

# WORKERS COMPENSATION COMMISSION

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

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**Matter Number:** M1- 3842/20  
**Appellant:** Lillian Olah-Jewell  
**Respondent:** Secretary, Department of Education  
**Date of Decision:** 18 January 2021  
**Citation No:** [2021] NSWCCMA 9

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**Appeal Panel:**  
**Arbitrator:** Carolyn Rimmer  
**Approved Medical Specialist:** Dr Patrick Morris  
**Approved Medical Specialist:** Dr Julian Parmegiani

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 23 October 2020, Lillian Olah-Jewell (the appellant) made an application to appeal against a medical assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission). The medical assessment was made by Dr Michael Hong, Approved Medical Specialist (the AMS) and issued on 26 September 2020.
2. The respondent to the appeal is the Secretary, Department of Education (the respondent).
3. 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.
4. 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.
5. 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.
6. 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).
7. The Appeal was made within 28 days of the date of the medical assessment.

### RELEVANT FACTUAL BACKGROUND

8. The appellant developed a primary psychological injury in the course of her employment as teacher when a student entered the classroom on 16 February 2017 and shouted "God is great" in Arabic.

9. The matter was referred to the AMS, Dr Michael Hong, on 11 August 2020 for assessment of whole person impairment (WPI) of the appellant's psychological/psychiatric disorder attributable to the injury on 16 February 2017.
10. The AMS examined the appellant on 22 September 2020 and assessed 8% WPI in respect of the psychological/psychiatric disorder as a result of the injury on 16 February 2017.

### **PRELIMINARY REVIEW**

11. 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.
12. Neither party sought an opportunity to make oral submissions to the Appeal Panel. The Appeal Panel does not consider it would benefit by hearing oral submissions from the parties. The Appeal Panel shall therefore determine the Appeal without an Assessment Hearing.
13. The appellant did not request that she be re-examined by an Approved Medical Specialist, who is a member of the Appeal Panel.
14. As a result of that preliminary review, the Appeal Panel determined that it was unnecessary for the appellant to undergo a further medical examination because there was sufficient evidence on which to make a determination.

### **EVIDENCE**

#### **Documentary evidence**

15. 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**

16. 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**

17. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.
18. The appellant's submissions include the following:
  - The MAC contained a demonstrable error and the assessment was made on the basis of incorrect criteria.
  - In respect of the Psychiatric impairment rating scale (PIRS) category of social and recreational activities, the AMS noted:

“I have noted Ms Olah-Jewell's usual and current recreational activities under ‘Social activities / ADL’. Ms Olah-Jewell maintains contact with the same friends and was having regular social gatherings until early 2020, when COVID-19 restrictions commenced.”

- The AMS has failed to consider that the appellant does not voluntarily go out on her own. The appellant's husband pushes her to go out, as stated in the appellant's statement and in the report of Dr Graham George.
- As late as 5 June 2020, the appellant discussed issues with leaving her home with her psychologist, Zeina Boutros, who recorded:
 

“...now that more people are going out to the shops she's becoming overwhelmed. People & crowds are a trigger. Avoidance of going shops...Trying to keep to herself. Using sore leg as an excuse for avoiding family/friends.... ...Watching re-runs of Glee as it's a better time for her. Can't deal with wordly [sic] issues”
- The AMS's perception of the appellant's ability to socialise was inconsistent with the psychologist's notes. This was a demonstrable error. The appellant does socialise, albeit infrequently, and when pushed by her husband, with family and with a small circle of friends.
- The appellant informed the AMS that she does not go out on her own, although this was not included in his report. She is always accompanied by someone she trusts, be it a close friend for coffee in a group of trusted friends, or her husband when they attend the local shopping area.
- The appellant does meet up with friends for coffee, but these friends are only a small group of friends who have been her closest friends. These friends do not speak of work or what happened to the appellant, knowing full well that any talk of work is one of the appellant's triggers. When attending a social outing with friends, the appellant is picked up by her close friend and is dropped off when she arrives home. The appellant is unable to travel alone.
- The appellant submits this is not a Class 2 as rated by the AMS, but rather a Class 3: “Moderate impairment: rarely goes out to such events, and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn.” As explained above, the appellant is unable to leave her home without a support person, does not voluntarily go out to socialise with family and friends and is prompted to go by her husband.
- Accordingly, the appellant submits the AMS's assessment was on the basis of incorrect criteria and contained a demonstrable error.
- In respect of employability, the AMS noted the following for this PIRS Category:
 

“Ms Olah-Jewell has not worked since the subject injury and her anxieties impact on her work capacity. Ms Olah-Jewell contributes to limited household chores. She is not devoid of productivity or household contribution, performs gardening and cooking and some cleaning at home.”
- From the reading of the MAC, the AMS has relied on the appellant's “ability” to perform the following activities in his assessment of the appellant as Class 4 in the PIRS Category of “Employability”: the ability to walk her dog every day, organising dinner, talking to her children or friends, walking to the building site of her home that is being constructed, going to the shops nearby and buying some food to prepare dinner and cooking maybe two or three times a week for her family.

- The AMS failed to consider the following:
  - (a) the appellant walks every day with her dog and does not walk alone;
  - (b) she organises dinner, as recommended by her psychologist, for her family but this is not “organisation” at a level expected from an employee in an employment environment;
  - (c) the appellant talks to her children and friends, who are people she is comfortable with and trusts, but she is incapable of speaking to anyone outside of her circle of trusted family and acquaintances and even experienced an episode of anxiety when a stranger sat next to her on the beach. The AMS correctly stated in the MAC that the appellant is “...anxious when she is out” and this anxiety is an impediment for the appellant working in an any kind of environment where she is exposed to strangers;
  - (d) the appellant does not go out of the home alone, including on her walk to the renovation site of her new home (the appellant’s new home is undergoing renovation) or to the shops. This is a 15-minute walk from where she is currently residing at her brother’s home, to where her home is being renovated. She is accompanied by either her daughter, who resides with the family and is a university student, or her son, who works from home. The appellant attempted to explain this to the AMS during the video assessment but was cut off mid-sentence by the AMS. This is an impediment for the appellant to work independently in any environment;
  - (e) the appellant does not cook for her family but sits in the kitchen with a family member and helps by peeling a vegetable, while the family member actually does the cooking. The appellant attempted to explain this to the AMS during the video assessment but was cut off mid-sentence by the AMS. The ability to cook (or peel a vegetable) is not a transferable skill in the open labour market, and
  - (f) the appellant has anxiety issues and issues of being surrounded by strangers and lacks the concentration to do more advanced tasks requiring concentration.
- The issues pointed out above suggest that the appellant is incapable of working outside of her home, where she will be expected to talk to people that she is not familiar with and trust and be expected to be productive. The appellant, when she does leave her home, only visits local areas.
- Furthermore, one of the appellant’s triggers is “people and crowds”. This prevents the appellant from being outside of the home environment. The AMS did not take this into account when reaching his opinion. This was a demonstrable error.
- Accordingly, the PIRS Category for employability is not Class 4 as rated by the AMS, but rather Class 5: “Totally impaired: Cannot work at all.”

- As explained about, the appellant has difficulties being around strangers and is unable to leave her home alone. An ability to perform some housework does not translate into an ability to perform work or tasks outside the home environment and in a professional setting. Accordingly, the appellant submits the AMS's assessment was on the basis of incorrect criteria and contains a demonstrable error.
- The correct assessment should be: Class 2 for Self-Care & Personal Hygiene, Class 3 for Social & Recreational Activities, Class 2 for Travel, Class 2 for Social Functioning, Class 3 for Concentration, Persistence & Pace and Class 5 for Employability and Adaptation. This produces an assessment of 19% WPI.

19. The respondent's submissions include the following:

- The AMS has taken a thorough history including documenting that history taken at various parts of the MAC including page 5 where he addresses social and recreational activity and noted Dr Teoh's assessment.
- The AMS also referred to a thorough history regarding this category on pages 2 and 3 of the MAC. The AMS explained that the appellant:
 

“..... described social recreational activities which are consistent with some of the descriptors from Class 1, 2 and 3. Class 3 impairment is when a person rarely goes out to a social event, mostly when prompted by a friend or family, would not go without a support person, is not actively involved and remained quiet and withdrawn. In my opinion, Ms Olah-Jewell's described social and recreational activities are most consistent with a Class 2 impairment, in that she had regular social gatherings before COVID-19, she does not require a support person, she is actively involved when there is a social gathering.”
- The AMS acknowledged that the appellant's reporting on this category was consistent in part with Class 1, 2 and 3 and considered the history in totality prior to ultimately assessing Class 2 which was appropriate in the circumstances.
- The AMS also considered the appellant's various statements as noted on page 7 of the MAC. The appellant provides two separate statements dated 8 June 2017 and 10 July 2020. The first statement was dated given that it was prepared more than three years ago. The second statement was quite brief on the impact on social and recreational activities and in this regard, the appellant was in fact aided by the AMS in the ability to explain more as to how the psychological injury had in fact impacted upon this category rather than simply relying upon the appellant's most recent statement.
- The AMS also considered the medical report of Dr Teoh dated 14 November 2018 as part of the assessment but that was dated given that the report was prepared two years ago.
- Importantly, the AMS obtained his own history at the examination as he was required to do. In that history, he was able to obtain from the appellant that she was able to go out without a support person and also that the appellant was able to go to a local café to 'meet up' with her friend. The AMS specifically referenced the appellant also being "actively involved" when there is a social gathering.
- The appellant seeks to challenge the AMS in stating that she is able to go out on her own yet did not cavil with his opinion that she was able to meet up with friends. This would be suggestive of Class 2.

- Also, as noted by the AMS the appellant went overseas to America. The AMS was not entirely sure as to whether this occurred in 2018 or 2019 however in the clinical entry of Dr Madhu Lal dated 13 August 2019 there is some suggestion that this occurred around August 2019.
- In any event, the appellant appears to be attacking the integrity of the AMS in history taking and this should be outrightly rejected. An AMS is not required to record every single comment made by the appellant. What is required is that he records the relevant information before arriving at his overall assessment which the respondent submits the AMS has attended to unreservedly.
- On the totality of the evidence, the AMS reached a conclusion that was open to him, namely that the appellant has a mild impairment.
- The AMS had carefully considered the history before arriving at Class 2. Accordingly, the respondent submits there is no demonstrate error and the MAC is not based on incorrect criteria.
- In respect of employability, the relevant Classes are defined as follows: Class 4: Severe impairment: Cannot work more than one or two days at a time, less than twenty hours per fortnight. Pace is reduced, attendance is erratic. Class 5: Totally impaired. Cannot work at all.
- The appellant has attacked the integrity of the history obtained at the examination by introducing new information to the Workers Compensation Commission rather than adhering to the information already considered in the material before the AMS at the time of the examination.
- An application would need to have been made under s 327 (3)(b) of the 1998 Act. That has not occurred and so, the respondent submits that the application to appeal in relation to the new evidence cannot proceed.
- The AMS is an experienced assessor having conducted numerous psychiatric medical examinations with specific application of the PIRS scale and his assessment was not at odds with the evidence including the appellant's statement dated 10 July 2020.
- On the totality of the evidence, the AMS has reached a conclusion that was open to him. The AMS has considered the history before arriving at Class 4. Accordingly, the respondent submits there was no demonstrate error and the MAC was not based on incorrect criteria.
- In summary, the appellant's submissions appear to be based purely on disagreement rather than any sufficient ground of appeal. The appellant is attacking the integrity of the history obtained at the examination. The AMS is an experienced assessor and his assessment should be preferred particularly noting the thorough history taken by him which was not at odds with the totality of the evidence. The appellant sought to introduce new information when attacking the history of the AMS through its submissions particularly on the category of employability which the respondent submits is not appropriate particularly in the absence of the appellant specifically making an application to appeal under s 327 (3)(b) of the 1998 Act. The AMS has recorded an accurate and detailed history from the appellant through appropriate enquiry and has carefully considered the material before him before reaching his conclusion. The AMS has applied the appropriate Guides and importantly, has used them as a guide only before reaching his own conclusion. Accordingly, there was no demonstrable error nor was the assessment based on incorrect criteria.

- The MAC should be confirmed.

## FINDINGS AND REASONS

20. 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.
21. In *Campbelltown City Council v Vogan* [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.
22. Though the power of review is far ranging it is nonetheless confined to the matters that can be the subject of appeal. Section 327(2) of the 1998 Act restricts those matters to the matters about which the AMS certificate is binding. Section 327(2) was amended with the effect that while the appeal was to be by way of review, all appeals as at 1 February 2011 were limited to the ground(s) upon which the appeal was made. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 Davies J considered that the form of the words used in s 328(2) of the 1998 Act being, 'the grounds of appeal on which the appeal is made' was intended to mean that the appeal is confined to those particular demonstrable errors identified by a party in its submissions.
23. In this matter the Registrar has determined that he is satisfied that at least one of the grounds of appeal under s 327(3)(d) was made out, in relation to the AMS's assessment of the PIRS classes.

## Discussion

24. The Panel reviewed the history recorded by the AMS, his findings on examination, and the reasons for his conclusions as well as the evidence referred to above.
25. The appellant in effect submitted that the AMS's WPI assessment was incorrect against the criteria in the PIRS tables within the Guidelines. In particular, there was a misapplication of the PIRS criteria in respect of the following ratings.
  - (a) Table 11.2, for social and recreational activities, and
  - (b) Table 11.6, for employability.
26. The AMS is required to interview the worker and provide his assessment of WPI and opinion based upon his own findings as at the date of the examination.
27. In *Parker v Select Civil Pty Ltd* [2018] NSWSC 140 (*Parker*) Harrison AsJ at [66] said:
  - "66. In relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense...
  70. To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence.

71. The AMS took the history from Mr Parker and conducted a medical assessment, the significance or otherwise of matters raised in the consultation is very much a matter for his assessment. It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ. Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error. The material before the AMS, and his findings supports his determination that Mr Parker has a Class 3 rating assessment for impairment for self-care and hygiene, that is to say, a moderate impairment of self-care and hygiene..."
28. In *Chalkias v State of New South Wales* [2018] NSWSC 1561, Adamson J noted that the worker alleged that the Medical Appeal Panel (MAP) failed to identify the error in the MAC which was a necessary jurisdictional prerequisite, and had erred by substituting its own opinion for that of the AMS. Adamson J found at [33]-[36] that the MAP reasons demonstrated that it had correctly understood and exercised its jurisdiction. The MAP was satisfied that the AMS had made errors relating to the grading of the self-care and personal hygiene category, and having identified the error, the MAP was entitled and obliged to review the assessment in relation to that category.
29. Adamson J found that the MAP's assessment of the self-care category did not amount to a mere difference of opinion of the kind described by Harrison AsJ in *Parker*, and that the MAP coming to a different assessment of that category did not "convert" its initial finding of error into a mere difference of opinion (at [36]). Adamson J dismissed the worker's appeal of a MAP's decision, finding there was no error of law or jurisdictional error.
30. The Panel reviewed the appellant's submissions and the evidence in this matter.

### **Social and Recreational Activities**

31. The appellant submitted that the AMS failed to apply the appropriate PIRS criteria with respect to the choice of ratings for social and recreational activities. The appellant argued that the AMS incorrectly rated her as Class 2 of "Table 11.2: PIRS- social and recreational activities" and that the AMS should have correctly rated her to be in Class 3 in that category.
32. The examples under Table 11.2 in the Guidelines for Class 1 are: "No deficit, or minor deficit attributable to the normal variation in the general population: regularly participates in social activities that are age, sex and culturally appropriate. May belong to clubs or associations and is actively involved with these." The examples for Class 2 for social and recreational activities are: "Mild impairment: Occasionally goes out to such events without needing a support person, but does not become actively involved (eg. dancing, cheering favourite team)." The examples for Class 3 are: "Rarely goes to such events, and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn".
33. In the PIRS Rating Form, the AMS assessed the appellant as Class 2 and wrote:
- "I have noted Ms Olah-Jewell's usual and current recreational activities under 'Social activities / ADL'. Ms Olah-Jewell maintains contact with the same friends and was having regular social gatherings until early 2020, when COVID-19 restrictions commenced."



34. On page 4 of the MAC under “social activities/ADL”, the AMS wrote:

“Ms Olah-Jewell said she has a daily activity plan as recommended by her psychologist. She would take her dog for a walk every day, and she would organise dinner and talk to her children or a friend. She said her husband pushed her to go out and do things.

A couple of times a week, she walks to the building site, which is not far from home and she would then go to the shops nearby - this is a small shop where there are not many people, and she would buy some food to prepare dinner. Ms Olah-Jewell reported she goes to the shops only two or three times a week and that her husband performs most of the grocery shopping.

The family shares the cooking and they are all vegetarians. Ms Olah-Jewell said she would cook maybe two or three times a week. Her family tells her what they want, and she would cook it for them.

Ms Olah-Jewell said that before her psychological injury she had five close friends. They had known each other for a long time, and their children had grown up together. She reported that she has not lost friends and still has regular contact with the same friends, and they are very understanding. They talk about television, their families, travel they have done and cooking, but she does not really talk about her psychological injury with them.

A friend had lost employment and has been visiting Ms Olah-Jewell recently, every one or two weeks. They would take walks together, walk to a local café and drink tea, near the local fruit shop.

The other friends are working and some are teachers. They talk and message each other on social media.

Ms Olah-Jewell said that there is always some reason to get together with her friends, for dinner or visit each other, have a pizza night or a barbeque or parties, with the group of five friends. Earlier this year, they get together almost every week, but since the COVID-19 restrictions they have not been doing it. When they get together she actively engages in conversation with them, and while she is anxious she also finds it enjoyable to have contact with her friends.

...

Ms Olah-Jewell does not have any particular hobbies anymore. I note that in her file she previously liked going to movies, doing gardening and taking walks.

Ms Olah-Jewell has been doing gardening, trimming the hedge on most days for about half an hour. She would tend to the flowers and said she enjoys having fresh air. She has a dog, which is a rescue dog from the RSPCA.

The last holiday Ms Olah-Jewell had was in 2018 or 2019. She went to the USA to visit a cousin..”

35. On page 5 of the MAC, under “summary of injuries and diagnoses” the AMS wrote:

“Regarding social recreational activity, Dr Teoh rated 3 and advised that Ms Olah-Jewell reported significant loss of interest in usual activities and social isolation, lacking motivation and interest and feeling agitated, hypervigilant and easily startled and he did not note her social contact with the same group of friends. This was 2 years prior to my assessment. In my assessment I noted that Ms Olah-Jewell maintained regular contact with the same group of friends, and before COVID-19 she had regular contact with them, often on a weekly basis.

They would visit each other and eat together, and since COVID-19 she would sometimes go out with a friend to a local café and to chat. Her friend also visited her at home, and this had been the pattern since her injury and before COVID 19. Ms Olah-Jewell does go out by herself and goes to a local café to meet up with her friend. Whilst she prefers a support person, she does not need a support person to go out. Her husband pushes her to go out and do things, and without his prompting she would attend fewer activities on her own volition. Ms Olah- Jewell is actively engaged in general conversation when she is with her friends but avoids discussion about her psychological injury. Ms Olah-Jewell also enjoys her usual solitary recreational activity such as gardening, but cannot enjoy other activities such as reading books.

Ms Olah-Jewel described social recreational activities which are consistent with some of the descriptors from Class 1, 2 and 3. Class 3 impairment is when a person rarely goes out to a social event, mostly when prompted by a friend or family, would not go without a support person, is not actively involved and remained quiet and withdrawn. In my opinion, Ms Olah- Jewell's described social and recreational activities are most consistent with a Class 2 impairment, in that she had regular social gatherings before COVID-19, she does not require a support person, she is actively involved when there is a social gathering.”

36. In her statement dated 8 June 2017, the appellant said that she enjoyed reading, going to movies, gardening, going for walks. She said that she loved animals and has dogs and liked spending time with her children, family and friends.
37. In her statement dated 10 July 2020, the appellant said that she had been attending Zeina Boutros, psychologist. She wrote:

“My sessions with Zeina help me, we talk about what happened and how I can cope with what happened. She has encouraged me to work in the garden, to occupy my mind with other activities. She also recommended that I cook and walk the dog for exercise. She tried to help stop me feeling powerlessness.

I find it difficult to enjoy activities. I lack initiative and motivation. If it was not for my husband pushing me to go out, I would remain in the house all day. I have tried to go out with friends for a coffee on some occasions. I find it hard to socialise. Any talk of work triggers bad thoughts.

I have problems going to the local shopping plaza and I could not face the crowds of what was my local Westfields.”
38. In his report dated 14 September 2018, Dr Ben Teoh rated the appellant as Class 3 for social and recreational activities providing the following reasons:

“She reported significant loss of interest in her usual activities and social isolation. She has been lacking motivation and interest. She has been feeling agitated. She has been hypervigilant and easily startled.”
39. Dr Graham George in a report dated 11 September 2017 made a diagnosis of chronic post-traumatic stress disorder and noted:

“She said that she had friends with whom she can have a meal out or a coffee on occasions. She said that she would watch a movie with a girlfriend on occasions. She attempts to walk for about 45 minutes a day most days. She enjoys listening to music, reading books and engaging in Facebook.”

40. In a supplementary report dated 15 October 2019, Dr George wrote:
- “She finds it difficult to enjoy activities. Unless her husband pushed her to do so, she would not go out. She lacks initiative and motivation..”
41. In her clinical notes dated 5 June 2020, Zeina Boutros, treating psychologist, recorded the following:
- “Rushing is a trigger - now that more people are going out to the shops she’s becoming overwhelmed.
- People & crowds are a trigger. Avoidance of going shops (sic)...Trying to keep to herself.
- Using sore leg as an excuse for avoiding family/friends....
- ...Watching re-runs of Glee as it’s a better time for her. Can’t deal with wordly [sic] issues.. Felt content being outside Liverpool area – finding peace away from there.”
42. The appellant argued that the AMS’s perception of the appellant’s ability to socialise was inconsistent with the notes of Ms Boutros and that she did socialise, albeit infrequently, and when pushed by her husband, with family and a small group of friends. The appellant also submitted that she told the AMS that she was not able to go out on her own but this was not included in his report.
43. The Appeal Panel considered whether the AMS had erred in making a Class 2 rating for social and recreational activities. Dr Teoh rated the appellant as Class 3 for social and recreational activities. The AMS acknowledged that the appellant’s reporting in this category was consistent in part with Class 1, Class 2 and Class 3 and considered the history in totality before finally assessing the appellant as Class 2.
44. The AMS has provided a detailed assessment. Although he obtained a history that she engaged in activities when told by her husband and psychologist to do them, he reported that she was actively involved in those social activities and, although anxious, found it enjoyable to have contact with her friends. Dr Teoh’s report was based on a history given more than two years ago, and it is possible that there has been some change since then particularly after the appellant moved home. The history obtained by the AMS was more up to date and more extensive than that given in Ms Boutros’s clinical notes.
45. The AMS noted that the appellant enjoyed gardening and took her dog for a walk. It appears that she was not accompanied by another person when she walked the dog. She attended social functions including going to cafes and the movies with friends. The AMS noted that the appellant also said that there was always some reason to get together with her group of five friends, for dinner or visit each other, have a pizza night or a barbeque or parties. He noted that earlier this year, they got together almost every week, but since the COVID-19 restrictions they have not been doing it. On balance, the Appeal Panel considered that the history was consistent with Class 2.
46. Based on the evidence before the Appeal Panel, and for the reasons provided by the AMS in the MAC, the Appeal Panel considered that it was appropriate for the AMS on the evidence to make an assessment of Class 2 for social and recreational activities.

## Employability

47. The appellant submitted that the AMS erred in making this rating and that the AMS failed to apply the appropriate PIRS criteria with respect to employability. The appellant submitted that she should be assessed as Class 5. The AMS had placed the appellant in Class 4 for employability.
48. Under Table 11.6 in the Guidelines, Class 4 for employability, the examples are: "Severe impairment: Cannot work more than one or two days at a time, less than twenty hours per fortnight. Pace is reduced, attendance is erratic." The examples in Class 5 are: "Totally impaired. Cannot work at all."
49. The AMS in the PIRS Rating Form wrote:

"Ms Olah-Jewell has not worked since the subject injury and her anxieties impact on her work capacity. Ms Olah-Jewell contributes to limited household chores. She is not devoid of productivity or household contribution, performs gardening and cooking and some cleaning at home..."
50. On page 6 of the MAC, under "summary of injuries and diagnoses" the AMS wrote:

"Dr Teoh rated Ms Olah-Jewell's employability as a 5. Based on my assessment, I believe a rating of 4 is more appropriate as she does contribute to various household activities on most days of the week and she is not devoid of productivity."
51. In her statement dated 8 June 2017, the appellant said that she had remained unfit for work since the incident on 16 February 2017. In her supplementary statement dated 10 July 2020, the appellant stated that she had not returned to work since the incident and remained off work.
52. In his report dated 14 September 2018, Dr Ben Teoh rated the appellant as Class 5 for employability providing the following reasons:

"She is not fit to work. She has been anxious about returning to work. She has recurrent images and memories of the incident on 16 February 2017."
53. Dr George, in his supplementary report dated 15 October 2019, did not provide any ratings for the PIRS categories as he considered that the appellant was not at maximum medical improvement. However, Dr George was of the view that the appellant had no capacity for work of any kind.
54. The Appeal Panel considered whether the AMS had erred in making a Class 4 rating for employability. The appellant has not worked since the injury on 16 February 2017.
55. It was significant that Dr Teoh's report was written more than two years ago and Dr George's report was written about 14 months ago. It is possible that some change has occurred since those assessments.
56. The appellant had alleged that she was prevented from providing further details to the AMS during the examination and submitted that she was cut off when providing some of her history and could not provide further details such as being accompanied by a family member when walking to the site of her new home or what she actually does when cooking a meal.

57. No fresh evidence was filed by the appellant in this matter. 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.
58. In *Lukacevic v Coates Hire Operation Pty Ltd* [2011] NSWCA 1122 (*Lukacevic*) at [78], Hodgson JA said:
- “A dispute by the workers as to the history set out in the certificate, or the observations made by the AMS, can be readily raised; and it could be raised honestly or dishonestly, on strong or flimsy grounds. Having regard to the matters I have set out, in my opinion it would be reasonable for an AP not to admit evidence raising such a dispute unless that evidence had substantial prima facie probative value, in terms of its particularity, plausibility and/or independent support. ...”
59. There is no evidence before the Appeal Panel that the appellant was cut off when providing some of her history in the examination by the AMS. It is not appropriate to attempt to introduce new information in the submissions in the absence of an application to lodge fresh evidence. In addition, allowing the submissions to be treated as evidence would unfairly prejudice the respondent, who would not be capable of adducing evidence to respond to the allegations concerning the manner in which the assessment was undertaken.
60. The appellant has filed two statements dated 8 June 2017 and 10 July 2020 in the proceedings, which provided some details of matters such as her symptoms and restrictions, daily activities and household activities and these were all matters that could have been addressed in further detail by her before the examination and assessment by the AMS.
61. Part 11.12 of the Guidelines provides that the examples of activities are examples only. The Guidelines are not prescriptive and are designed to provide a basis upon which to begin the process of rating and need to be adapted in each case. The AMS was in a position where he was able to make an assessment on examination using his clinical judgment. The Appeal Panel considered that a rating of Class 4 for Employability was open to the AMS even though the appellant has not been employed since the injury on 16 February 2017. The Appeal Panel noted that the AMS found that the appellant was capable of some productive activities and contributed to a variety of household activities. The AMS considered in making his assessment that the appellant had had the capacity to work less than 10 hours a week with reduced pace and erratic attendance. The Appeal Panel was of the view, after taking into account the medical evidence and the MAC, that it was open to the AMS to assess the appellant's impairment for employability as severe being a Class 4.
62. In conclusion, the Appeal Panel did not consider that there has been an incorrect application of relevant assessment criteria, that is, the relevant Guidelines including the PIRS Guidelines or any demonstrable error in the AMS' assessment.
63. For these reasons, the Appeal Panel has determined that the MAC issued on 28 September 2020 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*.

R Gray

Robert Gray  
Dispute Services Officer  
**As delegate of the Registrar**

