

# WORKERS COMPENSATION COMMISSION

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

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<b>Matter Number:</b>	<b>M1-188/20</b>
<b>Appellant:</b>	<b>Ratewave Pty Ltd t/as Manly Pacific Hotel Sydney</b>
<b>Respondent:</b>	<b>Radim Radek</b>
<b>Date of Decision:</b>	<b>8 January 2021</b>
<b>Citation No:</b>	<b>[2021] NSWCCMA 6</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Jane Peacock</b>
<b>Approved Medical Specialist:</b>	<b>Professor Nicholas Glozier</b>
<b>Approved Medical Specialist:</b>	<b>Patrick Morris</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 5 June 2020, Ratewave Pty Ltd t/as Manly Pacific Hotel Sydney (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Ashish Takyar, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 11 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, and
  - 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, 4<sup>th</sup> ed* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> 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 the Appeal Panel's preliminary review, the Appeal Panel determined that it was necessary for the worker to undergo a further medical examination.

## **Fresh evidence**

8. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in addition 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.
9. The appellant seeks to admit the following evidence:
  - (a) Application to Admit Late Documents comprising report of Dr Cotiga dated 29 May 2020.
10. The Appeal Panel determines that the following evidence should be received on the appeal, given it is treating doctors' evidence not previously available:
  - (a) Application to Admit Late Documents comprising report of Dr Cotiga dated 29 May 2020.

## **EVIDENCE**

### **Documentary evidence**

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

### **Medical Assessment Certificate**

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

## **SUBMISSIONS**

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

## **FINDINGS AND REASONS**

14. 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.
15. 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.
16. The matter was referred by the Registrar to the AMS for assessment ((s 319 of the 1998 Act) as follows:
  - **Date of injury:** 20 March 2019 (deemed)
  - **Body parts referred:** psychological

- **Method of assessment: Whole Person Impairment**

17. The AMS issued a MAC certifying as follows:

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 S323 for pre-existing injury, condition or abnormality (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
1. Psychiatric/ Psychological	20 March 2018 (deemed)	Chapter 11	Not applicable	19%	Nil	19%
<b>Total % WPI (the Combined Table values of all sub-totals)</b>					<b>19%</b>	

18. The assessment was based on an assessment by the AMS conducted under the permanent impairment ratings scale (PIRS), as set out in the following table:

**Table 11.8: PIRS Rating Form**

Name	Mr Radim Radek	Claim reference number (if known)	32102181
DOB	22 January 1972	Age at time of injury	46
Date of Injury	20 March 2018	Occupation at time of injury	Kitchen attendant/chef
Date of Assessment	4 May 2020	Marital Status before injury	

Psychiatric diagnoses	1. Major Depressive Disorder	2. Generalised Anxiety Disorder.
Psychiatric treatment	Antidepressant therapy and previous psychiatric review, psychological therapy.	
Is impairment permanent?	Yes	

PIRS Category	Class	Reason for Decision
Self-Care and personal hygiene	3	Mr Radek currently lives with three other housemates and has been living at his current residence for around 10 years. He described a reduction in frequency in bathing and self-care as a result of depressive changes, now bathing around twice a week and changing his clothes around the same frequency. He forces himself to eat three meals a day, but his enjoyment of food is low. He occasionally can cook by himself but often relies on Uber eats, and he reported that before his injury he would never order food in. He tries to minimise the frequency of grocery shopping because of anxiety, and his psychologist has encouraged him to make a list to do at one large

		shop on a less regular basis. He attends to household chores on a shared roster.
Social and recreational activities	2	He used to see friends three or four times a week prior to his injury outside of work. He stated that he very rarely was seeing friends before the current COVID-19 pandemic began, mostly having phone contact with family and friends. He said that he had lost many or most of his friends. His previous hobbies of photography, travel, bushwalking, hiking, time in nature and playing tennis and basketball have ceased. His only interest now is sometimes gardening, but he finds himself very fatigued quite quickly. He stated that he does attend social functions by himself at times if they are nearby, but often is actively symptomatic and withdrawn, and he describes sitting in the corner, and leaving after an hour. He stated that he is generally shy and does not talk to others.
Travel	2	He generally only travels within a local domain rather than to new places because of his anxiety and depressive symptoms, and he said when he travels to familiar places, he sometimes loses his car and has difficulty recalling where he parked because of anxiety and depressive changes.
Social functioning	2	He described losing around half of his friendships because of depressive withdrawal, anxious avoidance and a minor contribution from irritability. He was not in a relationship at the time of the injury. He reported that his family have increased contact with him because of concern about his mental state.
Concentration, persistence and pace	3	His concentration and memory difficulties were of a moderate grade. He frequently needed redirection in the review because of his anxious thought disorder. He describes struggling to focus on the TV for more than 15 minutes, and struggling to read for more than 15 to 25 minutes, usually around 15 to 20 minutes. He cannot multitask anymore and he stated that if he is driving he cannot sustain a conversation at the same time as he cannot focus on driving. He presented with moderate memory difficulty throughout the review.
Adaptation	5	Realistically, Mr Radek has no current psychiatric capacity for any employment for which he has skill, training or experience because of the severity of his depressive symptoms and anxiety, which are entrenched.

Score

Median Class

2	2	2	3	3	5
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=2.5, = 3

Aggregate Score Impairment

Total

%

+2	+2	+2	+2	+2
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17

19%

19. The AMS made no deduction under s 323 and made no adjustment for the effects of treatment.
20. The employer appealed.
21. In summary, the complaints on appeal by the appellant are that the AMS has made a demonstrable error and/or assessed on the basis of incorrect criteria by reason of the following:
  - (a) the worker's evidence provided to the AMS is inconsistent with the evidence on file, particularly in respect to his reported functioning in respect to the PIRS categories; and
  - (b) the AMS has failed to appropriately consider the entirety of the evidence before him.
22. In summary the respondent worker submitted that the AMS did not apply incorrect criteria nor did he make a demonstrable error and that the MAC should be confirmed.
23. The role of the AMS is to conduct an independent assessment on the day of examination. The AMS is required to take a history, conduct a mental state examination, make a psychiatric diagnosis and have due regard to other evidence and other medical opinion that is before the AMS. The AMS must bring his clinical expertise to bear and exercise his clinical judgement when making an assessment of impairment under the PIRS categories. The assessment is not to be based upon self-report alone. An appeal panel cannot disturb ratings under the PIRS scale for mere difference of opinion but must be satisfied as to error.
24. The Panel considered that the AMS in making his assessment under the PIRS had little to no regard to the evidence that was before him about the activities that the worker was able to undertake particularly in regard to the AIRBNB operation. The AMS is mandated not to rely on self-report alone and should have due regard to the other evidence before him and a proper history taken. This was not done. In these circumstances, the Panel was satisfied that the AMS made an error and the Panel considered that a re-examination by an AMS member of the Panel was necessary. Professor Nicholas Glozier was appointed to conduct the re-examination. He provided a report to the Panel as follows:

**REPORT OF THE EXAMINATION BY APPROVED MEDICAL SPECIALIST  
MEMBER OF THE APPEAL PANEL**

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<b>Matter No:</b>	<b>M1-188/20</b>
<b>Appellant:</b>	<b>Rateway Pty Ltd t/as Manly Pacific Hotels Sydney</b>
<b>Respondent:</b>	<b>Radim Radek</b>

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<b>Examination Conducted By:</b>	<b>Professor Nicholas Glozier</b>
<b>Date of Examination:</b>	<b>12 November 2020</b>

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1. The worker's medical history, where it differs from previous records

Mr Radek reported that he had lived in the same accommodation for nearly a decade. This consists of a number of bedrooms in the main house, whilst the owner lives in a separate apartment in the garden. He has been responsible for organising the new

tenants for some years and likes to select older people, and preferably couples. Two of the other rooms are lived in by people on longer-term tenancies, currently couple who have lived there for one year and a woman who has been present for six months. He has been advertising on Gumtree, and later Airbnb, for a number of years. He said his friend, who is IT literate, help him set this up in 2015. He acknowledged that he continued to host Airbnb guests, managing their bookings etc, up until the almost-total decimation of the market when the COVID restrictions and travel occurred in early 2020. He said he enjoys seeing people from different countries, and as he as has lived in Manly for a long time he likes to share his experiences. He described being able to converse with guests and has continued to do so, even whilst unwell, enjoying this activity. He said he is fine with about 80% or 90% of the people but has difficulties with few of them. There has obviously been a reasonable turnover, as indicated by the frequency of guests and review postings. He said he would do the check-ins and check-outs, and the cleaning and checking of the apartments once the guests had left, although much of the business administration was routine. There appears to have been no significant impact of his condition on the running of this Airbnb setup since 2015.

He and his housemates share the household duties and they have a roster by which they organise the cleaning of their shared accommodations etc. He is responsible for his own shopping, cooking, cleaning although occasionally people will make larger meals, e.g. paellas for everybody, and he noted that he does use more takeaways than he did previously. They may swap rosters as he says occasionally he does not feel up to doing his part of the roster, but always completes his share of the housework. In terms of self-care, he describes bad days where he will do little, but conversely also appears to be highly motivated to look after himself and described a range of self-care activities. Currently he does a weekly yoga class and performs home practice, using downloaded apps. He has attended local Mindfulness courses over this year and attends these weekly. He noted he used to be more physically active however, and has relinquished sports.

## 2. Additional history since the original Medical Assessment Certificate was performed

Mr Radek has now consulted a new psychiatrist, Dr Cotiga, whose report was included as late documentation. His medication has changed since the MAC and he is currently treated with a combination of Mirtazapine 30mg and Desvenlafaxine 100mg mane which he has taken for just over a week. He sees her face-to-face every month or so. He continues to undergo psychological therapy with Dr Walker every month and he described some CBT techniques as well as more supportive therapy of late. He goes to a local clubhouse on a daily basis where he has made a number of friends. He says they are supportive and have safety plans for each other. However there has been no actual deliberate self-harm and he has not felt the need to trigger this, although entertains suicidal thoughts every three or four weeks during the bad days. At the clubhouse he has stopped volunteering in the kitchen because he found working in the kitchen confronting, reminding him of his previous experiences and now volunteers in the garden, still doing one or two hours of work a few days per week. He said these new friends form much of his social circle as he has now stopped seeing many from his previous Czech and Slovenian social circle, and only really has two close friends left, as well as a family friend. He goes on a weekly walking group on the Northern Beaches, again people with mental health problems, which he finds supportive.

Socially he continues to have some contact with people, although this appears to be prompted outside of the supportive networks above. He said a family friend in Maroubra asks him over. He stayed the night and she suggested that he may come and live with her. He found it embarrassing as he had a disturbed and aroused sleep when in her house. He went to the Royal National Park this year with a friend and shared the driving but found himself anxious driving there. He said he did not experience the same connection with nature and sense of relief that he used to. He

also had a recent panic attack a few months ago, driving to Dee Why where he had to stop the car, describing anxiety with classic panic symptoms. As a result he has now become more uncomfortable and anxious whilst driving, particularly when taking longer drives.

He outlined, as above, a range of activities and techniques that he has implemented to try and improve his health and wellbeing. He says he gets very exhausted in a number of situations which makes this difficult. His brother sends him self-help books to read, e.g. Eckhart Tolle, but he finds that after 30 minutes he gets fatigued and has a headache and so prefers to use audiobooks which he can focus on for a longer time. He will still go to the gym at times, generally prompted by a friend.

There was no other additional or conflicting information elicited today. Mr Radek was aware of the focus on new information since the MAC, as well as the focus on discrepancies caused by the Appeal. He noted that he was upset by the surveillance which he said was planned at a time his family visited from Croatia in December 2018 which he found intrusive. During the assessment my understanding of his distress this was that they watched him doing a significant number of family-based activities which did not match the surveillance report provided, although they do appear to be at the same time.

### 3. Findings on clinical examination

Mr Radek was kempt, bearded, polite. He had a reactive but somewhat restrictive affect and was easily moved to tears regarding his situation, and the change in his life circumstances and the events at work. He showed a good focus and concentration throughout the assessment, as well as unprompted recall of events and dates without recourse to documentation. He describes a fairly pervasive low mood with, some days, a very significant worsening, and near-anhedonia with little enjoyment. He is motivated to try and get better and describes numerous activities and strategies that he has implemented to try and improve this, but problems with energy, fatiguability and pronounced rumination and focus on the way he was treated at work and the change in his life. He continues to have regular nocturnal disturbances. He goes to bed around 10pm and tries to keep a routine as he knows this is good for him. Two or three times a week he may take up to 90 minutes to fall asleep, ruminating and unable to switch off. About half the week he wakes aroused, with nightmares and is awake for half an hour to an hour before falling back to sleep again. He wakes around 7am-7:30am and thus most of the time gains a low-normal sleep duration but of broken nature. He can be quite sluggish in the mornings. He has some brief suicidal ideation every few weeks but no intent or actions associated with this. He finds that people do not understand how he is, or how he has become like this, and he also struggles with this. He has lost trust in people as a result of his experiences and the surveillance and is concerned that he can never return to where he saw his possibilities with life, family etc. He continues to have anxiety attacks, the last of which was approximately a couple of weeks ago, and more frequent increased arousal that he manages through his various management strategies.

### 4. Results of any additional investigations since the original Medical Assessment Certificate

Nil.

### Summary

I concur with the diagnosis provided by the AMS.

As noted in the Appeal, the reasoning provided by the AMS for the class 3 Self-Care and Personal Hygiene provided would appear to be erroneous, and even at face value

do not support a class 3 moderate impairment. Mr Radek continues to contribute to household chores, much as he always has done, on a shared roster, outlined a range of activities he does to try and improve himself. Even if some of these were prompted by clinicians originally, he has managed to embed these and he continues to do a number of these on a regular basis unbidden and unmotivated. He can clean and maintain a room for the Airbnb business. All of this would appear to meet exactly the criteria for a class 2 mild impairment in Self-Care and Personal Hygiene.

In terms of Adaptation, Mr Radek was continuing to operate the Airbnb business on a regular basis up until early 2020 when this stopped due to COVID. This would amount to at least a few hours of work every week or two, during the changeover of clients. He also reports volunteer work for several hours a week at the clubhouse which could theoretically be remunerable on the open job market, although he notes his condition is of such inconsistency that he would be at times a variable worker and not totally reliable. Again, this at most equates to a severe impairment in Adaptation.

Whilst the Concentration observed today for over an hour would not indicate a significant impairment, he reports struggling to read books for half an hour and thus the assessment of a class 3 in Concentration, Persistence and Pace was open to the AMS as many of the Airbnb processes are automated.

The other three categories were not appealed and there is no information listed from the assessment today that would lead me to disturb these. This equates to an, in order: 2,2,2,2,3,4 – median class 2 – total of 15, which is an 8% whole person impairment.



Signed: Professor Nick Glozier

25. The Panel adopts the findings and the report of Professor Glozier.
26. This results in an assessment of 8% WPI as a result of injury deemed to occur on 20 March 2018 and the Panel certifies as follows:

<b>Body Part or system</b>	<b>Date of Injury</b>	<b>Chapter, page and paragraph number in NSW workers compensation guidelines</b>	<b>Chapter, page, paragraph, figure and table numbers in AMA5 Guides</b>	<b>% WPI</b>	<b>WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality (expressed as a fraction)</b>	<b>Sub-total/s % WPI (after any deductions in column 6)</b>
1. Psychiatric/ Psychological	20 March 2018 (deemed)	Chapter 11	Not applicable	8%	Nil	8%
<b>Total % WPI (the Combined Table values of all sub-totals)</b>					<b>8%</b>	

27. For these reasons, the Appeal Panel has determined that the MAC issued on 11 May 2020 should be revoked. A new Medical Assessment Certificate is attached to this statement of reasons.



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 MacLeod*

Ann MacLeod  
Dispute Services Officer  
**As delegate of the Registrar**



# WORKERS COMPENSATION COMMISSION

## APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

**Matter Number:** 188/20  
**Applicant** Ratewave Pty Ltd t/as Manly Pacific Hotel Sydney  
**Respondent:** Radim Radek

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 Ashish Takyar 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)
1. Psychiatric/ Psychological	20 March 2018 (deemed)	Chapter 11	Not applicable	8%	Nil	8%
<b>Total % WPI (the Combined Table values of all sub-totals)</b>					<b>8%</b>	

**Jane Peacock**  
Arbitrator

**Professor Nicholas Glozier**  
Approved Medical Specialist

**Dr Patrick Morris**  
Approved Medical Specialist

8 January 2021

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*.

*A MacLeod*

Ann MacLeod  
Dispute Services Officer  
**As delegate of the Registrar**

