderate impairment."

65. The descriptor for this class is: "Moderate Impairment: cannot work at all in the same position. Can perform less than 20 hours per week in a different position, which requires less skill or is qualitatively different (eg less stressful)."

66. The appellant submits that the assessment by the AMS is inconsistent with the evidence for the following reasons:

    (a) as at 25 June 2018 the worker was according to Dr C Keat Yong "ready to start work with a different employer…";

    (b) as at 13 August 2018 the worker "has a new job full time to start 22/08 with employer who he has a good relationship and knowledge of work colleagues so confident he can fit in…;"

    (c) the AMS makes no mention of having regard to the contents of the ATALD dated 25 September 2019 included in the referral for medical assessment;

    (d) as at October 2018, according to his lawyers' letter of 6 September 2019 (ATALD page 1), the worker was "working as a self-employed carpenter, working 25 hours per week and then gradually increased to full-time hours after a break for the holiday season. He earns around $45 gross per hour…;"

    (e) according to an extract of his tax return for 2019, the worker reported his business income to be $47,800 for that financial year which would support based on seven or so months of employment that he is working close to 38 hours per week excepting for a period off for holidays, and

    (f) Dr Brown assessed the worker as having no deficiency on the basis he could work full-time with a new employer and was able to perform the work and meet its normal demands including learning new skills.

67. The appellant submits that these factors are "consistent with a Class 2 impairment rating."

68. The appellant added:

> "The AMS failed to take into account or adequate account evidence, which was attached to the ARD, the Reply and to the ATLAD.
>
> The Appellant notes that the AMS failed to mention the letter from the Respondent Worker's lawyers, the clinical notes of Dr C Keat Yong (as referred to above), the extract of the tax return for 2019 showing the Respondent Worker's capacity to earn, hours of work, hourly rate, the fact that he is working as a carpenter and not just a labourer and his earnings in a 78 month period since the end of August 2018. The Appellant employer confirms that the information was referred to as being referred to the AMS in the Referral for Assessment.
>
> As set out above, the Appellant Employer submits that a consideration of that evidence, would have altered the assessments given under the PIRS.

The Appellant says that the AMS would likely have given a different assessment had he properly considered this evidence."

69. These submissions amount to little more than commentary on the MAC where it is apparent that the appellant is unhappy with the outcome of the assessment by the AMS.

70. As we said earlier, mere disagreement with the MAC is not a proper basis for appeal, nor does a difference of medical opinion amount to either the use of incorrect criteria or a demonstrable error.

71. In our view, the AMS provided thorough and comprehensive reasons for his assessments. Indeed, his comments as regards employability in particular were considerably more detailed than what might have been expected from many AMS'.

72. We note that at paragraph 4 of the MAC, the AMS took a detailed history of both the nature and extent of the respondent's work since ceasing employment with the appellant.

73. As the respondent correctly pointed out, in *Jenkins v Ambulance Service of New South Wales* [2015] NSWSC 633 Garling J said at [73]:

> "It was a matter for the clinical judgment of the AMS to determine whether the impairment with respect to employability was at the moderate level, as he did, or at some other level. But, in seeking judicial review, a mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to judicial review."

74. It is indeed arguable that the respondent sat between a class 2 and a class 3 for employability, but the assessment by the AMS was not inconsistent with all the evidence and in particular the history he obtained from the respondent.

75. It is trite law that a decision maker does not have to refer to every piece of evidence before him or her. This is a principle developed from administrative law and judicial review generally. It is concerned with the concept of relevant and irrelevant considerations and adequate reasons.

76. This is particularly so in circumstances such as the present case where liability for the injury was not disputed, and the AMS had extensive evidence before him relevant to the nature of his task.

77. As the respondent correctly points out: "In order to fulfill a minimum legal standard, the reasons need not be extensive or provide detailed explanation of the criteria applied by medical specialists in reaching a professional judgment." (*Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273-274 (Mahoney JA) and 281-282 (McHugh JA) referred to.)

78. The respondent's submissions are equally thorough with extensive references to a number of relevant judicial decisions. We have carefully considered those submissions and we are broadly in agreement with them all.

79. Perhaps the best summary of the task of an Appeal panel is to be found in *Ferguson v State of New South Wales* [2017] NSWSC 887 where Campbell J said:

> "[23] By reference to *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36, the Appeal Panel directed itself that in questions of classification under the PIRS: '... the pre-eminence of the clinical observations cannot be underrated. 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'.

[24] The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.

[25] The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides 'the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment'…

[37] The descriptors, or examples, describing each class of impairment in the various categories are 'examples only'…"

80. In this case, we are not persuaded that any categorisation was glaringly improbable, or that the AMS was unaware of significant factual matters, or that a clear misunderstanding could be demonstrated, or an unsupportable reasoning process could be made out.

81. It seems to us, as the respondent pointed out, that "the appellant…cherry picks those aspects of the evidence and history recorded which fit the narrative it seeks to make."

82. For these reasons, the Appeal Panel has determined that the MAC issued on 26 November 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*.

L Golic

Lucy Golic
Dispute Services Officer
As delegate of the Registrar