

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-4048/19
Appellant:	Secretary, Department of Communities and Justice (NSW Trustee & Guardian)
Respondent:	Dean James Ardern
Date of Decision:	10 March 2020
Citation:	[2020] NSWCCMA 43

Appeal Panel:	
Arbitrator:	Carolyn Rimmer
Approved Medical Specialist:	Dr Michael Hong
Approved Medical Specialist:	Dr Julian Parmegiani

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 24 December 2019, Secretary, Department of Communities and Justice (NSW Trustee & Guardian) (the appellant) made an application to appeal against a medical assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission). The appellant was insured at the relevant time by QBE Insurance (Australia) Limited agent for iCare Insurance for NSW (TMF). The medical assessment was made by Professor Nicholas Glozier, Approved Medical Specialist (the AMS) and issued on 27 November 2019.
2. The respondent to the appeal is James Dean Ardern (Mr Ardern).
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*, 4th ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed (AMA 5).
7. The Appeal was made within 28 days of the date of the medical assessment.

RELEVANT FACTUAL BACKGROUND

8. Mr Ardern developed a primary psychological injury in the course of his employment as an Estate Manager in the Office of the Protective Commissioner when he was assaulted by a client on 3 June 2004.
9. The matter was referred to the AMS, Professor Nicholas Glozier, on 17 September 2019 for assessment of whole person impairment (WPI) of Mr Ardern's psychological/psychiatric disorder attributable to the injury on 3 June 2004.
10. The AMS examined Mr Ardern on 20 November 2019 and assessed 15% WPI in respect of the psychological/psychiatric disorder as a result of the injury on 3 June 2004.

Fresh evidence

11. 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.
12. Mr Ardern seeks to admit the following evidence:
 - (a) Email from the worker to Mr Simon Loveday, dated 19 October 2018;
 - (b) Email from Mr Loveday to the worker, dated 22 October 2018;
 - (c) Email from Mr Loveday to the worker, dated 2 April 2019;
 - (d) Email from Mr Loveday to the worker, dated 16 January 2020, and
 - (e) Mr Ardern's wage records from October 2018 to January 2020
13. Mr Ardern submitted that the evidence is relevant to the rating for employability and the email correspondence and leave record from the employer filed as late documents demonstrated issues with attendance and capacity. Mr Ardern argued that this material suggests that despite there being a reported capacity for four days per week, this was, in reality, not the case when one averages out attendance and reduced performance.
14. Mr Ardern did not make any submissions as whether the evidence was not available and could not reasonably have been obtained.
15. The Appeal Panel issued a direction following the preliminary review on 26 February 2020 directing the appellant to file within five days any submissions in relation to the fresh evidence annexed to the Notice of Opposition.
16. On 4 March 2020, the Commission forwarded to the members of the Appeal Panel a letter from the appellant's solicitor, Mr Krieg of Turks Legal, dated 10 February 2020. This letter addressed the issues raised by the Appeal Panel in the Direction dated 26 February 2020.
17. The appellant submits that the evidence filed by Mr Ardern amounts to fresh evidence and is inadmissible and cannot be considered by the Appeal Panel.

18. The appellant referred to the decision in *Markovic v Rydges Hotels Ltd* [2009] NSWCA 181 in which the Court held that the Medical Appeal Panel (MAP) also had the duty to act in accordance with the requirements of procedural fairness in relation to the respondent's additional evidence.
19. The appellant submitted that the evidence that was filed with the Notice of Opposition was available to Mr Ardern prior to the AMS's assessment. In particular, three out of the four emails that were filed pre-dated the filing of the Application to Resolve a Dispute and were in Mr Ardern's possession when the proceedings were commenced. The Appellant conceded that the email from Mr Loveday to Mr Ardern, dated 16 January 2020, did come into existence after the appeal was commenced but that email essentially contained the same information and statements of Mr Loveday as the previous two emails of October 2018 and April 2019. The appellant argued that the information contained in the email on 16 January 2020 was available prior to the appeal and could have been reasonably obtained earlier (which it was). The Appeal Panel agreed with the appellant that the emails from Mr Loveday apart from the one dated 16 January 2020 were available to Mr Ardern and could have reasonably been obtained by Mr Ardern before the medical assessment. The Appeal Panel accepted the submission from the appellant that a significant prejudice would be placed on the appellant if the email were admitted because Dr George, qualified on behalf of the appellant never had the opportunity to comment on them.
20. The Appeal Panel determines that the following evidence should not be received on the appeal:
 - (a) Email from the worker to Mr Simon Loveday, dated 19 October 2018;
 - (b) Email from Mr Loveday to the worker, dated 22 October 2018;
 - (c) Email from Mr Loveday to the worker, dated 2 April 2019, and
 - (d) Email from Mr Loveday to the worker, dated 16 January 2020.
21. The appellant submitted that the wage records of the worker were irrelevant to the calculation of Mr Ardern's whole person impairment. The Appeal Panel noted that one of the Psychiatric Impairment Rating Scale (PIRS) categories that is relevant to the assessment of permanent impairment is employability. One factor that is considered in assessing employability is the number of hours a worker can work per week. The Appeal Panel accepts that the actual number of hours worked is relevant in assessing employability.
22. The Appeal Panel determines that the following evidence should be received on the appeal:
 - (a) Mr Ardern's wage records from October 2018 to January 2020.

PRELIMINARY REVIEW

23. 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.
24. 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.
25. The appellant did not request that Mr Ardern be re-examined by an Approved Medical Specialist, who is a member of the Appeal Panel.
26. As a result of that preliminary review, the Appeal Panel determined that it was unnecessary for Mr Ardern to undergo a further medical examination because there was sufficient evidence on which to make a determination.

EVIDENCE

Documentary evidence

27. 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

28. 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

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

30. The appellant's submissions include the following:

- (a) The AMS used incorrect criteria in his application of the PIRS ratings based on his examination and the evidence available.
- (b) As a result of the incorrect criteria applied, the AMS made a demonstrable error in his assessment of Mr Ardern's WPI.
- (c) In respect of self-care and hygiene, the AMS rated Mr Ardern as Class 2. The AMS recorded at Part 4 of the MAC that Mr Ardern "...does all his own self-care, shopping, cooking and cleaning ... has a shower daily and presents himself for work in a respectable manner." The fact that Mr Ardern's home is messy and that his preparation of meals on a weekly basis is limited should be considered as a minor deficit. This is due to the regular functioning in other areas of self-care and personal hygiene.
- (d) In consideration of the above, an assessment of class 1 for "self-care and personal hygiene" is more appropriate.
- (e) In respect of travel, the AMS rated Mr Ardern as Class 2. The AMS recorded that Mr Ardern was previously able to fly to Tweed Heads and that he managed getting through the airport. In addition, Mr Ardern stated that he could manage public transport and sit with strangers on those journeys. Mr Ardern noted that he experienced anxiety at the airport and on public transport and also avoided areas when driving where he was likely to see homeless people or individuals with a psychiatric condition.
- (f) The restrictions outlined above amount to a normal variation in the general population. This is because it is not uncommon for individuals to experience anxiety when travelling and to avoid areas which may be dangerous. The fact that Mr Ardern is able to sit comfortably with strangers on public transport is an indication that he only has a minor deficit.
- (g) In view of the above, Mr Ardern satisfies an assessment of class 1 for "travel".
- (h) In respect of employability, the AMS rated Mr Ardern as Class 3.
- (i) Mr Ardern is currently working 30 hours, 4 days per week with the Department of Social Services. The AMS considered that the role was of a similar level of intellectual demand as Mr Ardern's pre-injury employment and it was acknowledged that it was recorded that Mr Ardern was not currently performing as well as his colleagues.
- (j) The appellant concedes that Mr Ardern does not work full time in a different position as required by the class 2 criteria. However, he is not restricted to 20 hours per week in a less demanding position, which does not qualify him to be assessed as class 3.
- (k) Given Mr Ardern is able to work 30 hours per week in a comparable position, an assessment of class 2 is more appropriate for "employability".

- (l) Mr Ardern should have been assessed as Class 1 for self-care and personal hygiene, Class 3 for social and recreational activities, Class 1 for travel, Class 3 for social functioning, Class 2 for concentration, persistence and pace and Class 2 for employability. The median of those scores is 2 and the aggregate is 12. This equates to 6% WPI. Mr Ardern should have been assessed with 6% WPI.

31. The respondent's submissions include the following:

- (a) In respect of self-care and hygiene, the AMS noted on pages 3-4 that Mr Ardern "will often eat late and sometimes misses meals or just reheats something because of his drinking. He says his doctor has encouraged him to make meals to put into the freezer that he can reheat such that he eats some proper food".
- (b) On page 4 of the MAC, the AMS noted that Mr Ardern said: "that he would previously be quite fastidiously neat,' and now his home is 'frequently a mess and untidy."
- (c) The AMS referred to the medical opinion given by Dr George and said that his assessment in this category differed in a way which "is not consistent with the history elicited today or reported to everybody else." The AMS noted, in particular, the area of self-care where he believed there was impairment. It appears that the allegation of error is mounted on a difference of opinion with that Dr George who was qualified by the appellant.
- (d) There was no error in assessing Mr Ardern as Class 2 for self-care and hygiene.
- (e) In respect of travel, there was again a difference of opinion with Dr George. In relation to Dr George, it was said he was the 'slight outlier compared to other assessors' (p. 7).
- (f) The AMS took a history that Mr Ardern 'can manage trains ... and drive locally;' however, 'he does not drive well ... and will avoid certain areas where he knows he might see homeless people or those who appear to have psychiatric problems' (p. 4).
- (g) The appellant submitted that this is 'a normal variation in the general population', but how this is so is unclear.
- (h) This issue was addressed by the AMS at page 7 where he wrote: "Although he has been able to travel using all modalities, there are a number of situations that he will avoid due to his anxiety. Neither of these would be considered to be within the normal range for the population."
- (i) No error has been demonstrated in assessment of travel as Class 2.
- (j) In respect of employability it is evident that the examples given for Class 2 and Class 3 do not have to co-exist.
- (k) In Class 2 which the appellant submitted should apply, several examples are given. First, it is said that the worker is able to work full-time in a different environment that requires comparable skill and intellect. Second, it is said that the worker is able to work in the same position but no more than 20 hours per week. It is quite plain that these two scenarios do not have to exist at the same time in order for a worker to be a Class 2, as they are quite different scenarios. In fact, they could not exist at the same time as they are distinct.
- (l) The same can be said about Class 3. First, there is the inability of the worker to work at all in the same position. Second, there is the ability to perform less than 20 hours in a different position requiring less skill or which is less stressful, for example.
- (m) The appellant concedes that Mr Ardern cannot work full-time, but says he is working 30 hours per week. This does not mean, however, that he must be a Class 2, for the reasons given above. Mr Ardern has been unable to work at in the same position, and this places him in Class 3.

- (n) In terms of employability, it is said that there is 'difficulty dealing with his (now professional colleagues, not public) clients, not wanting to go to their offices, even avoiding dealing with them on the phone with anticipatory anxiety that they will be aggressive' (p. 2). It is further said there that performance issues have been noted by the employer of the Respondent.
- (o) The email correspondence and leave record from the employer filed as late documents demonstrated issue with attendance and capacity. This material suggests that despite there being a reported capacity for four days per week, this is in reality not the case when one averages out attendance and reduced performance.
- (p) In terms of the material before the AMS, there were a number of references in the clinical notes of the general practitioner which indicate there has been time off work due to increased anxiety (see, for example, p. 369 ARD).
- (q) There is no error demonstrated in the assessment and rating of employability.
- (r) The MAC should be confirmed.

FINDINGS AND REASONS

- 32. 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.
- 33. 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.
- 34. 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.
- 35. 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 Mr Ardern's permanent impairment.

Discussion

- 36. 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.
- 37. The appellant submitted that the AMS' WPI assessment of Mr Khalilian, 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 11.1, for self-care and personal hygiene;
 - (b) Table 11. 3, for travel, and
 - (c) Table 11.6, for employability.

38. 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.
39. 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...”
40. 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.
41. 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.
42. The Panel reviewed the appellant’s submissions and the evidence in this matter.

Self-Care and Personal Hygiene

43. The appellant submitted that the AMS failed to apply the appropriate PIRS criteria with respect to the choice of ratings for self-care and personal hygiene. The appellant argued that the AMS incorrectly rated Mr Ardern as Class 2 of “Table 11.1: PIRS-Self Care and Personal Hygiene” and that the AMS should have correctly rated Mr Ardern to be in Class 1 in that category.

44. The examples under Table 11.1 in the Guidelines for Class 2 for self-care and personal hygiene are: "Mild impairment: able to live independently; looks after self adequately, although may look unkempt occasionally; sometimes misses a meal or relies on take-away food." The examples for Class 1 are: "No deficit, or minor deficit attributable to the normal variation in the general population".

45. In the PIRS Rating Form, the AMS assessed the appellant as Class 2 and wrote:

"He does all his own self-care, shopping, cooking and cleaning. However he said that previously he would be quite fastidiously neat and now he frequently does little around the home because of his drinking, such that it is frequently a mess and untidy. He had to be prompted to try and eat proper meals which he tries to prepare at the weekend as his mood and alcohol use limit this. He generally has a shower daily and presents himself for work in a respectable manner."

46. On page 3-4 of the MAC under "general health" the AMS wrote:

"He drinks excessively. He has settled into a chronic pattern where he drinks daily. On the nights before (sic) he works, he will start the moment he gets home, c. 5pm, and drink until falling asleep drunk, at times not recalling going to bed. He drinks at least 6-8 stubbies or a litre of wine each night and ensures that he has alcohol around the home. He will often eat late and sometimes misses meals or just reheats something because of his drinking. He says his doctor has encouraged him to make meals to put into the freezer that he can reheat such that he eats some proper food. He only very occasionally drinks much more than this at the weekend, where he might start at around 1 pm."

47. On page 4 of the MAC, under "Social activities/ADL" the AMS wrote:

"Mr Ardern lives on his own in an apartment that he has owned for many years, although only moved into five years ago. He does all his own selfcare, shopping, cooking and cleaning. However he said that previously he would be quite fastidiously neat. Now he frequently does little around the home because of his drinking, such that it is frequently a mess and untidy. He had to be prompted by his doctor to try and eat proper meals which he tries to prepare at the weekend as his mood and alcohol use limit this. He generally has a shower daily and presents himself for work in a respectable manner."

48. In his statement dated 3 July 2019, Mr Ardern wrote:

"I used to keep my apartment very clean and tidy before the assault and vacuum once a week as well as do my laundry regularly. I am now ashamed of the state of my apartment and don't want to have anyone over to visit. On days when I am not working, I struggle to shower and wear clean clothes. I tend to rely on pre-packaged food for the convenience, as I struggle to cook more than a few times per week."

49. In his report dated 9 December 2018, Dr Bertucen rated Mr Ardern as Class 2 for self-care and personal hygiene providing the following reasons:

"Mr Ardern states that he struggles to bathe and wear clean clothes on the days when he is not working. He is frequently demotivated to clean the apartment and as a result is embarrassed about its condition and does not admit visitors to the home. He cooks several nights a week, but otherwise lives on sandwiches or packaged food."

50. In the MAC dated 21 February 2012 Dr Mason rated Mr Ardern as Class 2 for self-care and personal hygiene providing the following reasons:

“While Mr Ardern does look after himself with regard to showering and changing clothes during the week, he neglects this on the weekend. He does not properly care for his nutritional needs and tends to drink alcohol instead. This has caused liver damage.”

51. Dr Scott Clark in a report dated 1 March 2018 noted that Mr Ardern said that he did not attend to his needs at home, leaves bills unpaid, and has not cleaned his house. Dr Clark rated Mr Ardern as Class 2 for self-care and personal hygiene providing the following reasons:

“Mild Impairment. Showers daily except on weekends. Skips breakfast. Often eats limited range of foods including canned tuna and packaged food. Does not wash all of his clothes regularly.”

52. Dr George in a report dated 10 April 2019 rated Mr Ardern as Class 1 for self-care and personal hygiene providing the following reasons:

“Mr Ardern showers daily and dresses independently. He often will eat ‘take away’ food or pick up some food on the way home from Woolworths such as a fried chicken and some salad, from which he can make up a meal. In general, he looks after his own self-care.”

53. The AMS commented on Dr George’s report and wrote:

“Dr George opines that Mr Ardern’s self-care and travel are both unimpaired. This is not consistent with the history elicited today or reported to everybody else. He reports a number of areas in which he is impaired in terms of his self-care regarding his ability to look after his home and/or shop. Although he has been able to travel using all modalities, there are a number of situations that he will avoid due to his anxiety. Neither of these would be considered to be within the normal range for the population.”

54. The Appeal Panel considered whether the AMS had erred in making a Class 2 rating for self-care and personal hygiene. Dr Bertucen, Dr Mason and Dr Clark all rated Mr Ardern as Class 2 for self-care and personal hygiene. Only Dr George rated Mr Ardern as Class 1 for self-care and personal hygiene. The reasons provided by Dr George for the rating were not consistent with the reasons obtained by the other psychiatrists and, in particular, the AMS, Professor Glozier. There was evidence, which the Appeal Panel accepts, that Mr Ardern was impaired in terms of his self-care and personal hygiene.

55. The AMS noted that Mr Ardern sometimes missed meals or just reheated food and had to be prompted by his doctor to prepare proper meals. The AMS also noted that although Mr Ardern did all his own selfcare, shopping, cooking and cleaning, he frequently did little around the home because of his drinking and was untidy. Mr Ardern told the AMS that previously he would be quite fastidiously neat. 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 self-care and personal hygiene as mild.

Travel

56. The appellant submitted that Mr Ardern should be assessed as Class 1. The AMS had placed Mr Ardern in Class 2 for travel. In particular, the appellant argued that the restrictions outlined in the MAC amounted to a normal variation in the general population.

57. In the PIRS Rating Form, the AMS assessed Mr Ardern as Class 2 and wrote:
- “Although he has been able to travel using all modalities, there are a number of areas and situations that he will avoid due to his anxiety.”
58. The AMS noted under “social activities/ADL”:
- “He has flew [sic] a couple of years ago to see a friend in Tweed Heads and said he could get through the airport, being highly anxious. He can manage trains and tries to go to work early so he avoids the rush hour traffic but finds he can sit with people and manage that anxiety, and drive locally. He says he does not drive well, is frequently distracted having had 'scrapes' and will avoid certain areas where he knows he might see homeless people or those who appear to have psychiatric problems.”
59. Under Table 11.6 in the Guidelines, in Class 1 for travel the examples are: “Mild impairment: can travel without support person, but only in a familiar area such as local shops, visiting a neighbour. The examples for Class 2 for travel, are: “Mild impairment: can travel without support person, but only in a familiar area such as local shops, visiting a neighbour.”
60. In his report dated 9 December 2018, Dr Bertucen assessed the appellant as either Class 2 or Class 3 for travel. Unfortunately, the ratings for five of the six categories and reasons for these rating were not attached to the Application.
61. In the MAC dated 21 February 2012, Dr Mason rated Mr Ardern as Class 2 for travel providing the following reasons:
- “Mr Ardern is able to use all forms of transport but avoids certain areas of the city because of his anxiety in encountering his assailant. There are areas into which he will not travel.”
62. Dr Scott Clark in a report dated 1 March 2018 rated Mr Ardern as Class 1 for travel providing the following reasons:
- “No deficit. He is able to drive a car and use public transportation. Avoids close proximity to individuals that remind of his assailant.”
63. Dr George in a report dated 10 April 2019 rated Mr Ardern as Class 1 for travel providing the following reasons:
- “He indicated that he could drive a car independently. He indicated that he could travel in public transport independently.”
64. The AMS commented on Dr George’s report and wrote:
- “Dr George opines that Mr Ardern's Self-Care and Travel are both unimpaired. This is not consistent with the history elicited today or reported to everybody else. ...Although he has been able to travel using all modalities, there are a number of situations that he will avoid due to his anxiety. Neither of these would be considered to be within the normal range for the population.”
65. The Appeal Panel considered whether the AMS had erred in making a Class 2 rating for travel. The Appeal Panel noted that Dr George did not make any reference to Mr Ardern avoiding travelling in a number of situations because of his anxiety. The AMS formed the view that these restrictions would not be considered to be within the normal range for the population.

66. The descriptors in Class 2 are examples and not intended to be exclusive. On balance, and after taking into account the findings on examination, the medical evidence, the Appeal Panel concluded that it was open to the AMS to make a Class 2 assessment for travel on the evidence.

Employability

67. The appellant submitted that the AMS erred in making this rating as Mr Ardern has been able to maintain his fulltime pre-injury position since November 2017. The appellant argued that the AMS failed to apply the appropriate PIRS criteria with respect to employability. The appellant submitted that he should be assessed as Class 2. The AMS had placed the appellant in Class 3 for employability.

68. Under Table 11.4 in the Guidelines, Class 2 for employability, the examples are:

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

69. The examples in Class 3 are:

“Moderate impairment: cannot work at all in same position. Can perform less than 20 hours per week in a different position, which requires less skill or is qualitatively different (eg less stressful).”

70. The AMS in the PIRS Rating Form wrote:

“For the past three years he has been unable to sustain fulltime employment in a different occupation. Although it is probably of a similar level of intellectual demand, he has not been able to return to his previous occupation or its location and has not been performing as well as colleagues.”

71. In his statement dated 3 July 2019, Mr Ardern wrote:

“37. I had another incident of a reoccurrence of depression caused by constant drinking in 2016 which again was accepted by the insurer. I had seen a former colleague from OPC and was informed that their customer service centre was very close to my work. This was unsettling. My Work Cover Medical Certificate allowed me to only work four days a week and at reduced hours on the days I did work. I took Wednesdays off while my anxiety reduced this was all under a Work Cover medical certificate.

38. My medication was changed and I settled briefly, however I still had the thoughts of the assault and negative interactions with clients and providers and the drinking continued. However, as I was receiving more support from work and had reduced my work days to 4 days per week, it was perceived I was doing ok....

40. I went through another long reoccurrence from December 2017 to April 2018 where I was experiencing flash backs to the incident and had the continuing major concerns about meeting with providers. I was sleeping very badly. I was constantly intoxicated at night. I became hypervigilant when seeing people who reminded me of the perpetrator.”

72. In his report dated 9 December 2018, it appears that Dr Bertucen rated Mr Ardern as either Class 2 or Class 3 for employability. The AMS noted that Dr Bertucen’s assessment of the PIRS classes “of 2,2,2,3,3,3 were the same I assess”.

73. In the MAC dated 21 February 2012 Dr Mason rated Mr Ardern as Class 2 for employability providing the following reasons:

“While Mr Ardern has obtained new positions and these are seemingly promotions, he has been unable to continue in the type of work he was doing prior to his assault. He is much less able to deal with interpersonal conflict in the work place than before the assault.”

74. The AMS commented on Dr Mason’s assessment as follows:

“...in terms of employability, for the past three years he has been unable to sustain fulltime employment. Although his role is probably of a similar level of intellectual demand, he has not been able to return to his previous occupation or its location, and he has not been performing as well as his colleagues, which is a moderate impairment.”

75. Dr Scott Clark in a report dated 1 March 2018 rated Mr Ardern as Class 2 for Adaptation providing the following reasons:

“Mild impairment. Has difficulty having direct client contact, needs a support person to do this. May require some reduction in hours at times.”

76. Dr George in a report dated 10 April 2019 rated Mr Ardern as Class 2 for employability providing the following reasons:

“He has maintained employment for quite a number of years but is working around 30 hours per week now. He is working in the same position, which he has held for some time.”

77. The Appeal Panel noted that some of the reports predated the more recent recurrences, periods off work and also the reduction of hours from five to four days a week. Dr George took a limited history and did not refer to recurrences, the need to take time off work or issues with work performance.

78. The Appeal Panel considered whether the AMS had erred in making a Class 3 rating for employability. Mr Ardern has been working four days a week or 30 hours a week for the past three years. He works for the Department of Health and Aging as a resolutions officer. There have been deteriorations in his condition in 2011 (Mr Ardern was off work for several months), 2016 (Mr Ardern worked reduced hours on four days a week), December 2017 to April 2018 (dosage of Pristiq increased from 200mg to 250 mg) and October 2018.

79. Mr Ardern’s description of his performance since his return to work suggested that he was unable to cope with the normal demands of the job. DSST testing in the examination by the AMS would support this assessment of his performance at work as Mr Ardern scored in the low average range for processing speed, working memory and executive function. Mr Ardern told the AMS that following the deterioration in 2018 he had further problems at work, with difficulty dealing with his (now professional colleagues, not public) clients, not wanting to go to their offices, even avoiding dealing with them on the phone with anticipatory anxiety that they will be aggressive. Mr Ardern said that this had been noted and commented on by his employer and managers in terms of a less than satisfactory performance.

80. After taking into account his work performance, the reduction in his work hours to four days a week as well as periods of leave Mr Ardern taken over the years from his current employment when his condition has deteriorated, it can be inferred that his current employer is a supportive employer. The Appeal Panel is not persuaded that Mr Ardern would be capable of working 30 hours a week on the open labour market.
81. 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. As noted above, Mr Ardern has a supportive employer and could take leave when required. After considering these factors, the Appeal Panel agreed with the AMS that Mr Ardern could be assessed as Class 3 even though he was employed to work more than 20 hours a week. In such a situation, Mr Ardern is closer to a Class 3 than a Class 2 rating. The Appeal Panel considered, after taking into account the medical evidence, Mr Ardern's statement and the MAC, that it was open to the AMS to assess the Mr Ardern's impairment for employability as moderate being a Class 3.
82. 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.
83. For these reasons, the Appeal Panel has determined that the MAC issued on 27 November 2019 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*.

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar

