

# WORKERS COMPENSATION COMMISSION

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

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<b>Matter Number:</b>	<b>M1-3867/19</b>
<b>Appellant:</b>	<b>Amie Marshall</b>
<b>Respondent:</b>	<b>Coles Supermarkets Australia Pty Ltd</b>
<b>Date of Decision:</b>	<b>6 March 2020</b>
<b>Citation:</b>	<b>[2020] NSWCCMA 41</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Mr William Dalley</b>
<b>Approved Medical Specialist:</b>	<b>Professor Nick Glozier</b>
<b>Approved Medical Specialist:</b>	<b>Dr Patrick Morris</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 18 December 2019 Amie Marshal (Ms Marshall/the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Julian Parmegiani, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 21 November 2019.
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 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*, 4<sup>th</sup> ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5<sup>th</sup> ed (AMA 5).

### RELEVANT FACTUAL BACKGROUND

6. Ms Marshall commenced employment in a Liquorland store, owned by the respondent, in 2007. She worked at various Liquorland outlets performing administrative and sales duties. She suffered a psychological injury as a result of armed robberies at outlets where she was employed at the time in 2009 and 2012.

7. Following the second robbery Ms Marshall had a period off work and then returned to work although her symptoms recurred from time to time. In 2015 Ms Marshall ceased employment as a result of her psychological injuries. Attempts at returning to work in other employment were unsuccessful.
8. Ms Marshall continued to undertake psychological counselling and was treated by a psychiatrist. On 5 November 2018 Ms Marshall was examined by an independent medical expert, Dr Richa Rastogi, psychiatrist, for the purposes of a claim pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act).
9. Dr Rashogi diagnosed Ms Marshall as suffering from post-traumatic stress disorder with adjustment disorder resulting from the events in 2009 and 2012. She assessed Ms Marshall as suffering 19% whole person impairment resulting from her psychological injury.
10. Ms Marshall's solicitors lodged a claim for permanent impairment compensation pursuant to section 66 of the 1987 Act in accordance with Dr Rashogi's assessment. The respondent having failed to deal with the claim, an Application to Resolve a Dispute was filed in the Commission alleging psychological injury in 2009, 9 August 2012 and 11 March 2015.
11. The respondent filed a Reply disputing the allegation of injury on 11 March 2015 and disputing the degree of impairment alleged. The parties were able to agree that the claim should be referred to an Approved Medical Specialist for assessment in respect of psychological injury on 19 May 2009 and 9 August 2012 (the relevant injuries).
12. The AMS examined Ms Marshall on 19 November 2019 and assessed her as suffering 7% whole person impairment resulting from the relevant psychological injuries. It is against that assessment that the current appeal is brought.

## **PRELIMINARY REVIEW**

13. 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.
14. 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. For the reasons set out below no error has been established. Re-examination cannot be performed to determine if a ground of appeal is made out but can only be carried out after a ground of appeal has been established.<sup>1</sup>

## **EVIDENCE**

### **Documentary evidence**

15. 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**

16. The AMS noted that Ms Marshall had no previous psychological problems. He recorded the history of the two armed robberies which gave rise to her psychological condition. He noted that Ms Marshall continued to suffer repetitive nightmares every night with poor sleep and decreased energy. He recorded that Ms Marshall consumed up to 6 cans of energy drinks per day. Her weight had increased from 155 kg to 197 kg.

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<sup>1</sup> *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792 at [33]

17. The AMS noted that Ms Marshall reported that she became irritable, withdrawn and unmotivated. She had been unable to cope with reduced working hours and had stopped working altogether in March 2015.
18. The AMS recorded that work trials as a receptionist at a nursing home and in a warehouse four hours per day one day per week had been unsuccessful due to anxiety.
19. The AMS noted that Ms Marshall had consulted psychiatrists and was seeing a psychologist, Mr Peter Tingle. She was taking prescribed psychotropic medications. The AMS reported:

“Ms Marshall suffered panic attacks once or twice per month. Nightmares occurred on average once per week. She continued to re-experience the robbery through flashbacks. She was irritable and emotionally labile. Ms Marshall cried with minimal trigger on average twice per week. She remained withdrawn, irritable and frustrated with the lack of improvement. Ms Marshall slept poorly between 6 AM and 4 PM. Her concentration was poor.”
20. The AMS recorded a reasonably unremarkable background history. He noted Ms Marshall’s preinjury employment and her range of social and recreational activities.
21. The AMS recorded current social activities and activities of daily life including her residing with an aunt and her relationship with a young man. He recorded:

“Ms Marshall went to bed at 12 midnight, but she could not sleep until 6 AM. She spent up to 3 hours reading books. These included the Twilight series and Glasshouse series, a book about vampires. Ms Marshall spent up to seven hours per day crocheting blankets. She gave them away to family members. She estimated making 15-20 blankets since she stopped working. She purchased materials online, or from Spotlight. Ms Marshall was able to drive locally. She visited her doctors and she recently took a grandmother to a medical appointment. She saw a friend once per week, with her boyfriend. They spent a few hours at his house, playing cards and talking. Ms Marshall played an online game called Township. She went to restaurants with her family or with [the boyfriend] once per month. Ms Marshall showered every second day. She washed her hair less frequently.”
22. The AMS noted that Ms Marshall presented as a “well-groomed 33-year-old woman of above average weight.” He recorded that Ms Marshall was cooperative with the interview process and maintained appropriate eye contact. Her speech was normal in volume and rate. The AMS noted that Ms Marshall “remained anxious and fidgety during the interview.” He recorded that her thinking was coherent and she did not express delusional ideas or claim to experience visual or auditory hallucinations. She was oriented in time, place and person and her memory was generally intact.
23. The AMS diagnosed Chronic Post-Traumatic Stress Disorder. After noting the robberies which had led to the onset of the psychological disorder, the AMS noted:

“She re-experience the robbery through nightmares and flashbacks exposure to reminders exacerbated her anxiety. Ms Marshall became irritable, withdrawn and unmotivated. She slept poorly and her energy decreased. Ms Marshall gained a significant amount of weight due to a combination of comfort eating and increased consumption of energy drinks. Ms Marshall receives appropriate psychiatric and psychological treatment, including medication. Her symptoms improved but did not resolve altogether.”
24. The AMS assessed the appellant by reference to chapter 11 of the Guidelines, determining a rating in respect of each of the six class descriptors of the Psychiatric Impairment Rating Scale (PIRS) set out in Table 11. The AMS determined:

PIRS Category	Class	Reason for decision
Self-Care and Personal Hygiene	2	Ms Marshall was able to purchase groceries. She prepared meals infrequently, and she preferred to consume frozen meals. She did not shower daily due to reduced motivation. Ms Marshall could live independently if she had to, with a mild degree of neglect.
Social and Recreational Activities	2	Ms Marshall saw her boyfriend every day. They visit a friend once per week. Ms Marshall enjoyed crocheting for many hours during the day, and she played an online game. She went to restaurants once per month.
Travel	2	Ms Marshall was able to travel alone in familiar areas. She did not however travel to unfamiliar places without a support person, due to anxiety.
Social Functioning	2	Ms Marshall was able to establish a new relationship in 2015. The relationship continued to date. She lost contact with some friends.
Concentration, Persistence and Pace	2	Ms Marshall reported a subjective impairment of concentration. She was however able to read for 2 - 3 hours at night, when she could not sleep. She spent up to eight hours per day crocheting blankets. She maintained concentration during the interview.
Employability	4	Ms Marshall was able to perform some productive activities. She drove locally, and she took her grandmother to a medical appointment. She made blankets for her family. Under different circumstances she could be remunerated for these activities. She would however struggle to work more than a few hours per week, or maintain a routine.

## SUBMISSIONS

25. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
26. In summary, the appellant submits that in assigning class 4 with respect to "Employability" (Table 11.6), class 2 with respect to "Social and Recreational Activities" (Table 11.2) and class 2 with respect to "Self-Care and Personal Hygiene" the AMS had fallen into error in the

light of the evidence and, in the alternative had made the assessment on the basis of incorrect criteria.

27. In reply, the respondent submits that the AMS had assessed Ms Marshall in accordance with the Guidelines and his assessment in each of the categories complained of was open to the AMS on the evidence.

**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. 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.
30. It is convenient to consider the respective submissions with respect to each of the three class descriptors which are the subject of the appeal.

Employability.

31. The appellant submitted that the AMS “ought to have found class 5 impairment – cannot work at all.” The appellant noted the history recorded by the AMS and the reasons for assigning class 4 as set out above. The appellant noted that the AMS had given weight to the ability to drive locally, take a relative to a medical appointment and crochet blankets as evidence of an ability to work.
32. The appellant submitted that the AMS had fallen into error:
- “The applicant submits that Dr Parmegiani has erred in relying on her capacity to perform these activities as evidence of any employability. These are favours performed within the confines of the family unit, for people who are aware of her psychiatric condition.
- It is noted the history taken by Dr Parmegiani is that she drove her grandmother to a medical appointment on **one** occasion [original emphasis].
- Dr Parmegiani’s opinion that the applicant would be capable of performing these activities for remuneration in “*different circumstances*” is not supported by the evidence in the applicant’s respectful submission.”

33. The relevant descriptors in Table 11.6 are as follows:

Class 1	No deficit, or minor deficit attributable to the normal variation in the general population. Able to work full-time. Duties and performance are consistent with the injured worker’s education and training. The person is able to cope with the normal demands of the job.
Class 2	Mild impairment: Able to work full-time but in a different environment from that of the preinjury job. The duties require comparable skill and intellect as those of the preinjury job. Can work in the same position, but no more than 20 hours per week (e.g. no longer happy to work with the specific persons, or work in a specific location due to travel required).

Class 3	Moderate impairment: cannot work at all in the same position. Can perform less than 20 hours per week in a different position, which requires less skill or is qualitatively different (e.g. less stressful).
Class 4	Severe impairment: cannot work more than one or two days at a time, less than 20 hours per fortnight. Pace is reduced, attendance is erratic.
Class 5	Totally impaired: cannot work at all.

34. The report of Dr Rashogi, who examined Ms Marshall on 5 November 2018 was in evidence. The doctor was of the opinion that Ms Marshall was at that time unfit to work in her “premorbid capacity or in any capacity currently”. She was of the view that Ms Marshall’s future fitness for employment was “guarded”. She said of the appellant:

“It is unlikely that your client will ever return back to preinjury duties or any modified duties by way of her education, training and experience due to incapacitation from her psychological injury from work. Her vocational options are very limited as she has retrialed work in a different roles and organisation but has been unable to sustain due to severe anxiety and poor stress vulnerability.”

Dr Rashogi assessed Ms Marshall as totally impaired (class 5).

35. The reports of Associate Professor Robertson, consultant psychiatrist, deal with the situation in 2015 and 2016 and would have been of little assistance to the AMS when assessing employability in 2019.
36. The reports of the treating psychiatrist, Dr Cross, are more up-to-date with the most recent report being that dated 18 January 2018. At that time Ms Marshall was attempting a work trial. Dr Cross noted that Ms Marshall was continuing to see her psychologist fortnightly.
37. The reports of the treating psychologist, Mr Peter Tingle, were included among the material considered by the AMS. In the report dated 11 July 2018 the psychologist was of the opinion that Ms Marshall had some limited capacity for part-time employment.
38. The AMS has provided the reasons for assessing Ms Marshall as severely impaired (class 4) in accordance with Table 11.6. Having regard to the recorded capabilities, that assessment was open to the AMS on the evidence and does not disclose the adoption of incorrect criteria nor the existence of demonstrable error. This aspect of the appeal has not been established.

#### Social and Recreational Activities.

39. The appellant submitted that the AMS should have assessed class 3 in this area. The appellant noted that the Guidelines (Table 11.2) provide descriptors:

Class 2	Mild impairment: occasionally goes out to such events e.g. without needing a support person, but does not become actively involved (e.g. dancing, cheering favourite team).
Class 3	Moderate impairment: rarely goes out to such events, and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn.

40. The “events” referred to in the class 2 examples are those mentioned in the class 1 descriptors; “regularly participates in social activities that are age, sex and culturally appropriate. May belong to clubs or associations and is actively involved with these.”

41. The appellant noted the premorbid history which included attendance at sporting events, movies and poker nights at the local club. The appellant contrasted this with the situation noted by the AMS which included seeing a friend once a week accompanied by her boyfriend, playing a game online and going to restaurants with family or boyfriend once a month.
42. The appellant submitted:
- “The applicant submits that the AMS has erred here and that, in the context of her premorbid history, her activities of crocheting and video gaming are indicative of withdrawal. These are activities that do not require the applicant to leave the confines of her home, in contrast to her premorbid social life.”
43. In his reasons for assigning class 2 to this area the AMS recorded:
- “Ms Marshall saw her boyfriend every day. They visit a friend once per week. Ms Marshall enjoyed crocheting for many hours during the day, and she played an online game. She went to restaurants once per month.”
44. The appellant contrasts Ms Marshall’s level of social interaction with her premorbid condition. That is not the basis upon which the assessment is made by the AMS. The Guidelines require consideration of activity that is usual for people of the worker’s age, sex and cultural norms <sup>2</sup>.
45. The reasons provided by the AMS are not disputed factually. Rather the appellant submits that the AMS has drawn the wrong conclusion from the evidence. The Panel does not accept that submission. The Panel accepts that reasons given by the AMS are supported by evidence and the assessment of Ms Marshall as mildly impaired was open to the AMS and appropriate.
46. The Panel is of the view that the AMS has relied on appropriate criteria and no demonstrable error has been established. This aspect of the appeal also fails.

Self-Care and Personal Hygiene.

47. The appellant submitted that the AMS had erred in assigning class 2 to this area, submitting that the evidence established moderate impairment. The appellant noted the relevant Guidelines:

Class 2	Mild impairment: able to live independently, looks after self adequately, although may look unkempt occasionally, sometimes misses a meal or relies on takeaway food.
Class 3	Moderate impairment: can’t live independently without regular support. Needs prompting to shower daily and wear clean clothes. Does not prepare own meals, frequently misses meals. Family member or community nurse visits (or should visit) 2 to 3 times per week to ensure minimum level of hygiene and nutrition.

48. The appellant noted the reasons given by the AMS for assigning mild impairment and submitted that the AMS had failed to take into account the weight gain subsequent to the injury, noting that Ms Marshall’s weight had increased from 155 kg to 197 kg following the injury. The appellant submitted that “the deterioration of her eating habits and her significant weight gain represents more than a ‘mild’ impairment.”

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<sup>2</sup> Guidelines 11.2

49. The Panel does not accept that submission. It is clear that the AMS has taken into account the significant weight gain but has also noted that Ms Marshall was significantly overweight prior to injury. The AMS was entitled to assess the significance of the weight increase but was entitled to assess mild impairment in the overall assessment of this area on the whole of the evidence. The examples given in Table 11.1 describe the level of impairment where it is suggested outside assistance would be required to achieve a satisfactory level of self-care and personal hygiene. The evidence does not suggest that Ms Marshall is at that level.
50. The appellant's own independent medical expert, Dr Rashogi, assessed class 2 in this area giving as the reason "mild impairment in that she occasionally needs prompting with showering and dressing as well as meals".
51. The Panel accepts that it was open to the AMS to assess mild impairment in respect of this area. No reliance upon incorrect criteria or demonstrable error has been made out and the appeal in respect of this area of function also fails.
52. For these reasons, the Appeal Panel has determined that the MAC issued on 21 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 Vermeulen*

**Anneke Vermeulen**  
**Dispute Services Officer**  
As delegate of the Registrar

