WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-506/20**
Appellant:	**Glen Joseph Keane**
Respondent:	**State of New South Wales (NSW Police Force)**
Date of Decision:	**24 August 2020**
Citation:	**[2020] NSWWCCMA 136**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Professor Nicholas Glozier**
Approved Medical Specialist:	**Dr Michael Hong**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 8 May 2020, Glen Joseph Keane lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Samson Frederick Roberts, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 14 April 2020.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

   - the MAC contains a demonstrable error.
   - the assessment was made on the basis of incorrect criteria.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The Workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

PRELIMINARY REVIEW

6. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.

7. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because none was requested, and we consider that we have sufficient evidence before us to enable us to determine the appeal.

Fresh evidence

8. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.

9. The appellant seeks to admit the following evidence:

> Statement of the appellant dated 22 April 2020.

10. The AMS assessed the appellant on 25 March 2020 by Skype.

11. The appellant submits as follows:

> "The evidence is relevant to address the incorrect history taken by the AMS and will assist the Panel in determining the appeal. The appellant submits that the statements should be admitted under s 328 (3) of the 1998 Act because of the issues the appellant seeks to clarify only came into existence with Dr Roberts."

12. The respondent submits the statement is not fresh evidence and the appellant does not make out this ground of appeal.

13. We agree.

14. As the respondent correctly points out, citing Hoeben J in *Petrovic v BC Serv No 14 Pty Limited and Ors* [2007] NSWSC 1156:

> "'additional relevant information' contemplated by section 327(3)(b) means: '… information of a medical kind or which is directly related to the decision required to be made by the AMS. It does not include matters going to the process whereby the AMS makes his or her assessment…
>
> It follows that the statutory declarations which related to the way in which the AMS carried out his examination and the way in which questions and answers were interpreted during the examination were not 'additional relevant information' for the purposes of subs 327(3)(b)…
>
> There is another consideration which I have taken into account. If the function of the Registrar under s327 is to be in reality that of a gatekeeper, then statutory declarations such as were sworn in this case should not be regarded as 'additional relevant information' for the purposes of s327(3)(b). If they are, it would be open to every dissatisfied party to challenge the assessment process of an AMS in the same way thereby gaining automatic access to an appeal."

15. The respondent adds:

> "The only 'additional information' filed with the Application is a statement from the appellant. The statement does no more than cavil with the examination by Skype and seeks to expand upon the history taken by the by Dr Roberts during the AMS assessment and his subsequent assessment in the MAC. The statement of the appellant reiterates his IME, Dr Smith's assessment of him in the various Psychiatric Impairment Rating Scale (PIRS) categories."

The respondent further adds:

"In *Lukacevic v Coates Hire Operations Pty Limited* [2011] NSWCA 112 Handley AJA said:

> 'The applicant's statement contains lengthy details of his activities and habits before and after his work injury. In so far as this adds to the history and his statement of 2 April 2008, or the histories in the medical reports before the AMS, it was available and could reasonably have been obtained before the assessment and was not admissible.
>
> In so far as the statement repeats information in the earlier statement or in the medical reports it was not evidence "in addition to ... the evidence received in relation to the medical assessment", and was not admissible.'"

16. The Appeal Panel determines that the evidence sought to be admitted by the appellant should not be received on the appeal for the reasons stated by the respondent with which we fully concur.

EVIDENCE

Documentary evidence

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

SUBMISSIONS

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

19. In summary, the appellant submits that the AMS erred in his assessment with respect to a number of the PIRS categories, namely Self-Care and Personal Hygiene, Social and Recreational Activities, Social Functioning and Concentration, persistence and pace.

20. In reply, the respondent submits that no errors were made.

FINDINGS AND REASONS

21. 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.

22. 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.

23. The respondent was referred to the AMS for assessment of whole person impairment (WPI) in respect of a primary psychological injury resulting from a deemed date of injury of 22 July 2019.

24. The AMS took a detailed history of the circumstances leading up to the injury which we do not intend to repeat here.

25. After documenting the appellant's treatment, the AMS then set out details of his "present symptoms" as follows:

> "Mr Keane described disturbed sleep. He has difficulty falling asleep and wakes in the middle of the night unable to return to sleep. He may wake in the early hours of the morning and walk his dogs. Sometimes he uses the hypnotic Imovane.
>
> Anxiety occurs when he is compelled to engage with other people. Mr Keane stated that he dislikes crowds especially when there are people he does not know. He does not generally become anxious when he goes to bowls. He is familiar with the environment and the people but he avoids the bowling club when there is a large event. He was anxious at the expectation that he might have to come to Sydney for the assessment. He does not like driving in familiar areas. He acknowledged that he has never enjoyed travelling to Sydney. He avoids busier shopping centres but rather restricts himself to smaller suburban shops. If he goes somewhere busy, he prefers to have someone with him. For the last two trips he made to Sydney, he had a retired sergeant friend and a friend from bowls travel with him. He is not so anxious in the local area because of its familiarity. He reiterated his discomfort in the presence of strangers and he is prone to anxiety when there is a prospect of confrontation. He seeks to avoid people that he might have met through his roles as a police officer. He acknowledged diminished confidence.
>
> Mr Keane continues to think about work. He misses the work, the camaraderie and the way of life. He spoke of a propensity to reflect on past circumstances in the context of three recent fatal motor vehicle accidents in his local area. He no longer watches the news and has avoided using Facebook for six or seven months. Such reminders cause him to reflect on his experiences at work. He also reflects in the absence of any reminders. His dreams are both good and bad. Sometimes they are very vivid. Sometimes he has recurring dreams of work traumas.
>
> Mr Keane described a variable mood. Sometimes he finds it difficult to get out of bed during periods that he is depressed and upset. Other days are not too bad. He explained that even during the period he was an inpatient at South Coast Private Hospital, he was expecting to return to work. When he was in South Coast Private Hospital he would go to the gym and walk. He lost motivation when he was informed by injury management that he was to be medically discharged. He spoke of having undertaken a couple of mini-triathlons and half-marathons in Melbourne and Canberra during 2019. He acknowledged the wear and tear that the training had caused to his back and knees. He found bike riding easier than running. At the time of his assessment, however, his motivation was low. By way of example, he spoke of his less consistent attendance at the bowling club. Sometimes he thinks that his family would be better off without him but he did not describe suicidal intent."

26. The AMS then documented the appellant's general health and psychosocial history, adding:

> "Mr Keane and his wife were married in 1992. He described a supportive relationship. He acknowledged that prior to him obtaining treatment for his psychiatric injury, his symptoms were affecting his marriage. He spoke positively of his relationship with his children and he has a good relationship with long-term friends. Some of his workmates check up on him from time to time. He maintains friendships with people with whom he had worked in the police but distance precludes regular contact."

27. As regards his activities of daily living (ADL's) the AMS said:

> "As stated previously, Mr Keane resides with his wife in Temora. He described a 'fairly quiet' lifestyle. Over the five months leading up to his attendance, he had been volunteering at the bowling club, mowing and rolling the greens and generally supporting the greenkeeper. Typically, he works two to three days per week, usually for two to five hours. At home he is busy with the dogs. He walks them. He undertakes household activities. He watches television. His wife leaves him a list of tasks but he does not consistently complete the list. In the past, he would vacuum, wash and cook. He occasionally has a visitor to his home. His closer work friends live far away. A few of his local friends catch up with him. On Wednesdays he often goes to play lawn bowls. He undertakes an occasional outing with his wife. His daughter lives two doors away and visits regularly. He speaks to his son three to four times each week and sees him once or twice a week.
>
> Mr Keane has not left town during the last two years other than to attend appointments. His psychologist is based in Wagga Wagga and his parents are also in Wagga Wagga which is a 90-kilometre drive from his home. He typically drives there and back in a day and if his wife has a day off work, she may go with him.
>
> Mr Keane explained that his household bills are deducted automatically, otherwise he will pay them online. His wife does 90% of the shopping. The shopping is done in the local area. His appetite is diminished and he picks at his food and grazes if there is no meal to eat. He typically sits down for meals with his wife. He prepares their evening meal.
>
> Mr Keane has not engaged in reading for three to four years citing compromised concentration. He watches television and generally can follow what he is watching. On occasion he may rewind something and re-watch it. He is able to participate fully and effectively in conversations."

28. Findings on mental state examination were reported as follows:

> "Mr Keane was assessed over Skype and, as such, aspects of the mental state examination could not be assessed. His hair was noted to be cropped. He was unshaven. He was noted to have a double chin suggestive of the obesity that he described during the assessment. He exhibited a flat affect and described a depressed mood. He was not overtly anxious or agitated at interview but he described a tendency to anxiety. He participated fully and effectively in a lengthy interview process. No features of a psychotic nature were apparent."

29. The AMS summarised the injuries and diagnoses as follows:

> "The account presented by Mr Keane was considered reflective of the presence of Posttraumatic Stress Disorder characterised by past exposure to multiple circumstances of a traumatic nature followed by anxiety, avoidance and intrusion symptoms. He also described depressive symptomatology of a nature and severity sufficient to meet criteria for Major Depressive Disorder. His description of alcohol use reflected a pattern consistent with Alcohol Use Disorder.
>
> Mr Keane has been in receipt of comprehensive treatment under the supervision of a consultant psychiatrist and he remains in receipt of treatment. Although it is expected that further adjustments to treatment may be undertaken over time, his conditions are likely to endure and it is not expected that further treatment will yield a significant change in the severity of his psychiatric conditions having

regard for the chronicity and the response to treatment thus far. On this basis, his overall condition is considered to be stabilised."

30. The AMS assessed 9% WPI.

31. He then commented on the other medical opinions as follows:

> "The contents of Mr Keane's statement were raised with him. It makes reference to his last date of service being August 2019. The basis for the date was unclear. Mr Keane confirmed that he was medically discharged on 5 September 2019 and last worked a full shift on 1 April 2018. He then worked for a further two months undertaking four hours of work for a couple of days per week in late 2018 between admissions to South Coast Private Hospital. He was undertaking office duties during this time. His statement makes reference to depression and trauma symptoms. It also documents his alcohol consumption. It includes an account of multiple traumatic events, the details of which were not revisited at interview. The medication regime is consistent with that reported at the time of the assessment albeit at lower doses.
>
> The psychiatric report of Dr Selwyn Smith dated 3 July 2019 includes diagnoses of Posttraumatic Stress Disorder, chronic in duration, comorbid Major Depressive Disorder, chronic in duration and Alcohol Use Disorder, in partial remission. An assessment of whole person impairment was undertaken at that time, concluding on 24% and adding 2% for effects of treatment. Mr Keane was asked about the effect of treatment on his condition and he replied that the psychological sessions have been positive and the medications have influenced his mood.
>
> A report of Leah Dodsworth dated 25 May 2016 includes a diagnosis of Posttraumatic Stress Disorder. Another letter of Leah Dodsworth dated 3 May 2018 includes reference to the same diagnosis…
>
> Correspondence of Dr Victoria Kim confirmed the information presented by Mr Keane.
>
> Reference to Mr Keane's daughter having been involved in what appears to have been a serious motor vehicle accident is documented in the clinical entry of Dr Jennifer Smith of 18 April 2016. He confirmed this to be the case explaining that it occurred around the same time as the fatal motor vehicle accidents in which he became involved. He explained that he became very protective and vigilant towards his children, demanding that they ring him when they go out. He spoke of actually going out to find his children on occasion. The general practice clinical notes refer to alcohol consumption, obstructive sleep apnoea and psychiatric symptoms. The entry of 16 June 2016 makes reference to Mr Keane struggling with work performance and on being asked about this, he stated that any diminution of his work performance was not of a nature as to come to the attention of others. He described it as a lack of motivation. Alcohol consumption was evidently sufficient to warrant a prescription of Antabuse as documented in an entry of 29 August 2017.
>
> The psychiatric report of Dr Peter Young dated 22 November 2016 was reviewed. At interview, Mr Keane highlighted two incidents that occurred during 2015 that impacted on his mood and described an escalation in alcohol consumption. Dr Young considered that the symptoms at least met the diagnostic threshold for Adjustment Disorder with Depression and Anxiety, if not Posttraumatic Stress Disorder, and he diagnosed Alcohol Abuse Disorder. He prepared a further report dated 4 November 2019. He identified personal stressors having occurred recently. At that time, he identified considerable improvement followed by a recent partial relapse but upheld his diagnoses of Posttraumatic Stress Disorder and Alcohol Use Disorder adding Major Depressive Disorder. He did not consider that maximum medical improvement had been achieved."

32. Dealing firstly with the appellant's challenge to the assessment with respect to Self-Care and Personal Hygiene, the appellant submits that the AMS erred in assigning a Class 2 and should have assigned a Class 3, consistent with the opinion of Dr Smith.

33. The appellant added:

> "Given the limitations of Skype, it would be difficult to assess the appellant's overall personal appearance and hygiene…
>
> In the appellant's subsequent statement dated 7 June 2020, he not only requires a support person to prepare his clothes, but he requires his wife to prompt him about self-care and personal hygiene activities.
>
> The appellant requires regular [sic-?] in order to maintain an adequate level of self-care and personal hygiene. Given the appellant require regular support, the AMS has erred in assigning Class 2 in respect to Self-Care and Personal Hygiene."

34. At the outset, we acknowledge that there are some challenges with a Skype assessment, but these were also acknowledged by the AMS who conducted a thorough and detailed assessment for that reason, as the MAC attests.

35. In summary, the appellant simply submits that the AMS should have adopted the assessment of Dr Smith, who it is noted examined the appellant on 3 July 2019, some 10 months prior to the assessment by the AMS, and indeed prior to the deemed date of injury.

36. The Guidelines are clear in that assessing permanent impairment "involves clinical assessment…on the day of assessment, taking into account the claimant's relevant medical history and all available relevant medical information…"

37. In assessing a Class 2 in this category, the AMS said:

> "Mr Keane maintains his personal grooming. He participates in some exercise. He acknowledged compromised appetite and a dietary pattern that reflected a degree of inconsistency. He acknowledged significant weight gain in the context of his psychiatric decline to such an extent as to impact on his physical health. He participates in some household tasks and is independent in self-care. Mr Keane acknowledged that he may re-wear clothes if he has not done much in them and he may miss showers, sometimes requiring his wife's encouragement. His account reflected mild impairment."

38. It is perhaps timely at this point to set out the task of an Appeal panel as stated in *Ferguson v State of New South Wales* [2017] NSWSC 887 where Campbell J said:

> "[23] By reference to *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36, the Appeal Panel directed itself that in questions of classification under the PIRS: '... the pre-eminence of the clinical observations cannot be underrated. 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'.
>
> [24] The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error.

One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.

[25] The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides 'the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment'…

[37] The descriptors, or examples, describing each class of impairment in the various categories are 'examples only'…"

39. In our view, the history recorded by Dr Roberts is consistent with his assessment of a Class 2 for self-care and personal hygiene, and we cannot see any error in his assessment. There was simply nothing in the AMS' assessment with respect to self-care and personal hygiene that could be regarded as "glaringly improbable" nor was there anything to suggest a flawed reasoning process.

40. Turning now to Social and Recreational Activities. The AMS assessed a Class 2, stating:

> "Mr Keane described attending the local bowling club albeit not consistently. He goes out occasionally and engages with friends. He described anxiety in crowds and in the presence of strangers. His account reflected his enduring ability to undertake limited social and recreational activities independently. His description of functioning in this area was reflective of mild impairment."

41. Again, the appellant's submissions do no more than repeat the contents of Mr Keane's statements and the opinion of Dr Smith. In addition, Dr Smith seems to have confused this category with "social functioning" because he stated: "Mr Keane's previously established relationships have been severely strained. Sexual intimacy no longer occurs. His has come close to separating from his wife." This is not relevant to this particular category which addresses social activities such as attending social events.

42. The AMS' assessment was consistent with the evidence and we cannot see any error in his assessment.

43. The appellant next challenges the assessment with regard to social functioning.

44. The AMS assessed a Class 1, stating:

> "Mr Keane spoke positively of his marital relationship and described regular positive contact with his children. He referred to distance as a factor impeding his contact with former colleagues. He described continued social contact and visits with friends. Although he reported diminished frequency of contact with friends, he did not ascribe to this the loss of friendships and his description in general indicated the intact nature of his relationships. He did describe the strain that his psychiatric condition had previously caused his marital relationship, but his account indicated that this circumstance was not enduring at the time of the assessment."

45. Again, we point out that the AMS must make an assessment *on the day*, and in our view, his rating was not only consistent with the evidence but also with the descriptor, namely:

> "No deficit, or minor deficit attributable to the normal variation in the general population. No difficulty in forming and sustaining relationships (eg a partner, close friendships lasting years)."

46. The appellant submits that a Class 3 rating should have been ascribed because “not only has there been an impairment in his relationship with others, but there is evidence of isolation.”

47. The AMS in fact acknowledged this, but also noted the long-term and sustained nature of some friendships which the appellant himself described.

48. Reliance is placed again on the opinion of Dr Smith who simply said: “Mr Keane has become socially withdrawn and isolated. He prefers to remain at home. He has lost friends.” He did not provide any reasons why he assessed a Class 3 based on this limited statement.

49. Again, the appellant seems to simply cavil at matters of clinical judgment made by the AMS without evidence of any error. The submissions focus on what the AMS should have done rather than any evidence of error.

50. The appellant’s statement and other medical evidence he relies upon focus on what he is unable to do, rather than what he can do. The AMS in our view clearly looked at “the significance” of all the matters raised in his consultation, including both the limitations in some aspects of Mr Keane’s life but also quite properly at the relationships and activities he was able to maintain.

51. For these reasons, we cannot see any error in his assessment.

52. Finally, the appellant submits that the AMS erred in his assessment with regards to Concentration, persistence and pace (Cpp).

53. The AMS assigned a Class 2 stating:

> “Mr Keane reported impaired concentration for reading but general intact concentration when watching a movie. The occasional need to rewind a movie is not considered to represent an unusual circumstance in itself. He reported being able to participate in conversations. He participated effectively in a lengthy interview process for the purposes of this assessment. He also described participating in volunteer work and recreational activities of a nature that would be expected to require concentration, persistence and pace. Having regard for the overall description and the nature and severity of his psychiatric diagnoses, it is appropriate to conclude that he is mildly impaired in this area of functioning.”

54. We re-iterate our previous comments with respect to the appellant’s submissions.

55. The evidence supported a Class 2 rating, and the relevant descriptor.

56. The appellant simply submits that a Class 3 rating is appropriate because “The AMS noted the appellant’s inability to concentrate whilst reading. Such comments would suggest that the appellant will have difficulties following complex instructions.”

57. Reduced ability to concentrate does not of itself mean there is an automatic limited ability to follow complex instructions. In any event, the degree of activities undertaken by the appellant as noted by the AMS were indicative of mild impairment of function. There was certainly no suggestion that the appellant was “unable to read more than newspaper articles” as set out in the descriptor for this category.

58. It is true that in his statement dated 7 June 2019, the appellant said:

> “I have a reduced level of tolerance and I am easily frustrated. I struggle with concentration and this has affected my ability to conduct daily tasks and engaging in activities that I once enjoyed such as reading books, watching TV and communicating with others.”

59. However, at the time of the assessment some ten months later, it was clear from the information obtained by the AMS that there had been some improvement in this area, since, for example, there was no suggestion that the appellant was unable to watch tv or communicate with others.

60. In our view, the MAC demonstrates the thoroughness of the AMS' assessments following, as he said, "a lengthy interview process" and we cannot see that he has erred in his assessment in any of the PIRS categories raised by the appellant.

61. For these reasons, the Appeal Panel has determined that the MAC issued on 14 April 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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar