

WORKERS COMPENSATION COMMISSION

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

Matter No: M1-1351/19
Appellant: Australia and New Zealand Banking Group Ltd
Respondent: Sarah McLennan-Starling
Date of Decision: 28 October 2019
Citation: [2019] NSWCCMA 152

Appeal Panel:
Arbitrator: Carolyn Rimmer
Approved Medical Specialist: Dr Julian Parmegiani
Approved Medical Specialist: Professor Nicholas Glozier

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 27 August 2019, Australia & New Zealand Banking Group Ltd (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 AAI Limited trading as GIO. The medical assessment was made by Dr Brian Parsonage, Approved Medical Specialist (the AMS) and issued on 30 July 2019.
2. The respondent to the appeal is Sarah McLennan-Starling (Ms McLennan-Starling).
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, and
 - the Medical Assessment Certificate (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 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. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th Edition* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition* (AMA 5).
6. The Appeal was made within 28 days of the date of the medical assessment.

RELEVANT FACTUAL BACKGROUND

7. Ms McLennan-Starling developed a primary psychological injury in her employment as a bank officer with the appellant arising from bullying that she was subjected to in the Grafton Branch by agents employed by the appellant. The injury was deemed to have occurred on 20 July 2018.

8. The matter was referred to the AMS, Dr Brian Parsonage, on 5 June 2019 for assessment of whole person impairment (WPI) of Ms McLennan-Starling's 's psychological/psychiatric disorder attributable to the injury deemed to have occurred on 20 July 2018.
9. The AMS examined Ms McLennan-Starling on 25 July 2019 and assessed 22% WPI in respect of the psychological/psychiatric disorder deemed to have occurred on 20 July 2018.

PRELIMINARY REVIEW

10. 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.
11. Neither party sought an opportunity to make oral submissions to the 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.
12. The appellant did not request that Ms McLennan-Starling be re-examined by an Approved Medical Specialist, who is a member of the Appeal Panel.
13. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for Ms McLennan-Starling to undergo a further medical examination because there was sufficient evidence on which to make a determination.

EVIDENCE

Documentary evidence

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

Medical Assessment Certificate

15. 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

16. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.
17. The appellant's submissions include the following:
 - First, the AMS failed to make any deduction pursuant to s 323 of the 1998 Act for a pre-existing psychiatric/psychological disorder.
 - There is evidence that the pain throughout the worker's body, with its diagnosis of fibromyalgia, caused a condition requiring treatment with antidepressant medication.
 - Ms McLennan-Starling ceased antidepressant medications because of side effects. She stated that the only psychiatric medication that she has taken regularly is Diazepam. It can be inferred that Diazepam is the preferred treatment for her psychological condition that has been caused by the fibromyalgia.

- On the face of the MAC, the complete exclusion of the untreatable fibromyalgia as having any role whatever in the causation of the psychiatric treatment for which assessment was made, must be an error.
- Second, the entry of the single word 'nil' in response to the question of the s 323 deduction, and the omission to provide any explanation at all of this conclusion is an error. A party affected by the MAC has an entitlement to understand the reasoning of its author. The AMS should have provided reasoning in the section where he gave his answer to the s 323 issue and failed to do so.
- Third, the AMS rejected the methodology applied by Dr Andrews in his report dated 17 June 2018. Dr Andrews concluded that there was a psychological component to fibromyalgia, and it is more likely than not that it was also contributing to her current condition. He noted that fibromyalgia is associated with depression and that is part of the definition of this syndrome.
- At page 11 of the MAC the AMS said: "While there may be some psychological components to her whole-body pain, it is necessary to ignore any impairment arising from her pain, whether it be a somatoform disorder or a separate painful medical condition."
- The AMS misdirected himself as it was not necessary to ignore the impairment arising from Ms McLennan-Starling's pain. The correct application of s 323 required the AMS to take into account the impairment arising from this pain. Had the AMS not misdirected himself, he might well have taken into account material in the evidence before him in which Ms McLennan-Starling expressed in her own words the difficulty she was experiencing with her fibromyalgia from a psychological perspective.
- The AMS in approaching s 323, applied incorrect criteria in that he made an assessment of a psychiatric condition which, while its causes may be mixed, is not one that requires the exclusion of impairment resulting from pain.
- The MAC should be set aside.

18. The respondent's submissions include the following:

- The reasons of the AMS must be read as a whole: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6. It is not appropriate to examine the reasons with an eye attuned to error: *Sadsad v NRMA Insurance Limited* (2014) 67 MBR 601; *Campbelltown City Council v Vegan* [2006] NSWCA 284.
- The ultimate question is whether the assessor has disclosed the actual pathway of reasoning: *Wingfoot Australia Partners Pty Limited v Kocak* [2013] HCA 43 at par 55. In this case it is clear that the AMS was well aware of Dr Andrews' opinion and well aware that there was a potential s 323 deduction relating to the apparent pain condition and/or fibromyalgia.
- The AMS took a complex and accurate history. In accordance with judicial authority, the AMS questioned Ms McLennan in relation to inconsistencies (see for instance *Frost v Kourouche* [2014] NSWCA 39 and then provided detailed reasons as to why he reached the conclusion he did.
- The AMS carefully weighed up the potential issues and then formed a view based on his own clinical judgment. He reached the conclusion that the worker's current impairment was as a result of the work injury and not as a result of any apparent pre-existing condition, or co-morbid condition. The AMS sufficiently exposed his reasoning process in doing so.

- It cannot be suggested that the AMS only dealt with the apparent s 323 deduction by writing the word "nil". The decision must be read as a whole. The MAC is replete with references to how the assessor applied his clinical judgment in reconciling whether any deduction should be applied (see for instance, pages 8-11. It is misleading to suggest "nil" is the only reasoning applied.
- Reading the MAC as a whole, the AMS's examination and clinical experience revealed that there was insufficient evidence as at the time of the injury to establish that the worker had any condition/injury that would attract a deduction under the relevant Acts/guides. Given the evidence of the treating doctors and the worker, this finding was open to the AMS and in reality, it was the only finding open.
- The AMS was mindful of the potential s 323 deduction, if any, and clearly provided reasons as to why he did not consider any deduction appropriate. His findings from pages 8-11 in particular are sufficient to rebut the appellant's submissions.
- The appellant cavils with the AMS's approach to the evidence of Dr Andrews. The AMS clearly exposed his pathway in rejecting the specific methodology adopted by Dr Andrews (see MAC pages 8-12). Further, the appellant seemed to have misunderstood what the AMS actually found, that is, the AMS did not find any other secondary condition or unrelated condition, so as to warrant a deduction.
- The AMS found on page 11 of the MAC:
 - (a) A primary psychiatric disorder caused by harassment and bullying;
 - (b) No secondary psychiatric disorder arising from her fibromyalgia;
 - (c) No worsening of her psychological condition as she developed fibromyalgia, and
 - (d) A persistent depressive disorder (primary and related to the referred work injury).
- The AMS said at page 10 of the MAC: "while there may be some psychological component to her whole-body pain it is necessary to ignore any impairment arising from her pain, whether it be a somatoform disorder or a separate painful medical condition". The AMS thereby confirmed that he was ignoring any component arising due to physical problems "which were not assessable".
- The appellant has misread the report. The AMS merely confirmed that any pain that may contribute to her state has been ignored for the purposes of the worker's assessable impairment. The AMS did not say he has ignored pain for the purposes of any deduction. He did not find anything to deduct.

FINDINGS AND REASONS

19. 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.
20. 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 detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

21. 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.
22. 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 Ms McLennan-Starling's permanent impairment.

Discussion

23. The Appeal 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.
24. On page 3 of the MAC the AMS wrote:

"Mrs McLennan-Starling had supportive treatment from her long-term GP. Around the time she became anxious and depressed, she also developed pain throughout her body which was diagnosed as fibromyalgia (see below) and for that condition was prescribed low doses of the anti-depressant Amitriptyline and Duloxetine but developed side effects and stopped these medications. The only psychiatric medication that Mrs McLennan-Starling has taken regularly is Diazepam when needed."
25. On page 4 of the MAC, the AMS wrote:

"Details of any previous or subsequent accidents, injuries or condition: When asked whether she had ever had any previous problems with anxiety or depression or treatment for such conditions before she began working at the Grafton branch of ANZ, Mrs McLennan-Starling said that she had never had any such problems, she 'never needed medication or treatment ever' and emphasized how resilient she had been in the face of previous life challenges, such as the death of her mother. I asked her about the reference in her GP clinical record dated 14.02.2012. Mrs McLennan-Starling said that it had been written in error and referred to her husband. I referred her to her own statement dated 11.12.2017 in which she stated 'On February 14, 2014 [sic], I attended the medical practice of my GP Dr McCarthy as I was feeling quite down and anxious. My husband and I were going through a separation but living under the same roof. He prescribed me with Valium and Pristiq which I never took.' Mrs McLennan-Starling replied, 'Adrian was treating me like a piece of crap and I was a bit of an asshole at the same time.' She was adamant that even if she had been somewhat anxious and depressed at the time, she did not experience ongoing symptoms of anxiety and depression, particularly in the period prior to her beginning work at the Grafton branch. Around the time that Mrs McLennan-Starling stopped work she developed pain all over her body 'from head to toe' which she rated in severity as being '9/10'. She also referred to having 'spasms' in various parts of her body including her hips and feet. When asked how her pain affected her, Mrs McLennan-Starling stated that 'I am a tough cookie and I do not change my life because of the pain at all.' She subsequently mentioned in passing that she couldn't have a shower which was on the second storey of her house because her physical complaints prevented her from being able to walk up the stairs. I pointed out to Mrs McLennan-Starling that it appeared that her physical problems did restrict her in some ways and she acknowledged they did but again stated that she was restricted by psychological not physical problems. Mrs McLennan-Starling denied that she'd had long-term problems with anxiety as stated by Cheryl

Patterson in her statement dated 30.01.2017. Mrs McLennan-Starling denied there being other significant problems affecting her. She had specifically said that while she had teenage children who sometimes had problems they had not particularly affected her. She said that 'it was a lie' that her son had been found in a drug lord's house, as reported in a statement by Cheryl Patterson dated 30.01.2017."

26. At Part 8 of the MAC, the AMS wrote:

- e. Is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality? No. While Mrs McLennan-Starling had been treated at one consultation for anxiety and depression in 2012 I did not consider that there was evidence that she had an ongoing psychiatric or psychological condition in the period leading up to her moving to the Grafton branch which contributed to her current condition.
- f. If so, please indicate which body part/system is affected by the previous injury, pre-existing condition or abnormality. Not applicable.
- g. Indicate whether there has been any further injury subsequent to the subject work injury. If this injury has caused any additional impairment this should not be included with the assessment of impairment due to the subject work injury. There has been no additional assessable psychiatric condition subsequent to the subject work injury but I note the development of her chronic pain condition diagnosed as fibromyalgia."

27. At Part 10 of the MAC the AMS stated that he had excluded from his assessment (of Whole Person Impairment) the effects of her painful disabling condition diagnosed as fibromyalgia.

28. In commenting on other medical opinions, the AMS wrote:

"I disagree with the methodology chosen by Dr Andrews in his assessment of permanent impairment. He made a deduction of 1/5th of her WPI 'to account for the psychiatric aspects of her fibromyalgia.' Mrs McLennan-Starling had a primary psychiatric disorder caused by perceived harassment and bullying at work and there is no evidence that she suffered a secondary psychiatric disorder arising from her fibromyalgia. There was no worsening of her psychological condition as she developed fibromyalgia. While there may be some psychological components to her whole-body pain it is necessary to ignore any impairment arising from her pain, whether it be a somatoform disorder or a separate painful medical condition. There is no requirement however to deduct any component of the impairment arising from her Persistent Depressive Disorder with anxious distress which is a primary psychiatric disorder."

29. First, the appellant submitted that the AMS failed to make any deduction pursuant to s 323 of the 1998 Act for a pre-existing psychiatric/psychological disorder. The appellant argued that the complete exclusion of fibromyalgia as having any role whatever in the causation of the psychiatric treatment for which assessment was made, was an error.

30. The approach to be taken in assessing the s 323 deduction was considered by the Supreme Court in *Cole v Wenaline Pty Limited* [2010] NSWSC 78 (*Cole*). Schmidt J said:

"29. ...The section is directed to a situation where there is a pre-existing injury, pre-existing condition or abnormality. For a deduction to be made from what has been assessed to have been the level of impairment which resulted from the later injury in question, a conclusion is required, on the evidence, that the pre-existing injury, pre-existing condition or abnormality caused or contributed to that impairment.

30. Section 323 does not permit that assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will always, 'irrespective of outcome', contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality. The extent that the later impairment was due to the earlier injury, pre-existing condition or abnormality must be determined. The only exception is that provided for in s 323(2), where the required deduction 'will be difficult or costly to determine (because, for example, of the absence of medical evidence)'. In that case, an assumption is provided for, namely that the deduction 'is 10% of the impairment'. Even then, that assumption is displaced, if it is at odds with the available evidence.

31. ...That is a matter of fact to be assessed on the evidence led in each case".

31. In *Pereira v Siemens Ltd* [2015] NSWSC 1133, Garling J said:

- “81. The assessment required by s 323 is one which must be based on fact, not assumptions or hypotheses: *Elcheikh v Diamond Formwork (NSW) Pty Ltd (In Liq)* [2013] NSWSC 365 at [89]; *Matthew Hall Pty Ltd v Smart* [2000] NSWSC 284 at [33]; *Ryder v Sundance Bakehouse* [2015] NSWSC 526 at [40].
82. The process encompassed by s 323 requires the application of each of the following steps before reaching the ultimate conclusion of the existence of a pre-existing injury which has an impact on the assessment of the injury the subject of the worker's claim.
83. The first step requires a finding of fact that the worker has suffered an injury at work which has resulted in a degree of permanent impairment which has been assessed pursuant to s 322 of the 1998 Act: see *Elcheikh* at [125].
84. The second step which needs to be addressed is, assuming such an injury has been sustained and impairment has resulted, what is the extent of that impairment expressed as a percentage of the whole person: see *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [38]; *Elcheikh* at [126].
85. The third matter to be addressed is whether the worker had any previous injury, or any pre-existing condition or abnormality. The previous injury does not have to be one in respect of which compensation is payable under the 1998 Act. If the phrase 'pre-existing condition or abnormality' is to be relied upon, then such condition or abnormality must be a diagnosable or established clinical entity: *Fire & Rescue NSW v Clinen* [2013] NSWSC 629.
86. A finding of the existence of a previous injury can be made without the presence of symptoms, but there must be evidence which demonstrates the existence of that pre-existing condition: *Mathew Hall* at [31]-[32].
87. The pre-existing injury or condition must, on the available evidence, have caused or contributed to the assessed whole person impairment: see *Matthew Hall* at [32]; *Cole* at [29]-[31]; *Elcheikh* at [88] and *Ryder* at [42].
88. It cannot be assumed that the mere existence of a pre-existing injury means that it has contributed to the current whole person impairment: *Clinen* at [32]; *Cole* at [30]; *Elcheikh* at [91]. What must occur is that there must be an enquiry into whether there are other causes of the whole person impairment which reflect a difference in the degree of impairment: *Ryder* at [45].

89. Next in dealing with the application of s 323, the extent of the contribution, if any, of the pre-existing condition to the current impairment must be assessed in order to fix the deductible proportion. If the extent of the deductible proportion will be difficult or costly to determine, an assumption is made that the deductible proportion will be fixed at 10%, unless that is at odds with the available evidence: s 323(2) of the 1998 Act.
90. Each of these steps, and considerations, is a necessary element of a determination that an assessed whole person impairment is to be reduced by a deductible proportion by virtue of the application of s 323 of the 1998 Act.”
32. The first question to be addressed is whether Ms McLennan-Starling had any previous injury, or any pre-existing condition or abnormality and if so, whether the previous injury etc contributed to the current WPI. The AMS referred to the worker “being treated at one consultation for anxiety and depression in 2012” but did not consider that there was evidence of an ongoing psychiatric or psychological condition in the period leading up to her moving to the Grafton branch. The AMS explicitly concluded that the system assessed (psychiatric) was not affected by the previous (psychiatric) injury, pre-existing condition or abnormality.
33. Dr Douglas Andrews, consultant psychiatrist, in his report dated 17 May 2017 noted that Ms McLennan-Starling had been diagnosed with fibromyalgia during the period of her employment at the Grafton branch and that this was not a psychiatric illness. Dr Andrews also concluded based on the history available, there was no evidence of any pre-existing (psychiatric) condition or illness contributing to current psychiatric presentation.
34. Dr Andrews in a report dated 27 June 2018 wrote:
- “Ms McLennan-Starling denies any mental health problems prior to going to work at Grafton for the ANZ bank. There is a note in her patient health summary, written by Dr Edward McCarthy on 14 February 2012, stating 'depressed 6 [months] ... anxious ... anorexia ... weight loss ... sleep disturbance insomnia'. He concludes that she has a significant mood disorder and recommends counselling. He had written a prescription for a benzodiazepine sedative, Valium (diazepam) and an antidepressant medication, Pristiq (desvenlafaxine). Ms McLennan-Starling argues that Dr McCarthy's entry was incorrect. She stated that her husband had been diagnosed with rheumatoid arthritis and had recently gone on to a disability pension. She said that he had a severe depression and that she had commented that her husband was very hard to live with at the time. They briefly separated. She said that her own mood was upbeat - she was in 'bliss land' because things had been going well for her at work.”
35. Dr Andrews proceeded to comment:
- “It is also important to consider the possibility of a pre-existing psychological condition. Dr McCarthy's notes certainly discussed such a condition in 2012. Ms McLennan-Starling denies that, even at that time, she was suffering the depression described by Dr McCarthy. This was a full four years before the incidents which occurred at Grafton. There is no further suggestion of psychological problems in the available medical notes and Ms McLennan-Starling denies that there were any. I would conclude that it is most likely that she was well, from a mental health point of view, prior to her transfer to the ANZ branch at Grafton.”
36. In the Psychiatric Impairment Rating System (PIRS) Table under “Apportionment”, Dr Andrews wrote:
- “Pre-existing/subsequent impairment
There is insufficient evidence of a pre-existing psychological disorder or impairment to warrant a deduction in this regard. By all accounts, she was functioning well in her role with the bank and had received positive performance reviews and bonuses.

Because her workplace injury and psychiatric aspects of her fibromyalgia arose around the same time, it is not possible to use PIRS table methods to arrive at what contribution her fibromyalgia may be making to her current impairment. In other words, there are no two points in time where the impairment effect of one without the other can be measured. I will make a deduction of 1/5th of her WPI to account for the psychiatric aspects of her fibromyalgia.

I have not taken into account her pain or other physical restriction in this assessment.”

37. In a report dated 4 October 2018, Dr Trevor Lotz, Consultant Psychiatrist, made an assessment of PIRS at 10%, with an adjustment for current treatment and lack of evidence based appropriate treatment with psychotropic medication. Dr Lotz made no deduction under s 323.
38. In a report dated 7 November 2018, Dr Lotz noted that Ms McLennan-Starling had “a history of psychiatric disorders, the influence of fibromyalgia would also have a significant impact on her psychological functioning.”
39. It appears that neither Dr Andrews nor Dr Lotz made a deduction under s 323. Dr Andrews appeared to have made a reduction for a concurrent condition. Although Dr Lotz referred to other causative factors, he appears to have made no actual reduction in his assessment of WPI.
40. The Appeal Panel agreed with the AMS that while Mrs McLennan-Starling had been treated at one consultation for anxiety and depression in 2012, there was insufficient evidence that she had an ongoing psychiatric or psychological condition in the period leading up to her moving to the Grafton branch.
41. The AMS considered that there has been no additional assessable psychiatric condition subsequent to the subject work injury but noted the development of the chronic pain condition diagnosed as fibromyalgia. It was clear that the AMS formed the view that that the fibromyalgia was not a pre-existing condition. The fibromyalgia came on during the last month of Ms McLennan-Starling’s employment with the appellant. It was a concurrent condition, not a pre-existing condition, and therefore no deduction could be made pursuant to s 323.
42. The AMS stated that he had excluded from the assessment the effects of the fibromyalgia. The Appeal Panel agreed with this approach.
43. Fibromyalgia is not a recognized psychiatric illness or condition in *Diagnostic and Statistical Manual of Mental Disorders (DSM–5)* or in the *Psychiatric chapter of the 10th revision of the International Statistical Classification of Diseases and Related Health Problems (ICD-10)*. The Panel was satisfied that the fibromyalgia was a concurrent somatic disorder.
44. Fibromyalgia is frequently treated with off-label psychotropic medication and this treatment cannot be used as an indicator of any psychiatric disorder. Anti-depressants have effects on numerous neurotransmitters and are frequently used in the treatment of a range of conditions including chronic pain and irritable bowel disorder. The use of an “antidepressant” does not necessarily indicate that the treated individual has a psychiatric disorder.
45. The Appeal Panel was satisfied that there was no error on the part of the AMS in his decision not to make a deduction pursuant to s 323 of the 1998 Act for a pre-existing psychiatric disorder. He provided cogent reasons for why he discounted the episode in 2012, the fibromyalgia emerged concurrently with her psychiatric disorder not before, and not one of the assessing doctors has suggested there was a pre-existing psychiatric disorder.

46. Second, the appellant submitted that the entry of the single word 'nil' in response to the question of the s 323 deduction, and the omission to provide any explanation at all of this conclusion was an error.
47. The MAC should be read as a whole. The Appeal Panel was satisfied that more than sufficient reasoning was provided in other sections of the MAC in terms of providing an explanation as to why no deduction was made pursuant to s 323 of the 1998 Act, for example, Part 8e. There was no omission by the AMS to provide an explanation in relation to the question of a s 323 deduction.
48. Third, the appellant submitted that the AMS rejected the methodology applied by Dr Andrews in his report dated 17 June 2018. Dr Andrews concluded that there was a psychological component to fibromyalgia, and it is more likely than not that it was also contributing to her current condition. The appellant argued that the AMS misdirected himself as it was not necessary to ignore the impairment arising from Ms McLennan-Starling's pain. The appellant submitted that the correct application of s 323 required the AMS to take into account the impairment arising from this pain.
49. This submission is misconceived as Dr Andrews did not make a deduction under s 323. Dr Andrews made a deduction for a concurrent or further condition subsequent to the subject work injury. The AMS disagreed with this approach by Dr Douglas and did not accept that reduction of 1/5th for a concurrent or subsequent condition. The Appeal Panel agreed with the methodology adopted by the AMS. The fibromyalgia was a physical injury and the correct approach was to ignore impairment arising from a physical injury. The AMS excluded from the assessment the effects of the fibromyalgia rather than make a reduction in the impairment assessed as Dr Andrews did. The Appeal Panel was satisfied that there was no error in this approach and the AMS did not misdirect himself.
50. Fourth, the AMS in approaching s 323, applied incorrect criteria in that he made an assessment of a psychiatric condition which, while its causes may be mixed, is not one that requires the exclusion of impairment resulting from pain.
51. This ground is dealt with above. The Appeal Panel was satisfied that the AMS applied the correct criteria and that the assessment of the current WPI arising from the persistent depressive disorder required the exclusion of the effects of the fibromyalgia. The AMS also noted under Part 10c of the MAC, "There was no worsening of the psychological condition as she developed fibromyalgia." Accordingly, the AMS did not need to exclude psychiatric impairment arising from fibromyalgia.
52. For these reasons, the Appeal Panel has determined that the MAC issued on 30 July 2019 should be confirmed.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar

