

# WORKERS COMPENSATION COMMISSION

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

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**Matter Number:** M1-2433/20  
**Appellant:** Jeanette Walters  
**Respondent:** Mercy Health Albury Limited  
**Date of Decision:** 9 February 2021  
**Citation No:** [2021] NSWCCMA 27

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**Appeal Panel:**  
**Arbitrator:** Ross Bell  
**Approved Medical Specialist:** Dr Patrick Morris  
**Approved Medical Specialist:** Dr Douglas Andrews

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### BACKGROUND TO THE APPLICATION TO APPEAL

#### SUBMISSIONS

11. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel and are briefly summarised below. The grounds of appeal are against the findings of the AMS regarding the Psychiatric Impairment Rating Scale (PIRS) Categories of:
- (a) Self-care and personal hygiene;
  - (b) Social and recreational activities;
  - (c) Travel, and
  - (d) Concentration, persistence and pace.

#### Appellant

12. The appellant submits that the AMS has erred in taking an incorrect history regarding all PIRS Categories appealed. It is submitted that Ms Walters told the AMS things other than what he recorded. Additional information is put forward in the form of submissions which was not recorded by the AMS or contained in the materials relied on by the parties before the AMS.
13. The appellant submits that the AMS has erred in not taking proper note of the assessment of Dr Ben Teoh in his report of 21 August 2018 regarding Social and recreational activities; and Concentration, persistence and pace.
14. The AMS should have found a minimum of Class 3 impairment for Self-care and personal hygiene had he taken a correct history.
15. The AMS should have found a minimum of Class 3 impairment regarding Social and recreational activities as did Dr Teoh.
16. The AMS should have found a minimum of Class 3 impairment has he taken a correct history as to Travel.

17. The AMS should have found a minimum of Class 3 impairment for Concentration persistence and pace as did Dr Teoh.
18. The MAC should be revoked, and Ms Walters re-assessed by the Panel.

### **Respondent**

19. The respondent submits that there is no demonstrable error or use of incorrect criteria. The AMS was obliged to make his own assessment on the day of the examination.
20. The respondent relies on authorities setting out the principles in relation to the importance of the clinical observations of an AMS, and the need for more than a difference of opinion to establish error. These authorities are discussed below.
21. The AMS sets out his reasons for finding Class 2 for Self-care and personal hygiene. He has taken an adequate history. The appellant now seeks to submit a history contrary to what was given to the AMS. The AMS carefully considered the history before finding mild impairment.
22. The AMS has taken an adequate history regarding Social and recreational activities, going into detail as to Ms Walters' activities. The appellant is now attempting to introduce a new history not contained in her statements; the medical reports; and the history given to the AMS. The appellant relies on the report of Dr Teoh which was over two years old at the time of the assessment by the AMS. The AMS explains why he differs from Dr Teoh. Class 2 was open to the AMS and there is no error.
23. As to Travel the appellant again attempts to introduce a new history which is absent from the other evidence and the history reported to the AMS. Class 2 was open to the AMS and is consistent with the assessments of both Dr Teoh and Dr Allen who both also assessed Class 2 for Travel.
24. On the appellant's submissions regarding Concentration, persistence and pace, that the AMS disagreed with Dr Teoh does not constitute an error. The AMS explains why he disagrees with Dr Teoh. The appellant again attempts to introduce a new history in submissions that was not before the AMS.
25. The appeal is limited to pure disagreement rather than having a sufficient ground for appeal. There is no error, and the AMS has applied the correct criteria. The MAC should be confirmed.

### **FINDINGS AND REASONS**

26. 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.
27. 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.

### **Legal authorities and principles relevant to the submissions on the PIRS Categories appealed**

28. 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."

29. 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.”

30. The Panel notes that submissions are not evidence. In each of the PIRS Categories complained of the submissions are essentially expressing a difference of opinion with the AMS. The opportunity was there for Ms Walters to include in her statements and raise with the AMS at examination the assertions now belatedly made on her behalf. It is apparent from the above authorities that the appellant, in seeking to introduce in submissions a different history to that given to the AMS and contained in the materials is attempting to “cavil at matters of clinical judgment”.

31. The importance of the exercise of clinical judgement by the AMS in the process of assessment was noted by the Supreme Court in *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140 (*Parker*),

“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] NSWSC 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]).”

32. The Court said, finding the Panel in that matter erred in equating a difference of opinion with a demonstrable error at [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.”

33. The appellant submits that Dr Ben Teoh’s assessment and history should have been accepted by the AMS for the Categories of Social and recreational activities and Concentration, persistence and pace. The Panel notes an AMS is not obliged to accept any of the assessors relied on but to use their own clinical expertise as confirmed in *Parker*. A difference of opinion does not constitute an error on the face of the Certificate.<sup>1</sup> The Panel also notes that Dr Teoh’s assessment was conducted some two years prior to the assessment by the AMS.

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<sup>1</sup> *Mahenthirarasa*

34. The AMS had before him the history he took from Ms Walters, his findings on examination, and the materials provided, upon which he based his conclusions.
35. The AMS explained his finding of Class 2 for Self-care and personal hygiene and the assessment of Dr Allan and Dr Teoh at Part 10.c,

“Whereas Dr Allan and Dr Teoh both rated Ms Walters’ self-care as 1, I rated 2 on the grounds that she has been losing weight and feeling nauseated. I believe a substantial part of this is due to her psychological health and I have not identified another cause for her gastric symptoms. Although Ms Walters gives a history that she showers twice a day and does not require prompting to eat or to shower, she presented as being unkempt and therefore I did not believe her presentation was consistent with normal variation in the population.”

36. The AMS gave his reasoning for Class 2 regarding Social and recreational activities, also at Part 10.c,

“Dr Allan and Dr Teoh both rated Ms Walters’ social and recreational activities as 3. It is clear that her functioning in this category is improved compared to those assessments. I took a history that Ms Walters talks to her friends and visits them a few times a week. She enjoys talking to them and eating with them. Ms Walters enjoys gardening, taking walks, reading books for a couple of hours each time. If she had money, she would prefer to do more and within her current circumstances, she is already initiating and maintaining, and actively engaged in regular social and recreational activities. Ms Walters does not require a support person to attend these activities, and therefore I rated 2.”

37. For Travel, the AMS explains the Class 2 rating at Table 11.8,

“Ms Walters is anxious when she leaves home. She is independent in travel to familiar local area.”

38. The AMS explained the Class 2 rating for Concentration, persistence and pace at Part 10.c,

“Dr Teoh rated Ms Walters’ concentration, persistence and pace as 3 and advised that she has poor concentration and persistent preoccupation with negative thoughts, ruminating about unfair treatment at work. In my assessment, similar to Dr Allan, I noted that she completed a certificate IV within the normal timeframe. She continues to read books and can focus on reading for more than 1 hour at a time. She said subjectively there is no problem with her concentration and memory but taking into account that she presented as being disorganised at times (but not circumstantial and the IME noted), I rated 2.”

39. The above extracts reflect the degree of care with which the AMS approached each of the Categories appealed before reaching his conclusions. He also took account of the medical reports relied upon and considered that Ms Walters had improved since the assessments of both Dr Allan and Dr Teoh.
40. The findings in all the Categories appealed were open to the AMS and the Panel discerns no error. The appeal is based on differences of opinion and the submissions merely cavil with the findings of the AMS. The grounds of appeal are not made out.

## **Findings**

41. The Panel finds no demonstrable error on the face of the Certificate; and the AMS has used the correct criteria for the assessment.
42. For these reasons, the Appeal Panel has determined that the MAC issued on 8 September 2020 is 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*.

*A Reynolds*

Antony Reynolds  
Dispute Services Officer  
**As delegate of the Registrar**

