

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-1016/20
Appellant: Secretary, Department of Communities and Justice
Respondent: Roberta Mead
Date of Decision: 29 July 2020
Citation: [2020] NSWWCCMA 126

Appeal Panel:
Arbitrator: Ross Bell
Approved Medical Specialist: Professor Nicholas Glozier
Approved Medical Specialist: Dr Patrick Morris

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 3 June 2020, the Secretary, Department of Communities and Justice (appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Peter Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 15 May 2020.
2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):
 - the assessment was made on the basis of incorrect criteria (section 327(3)(c));
 - the MAC contains a demonstrable error (section 327(3)(d)).
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).

RELEVANT FACTUAL BACKGROUND

6. It is convenient to extract the background recorded by the AMS at Part 4 of the MAC,

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

Ms Mead told me that she started with the community services in 2001. She was a student and then a case worker and then a manager case work. She obtained the manager's position, she said on merit via selection process.

She told me that in the relevant period, 2012 to 2013, she was relentlessly harassed by a union representative, name given as Nabil. She said that comments were made about her. She was watched, she was followed to the car, she was stared at. She said that bullets were left on the desk with the managers names on them. A screensaver showed a golden hand gun. Another pregnant worker was told she should not associate with Ms Mead because, like Ms Mead, she would lose the baby.

Ms Mead indicated she complained through the appropriate channels.

She indicates the effects upon herself were considerable. She became anxious about the situation and became depressed when her efforts to have the situation improve did not have a yield. When stressed she would have vomiting, diarrhoea and be sweaty. She slept poorly. She cried a lot. She felt sad.

There was a period of months off work but there was a return to work in another office. That was working on a children's check register. The department was told they had to find a managers role for her.

She indicated that she received treatment from a psychologist, Stephen Solomon. She received treatment from her general practitioner with psychotropic medication. The treatments were ongoing.

She did not succeed in the alternative situation after the return-to-work programme. She said the treatment of her was poor because she had been a whistle blower. She was again certified unfit for work by her general practitioner.

She was retired medically unfit for the job.

At the time of failure to cope with the return to work to an alternative position she had continuing treatment with psychological counselling and this was augmented with psychiatric consultation and a change of psychotropic medication.

She was fortunate to find another job and told me she did so, on her own. This was a job with the National Disability Insurance Scheme and she said that organisation employed people with a disability and with mental health issues. She has now been three years with that organisation and she is a planner. She said she does not like the job and has had trouble performing the job. The job lacks camaraderie. She does not trust people. She had difficulty travelling to the workplace initially and worked on travel strategies with the psychologist. She falls behind in her work. She provides medical evidence when she has absences from work. She says a normal workplace would not tolerate her absences, her difficulties keeping up with the work, and her lateness. She struggles to get to the Parramatta office on time and arrives between 9.30 and 10.00 am. This is after her husband drops her at the station or her mother drops her at the station or on occasion she gets herself to the station.

Her symptoms have always been present since the 2012 to 2013 period. She is generally in a depressed mood and is often tearful. Sometimes this is spontaneous but sometimes she is aware that there are aggravating triggers such as seeing former workmates in the local area or seeing media accounts of workplace difficulty. Sometimes she has cried all day at work. Her sleep remains poor and she is generally fatigued. There are shortfalls of energy, motivation and enjoyment.

She stopped seeing the psychiatrist after a period but continued on the psychotropic medication to the present in the care of her general practitioner.

She continued with the psychologist until his retirement in the last couple of years. Her current treatment is in the hands of the general practitioner.”

PRELIMINARY REVIEW

7. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.
8. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination for the reasons given below.

EVIDENCE

Documentary evidence

9. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

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

SUBMISSIONS

11. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.
12. The appeal concerns the assessment of the Psychiatric Impairment Rating Scale (PIRS) Category of Employability, and the allocation of 1% WPI for the effects of treatment by the AMS.

Appellant

13. In summary, the appellant employer submits that the AMS has erred in finding Class 3 for Employability in the PIRS, when Class 2 is “best fit” as found by Dr Bertucen.
14. The AMS should have found Class 2 because Ms Mead can work full-time in another position. There is no evidence that the new employment is at a lower level of skill and intellect.
15. The AMS erred in adjusting the assessment by adding 1% WPI for the effects of treatment. The criteria for an adjustment were not met and the additional 1% should not have been allocated.
16. The MAC should be revoked.

Respondent

17. There is no demonstrable error by the AMS, the assessment is not based on incorrect criteria.
18. There is only a difference of opinion between the AMS and Dr Bertucen as to Employability and this is addressed by the AMS.

19. The AMS has taken a history of the nature of the new employment and carefully considered the Classes in exercising clinical judgement as he was required to do.
20. The MAC should be confirmed.

FINDINGS AND REASONS

21. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment, but the review is limited to the grounds of appeal on which the appeal is made.
22. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

Discussion

23. In *Mahenthirarasa v State Rail Authority of New South Wales & Ors* [2007] NSWSC 22 (*Mahenthirarasa*) the Court said: "A demonstrable error would essentially be an error for which there is no information or material to support the finding made – rather than a difference of opinion."
24. In *Marina Pitsonis v Registrar Workers Compensation Commission & Anor* [2008] NSW CA 88 the Court said,

"Those dependent on the applicant showing that the doctor failed to record or to record correctly things she had told him face a double difficulty. They are not demonstrable on the face of the Certificate. And they seek, in effect to cavil at matters of clinical judgment in that matters unrecorded are likely to be matters on which the specialist placed no weight. The same can be said about factual matters recorded in one part of the Certificate that did not translate into the decision favourable to the applicant now contended for."
25. It must be observed that "examples" are given in the SIRA Guidelines at Chapter 11, Tables 11.1 - 11.6 for the PIRS Categories, not inflexible measurement tools to be used literally. They are to assist the AMS in bringing clinical expertise to bear for each PIRS Category in the individual circumstances of the case.

Ground of appeal – Assessment of PIRS Category of Employability

26. The appellant submits that the AMS has erred in finding Class 3 for Employability when Ms Mead can work full-time, and when Dr Bertucen found Class 2.
27. The AMS records at "Social Activities/ADL" in general regarding this Category,

"She is in fulltime employment and works Monday to Friday as a planner for the National Disability Insurance Scheme. She has the alarm set for 6.30 but rises at 8.00 am and stresses about being late for work. She is taken by husband or mother to the station but sometimes drives herself to the station. She catches the train and then walks to work from Parramatta Station. She arrives late. Because she arrives late she works until 5.30 till 6.00. She has lunch at her desk. She says she does not associate with other people. She does mostly computer work. She says her concentration and capability is impaired but she has learnt to get by, by using folders and so forth. She has absences beyond what she thinks reasonable and she does not think her lateness is reasonable. She is not enjoying the work. She will do home visits on occasion and for that purpose will take a taxi in the local area."

28. At Part 10 the AMS the AMS says,

“Her condition had not improved sufficiently for her to cope with a return to work in a different role and she was medically retired.

Although she has obtained alternative employment elsewhere, there is no reason to consider that she recovered fitness for pre-injury employment.”

29. In discussing the assessment of Dr Bertucen reported on 26 February 2019 the AMS says,

“The second area of disagreement is with regard to employability. I have rated moderate rather than mild impairment as rated by Dr Bertucen. That is because she was medically retired from her pre-injury employment and she remains in my view medically unfit for her pre-injury employment.”

30. Table 11.6 of the SIRA Guides sets out the examples regarding employability for Class 2 and 3 as follows,

“Class 2 Mild impairment. Able to work full time but in a different environment from that of the pre-injury job. The duties require comparable skill and intellect as those of the pre-injury job. Can work in the same position, but no more than 20 hours per week (eg no longer happy to work with specific persons, or work in a specific location due to travel required).

Class 3 Moderate impairment: cannot work at all in 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).”

31. At Table 11.8 the AMS sets out his detailed reasoning for his conclusion of Class 3,

“She is unfit for pre-injury employment because of her symptomatology. She was medically retired for that reason. She has not recovered fitness for employment at the level of her pre-injury employment. However she has proved herself able to work on a fulltime basis in an alternative role, which does not require managerial responsibility and does not require the same degree of skill and intellect as the pre-injury position. In carrying out this role she is struggling in that she arrives late for work and has subjective difficulties in performance.

In my opinion her impairment in employability fits neither the published guidelines for class 2, nor the published guidelines for class 3. Her impairment does not fit class 2 guidelines because the duties of her full time position do not require the skill and intellect of her pre-injury employment. Her impairment does not fit class 3 guidelines because her current employment, although less stressful, qualitatively different and requiring less skill, is nevertheless more than a 20 hour per week job. In deciding upon a class 3 rather than class 2 impairment I have exercised judgment and given more weight to the greatly reduced quality of the current employment as compared to the number of hours for which she is remunerated.”

32. The respondent submits that the AMS should have found Class 2 as did Dr Bertucen, and that Class 2 is “best fit” because the worker can work full-time. The Panel does not accept this submission. The AMS was obliged to consider employability using his own clinical judgement. As the Supreme Court noted in *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140,

“In *Ferguson v State of New South Wales* [2017] NSWSC 887 at [23], Campbell J cited with approval *NSW Police Force v Daniel Wark* [2012] NSWCCMA 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. ...

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]).”

33. The AMS explains why he sees the Category differently to Dr Bertucen, as extracted above. Contrary to the submissions for the appellant, that Ms Mead can work full-time does not rule out Class 3. The AMS explains how he applied his clinical judgement to the criteria and concluded that Class 3 is the applicable rating. A difference of opinion with Dr Bertucen is insufficient.
34. The AMS has not applied incorrect criteria but has considered carefully the examples in the relevant Classes together with his findings on examination, and thoughtfully described the reasoning why he has assessed the worker as being moderately impaired. There is no demonstrable error on the face of the Certificate regarding Employability discerned by the Panel.

Adjustment of additional 1% WPI for the effect of treatment (paragraph 1.32 SIRA Guidelines)

35. The appellant submits that the AMS has erred in adding 1% WPI for the effect of treatment because the criteria are not met in this instance. The respondent submits that there is sufficient discretion available to the AMS to consider the effects of treatment such that the conclusion of additional WPI was open to him.
36. The SIRA Guidelines describe the basis of an “Adjustment for the effects of treatment” in this jurisdiction at paragraph 1.32,

“Where the effective long-term treatment of an illness or injury results in apparent substantial or total elimination of the claimant’s permanent impairment, but the claimant is likely to revert to the original degree of impairment if treatment is withdrawn, the assessor may increase the percentage of WPI by 1%, 2% or 3%. This percentage should be combined with any other impairment percentage, using the Combined Values Chart. This paragraph does not apply to the use of analgesics or anti-inflammatory medication for pain relief.”

37. The AMS explains at Table 11.8 the adjustment he made,

“It is reasonable to add 1% for the effects of treatment in maintaining her symptoms and impairments at the best possible level. Hence the final whole person impairment is 16%.”

38. The AMS notes the current treatment with Pristiq. However, the current symptoms reported by the AMS at Part 4 are not consistent with any adjustment for the effect of treatment,

“She describes anxiety and depression. She has reasonable command of anxiety management techniques learned through psychology consultation. Her sleep is poor. She has difficulty falling asleep. There is generalised anxiety. She has physiological symptoms of vomiting and diarrhoea. There are changes in appetite rhythms. She relies to a great extent on family to perform activities of daily living. Her mood appears pervasively depressed with congruent loss of energy, motivation and enjoyment.”

39. The Panel notes that in Ms Mead’s circumstances there has not been an “apparent substantial or total elimination of the claimant’s permanent impairment” as required by paragraph 1.32 and evidenced by the assessment of 15% Whole Person Impairment. This is a demonstrable error on the face of the Certificate.

Findings

40. If a ground of appeal is successfully made out and an error identified, the Panel must correct the error or errors found “applying the WorkCover Guides fully” (see *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499).¹ The Panel is able to make the assessment and correct the errors without recourse to further examination of Ms Mead.

41. The Panel notes that there is a simple error in the Certificate of the AMS which shows 15% WPI, whereas his final total including the purported adjustment was in fact 16% WPI.

42. The Panel can correct the error found simply by removing the adjustment of the additional 1% WPI applied from paragraph 1.32 of the SIRA Guidelines. This results in 15% WPI, as shown in the Panel’s Certificate below.

43. For these reasons, the Appeal Panel has determined that the MAC issued on 15 May 2020 should be revoked, and a new MAC issued. The new Certificate is attached to this statement of reasons.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar



¹ See also *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792

WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Matter Number: 1016/20
Appellant: Secretary, Department of Communities and Justice
Respondent: Roberta Mead

This Certificate is issued pursuant to s 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Appeal Panel revokes the Medical Assessment Certificate of Dr Peter Anderson and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - Whole Person Impairment (WPI)

Body Part or system	Date of Injury	Chapter, page and paragraph number in NSW Workers Compensation Guidelines	Chapter, page, paragraph, figure and table numbers in AMA5 Guides	% WPI	WPI deductions pursuant to s 323 for pre-existing injury, condition or abnormality (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
Psychological /psychiatric	23.03.13	Ch 11, Pp 55-60	Ch 14	15	nil	15
Total % WPI (the Combined Table values of all sub-totals)						15%

Ross Bell
Arbitrator

Professor Nicholas Glozier
Approved Medical Specialist

Dr Patrick Morris
Approved Medical Specialist

29 July 2020

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

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

