

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-831/20
Appellant: Premier Youthworks Pty Limited
Respondent: Ellie Cole
Date of Decision: 24 August 2020
Citation: [2020] NSWCCMA 137

Appeal Panel:
Arbitrator: Marshal Douglas
Approved Medical Specialist: Professor Nicholas Glozier
Approved Medical Specialist: Dr Lana Kossoff

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 19 June 2020, Premier Youthworks Pty Limited (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Patrick Morris, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 22 May 2020.
2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act):
 - the assessment was made on the basis of incorrect criteria,
 - the MAC contains a demonstrable error.
3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.
4. The WorkCover Medical 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 WorkCover Medical 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).

RELEVANT FACTUAL BACKGROUND

6. Ellie Cole (the respondent) commenced employment as a residential youth care worker with the appellant on 16 March 2015. She suffered a psychiatric injury as a consequence of her employment. That injury is deemed to have happened on 6 December 2017.

7. On 16 August 2019, the respondent's solicitors wrote to the appellant's insurer notifying it that the respondent claimed compensation under s 66 of the *Workers Compensation Act 1987* (the 1987 Act) of \$46,000 for 19% whole person impairment resulting from her psychiatric injury.
8. In several notices the appellant then issued to the respondent, under s 78 of the 1998 Act, it disputed it was liable to pay her compensation for permanent impairment from her psychiatric injury. This was because it considered the degree of her permanent impairment from her injury was less than 15%. It informed the appellant in its notices that s 65A(3) of the 1987 Act did not require it to pay her compensation unless the degree of her permanent impairment was at least 15%.
9. A medical dispute as defined in s 319(d) of the 1998 Act thereby arose between the parties. The respondent then registered with the Commission an Application to Resolve a Dispute (ARD) seeking determination of her disputed claim for compensation for the permanent impairment. The matter was referred to arbitrator Mr Phillip Young, who on 2 April 2020 remitted the matter to the Registrar so that the medical dispute could be referred to an AMS to assess.
10. A delegate of the Registrar duly did so on 3 April 2020.

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 WorkCover Medical Assessment Guidelines.

Fresh Evidence

12. During its preliminary review, the Appeal Panel considered whether it should receive into evidence a statement the respondent signed on 9 July 2020. In that statement, the respondent says, in substance, that her sister was living with her at the time the AMS assessed her. Her purpose in seeking to have statement received into evidence is to address a submission the appellant made to the effect that the history the AMS obtained from her during examination relating to whether her sister lives with her was factually inaccurate. The appellant contended that aspect of the history was inconsistent with a statement the respondent had made on 20 January 2020 that was attached to the ARD.
13. 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.
14. The Appeal Panel observes that the respondent's statement of 9 July 2020 post-dates the MAC. At the time the AMS examined the respondent, she of course was not to know that the appellant would appeal the MAC nor could she know the issues the appellant would raise in support of its appeal. As one of the issues the appellant raises is whether the AMS was correct to rely on a history that was in part based on what the respondent told him during examination, the Appeal Panel considers that it is appropriate for the respondent to provide evidence on the matter. Her statement was created after the assessment. It was not therefore available to her before assessment. In the circumstances set out, it could not reasonably have been obtained by her before the medical assessment. Accordingly the Appeal Panel has decided to receive into evidence the respondent's statement of 9 July 2020.

Further medical examination

15. As a result of the preliminary review, the Appeal Panel also determined that it was not necessary for the respondent to undergo a further medical examination. This is because for reasons explained below, the Appeal Panel has come to the view that neither of the grounds or appeal on which the appellant relied is established. The Appeal Panel cannot therefore revoke the MAC, and its power to require the appellant to be re-examined is not enlivened.¹

EVIDENCE

16. 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

17. The AMS recorded the following in the MAC with respect to the symptoms the respondent reported:

“Ms Cole reports having very poor sleep and occasional nightmares relating to the client who threatened her at her workplace. She reports being very hypervigilant, having great safety concerns for herself and being on the lookout for danger. She is very jumpy at sudden noises. She will not sit with her back to the door. She continues to have intrusive and traumatic memories of the experiences with the client who was violent to her, particularly if she feels unsafe in an environment such as being in a crowded shopping centre. She said that the memories of the violence towards her by the client are associated with emotions of sadness and tearfulness, an increased heart rate, feeling hot and sweaty and feeling as though she is about to have a panic attack. She tries to avoid thinking and talking about the incidents that occurred with the client. She avoids going to shopping centres because clients of Premier Youthworks visit these centres and if she sees them it will trigger memories of the assaults. She is socially withdrawn and does not mix with people. She has lost interest in going out with her friends and family. She finds it difficult to feel close to people. She avoids seeing her old friends. She describes believing the world is “a dangerous place”. She finds it difficult to feel happy, satisfied and have loving feelings now. She is more irritable since the incident. She complains of very poor concentration and reduced memory, and is not able to follow basic instructions anymore.

She reports her symptoms have been relatively stable for a long period.”

18. The AMS recorded the following regarding his findings from his mental state examination of the respondent:

“Ms Cole was a well-groomed young woman with tattooed forearms. She was cooperative but tense in the interview. Her speech was of normal rate and flow. Her mood was depressed and anxious. She was tearful at times in the interview. Her affect was appropriate to her mood but generally unreactive. There was no formal thought disorder and no psychotic symptoms.

Ms Cole was alert and orientated. She had impairments in short term memory as she could only recall 1 out of 3 items at three minute recall. Her concentration was unimpaired on testing at the interview.”

¹ *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792.

19. With respect to how the respondent functioned with her social activities and her activities of daily living, the AMS recorded the following:

“Ms Cole said she had been living with her partner for four years but their relationship broke up in mid-2018 as he could not cope with her psychological symptoms and the change in her behaviour.

Ms Cole is now living with her sister in a rented house in Newcastle. She said she is working three days per week as a receptionist at a Honey Ink tattoo studio since early 2019. She said she tried to commence work there as a tattooist but there were not enough clients to justify her working in that position and she became the receptionist. She works Mondays, Tuesdays and Thursdays.

Ms Cole said she was going to the gym nearby three days a week by herself prior to the coronavirus restrictions coming into effect. She said she visited other family members such as her brother and his partner (who have just had a baby) in the company of her sister. She said her mother who lives nearby will visit her and her sister at their home.

Ms Cole said her sister generally shops online. Her sister does the cooking, housecleaning, and clothes washing. Ms Cole said she has to remind herself to shower and change her clothes if she is not going to work. She spends a lot of time in her bedroom if she is not working. She is able to drive her car 25 minutes to and from work and five minutes to the gym where she exercises.”

20. The Appeal Panel notes that the appellant’s appeal relates to AMS’s ratings of the respondent’s impaired function in the areas of self-care and personal hygiene and concentration, persistence and pace. The AMS’s rated the respondent’s impairment as follows in those areas, for the reasons that appear adjacent to his ratings:

Self-Care and personal hygiene	3	Moderate impairment. Ms Cole relies on her sister, who has moved in to live with her, to live independently. Her sister does all the cooking, shopping, house cleaning and clothes washing. Ms Cole does not cook for herself. She said that on the day she does not go to work, she does not generally bother to shower or change her clothes.
Concentration, persistence and pace	3	Moderate impairment. Ms Cole complains of being very forgetful. She finds it difficult to read because of her reduced concentration. She said her memory problems affect her work performance and she finds it difficult to follow instructions at work. There were short-term memory impairments present on testing at the assessment.

21. The AMS assessed the degree of the respondent’s permanent impairment resulting from her injury to be 15% WPI.

SUBMISSIONS

22. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
23. The appellant submits that the AMS applied incorrect criteria to assess the respondent's impairment in the areas of self-care and personal hygiene, and in concentration, persistence and pace. The appellant contends that the AMS made an error in his assessment of the respondent's impairment in these areas such that the MAC contains a demonstrable error.
24. The appellant submits that the AMS's rating of the respondent's impairment in self-care and personal hygiene as moderate was unsupported both by his findings and by the evidence before him. The appellant notes that the AMS found from his examination of the respondent that she was well groomed. The appellant notes that evidence in the form of a report dated 9 October 2019 of Dr Deepi Miller, a consultant physician in psychiatry whom the appellant qualified to provide forensic medical legal reports, revealed the respondent had been taking care of her appearance and that she had regular Botox injections and cosmetic tattooing. The appellant also notes that an investigation done by Deprell Pty Ltd trading as M & A Investigations into the respondent's social media on 28 March 2018 included pictures and posts that showed the respondent to be well groomed and having applied makeup. The appellant notes that the respondent was regularly attending a gym before the advent of the corona virus restrictions and was working part-time. The appellant submits that this evidence is consistent with the respondent being well groomed, and states that the AMS took a history of the respondent's sister residing with her which is factually inaccurate.
25. The appellant submits, based on all that, that the AMS ought to have classified the respondent's impairment in self-care and personal hygiene as mild.
26. The appellant also submits with respect to the AMS's assessment of concentration, persistence and pace that the AMS was wrong to rate the respondent's impairment as moderate. The appellant contends the AMS ought to have rated it as mild. The appellant submits that the AMS based his assessment on unsubstantiated information the respondent provided and failed to have regard to his own findings from his examination which included that the respondent had unimpaired concentration. The appellant submits that the paramount factor when assessing the respondent's impairment in concentration, persistence and pace is concentration. The appellant submits that the AMS's assessment was inconsistent with both the respondent being able to work part-time and the respondent having been able in November 2019 to complete psychometric testing. The respondent further submits that the AMS did not have proper regard to the results of that psychometric testing.
27. In reply, the respondent submits that the AMS had regard to all relevant evidence and his assessment of her impairment is supported by the evidence. The respondent submits that being well groomed is not the sole criterion by which impairment in the area of self-care and personal hygiene is to be rated. The respondent submits that the AMS's assessment of her impairment in this area is correct because she is unable to live independently. The respondent submits that the fact that a worker can work does not mean that the worker's impairment in the area of concentration, persistence and pace can only be assessed as mild. The respondent submits that the AMS had regard to both his own findings from his examination and also the material that was before him when he assessed her impairment in the area of concentration, persistence and pace.

FINDINGS AND REASONS

28. 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.

29. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons.
30. The Guidelines at [1.6] note that an assessment of “permanent impairment involves clinical assessment of the claimant as they present on the day of assessment taking account the claimant’s relevant medical history and all available relevant medical information”.
31. Campbell J in *Ferguson v State of New South Wales* [2017] NSWSC 887 (*Ferguson’s case*) at [23], cited with approval the following passage at [33] from the decision of the Appeal Panel in *NSW Police Force v Daniel Wark* [2012] NSWCCMA 36:

“...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. ...”
32. The Appeal Panel considers that it is apparent from the MAC that the AMS had regard to all of the material before him. The Appeal Panel also considers the AMS took into account all relevant matters within that material when assessing the respondent’s impairment in the areas of function that under [11.11] of the Guidelines the AMS was required to assess, including the respondent’s function in the areas of self-care and personal hygiene and concentration, persistence and pace.
33. It seems to the Appeal Panel that the AMS, whilst considering all the material before him, gave pre-eminence to his clinical observations of the respondent at the time of his assessment and exercised his clinical judgment as to the significance of the matters the respondent raised with him in the assessment when assessing her permanent impairment from her injury, which, consistent with what Campbell J held in *Ferguson’s case*, the AMS was entitled to do.
34. The Appeal Panel agrees with the respondent that a worker’s personal appearance either at the time of the assessment, or that chosen to be displayed on social media, is not the sole factor by which a worker’s impairment in the area of self-care and personal hygiene is assessed. The AMS had regard to the fact that the respondent was well groomed at the time of examination. The AMS had regard to the photos and posts that were within the report of M & A Investigations. The Appeal Panel observes that the respondent’s personal appearance as “well groomed” is in part due to permanent cosmetic tattooing she has had, most of which was done before the date upon which her psychiatric injury was deemed to have happened.
35. The AMS was aware the respondent previously attended a gymnasium. The AMS was aware the respondent worked part time.
36. The AMS’s reason for assessing the respondent’s impairment in self-care and personal hygiene as moderate was in large part because the respondent was unable to live independently and required the support her sister.
37. The respondent’s statement of 9 July 2020 confirms the history the AMS obtained that the respondent’s sister resides with her and assists the respondent with her care at the time he assessed her. The AMS did not of course have the respondent’s statement of 9 July 2020. However, he was entitled to rely on the history he obtained at the time he assessed the respondent. He had before him the respondent’s earlier statement. He was aware of what she stated therein. There is no error in the AMS exercising his clinical judgement to prefer what the respondent reported during examination regarding her sister residing with her over what the respondent said in her earlier written statement. Clarifying such potential inconsistencies is a key aspect of the clinical assessment by an AMS. Again, that is consistent with what Campbell J held in *Ferguson’s case*.

38. Harrison AsJ held in *Glen William Parker v Select Civil Pty Ltd* [2018] NSWSC 140 at [66] that “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 a statutory sense”. The fact that Dr Miller assessed the respondent’s impairment in the area of self-care and personal hygiene differently from the AMS is therefore of no consequence. The AMS has provided sound reasons for classifying the respondent’s impairment in the area of self-care and personal hygiene as moderate. Further, Dr Miller’s assessment was undertaken several months before the AMS undertook his assessment of the respondent’s impairment.
39. The Appeal Panel considers that the AMS has applied the correct criteria to assess the respondent’s impairment in self-care and personal hygiene. The Appeal Panel can discern no error in his assessment of the respondent’s impairment in self-care and personal hygiene.
40. The Appeal Panel also considers that the AMS has applied the correct criteria to assess the respondent’s impairment in the area of concentration, persistence and pace and has not made an error with respect to his assessment.
41. The Appeal Panel rejects the appellant’s contention that concentration is the “paramount factor” when assessing a worker’s impairment in this area of function. The task when assessing a worker’s impairment in this area of function is essentially to determine a worker’s ability to focus attention and to stay on task with the cognitive activities in which a worker may be engaged. Concentration is only one factor to consider with respect to that. The AMS noted that at the time of examination the respondent had no impairment of her concentration. However the AMS also found that the respondent had impairment in short term memory which would impact upon the speed and persistence of cognitive activities. The AMS also found that the respondent was tense in interview and tearful.
42. The Appeal Panel observes that the evidence reveals that the respondent previously conducted her own business as a tattoo artist and also worked in employment as a tattoo artist. Her employment now is as a receptionist on a part-time basis (as confirmed in her payslips). The respondent, in terms of her present employment, is engaged at a much lower level than previously and that supports the AMS’s assessment that the respondent has a moderate impairment with her concentration, persistence and pace.
43. The AMS in any event had regard to all the evidence before him including the fact that the respondent had previously done psychometric testing. These psychometric tests were assessments of symptoms and not neuropsychological tests of cognitive function. The AMS was aware of the results, which were in the material before him, and specifically referred to in the MAC. The AMS however gave pre-eminence to his findings from examination, as he was entitled to do.
44. Contrary to what the appellant has submitted, a worker’s report to an AMS of how he or she functions does not need to be substantiated by other evidence before an AMS can rely on what the worker has reported when assessing the worker’s impairment. As Campbell J observed in *Ferguson’s* case, the significance or otherwise of matters raised in consultation is a matter of clinical judgment for the AMS.
45. For these reasons, the Appeal Panel has determined that the MAC issued on 19 June 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 De Paz

Glicerio De Paz
Dispute Services Officer
As delegate of the Registrar

