WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1521/20**
Appellant:	**Queensland Property Investments Pty Ltd**
Respondent:	**Ernesto De Paz**
Date of Decision:	**3 August 2020**
Citation:	**[2020] NSWWCCMA 129**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr Lana Kossoff**
Approved Medical Specialist:	**Dr Douglas Andrews**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 29 May 2020, Queensland Property Investments Pty Ltd lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Michael Hong, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 19 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 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 it is not relevant to the issue on 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 concluding that the respondent had reached maximum medical improvement (MMI) and thus making an assessment of whole person impairment (WPI) "when such a finding was not available on the evidence."

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 WPI in respect of a primary psychological injury resulting from a deemed date of injury of 23 July 2017. He consulted with the respondent on 12 May 2020.

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

16. Relevant to the issue in dispute, the AMS documented present treatment and symptoms as follows:

> "Mr De Paz reported that he has had recurrent suicidal thoughts. He tried to commit suicide in his psychologist's office and his psychologist called the police. He was taken to Liverpool Hospital and admitted to the psychiatric ward for one day. This was only recently. He does not recall having any other hospital presentations.
>
> The Mental Health Team has been involved.
>
> On specific enquiry, Mr De Paz reported experiencing the following symptoms:
>
> - Depressed mood.
> - Poor concentration and memory.
> - Recurring suicidal ideation. Not currently suicidal…
> - Panic attack-like symptoms…

Feeling emotionally numb and losing track of time.

- He has almost no social interaction.

Mr De Paz did not confirm being physically aggressive, or ever having experienced symptoms of psychosis, hypomania or mania."

17. The AMS then set out in some detail the respondent's social activities and ADL's.

18. He then noted his findings on mental state examination which was conducted by video-link.

19. The AMS diagnosed "a chronic Adjustment disorder and cannabis use disorder, which is similar to the other clinicians and assessors."

20. He added: "Dr Bisht's WPI came to a final rating of 8% whilst Dr Rastogi's rating came to 15% +1% for treatment effects."

21. The AMS assessed 22% WPI.

22. The AMS then set out his PIRS ratings and compared those to the findings made by Drs Bisht and Rastogi.

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

> "Mr De Paz's psychological symptoms are well stabilized with appropriate treatment, and not likely to alter to a substantial degree in the next 12 months."

24. The AMS then addressed "the other medical opinions and findings submitted by the parties and, where applicable, the reasons why my opinion differs" stating:

> "On 12 September 2018, Dr Michael Prior, IME psychiatrist, noted a similar history and that there were no prior psychiatric problems… At that point, he reported that he was able to enjoy things and still remained interested in doing things. His mood improved and he was spending time with his dogs, doing exercise, being around friends and doing gardening…Dr Prior noted Mr De Paz used to play touch football and undertake meditation and spiritual practices… Dr Prior thought that on testing there was mild slowing on tests of attention and concentration. He diagnosed an adjustment disorder and noted that if Mr De Paz used significant amounts of marijuana regularly, that would be a vulnerability factor.
>
> Alexandra Saunders, Treating Psychologist, has written a number of reports and advised that Mr De Paz has been having CBT and presented as quite stressed…
>
> On 17 February 2020, Dr Yajuvendra Bisht, IME Psychiatrist, reassessed Mr De Paz after a first assessment in January 2018. Towards late 2017, Mr De Paz started being constantly preoccupied with the stressful workplace experiences and therefore stopped work in late 2017. His condition had not improved after that first assessment. He was very angry towards his employer. He had been having fortnightly sessions with his psychologist. Dr Bisht said that Mr De Paz could live independently but self-care was not the same as before. He lives on sandwiches. He does not exercise. He has not been tending to his garden which was his passion. Mr De Paz only drives short distances and will only go to familiar places on his own. He is not even going to the shops. He does not attend any social gatherings now...There is sporadic use of cannabis but not in recent times…Dr Bisht thought that

there was no deficit in Mr De Paz's short-term memory. He diagnosed an adjustment disorder and cannabis abuse and completed a WPI…

There are numerous emails from Ms Saunders, Psychologist, recommending the use of Lifeline and while she was away Campbelltown mental health team had been aware and other safety management strategies. On 17 March 2020, Ms Saunders had written that he was currently a high risk of suicide…

Dr Rastogi's report of 17 September 2019 and other handwritten notes from Ms Saunders have been noted."

25. The thrust of the appellant's submission is that, following service of the report of Dr Bisht and the declinature of the claim for s66 benefits on 12 March 2020, the respondent "reacted very poorly to what he believed were inaccuracies and fabrications in Dr Bisht's report…" which led to a significant deterioration in his condition and affected the assessment of impairment.

26. In a supplementary statement dated 5 May 2020 the respondent said:

"My thoughts are dominated by the suffering I have suffered at the hands of my former employer and at EML. I cannot think about my compensation claim without becoming extremely angry and upset.

The perpetual dishonesty of the Insurer and my former employer sets me off whenever I think about it.

The latest report of Dr Bisht is very misleading…there is no mention of me swearing at Dr Bisht for what he had written in his first report and the effect that the denial of my claim on the basis of his report has had on me and my family…

Seeing Dr Bisht's latest report set me off and made me very upset. It triggered me because in the end I opened up to Dr Bisht and cried in front of him…

Dr Bisht's report triggered me and made me want to put an end to the misleading conduct of Dr Bisht and EML.

I told Dr Bisht that if he did not provide me with both reports he had written in my claim that I would overdose on medication in his office. Thankfully, my Psychologist and GP intervened and I was not able to get my hands on any medication as I had planned.

The Police conducted several welfare checks on me and I went to Liverpool Hospital and was discharged. The Campbelltown Community Mental Health Team followed up with me but I was not happy with their level of care…

Medication has previously been recommended to me and I have refused it. I do not intend on taking any medication for my psychiatric condition at the present time. Also, my GP has refused to give me any medication due to high risk of suicide and my intent on how I will use these pills."

27. As the AMS noted, there were numerous emails and notes from the treating psychologist, Ms Saunders. The rather urgent tone of these documents commences on 17 March 2020 when Ms Saunders wrote to" the treating gp and EML" as follows:

"I am writing this letter to provide you with progress information.

I recommend that Ernesto's workers compensation psychological treatment would benefit from treatment under a psychiatrist and or clinical psychologist. Because Ernesto has currently been assessed as high risk of suicide and is denying Safety Plan support since Monday and today, and I am due to go on

maternity leave, I believe his psychological wellbeing will be better managed either in-treatment care or with a psychiatrist or with a clinical psychologist, instead of myself.

As a result, I will no-longer be conducting treatment consultations for Ernesto and will cancel the 24th March appointment. I have called emergency services on Monday and today to admit Ernesto into hospital for in-treatment care, and informed his GP, that if he comes into contact with Ernesto to be mindful of high suicide risk and advised to call emergency services to admit him to receive in-treatment care."

28. The appellant submits that the respondent was assessed by the AMS "less than 2 months after an event (the service of Dr Bisht's report and dispute over impairment) which had a significant and deleterious effect on the worker's mental state." The appellant then referred to evidence of this which included the following:

    (a) Dr Prior noted the worker's symptoms were at their most severe (including suicidal ideation) from the date of injury up to late June 2018. He noted an improvement in symptoms from mid-August 2018 including decreased panic/anxiety and no longer having any suicidal ideation. This improvement in symptoms persisted to the date of examination in September 2018. In light of this recent improvement, doctor felt MMI had not been reached "by definition".

    (b) Dr Rastogi examined the worker in September 2019 at which time he presented as angry and frustrated yet he had no suicidal thoughts or plans.

    (c) Dr Bisht examined the worker in February 2020 and noted he presented with no evidence of self-neglect. He was not guarded or evasive during the examination and he strongly denied suicidal ideation or plans.

    (d) On 23 February 2020, the worker attended on Ms Saunders and said he was "finding peace" and presented as "neat, tidy and well-groomed." She noted improvement in his overall mental state and the worker said he had "improved emotional coping".

    (e) On 10 March 2020, the worker attended Ms Saunders casually addressed and in appropriate attire and advised there were nil suicidal thoughts or plans. He was calm throughout the session.

    (f) On 13 March 2020, the worker received notification that his claim for impairment had been denied and he was given the s 78 notice together with the report of Dr Bisht.

    (g) The worker reacted very poorly to what he believed were inaccuracies and fabrications in Dr Bisht's report. He contacted Dr Bisht and said he would overdose on medication. His psychologist and GP intervened and he was admitted to Liverpool Hospital.

    (h) The AMS examined the worker on 12 May 2020 and noted the recent admission to Liverpool Hospital on account of suicidal thoughts. He noted also that this was the first admission to hospital.

29. It is noted that Dr Prior said:

> "Mr De Paz has not attained maximum medical improvement and his injuries and associated impairments have not stabilised at this point. This is because he describes a very recent significant and ongoing improvement in his condition following a recent exacerbation/relapse. He describes ongoing improvement over the last 3-4 weeks which he attributes significantly to his psychological therapy and it is most likely that this improvement will be ongoing and thus by definition he cannot be seen to have reached maximum medical improvement at this point."

30. The appellant submits that the AMS noted "recurring suicidal ideation" although no suicidal admission at the date of assessment which is a misleading summary and gives the impression the worker has always been suicidal, which is patently incorrect. The appellant concedes that there was some initial suicidal ideation for several months but this subsided until the events of March 2020.

30. The appellant added:

> "The AMS noted the worker was unkempt, had difficulty controlling himself and had several outbursts during the teleconference. Such a presentation is obviously in stark contrast to several presentations to Ms Saunders in the weeks/months prior to the service of Dr Bisht's report."

31. The appellant concedes that "with psychological conditions of the kind the worker suffers, the severity of symptoms will wax and wane," but adds that:

> "The AMS did not simply assess the worker on a 'bad day'. Clearly the worker had a very adverse reaction to the service of Dr Bisht's report (evidenced by threatened suicide and the first hospital admission) and that adverse reaction was lingering at the date of examination less than 2 months later. The worker has shown the propensity for improvement (see, for example, Dr Prior) and hence the AMS's assertion his condition was unlikely to improve (again, only 2 months after a traumatic event) is untenable."

32. The appellant concluded:

> "Had the AMS paid proper regard to the recent deterioration in the worker's psychological state he would have found MMI had not been attained and thus declined to make an assessment. Just as Dr Prior declined to assess impairment due to improvement in symptoms two months prior, the AMS should have applied the same logic in respect of the deterioration."

33. In our view, there is considerable weight in the appellant's submissions.

34. It is clear to us that when the respondent received the report of Dr Bisht that this had a catastrophic impact, and his response was a clear deviation from the normal fluctuations in symptoms in a person with the respondent's condition.

35. Indeed, the receipt of the report of Dr Bisht and the respondent's significant increase in symptoms as a result can almost be seen as a fresh injury.

36. It was much more than a case where a condition had become temporarily unstable. The respondent himself in his statement made just a week before he saw the AMS highlights the extent to which he reacted to the opinion of Dr Bisht.

37. It is true that the Guidelines at Chapter 1.15 state:

> "Assessments are only to be conducted when the medical assessor considers that the degree of permanent impairment of the claimant is unlikely to improve further and has attained maximum medical improvement. This is considered to occur when the worker's condition is well stabilised and is unlikely to change substantially in the next year with or without medical treatment."

38. The respondent submits that:

> "The definition calls for an assessor to make two distinct assessments: 1) that the degree of permanent impairment is unlikely to improve further; and 2) that the worker has attained maximum medical improvement, the conditions for which are when the condition is 'well stabilised' and 'unlikely to change substantially in the next year with or without medical treatment.'"

39. This we accept. In other words, the issue to be determined is not about symptoms per se, but whether the *impairment* has reached MMI.

40. As the respondent submitted:

> "The appeal fundamentally misapplies the second subclause contained within clause 1.15, and advances on the (faulty) premise that a worker has not reached MMI if their symptoms are not well stabilised; it is rather the condition itself which must be well stabilised, and in this regard symptoms are only one aspect to be considered."

41. This is more readily observable in respect of physical injuries: symptoms are indeed only one aspect to be considered.

42. The difficulty with this argument is that because a psychiatric condition is defined by symptoms, that must of necessity form the basis of any assessment.

43. The respondent's symptoms in our view reflected a significant deterioration in his condition such that we agree that MMI has not been achieved.

44. We would suggest that a re-examination six months from the date of the AMS assessment would be appropriate when MMI is likely to be achieved.

45. For these reasons, the Appeal Panel has determined that the MAC issued on 4 December 2019 should be revoked.

46. A new MAC will issue following further assessment.

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