WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-3290/18**
Appellant:	**CSR Ltd**
Respondent:	**Marion Ewins**
Date of Decision:	**27 August 2019**
Citation:	**[2019] NSWWCCMA 123**

Appeal Panel:	
Arbitrator:	**Gerard Egan**
Approved Medical Specialist:	**Dr Julian Parmegiani**
Approved Medical Specialist:	**Dr Douglas Andrews**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 16 May 2019, CSR Ltd (the appellant, and/or the employer) made an application to appeal against a medical assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission). The medical assessment was made by Dr Wayne Mason, an Approved Medical Specialist (the AMS) in a Medical Assessment Certificate dated 24 April 2019 (the MAC).

2. The respondent to the Appeal is Marion Ewins (the worker) and a Notice of Opposition was lodged on 6 June 2019.

3. On 7 June 2019, the appellant filed a letter in the Commission which referred to an Application to Admit Late Documents, which was not enclosed. The appellant submitted that in view of the late documents it sought to have admitted on appeal, it wished to amend the grounds for appeal relied on in the appeal application to include reliance on s 327(3)(b) of *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). On 20 June 2019, the appellant refiled the letter dated 7 June 2019 but this time enclosing an Application to Admit Late Documents attaching surveillance investigation report dated 30 May 2019, by a firm titled "Virtual Intelligence Insurance & Litigation Support" (the surveillance report). The surveillance report is unsigned, and apparently authored by a person identified only as "Craig A".

4. On 20 June 2019, the appellant also lodged submissions "in reply" to the respondent's submissions, and submissions regarding the proposed amended ground of appeal, relying on the surveillance report.

5. A Delegate of the Registrar then directed the respondent worker to further submissions in response to the appellant employer's proposed additional ground of appeal (s 327(3)(b) of the 1998 Act) and reliance on the surveillance report. These were filed on 5 July 2019.

6. The appellant relies on the following grounds of appeal under s 327(3) of the 1998 Act:

    - availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against) (fresh evidence): s 327(3)(b);

- the assessment was made on the basis of incorrect criteria: s 327(3)(c), and

- the MAC contains a demonstrable error: s 327(3)(d.)

7. 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.

8. 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.

9. 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).

EVIDENCE

Documentary evidence

10. The 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. These include;

    - The Referral to the AMS;

    - Application to Resolve a Dispute and attached documents (excluding reports of Dr Synnott);

    - The Reply and attached documents (excluding reports of Dr Synnott);

    - The worker's Applications to Admit Late Documents - dated 5 September 2018 and 28 September 2018;

    - The appellant's Application to Admit Late Documents – dated 4 September 2018, 3 October 2018, 19 November 2018, and 24 January 2019;

    - Report of Dr Lee dated 17 September 2018;

    - Statement of the worker dated 18 December 2018;

    - The Amended Certificate of Determination – Consent Orders dated 2 April 2019;

    - Original Medical Assessment Certificate (MAC);

    - Appeal Form;

    - Notice of Opposition, and

    - The Decision of the Registrar pursuant to s 327 of the 1998 Act.

Further documentary evidence, filed after the MAC and after the Application to Appeal

11. In addition, there is the further correspondence, the surveillance report, and submissions regarding the proposed addition of grounds of appeal as set out above.

12. As can be seen from the above chronology, the appellant did not lodge additional information with the Application to Appeal, but rather, some time thereafter. However, the 28 day time limit does not apply in appeals based on s 327(b).

Fresh evidence, the appellant's submissions

13. In short, the appellant makes no submissions as to why it should be permitted to rely upon material gathered well after the AMS examination and the MAC. The appellant seems to assume that there is a right for it to adduce the material merely by recitation of the ground under s 327(3)(b) of the 1998 Act. If so, it is clearly mistaken.

14. The worker says the surveillance report is not material that could not have been obtained before the AMS examination. Additionally, it is plain from the worker's further submissions that it considers it has no probative value. This so because it is a reported opinions from an investigator "operative" only. Further, although surveillance was conducted over four days, it shows only that the worker does not emerge from her home for the first two days, is then seen only when she emerges to attend her local church on consecutive Sundays. It is submitted that it also shows the worker does not go to children's sport, does not get the mail, does not work in the garden does not otherwise go for a walk, walk the dog, go socialising, go to the gym or go shopping.

15. It is also submitted that if the fresh evidence were to alter the MAC, re-examination would be necessary as a matter of procedural fairness. This latter statement may be accepted without argument.

16. The ground identified in the appellant's further submissions is the ground of appeal under s 327(3)(b) of the 1998 Act. That provision reads (our emphasis):

> "(3) The grounds for appeal under this section are any of the following grounds:
>
> (a) ….
>
> (b) availability of additional relevant information (**but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against)** …."

17. Section 328(3) of the 1998 Act is also relevant and also prevents the Panel from receiving evidence that is fresh evidence, or evidence in addition to, or in substitution for, the evidence received in relation to the medical assessment appealed against, "**unless the evidence was not available to the appellant before the medical assessment, or could not reasonably have been obtained by the appellant before the medical assessment"** (again, our emphasis).

18. The reception of such evidence is a discretionary matter: *Lukacevic v Coates Hire Operations Pty Limited* [2011] NSWCA 112 (*Lukacevic*).

19. Although the application to appeal is statutory terms in s 327 of the 1998 Act, the principles regarding fresh evidence may be instructive. In *Wollongong Corporation v Cowan* [1955] HCA 16; (1955) 93 CLR 435, (*Cowan*), Dixon CJ (Williams, Webb, Kitto and Taylor JJ concurring), said at p 444:

"If cases are put aside where a trial has miscarried through misdirection, misreception of evidence, wrongful rejection of evidence or other error and if cases of surprise, malpractice or fraud are put on one side, it is essential to give effect to the rule that the verdict, regularly obtained, must not be disturbed without some insistent demand of justice. The discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well-known conditions are fulfilled. It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial."

20. When considering the relevant principles in *Ross v Zurich Workers Compensation Insurance* [2002] NSWWCC PD7 (*Ross*), Deputy President Fleming considered the approach at common law. The Deputy President said:

> "The relevant tests are firstly, that the evidence which is sought to be admitted on appeal was not available to the Appellant at the time of the original proceedings or could not have been discovered at that time with reasonable diligence, and secondly that the evidence is of such probative value that it is reasonably clear that it would change the outcome of the case (*Wollongong Corporation v Cowan* (1955) 93 CLR 435; *McCann v Parsons* (1954) 93 CLR 418; *Orr v Holmes* (1948) 76 CLR 632). These tests are addressed to the underlying principle of the need for finality in litigation and the importance of the ability of the successful party to rely on the outcome of the litigation. They are also addressed the fundamental demands of fairness and justice in the instant case."

21. In *Commonwealth Bank of Australia v Quade* (1991) 170 CLR 134, the High Court also considered *Cowan*, saying, at p134:

> "8. It is neither practicable nor desirable to seek to enunciate a general rule which can be mechanically applied by an appellate court to determine whether a new trial should be ordered in a case where misconduct on the part of the successful party has had the result that relevant evidence in his possession has remained undisclosed until after the verdict. The most that can be said is that the answer to that question in such a case must depend upon the appellate court's assessment of what will best serve the interests of justice, 'either particularly in relation to the parties or generally in relation to the administration of justice' cf, e.g., *McDonald v. McDonald* (1965) 113 CLR at pp 533-542. In determining whether the matter should be tried afresh, it will be necessary for the appellate court to take account of a variety of possibly competing factors, including, in addition to general considerations relating to the administration of justice, the degree of culpability of the successful party (10) cf. *Southern Cross Exploration N.L. v Fire and All Risks Insurance Co. Ltd.* (1985) 2 NSWLR 340 at p 357, any lack of diligence on the part of the unsuccessful party and the extent of any likelihood that the result would have been different if the order had been complied with and the non-disclosed material had been made available. **While it is not necessary that the appellate court be persuaded in such a case that it is "almost certain" or "reasonably clear" that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that that would have been so.**" (the Panel's emphasis)

22. In *Workers Compensation Nominal Insurer v Bui* [2014] NSWSC 832 (*Bui*), McCallum J made a number of observations concerning post-MAC surveillance:

> "44. It may be accepted that the Act expressly restricts the giving of 'fresh evidence' or 'evidence in addition to or in substitution for the evidence received in relation to the medical assessment appealed against'. Such evidence may not be given on an appeal unless it was not available to the party before the medical assessment and could not reasonably have been obtained before that assessment: see s 328(3) of the Act. To a degree, the strictness of that provision is at odds with the informal approach to the conduct of an assessment hearing allowed under clause 46 of the guidelines. But the purpose of the section is clear. Its object is to promote finality.
>
> 45. The surveillance evidence sought to be relied upon by the insurer was plainly fresh evidence (if it was anything), the period of surveillance having been after the date on which Dr Gertler assessed Ms Bui. The Medical Appeal Panel considered the terms of s 328(3) and on the appeal (at [33] of the statement of reasons, page 76 of the court book)." [at 44]

23. In *Bui,* however, the Panel had admitted the further surveillance (thought to be "perhaps generous to the insurer"), but had not then expressed proper reasons for concluding that the material did not affect the AMS's assessment within certain Psychiatric Impairment Ratings Scale (PIRS) categories, when it was "was plainly capable of informing at least two of the other PIRS categories" (at [77]).

24. In *State of New South Wales v Ali* [2018] NSWSC 1783 (21 November 2018), Harrison J

> "31. In my opinion, the plaintiff's application is misconceived and its summons should be dismissed. This is for the following reasons.
>
> 32. First, the information contained in the later surveillance reports is neither additional nor relevant as properly understood. The expression 'additional relevant information' contemplates or anticipates a qualitative addition to the information otherwise previously available. It is not concerned with the information being merely quantitatively different, in the sense that there is more of the same. That is made plain by the words in parentheses, which emphasise that the additional relevant information must also qualify as information that could not reasonably have been obtained before the medical assessment appealed against. **As a matter of plain language, that does not mean or refer to something that could not have been obtained simply because it came later in time. Everything that occurs later than an earlier event is by definition additional in a temporal sense.** That is obviously so in the present case, in which the so-called additional relevant information consists of the investigation reports, which uncontroversially 'could not reasonably have been obtained ... before'. (our emphasis)
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> …..
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> 35. Secondly, but in a related sense, the plaintiff's contentions do not accord with the approach emphasised by Hoeben J (as he then was) at [31]–[32], [34] in *Petrovic v BC Serv No 14 Pty Ltd & Ors* [2007] NSWSC 1156 as follows:

‘[31] In my opinion the words “availability of additional relevant information” qualify the words in parentheses in s 327(3)(b) in a significant way. The information must be relevant to the task which was being performed by the AMS. That approach is supported by subs 327(2) which identifies the matters which are appealable. They are restricted to the matters referred to in s 326 as to which a MAC is conclusively taken to be correct. In other words, ‘additional relevant information’ for the purposes of s 327(3)(b) is 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. Such matters may be picked up, depending on the circumstances, by s 327(3)(c) and (d) but they do not come within subs 327(3)(b).

[32] 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) and should not have been treated as such by the Registrar.

...

[34] There is another consideration which I have taken into account. If the function of the Registrar under s 327 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 s 327(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.’

36. It is clear that his Honour was not literally limiting the material that might qualify under this provision to information ‘of a medical kind’ so much as information relevant to the assessment of the medical issue in question. Be that as it may, in the present case the plaintiff says that the latest surveillance reports indicate or suggest that Mr Ali is in fact engaging in employment or employment related activities and is socialising and that these are matters that ought properly to inform a medical assessment in accordance with the Guidelines. However, even though the Guidelines advert to matters, among others, such as employability and social and recreational activities as an aid to assessing (relevantly for present purposes) the existence or extent of a person’s psychiatric condition, and hence their degree of permanent impairment, they are not matters that could be said to exist ‘on the face of the application’ in accordance with s 327(4) even notwithstanding the plaintiff’s submissions concerning them. The plaintiff’s opinion or assertion that Mr Ali is employable or is capable of engaging in social activities cannot qualify as ‘additional relevant information’ as it is unrelated to the medical exercise in which the Approved Medical Specialist was required to engage. In my view, the same applies to the latest surveillance material which is only quantitatively different to the earlier obtained reports.

37. Thirdly, accepting for the purposes of the argument that the so-called additional information is capable of supporting the suggestion that Mr Ali's degree of permanent impairment may be potentially different, I am not satisfied that it could not reasonably have been obtained by the plaintiff before the medical assessment appealed against. The plaintiff's opinion that its most recent investigation or surveillance reports are capable of establishing that Mr Ali's activities are now different or more extensive than when the challenged assessment was made is not coextensive with the proposition that the latest surveillance reports are thereby additional relevant information. The fact that the plaintiff contends that the latest surveillance material suggests or supports a different degree of permanent impairment does not mean that it was also not available or could not reasonably have been obtained before the impugned assessment was made.

38. Fourthly, the information is not in any event *additional* in the sense required. According to the plaintiff's analysis, the material is additional because it arguably demonstrates that Mr Ali is now in some way significantly involved in his daughter's business, or is gainfully employed, in contradistinction to the earlier reports that were either neutral or inconclusive about that possibility. That is a false distinction in my opinion. The fact that the latest investigation reports appear (according to the plaintiff) to provide some enhanced forensic support for its assertions that Mr Ali's assessed degree of permanent impairment is questionable does not thereby convert the reports themselves into additional relevant information. 'Additional relevant information' is not the same thing as the (potential) availability of an argument in support of a different forensic outcome.

39. Finally, the whole structure and wording of s 327 are concerned with appeals. With the exception of s 327(3) (a), the section proceeds upon the basis that a party aggrieved by the challenged assessment should be given a limited opportunity to establish, if it be the case, that not all relevant information available at the time was taken into account. Section 327(3)(b) limits that right of appeal to circumstances where additional relevant information is available but only if the additional information was not available to, and could not reasonably have been obtained by, the plaintiff before the medical assessment appealed against. That clearly anticipates the existence of a provable state of affairs at the time the decision is made. Section 327(3)(b) cannot be read in any other way: it deals with the circumstances in which an appeal will lie from an assessment that was allegedly made without the benefit of information that existed at the time. It is not concerned with offering an aggrieved party the chance to run the assessment again because circumstances have *since* changed. It may be contrasted with s 327(3)(a), which contemplates an appeal when circumstances have actually changed, although limited to cases of an increase in the degree of permanent impairment and not the opposite. That limitation suggests, as a matter of ordinary statutory construction, that an appeal with respect to an alleged reduction in the degree of permanent impairment is neither contemplated by the words of s 327 in general nor provided by s 327(3)(b) in particular."

25. The "additional relevant information" sought to be relied upon by the appellant is the surveillance report. That, in this case, is clearly not information "of a medical kind or which is directly related to the decision required to be made by the AMS".

26. Further, even if it were, it is not information that was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against. The appellant does not submit otherwise. The date of the report is the only aspect of the material that would suggest it could not have been obtained before. The activities depicted are not suggested to have arisen only after the AMS examination.

27. If a worker is to be prevented from challenging the history recorded by an AMS (as in *Petrovic v BC Serv No 14 Pty Ltd & Ors* [2007] NSWSC 1156), there seems to be no reason that the employer should be permitted to continue digging for evidence to undermine the recorded history in the MAC, absent special circumstances. This is more so, when the appellant has, in this case, been faced with a claim for 17% WPI since at least 20 March 2018. That claim was based on aggregate PIRS scores of 16, and a median score of 3, precisely the same aggregate and median recorded by the AMS in the MAC.

28. The appellant provides no evidence or submissions as to why the surveillance report could not have been obtained before the proceedings were commenced or at least before the AMS examination. On face value, there is no reason why it could not have.

29. All of the forgoing reasons against receiving the further surveillance material in the appeal assume that the information is “relevant”, as required by s 327(3)(b). Given the content of the surveillance report, the Panel considers the information to be either irrelevant, or of marginal relevance.

30. In *Lukacevic,* Handley JA said at [102]:

> “102. Section 328 does not, in terms, require the Panel to receive new evidence which meets the threshold in subs (3) and it cannot be required to receive irrelevant evidence.
>
> 103. Guideline 43 requires the Panel to decide, at its preliminary review, on ‘the appropriate action to take in the appeal’, including whether ‘new evidence should be allowed’. In my judgment, this gave it the power to reject otherwise relevant evidence on discretionary grounds.
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> 104. The next question is whether the Panel's exercise of its discretion was irrational or vitiated by patent legal error.
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> 105. I reject the applicant's argument, based on the sequence of paras 8 and 12 of the Panel's reasons, that it decided that it was ‘not necessary’ to have a further medical examination before it considered whether it would receive the new evidence.
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> 106. The Panel considered both questions during its preliminary review. Guideline 43 required a decision on a further medical examination, and the allowance of new evidence, in that order. This probably explains the order in which the Panel recorded its decisions.”

31. Apart from broad assertions, the appellant’s submissions are devoid of detail as to the precise error in each category alleged, the specific evidence that would support the assertion, or identification of any evidence with precision as to time, date, or author.

32. The surveillance shows that the worker can drive to church on a Sunday, but is not otherwise seen to emerge from her house. It does not demonstrate the worker socialising, maintaining relationships, travelling, concentration or demonstrating employability capacity that would impact on any of the assumptions or clinical conclusions of the AMS in the MAC. Rather, the surveillance is consistent with the MAC, where it is accepted she could drive to the city, drive her children to school, but could not use public transport alone because of anxiety in crowds, leaving a mild impairment. Attendance at church (in the absence of any socialisation demonstrated, as is the case) is more likely to be an exercise in introspection or self-contemplation. The presence of another child in the car during the activity does not alter these observations.

33. While, in *Bui,* the Panel was criticised for not addressing each PIRS category and providing individually specific reasons why the surveillance did not establish error by the AMS, the surveillance was said to "plainly inform" the relevant PIRS categories. In this case, the material is, in the context of the MAC, uninformative, and it serves little purpose to recite all PIRS categories and reject the possible effect on each example activity (for they are examples only: cl 11.12 of the Guidelines, p 55).

34. The Panel determines that the surveillance report should not be received in the Appeal, and determines that the ground based on additional information is not made out.

OTHER GROUNDS OF APPEAL: SUBMISSIONS

35. Both parties made written submissions, attached to the Application to Appeal and the Opposition respectively. It is far from clear whether the appellant ought be permitted to rely upon submissions in Reply, but as there is no issue raised, the Panel with deal with them.

36. The grounds of appeal, subject to falling within one of the categories in s 327(3) of the 1998 Act are the grounds restricted to those specified in the submissions accompanying the appeal: *New South Wales Police Force v Registrar of the Worker Compensation Commission* [2013] NSWSC 1792 (*Police Force v Registrar)* Davies J at [49]). This was confirmed by His Honour in *The UGL Rail Services Pty Ltd (formerly United Group Rail Services Pty Ltd) v Attard* [2016] NSWSC 911; see also *Wilkinson v C & M Leussink Pty Ltd* [2015] NSWSC 69.

37. The submissions will be dealt with below, but the initial grounds of appeal by the employer are the AMS applied incorrect criteria and that the MAC contains a demonstrable error in failing to take into account relevant considerations and also in making an assessment where there is either no evidence or insufficient evidence to support it. Further particular grounds are alleged to constitute demonstrable error or the application of incorrect criteria in the AMS's assessments within all of the six PIRS categories.

38. It is noted that the appellant makes submissions based on reports by Dr Synott, which were explicitly not before the AMS, and are not before the Panel.

PRELIMINARY REVIEW

39. 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.

Hearing on the papers and Further Medical Examination by an AMS Panel Member

40. The appellant says it "is of the view" that this matter should have an oral hearing before the Appeal Panel due to the volume of material and number of errors alleged. It also says a re-examination should occur.

41. The worker opposes an oral hearing and says re-examination would only be necessary if the Panel receives the further surveillance into the materials for consideration.

42. On the basis of the preliminary review, and the fact that the Panel does not receive the further surveillance report, the Panel determined that there is sufficient evidence in the materials before the AMS and the Panel and the written submissions identify the alleged errors and grounds of appeal with sufficient detail to allow the Panel to deal with the appeal without such a hearing in accordance with the Registrar's Guideline: Appeal Against Medical Assessment.

43. In the preliminary review the Panel concluded that for reasons expressed below, further examination is not necessary to deal with the appeal.

RELEVANT FACTUAL BACKGROUND

44. The worker suffered psychological injury (deemed to have occurred on 28 September 2017) as a result of bullying and harassment during the course of the employment with the appellant respondent.

The proceedings

45. Various treating practitioners over time refer to the worker's social isolation and ongoing fear.

46. Clinical notes of the worker's general practitioner disclose the following:

    (a) On 8 April 2014, she complained of pain in her joints for two years, the doctor recording "worry of MS", with no relevant treatment;

    (b) On 27 April 2014, a note reveals concerns that her step-daughter may have sexually assaulted the worker's young daughter. She was noted to be sad and reactive depression was the impression. There is no note for prescribed medication and she was referred to Ana Catarina for counseling;

    (c) On 21 September 2014, the worker was "stressed" about her young child, with no relevant treatment;

    (d) On 30 March 2015, a note said "distress +++". Her husband was to see a neurologist for tinnitus and dizziness, and her mother had injured her foot. No treatment was offered, other than "chat";

    (e) In August 2016, the worker discovered a lump on her right breast. She was subsequently fired for crying at work. No psychological treatment was offered but investigations into the lump were arranged.

47. On 20 March 2018, the worker claimed lump sum compensation based on an assessment of 17% whole person impairment (WPI) in a medico legal report by Dr Teoh dated 28 February 2018.

48. Dr Teoh assessed the worker within the PIRS categories set out in Chapter 11 of the Guidelines as follows:

    (a) Table 11.1: Self Care and Personal Hygiene: Class 2 - "She has been lacking motivation to care for herself. She requires help from family and friends".

    (b) Table 11.2: Social and Recreational Activities: Class 3 - "She reported significant loss of interest in her usual activities and social isolation".

    (c) Table 11.4: Travel: Class 2 - "She is able to travel on her own with apprehension".

    (d) Table 11.4: Social Functioning: Class 3 - "She has a strained relationship due to irritability and lacking communication".

    (e) Table 11.5: Concentration, Persistence and Pace: Class 3 - "She has poor concentration and persistent preoccupation with negative thoughts".

    (f) Table 11.6: Employability: Class 3 - "She is fit for suitable duties. She lost her confidence. She became anxious going to work".

49. Dr Teoh determined a median Class score of 3 (Guidelines cl 11.16, p58), and an aggregate (Guidelines cl 11.17, p58) of 16. He applied the conversion Table 11.7, and arrived at 17% WPI. No deduction for impairment due to pre-existing injury or condition was applied.

50. After examination by Dr John Albert Roberts at the appellant's request, a report of 3 November 2017 was produced. The respondent initially declined the claim based on an assertion that the worker had suffered injury. The matters of "liability" were eventually resolved and the worker was referred to the AMS.

51. Dr Roberts concluded that the worker was "suffering from a major depression, possibly with psychosis". However, he concluded it was "unrelated to the circumstances and conditions of employment" principally because he accepted the alleged bullies and harassers over the allegations by the worker. He concluded the worker presented "as an unwell person, exhibiting symptomatology of agitation and depression". He noted "the history of previous psychiatric illness", round the birth of her son aged four and a half years prior. He concluded that his history "would result in there being a predisposition to the development of a psychiatric illness in later life".

52. Dr Roberts' report will be dealt with when considering the grounds of appeal.

53. The AMS examined the worker on 5 April 2019 leading to the MAC dated 24 April 2019 under appeal.

THE MAC FINDINGS

54. In the MAC, the AMS noted the circumstances of the injuries and subsequent treatment.

55. He continued:

> **"Present symptoms:** She stated her sleep remains disturbed with the initial insomnia worse. She does not want to get out of bed in the morning. She said she feels depressed, doesn't want to die, but does experience strange thoughts about deliberate self-harm and suicide. She said she wants to be invisible. She will not attend school activities with the children on her own. She will go to school soccer if her husband accompanies her. She said she is still anxious and experiences panic quite often for no apparent reason. She described a panic attack on her way to the medical centre in the car driven by her husband. She said she jumped out of the car on the Hume Highway, ran across the traffic, and then spent three days in bed. She said she thought she would die. She also described what she referred to as silent panic attacks in which the whole-body tingles and she feels exhausted and overwhelmed. She said when her level of the distress builds up it comes out in a flood of rage at her husband and children and she then feels awful. She said she doesn't want them to know how bad she feels and it makes her ashamed that she treats them in such a manner. She said on two days per week she wakes with a headache and spends all day in bed because she has the sense of being unable to cope and of never getting better.
>
> **Details of any previous or subsequent accidents, injuries or condition:**
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> Ms Ewins said she had postnatal depression after the birth of her son. She used the anti- depressant agent paroxetine for a few days only and had only one session with psychologist Ms Rhonda Miller; she said they did not gel. It eventually emerged that her son was allergic to milk protein, eggs and nuts, and some dietary re-organisation resulted in her problems resolving.

I asked Ms Ewins about an entry in the GP record in April 2014 that she feared she had multiple sclerosis; she said she had no memory of reporting such a fear. On 27 April 2014, there was a report in the GP record that her daughter's stepsister (her husband's child from a previous marriage) had attempted to perform sexual acts on her daughter. Ms Ewins was very uncomfortable that this information was available because she thought there had been a legal agreement that it would not be made public. The matter was reported to DOCS and her husband has not seen his three children from the previous relationship since then. Up until then the children spent every second weekend with them. Ms Ewins was distressed for her daughter, her stepchildren and her husband. She had 12 counselling sessions with Ms Ana Caterina of Rose Cottage Liverpool, a specialised clinic for child sexual assault victims. I was satisfied there was no current psychological injury arising from these events.

On 19 February 2019, Ms Ewins' mother died of aortic stenosis while awaiting surgery. She was appropriately distressed about the recent loss of her mother, but I was satisfied she was experiencing normal grief. In 2007, she was involved in a work-related motor accident which resulted in physical injuries but no psychological injury. There was a settlement in regard to this matter.

General health: Ms Ewins informed me she suffered diabetes of pregnancy prior to the birth of her daughter and used insulin for three months; this resolved following the birth. Both pregnancies were delivered by Caesarean section. Both pregnancies were conceived using IVF, resulting from one attempt with her daughter and two attempts with her son. Ms Ewins had some concerns about gastrointestinal issues because her sister suffers from Crohn's disease.

She had surgery for excision of a right ganglion cyst in 2003 or 2004. She said there were no other health issues. She noted her sister has some difficulty with depression arising from her Crohn's disease. Ms Ewins stated she did not use cigarettes or recreational drugs and drinks alcohol rarely. She does not gamble. There is no history of problems with the law.

Work history including previous work history if relevant: Ms Ewins completed a bachelor of commerce at the University of Western Sydney in the year 2000. She said she worked at Freedom Furniture while she was a student and remained with them after the completion of studies. She was made administration manager in December 2001 and worked for them for 10 years. She said the final role was as a staff educator in learning and development. She then worked for United Rail Fleet Services for 11 months, following which she was the state training manager for Bluescope steel for two years; she was made redundant when they slashed 40 jobs in 2008. She then did an administration manager job for six months following which she worked for a registered training organisation for eight months and resigned prior to the birth of first child. She was asked about an entry in the GP medical record indicating she had been sacked after one week in a job in 2015; Ms Ewins stated she had no idea why the entry was made. She commenced work with Bradford insulation in September 2015. In January 2018, she attempted a return to work in the same company as her husband doing 4 hours in the office on Mondays and three days at home per week; she said she struggled with social anxiety while in the office and had difficulty with concentration while attempting to work from home. Total hours worked per week were between 10 and 12. This work ended when her husband changed jobs in October 2018 and she has not felt confident to seek work since then on the open market.

Social activities/ADL: I questioned Ms Ewins about her pre-accident functioning and was satisfied there was no pre-existing psychiatric condition and she was unimpaired. With regard to her current functioning she said in the morning she gets her children ready and then drives them to school. She usually returns home and may spend some time with her sister who lives in the house, but usually spends time on her own. She said she is no longer able to volunteer to help with the children's reading at school. She said she is able to go to the local Woolworths store on her own and she does prepare meals.

Self-care and personal hygiene: Ms Ewins said she mostly showers daily but will often spend time in her tracksuit. She does not bother to use make up unless her husband urges her to do so. She has not been clothes shopping since her work injury. She does attend to her own nutrition and that of the family. She is mildly impaired.

Social and recreational activities: Ms Ewins said she no longer entertains friends at home, which they frequently did in the past, or visits other families. She said she has an occasional cup of coffee with a group of girls every few months if she is pushed. She went out with her husband for lunch on one occasion two weeks ago when she was in the city for a conference in relation to the workers compensation case. She said she no longer participates in her children's sporting and social activities, but will go to their soccer games if accompanied by her husband. She has stopped attending her local Catholic Church. She is moderately impaired.

Travel: Ms Ewins is able to drive alone and said she could drive to the city. She said she could not use public transport alone because of anxiety in crowds. She is mildly impaired.

Social functioning: Ms Ewins said her relationship with her husband is solid and there is no talk of separation but she has no sense of affection for him, no libido, and is withdrawn in the relationship. She said she experiences intermittent angry outbursts at him or the children. She is mildly impaired.

Concentration, persistence and pace: Ms Ewins said her concentration is poor and she is unable to manage the children's homework. She said she had difficulty understanding the instructions for a children's board game and cannot deal with letters from lawyers. I note that she was able to manage part-time employment with her husband's logistics company for about nine months following the accident, but described significant concentration difficulties. There was some clinical evidence of impaired concentration throughout the interview. She is moderately impaired.

Employability: Ms Ewins said she would like to return to work but at the moment does not believe she could manage that without more therapy. She said she is unable to deal with any form of aggression in workplace. She would like to work 2 to 3 days per week during school hours in some form of professional role where people behave decently towards each other. This amounts to 8 to 12 hours per week. She is severely impaired.

5. FINDINGS ON MENTAL STATE EXAMINATION

Ms Ewins is a 40-year-old woman whose appearance is consistent with her state of age. She was neatly casually dressed and well presented. She was 159 cm tall and weighed 77 kg; I calculated her BMI at 30.5, which is inside the obese category. She was a cooperative and appropriate interviewee who provided information willingly and without prompting.

She was depressed in appearance. She was frequently tearful throughout the interview and there was clinical evidence of anxiety during the interview. She described the occurrence of panic attacks in situations where she did not feel safe. She also described some paranoid thoughts such as the fear that she might shot by a CSR employee. I was satisfied this fear did not represent a psychotic disorder, but was a manifestation of the significant fear which had been generated by her experiences in the workplace. Her range of affective expression was full and appropriate.

She was fully oriented in time person place and displayed no evidence of organic or psychotic psychopathology.

SUMMARY

Summary of injuries and diagnoses: I have diagnosed Major Depressive Disorder and Panic Disorder.

Consistency of presentation: Ms Ewins presentation was both internally consistent and consistent with the documentation provided.

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

The facts on which I have based my assessment of whole person impairment are:

The history I obtained from the applicant, the documentation provided with the referral and the mental state examination I conducted during the interview.

My brief comments regarding the other medical opinions and findings submitted by the parties and, where applicable, the reasons why my opinion differs

Dr Ben Teoh, psychiatrist of Parramatta, provided a report dated 27 February 2018. He diagnosed an Adjustment Disorder with Mixed Anxiety and Depressed Mood arising from the work situation. He assessed whole person impairment at 17%. He noted she had commenced a new job two weeks prior to the assessment. My assessment of whole person impairment is similar to do that arrived out by Dr Teoh. The diagnoses differ slightly.

The clinical notes of Idameneo (Number 123) Pty Limited date from April 2003 to March 2018. She became pregnant using IVF and delivered by caesarean section on 21 January 2013. On 23 July 2013, she was distressed by multiple social factors and Aropax was commenced. On 11 November 2013, the early childhood centre in Ingleburn suggested she was suffering from postnatal depression; she had been on Aropax since July 2013. She was referred to psychologist Ms Rhonda Miller. On page of April 2014 (sic) she was worried about the possibility of multiple sclerosis. On 27 April 2014, she was concerned her stepdaughter may have sexually assaulted her three-year-old daughter Noelle.

The step-children lived with her husband's ex-wife and they had been taken away by DOCS; consequently, her husband was not coping. Her K10 score was 43/50. A reactive depression was diagnosed and she was referred to counsellor Ana Caterina; no medication was prescribed.
On 21 September 2014, she remained stressed about her family and her young child. On 30 March 2015, she was stressed regarding her husband, children and mother. On 17 August 2015, she presented in tears having been fired from a job which she had held for only one week. In September 2016, there were multiple pressures; mother-in-law fell while travelling to Canberra, has to drive to Canberra to bring her home, husband injured his back, daughter is sick, mother needs dialysis and new job has too much pressure. On 1 March 2017, she reported a nervous breakdown due to bullying from one of the sales people who had been rude to her since September 2015. She discussed resignation with her boss but time off was suggested. She was provided with a medical certificate and Ativan 0.5mg tds was prescribed. 29 September 2017 she was being bullied at work by everybody and was anxious and tearful. Requested a day off and wanted medication for sleep and relaxation. On 2 October 2017 she was teary, distressed about her work situation, and worried about a suicidal girl at work. She was short tempered at home. She had thoughts of self-harm and was worried about losing her job. Ativan 1 mg was prescribed and she was referred to a psychologist under a GP mental health care plan. On 8 October 2017, she was more distressed and had thoughts of walking into traffic in the city. She was referred to psychologist Ms Kim Malone. 16 October 2017, she was slightly improved and was going on a pre-planned five-day holiday in Fiji. On 1 November 2017, Valdoxan 25 mg had been prescribed. On 9 November 2017, she was consulted in the presence of husband and informed that psychiatrist Dr Roberts had diagnosed a psychotic depression, a conclusion she could not accept. She accepted referral to another psychiatrist. On 23 November 2017 she was feeling somewhat better, had ceased Ativan and was continuing on Valdoxan. She had consulted a solicitor. On 8 January 2018 two thousand and eighteen 18 she reported improvement over the Christmas period. 15 March 2018 she was working in her husband's office on a part-time basis and had seen psychiatrist Dr Ben Teoh. *I have the address the issues arising in the GP clinical record and these are reported above in the body my report.*

Ms Kim Malone, psychologist of Prestons, provided a report dated April 2018. She had consulted with the claimant on 13 occasions between 7 October 2017 and 19 March 2018. She described a history of bullying and harassment within her employment and a distressing interaction with a suicidal employee who was under her management. Ms Malone diagnosed major depressive disorder, generalised anxiety disorder and panic attacks, noting the claimant did not meet full DSM-5 diagnostic criteria for post-traumatic stress disorder. She noted some improvement following treatment with CBT and use of antidepressant medication. She reported a return to part-time work with another employer doing one day in the office and other days remotely from home. *I agree with Miss Malone that the injured worker did not make the DSM five criteria for PTSD. I agree that she suffers from a major depressive disorder and a panic disorder. Her diagnosis of generalised anxiety disorder is subsumed in the diagnoses I have made.*

Dr John Roberts, psychiatrist of Burwood, provided a report dated 3 November 2017. He diagnosed major depressive disorder and considered the possibility of a psychosis because the claimant's perception of events in the workplace were at variance with the perceptions of various people interviewed in the factual investigation report. Dr Roberts noted the claimant left the interview in considerable distress as a consequence of his questioning. *I agree with the diagnosis of major depressive disorder made by Dr Roberts. I do not believe she suffers from a psychotic condition, but fear of reprisals caused by her experiences in the workplace.*

Ms Kim Malone, psychologist of Prestons, provided a report to Dr Patrick Lee dated 24 November 2017. She diagnosed major depressive disorder, generalised anxiety disorder and panic attacks using DSM-5 criteria. She specifically stated she did not agree with the diagnosis reached by a psychiatrist Dr John Roberts.

Ms Kim Malone, psychologist of Prestons, provided a report to Dr Patrick Lee dated 6 March 2018. She noted a deterioration in her condition in early 2018 and requested referral for a further six sessions of counselling and recommended an increase in the antidepressant medication. She noted the claimant was working from home at that time. The indication of deterioration during 2018 by Ms Malone confirms the claimant's history."

56. The AMS applied the PIRS as follows:

(a) Table 11.1: Self Care and Personal Hygiene: Class 2 – "Ms Ewins said she mostly showers daily but will often spend time in her tracksuit. She does not bother to use make up unless her husband urges her to do so. She has not been clothes shopping since her work injury. She does attend to her own nutrition and that of the family but has put on weight. She is mildly impaired."

(b) Table 11.2: Social and Recreational Activities: Class 3 – "Ms Ewins said she no longer entertains friends at home, which they frequently did in the past, or visits other families. She said she has an occasional cup of coffee with a group of girls every few months if she is pushed. She went out with her husband for lunch on one occasion two weeks ago when she was in the city for a conference in relation to the workers compensation case. She said she no longer participates in her children's sporting and social activities, but will go to their soccer games if accompanied by her husband. She has stopped attending her local Catholic Church. She is moderately impaired."

(c) Table 11.4: Travel: Class 2 – "Ms Ewins is able to drive alone and said she could drive to the city. She said she could not use public transport alone because of anxiety in crowds. She is mildly impaired."

(d) Table 11.4: Social Functioning: Class 2 – "Ms Ewins said her relationship with her husband is solid and there is no talk of separation but she has no sense of affection for him, no libido, and is withdrawn in the relationship. She said she experiences intermittent angry outbursts at him or the children. She is mildly impaired."

(e) Table 11.5: Concentration, Persistence and Pace: Class 2 – "Ms Ewins said her concentration is poor and she is unable to manage the children's homework. She said she had difficulty understanding the instructions for a children's board game and cannot deal with letters from lawyers. I note that she was able to manage part-time employment with her husband's logistics company for about nine months following the accident, but described significant concentration difficulties. There was some clinical evidence of impaired concentration throughout the interview. She is moderately impaired."

(f) Table 11.6: Employability: Class 4 – "Ms Ewins said she would like to return to work but at the moment does not believe she could manage that. She said she is unable to deal with any form of aggression in workplace. She would like to work 2 to 3 days per week during school hours in some form of professional role where people behave decently towards each other. This amounts to 8 to 12 hours per week. She is severely impaired."

57. When asked whether any proportion of the impairment was due to a previous injury, pre-existing condition or abnormality, he replied “No”.

58. On these classifications, the AMS assessed an aggregate of 16 and a median Class of 3, producing 17% WPI. He made no deduction for impairment due to pre-existing injury, condition or abnormality under s 323 of the 1998 Act, saying there was “no requirement” to do so.

FINDINGS AND REASONS

59. The Appeal Panel is obliged to give reasons, the extent of which will vary from case to case: *Campbelltown City Council v Vegan* [2006] NSWCA 284.

60. The power of review is far ranging but nonetheless confined to the matters set out in s 327(2) of the 1998 Act which can be the subject of appeal. The procedure on appeal is one of limited review, as set out in s 328.

61. In this matter the Registrar has determined that at a ground of appeal under s 327(3) is made out.

DEALING WITH THE APPEAL

Some provisions in the Guidelines 4th Ed

62. Clause 1.6 of the Guidelines provides that assessing permanent impairment involves:

> “…. clinical assessment of the claimant as they present on the day of assessment” is required, taking account the claimant’s relevant medical history and all available relevant medical information to determine (the relevant matters”.

63. Clause 1.8 makes it clear that: “The degree of permanent impairment that results from the injury must be determined using the tables, graphs and methodology given in the Guidelines and AMA5, where appropriate”.

64. Chapter 11 of the Guidelines replaces Chapter 14 of AMA 5 for the assessment of impairment from psychological injury. Assessment is based on behavioural consequences affecting functional impairment: cl 11.11.

65. Tables 11.1 to 11.6 are to be used to assess six different scales of functioning (the PIRS categories). However, cl 11.12 of the Guidelines makes it clear that the PIRS Class descriptors in the Tables are “examples of activities” and “are examples only”. The assessing psychiatrist should take account of the person’s cultural background. Consider activities that are usual for the person’s age, sex and cultural norms.

The appellant’s submissions: s 323 deduction.

66. The appellant employer asserts demonstrable error and the application of incorrect criteria in that the AMS applied the wrong test applicable to the exercise of a deduction for impairment due to pre-existing injury, condition or abnormality. It is submitted that the AMS “simply declined to make such a deduction on the basis that he “was satisfied there was no current psychological injury arising from these events".

67. It is noted that the AMS identified a number of entries in the general practitioner’s notes (including some listed at [46] above) “during which the Respondent suffered from psychiatric or psychological problems”.

68. Although the appellant complains that the worker disclosed only a limited history herself, it is noted Dr Roberts specifically referred those pre-existing recorded issues and commented that the pre-existing illness disclosed to him would result in there being a pre-disposition to the development of the psychiatric illness.

69. The appellant submits that such a deduction would need to be in the order of one-half to three-quarters.

The respondent worker's submissions: s 323 deduction.

70. The appellant makes a general submission the appellant's reliance on Dr Roberts' undermines all the appellant's submissions because Dr Roberts believes the worker does not have a work related injury, when that issue is conceded. Further, it is inconsistent for the appellant to urge assessments of Class 1 in all PIRS categories when Dr Roberts diagnosed a Major Depressive Disorder.

71. The respondent submits, in accordance with cl 11.12 above, that the PIRS descriptors are merely examples and the boundaries between the categories not 'bright line boundaries'.

72. In *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 14 (*Parker*) Harrison AsJ said (at [65]):

> "65. In *Ferguson v State of New South Wales & Ors* [2017] NSWSC 887 (*Ferguson*), Campbell J, (at [23]) cited with approval *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36 (at [33]), where it is stated:
>
> > '...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.'
>
> 66. In relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense. (*Ferguson* [24]). The Appeal Panel assessed a moderate impairment on the basis that the history taken and the available evidence are consistent with criteria for rating a mild impairment at Class 2 because in its opinion the worker is primarily able to live independently. ([25])."

73. Her Honour found the Panel in *Parker* erred when it reassessed merely because it considered that a different PIRS Class was "more appropriate"

The Panel's consideration and findings: s 323 deduction

74. Section 323(1) of the 1998 Act requires a deduction for any proportion of the impairment that is due to any previous injury or that is due to any pre-existing condition or abnormality. If the extent of a deduction will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence: s 323(2).

75. The approach in making a deduction under s 323 of the 1988 Act is set out in *Cole v Wenaline* [2010] NSWCS 78 (*Cole*). The assessment of the extent to which a prior injury or pre-existing condition contributes to impairment must be based on evidence relevant to the likely effects of that condition or injury to the worker's present impairment. Any deduction under s 323(1) for the proportion of impairment due to prior factors must be based on evidence and not hypothesis or assumption.

76. In *Vitaz v Westform New South Wales Pty Limited* [2011] NSWCA 254, Basten JA (McColl JA and Handley AJA agreeing), said, following the approach adopted in *D'Aleo v Ambulance Service of New South Wales* (NSWCA, 12 December 1996, unrep) (quoted by Giles JA, Mason P and Powell JA agreeing, in *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284; 21 NSWCCR 34 at [30]- [32] and by Schmidt J in *Cole:*

> "The resulting principle is that if a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury. In the absence of any medical evidence establishing a contest as to whether the pre-existing condition did contribute to the level of impairment, the complaint about a failure to give reasons must fail. An approved medical specialist is entitled to reach conclusions, no doubt partly on an intuitive basis, and no reasons are required in circumstances where the alternative conclusion is not presented by the evidence and is not shown to be necessarily available." at [43].

77. In *Fire & Rescue NSW v Clinen* [2013] NSWSC 629 Campbell J said:

> "As Schmidt J pointed out in *Cole and Elcheikh*, it is necessary to find a pre-existing abnormality or condition, here the latter, actually contributing to the impairment before s. 323 WIM is engaged. This conclusion has to be supported by evidence to that effect. Assumption will not suffice."

78. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526*,* Campbell J said at [54]:

> "Section 323 as I have already said, requires there to be a deduction for any proportion of the impairment that is *due to* any pre-existing condition. This is an essential element of the section; indeed, it is the pith of it. It is not enough to simply identify that there is a pre-existing condition and that there has been a subsequent impairment and therefore make a deduction under this section because of the existence of the pre-existing condition. Such reasoning fails to consider a necessary condition of the operation of the section; that a proportion of the permanent impairment is *due to* the pre-existing condition."

79. There must actually be an actual pre-existing condition rather than a predisposition or susceptibility: *Cullen v Woodbrae Holdings Pty Ltd* [2015] NSWSC 1416, (*Cullen*) Beech-Jones J at [46].

80. The Panel must accept that the AMS erred when expressing his reasons for not making a deduction. He did review and question the worker about the clinical records in April 2014 (feared multiple sclerosis), and she had no memory of that. The stressors regarding attempted sexual approaches to her young child were also noted. The worker, understandably, was uncomfortable that this information was available, but admitted to being distressed for her daughter, her stepchildren and her husband, and undergoing 12 counselling sessions with a specialist in child sexual assault victims.

81. However, regarding these historical notes, the AMS concluded: "I was satisfied there was no current psychological injury arising from these events".

82. Additionally, the AMS questioned the worker concerning her social and daily activities "her pre-accident functioning" and said he was "satisfied there was no pre-existing psychiatric condition and she was unimpaired".

83. In psychological injury cases, the above authorities are equally applicable. However, the Guidelines also provide assistance as to how the statutory regime in s 323 is applied, Clause 11.10 of the Guidelines is as follows:

> "Pre-existing impairment
>
> 11.10 To measure the impairment caused by a work-related injury or incident, the psychiatrist must measure the proportion of WPI due to a pre-existing condition. Pre-existing impairment is calculated using the same method for calculating current impairment level. The assessing psychiatrist uses all available information to rate the injured worker's pre-injury level of functioning in each of the areas of function. The percentage impairment is calculated using the aggregate score and median Class score using the conversion table below. The injured worker's current level of WPI% is then assessed, and the pre-existing WPI% is subtracted from their current level, to obtain the percentage of permanent impairment directly attributable to the work-related injury. If the percentage of pre-existing impairment cannot be assessed, the deduction is 1/10th of the assessed WPI."

84. This conclusion or reason is the wrong test, as can be seen from the above authorities. Although a "current injury" is not necessary for deduction to apply, if some proportion of the impairment is due to a pre-existing injury or condition or abnormality, the further explanation by the AMS that he was satisfied there was no pre-existing psychiatric condition and she was unimpaired addresses the statutory requirements in the circumstances. In the first statement, he excluded, in effect, a pre-existing condition possibly indicated by the clinical records. In the second, he addressed s 323, in the context of the Guidelines, cl 11.10.

85. However, even if the expressions involve a technical error, and the MAC should therefore be revoked, the Panel must re-assess the impairment: *Broadspectrum (Australia) Pty Ltd v Fiona Louise Wills* [2018] NSWSC 1320. In this regard, the Panel returns to the question of conducting a further examination. The appeal does not raise any clinical issues, and the arguments revolve around historical material and the importance attached to them by the AMS

86. As for the merits of the argument for a deduction, essentially, the appellant asserts that because the worker had suffered previous stressors and expressed distress, and a general practitioner had in April 2014 expressed an "impression" that there was reactive depression, a deduction is mandated.

87. The Panel does not accept this submission. Even if the impression in 2014 was a correct diagnosis at the time, it was five years before the AMS's examination. The last relevant record relied upon by the appellant for its submissions, was that the worker was crying following news of a beast lump in August 2015. The AMS was required to, and did, assess the worker on the day, and reviewed the clinical notes in doing so. The reactions recorded in the notes do not reflect any pre-existing condition any time proximate to the date of injury. At most, they may be suggestive of her personality, which if that were the case, would be no more than a possible pre-disposition, insufficient to found a deduction: *Cullen*.

88. Moreover, there is no evidence that any previous stressed state, or even a depression in reaction to a trauma (if the "impression" was correct) is contributing to the impairment assessed now.

89. In reassessing the issue of whether a deduction should apply, based on the various stressors identified in the clinical history, the Panel is comfortably satisfied that a pre-existing injury, condition or abnormality has not been identified and that there is no basis upon which to determine that a proportion of the impairment now assessed is "due to" any such factors. To determine otherwise on both issues would be mere speculation.

90. Accordingly, the conclusion of the Panel is:

    (a) the ground of appeal is dismissed,

    (b) even if an error in the expression of reasons exists (which is not accepted) the result is reassessment is the same as in the MAC.

Other PIRS Grounds:

91. Other than the issue concerning the s 323 deduction (in which the appeal fails), the Panel does not accept that the appellant has established error in the MAC concerning any of the assessments in the PIRS categories. The reasons are expressed below.

92. However, if the Panel is wrong regarding the s 323 ground, and the MAC must be set aside, there is a question as to whether all categories must be reassessed: *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC 1053. For more abundant caution, the following reasons should therefore be read in the context of both the absence of error in the MAC and reasons for reassessment, based on the history and clinical findings of the AMS and others.

The appellant's submissions: Self Care and Personal Hygiene

93. The appellant asserts that the AMS recorded "essentially no deficit in respect of this issue", and the worker "clearly comes within Class 1" in the PIRS Guidelines.

94. It is submitted that the recorded issues of sometimes not applying make up and spending time in her track suit are matters "clearly and unequivocally well within the normal variation in the general population". The appellants contrasts the workers presentation to Dr Roberts (in 2017) "as a well-dressed person who gave a high level of attention in terms of personal care ...", and asserts "all of the evidence available is consistent with this", without identifying any such evidence.

The respondent worker's submissions: Self Care and Personal Hygiene

95. The respondent notes that both the AMS and Dr Teoh, assessed Class 2 for self care and personal hygiene. Dr Teoh recorded that the worker was lacking motivation to care for herself and required help from family and friends.

96. It is pointed out that the appellant's suggested Class 1 rating is only appropriate for an individual who has no deficit or minor deficit attributable to the normal variation in the general population, whereas Class 2 acknowledges mild impairment, in the worker who is able to live independently and looks after herself adequately although may look unkempt occasionally.

The Panel's consideration and findings: Self Care and Personal Hygiene

97. It is noted Dr Roberts recorded in 2017 that the worker had spent the previous weekend in bed, and some days she performed tasks well and other days she does not. He said she presented as a well-dressed person who gave a high level attention in terms of personal self-care. He did not otherwise elicit the nature of her self-care.

98. The AMS assessed "mild" impairment only. His reasons include that the worker "mostly" showers daily, often spends time in her tracksuit, does not "bother" to use make up unless urged by her husband. She has not shopped for clothes since the injury. Her mild impairment in self-care has led to weight gain.

99. All of these observations are indicative, in the Panel's re-assessment, of the descriptors of Class 2 in the PIRS Table 11.1. The ground of appeal is dismissed. If reassessment was required, the Panel assesses Class 2.

The appellant's submissions: Social and Recreational Activities

100. The appellant appeals the AMS's assessment of Class 3 for social and recreational activities, and asserts the AMS examination justify only a Class 1 or at best Class 2 assessment, being mild impairment.

101. Again, Dr Roberts' history (that "she had gone back to church and was praying after having stopped doing so") is relied upon which is said to specifically contradict the information recorded in the MAC. The appellant refers to "the large volume of other evidence available" without elaboration other than reference to the worker's return to work without apparent restriction).

The respondent worker's submissions: social and recreational activities

102. The worker notes both Dr Teoh and the AMS assessed social and recreational activities, in Class 3. It is submitted the AMS recorded that the worker no longer entertains friends at home or visits other families, has an occasional cup of coffee with friends every few months "if she is pushed", and a single outing with her husband for lunch.

The Panel's consideration and findings: social and recreational activities

103. In addition to the observations by the AMS noted by the worker, the Panel notes Dr Roberts' report that she is "embarrassed to be around people; that she feels in a bubble; that it is as if her soul had been taken out as if it was somewhere else".

104. Given the imprecision in the appellant's submissions, it is not possible, or at least extremely difficult to address items of evidence in turn in these reasons.

105. However, the MAC records the worker's history, which has not been undermined by any other clinical material, including the rejected surveillance report. She "wants to be invisible", will not attend school activities with the children on her own. She will only go to school soccer if her husband accompanies her. She is anxious and experiences panic quite often for no apparent reason. She described a panic attack in the car driven by her husband when she jumped out of the car on the Hume Highway, ran across the traffic, and then spent three days in bed.

106. The appellant's reliance upon the worker resuming church attendance does not assist the appeal. As noted above is likely to be an exercise in introspection or self-contemplation, or even, a "reaching out" in her injured circumstances.

107. The workers presentation is more than "mild impairment" of Class 2 in Table 11.2. With acceptance that the descriptors within the Classes are examples only, and based on these reactions to social situations, it is relatively clear that Class 3 was open to the AMS, and indeed, appropriate. The ground of appeal is dismissed. If reassessment was required, the Panel assesses Class 3.

The appellant's submissions: Travel

108. It is again asserted that there is no basis for assessing a Class 2 impairment. It is also asserted that the worker has "no constraint at all" regarding travel. It is noted the worker is able to travel without restriction, including driving to the city alone and to travel to Fiji and back immediately prior to seeing Dr Roberts on 30 October 2017 supported by clinical records. The appellant submits that a Class 1 assessment was appropriate.

The respondent worker's submissions: Travel

109. The worker submits that Class 1 is only appropriate in circumstances where there is no deficit, or minor deficit, attributable to the normal variation in the general population, and the descriptors are not applicable to the worker. It is noted that Dr Teoh assessed Class 2, citing the ability to travel alone but with some apprehension.

110. This is similar to the AMS who noted the worker can drive alone even in the city. However she does not use public transport alone due to anxiety in crowds. This is consistent with a Class 2 rating of mild impairment as it corresponds to the descriptors in Table 11.3.

The Panel's consideration and findings: Travel

111. Dr Roberts recorded that the worker, in late 2017, had travelled to Fiji, but while there "she had not engaged with her husband or children; that the holiday was a disaster for her".

112. The mere trip does not address the descriptors or the application of the PIRS Table. The information in Dr Roberts' report indicated an inability to travel rather than a suggestion of no impairment. The AMS recorded that she is still anxious and experiences panic quite often for no apparent reason, including a panic attack on her way to the medical centre in the car driven by her husband. Obviously, this reflects on her travel functioning.

113. Class 2 is a mild impairment. The worker has conceded an ability to travel by car and (by implication) a limited ability to use public transport if accompanied. The appellant has not demonstrated error of incorrect criteria in the AMS's assessment of Class 2. The ground of appeal is dismissed. If reassessment was required, the Panel assesses Class 2.

The appellant's submissions: Social Functioning

114. The appellant submits that Class 1 assessment for social functioning would be appropriate, and there is no basis for the AMS's Class 2 assessment. It is asserted that the worker "demonstrated and demonstrates no difficulty in forming and sustaining relationships including with her partner" and has "recorded continuing social contact with her friends". The appellant cites no particular evidence on this point.

115. It is also again asserted that the MAC "and other evidence" discloses only normal variation in the general population so far as social functioning is concerned, resulting in a more correct Class 1 assessment

The respondent worker's submissions: Social Functioning

116. The respondent points out Dr Teoh assessed Class 3, noting the respondent's relationships are strained due to irritability and lack of communication, but the AMS only assessed Class 2, noting the respondent's relationship with her husband was solid and there was no talk of separation but she has no sense of affection for him, no libido and is withdrawn in the relationship. She experiences intermittent angry outbursts at him and at their children and therefore is mildly impaired.

117. Again, it is submitted that a Class 1 assessment relates solely to individuals who have no deficit or minor deficit attributable to the normal variation in the general population, not consistent with the worker's history. It is submitted that only a mild impairment of Class 2 is assessed which is consistent with her relationships being strained.

The Panel's consideration and findings: Social Functioning

118. The AMS concluded there was a mild impairment, explaining his rating in Class 2, by noting deficits in that the worker has no sense of affection for her husband, no libido, and is withdrawn in the relationship. She said she experiences intermittent angry outbursts at him or the children. He had recorded the worker experiencing "silent panic attacks in which the whole body tingles and she feels exhausted and overwhelmed. She said when her level of the distress builds up it comes out in a flood of rage at her husband and children and she then feels awful".

119. The appellant identifies no evidence which establishes that the history or assumptions for the AMS's rating is in error, or applied incorrect criteria. The Panel is satisfied that there is no error, and this ground of appeal is dismissed.

120. If reassessment were required, the Panel would apply the same history and independently arrive at a Class 2 rating.

The appellant's submissions: Concentration Persistence and Pace

121. The appellant points out that the worker had "no difficulty" in securing a protracted return to employment after the date of injury, and suffered no objective, or subjectively expressed, difficulty. The appellant does not identify evidence going to the level of difficulty involved.

122. The appellant says the worker herself says that she had no restriction of any kind on her capacity to carry out such employment, but again, is imprecise what evidence is relied upon.

123. The worker's employment records are said by the appellant to demonstrate the she had been working hours routinely between 18 and 24 hours per week in 2018, submitted to be inconsistent with the worker's self report, once again, without identifying the contrary evidence.

124. It is submitted that it is "impossible to see how the Claimant could be put in Class 3", and a Class 1 assessment is urged. The appellant submits that "no deficit, or minor deficit attributable to the normal variation in the general population. Able to pass a TAFE or University course within normal timeframes" is the appropriate descriptor.

The respondent worker's submissions: Concentration Persistence and Pace

125. In is again noted that Dr Teoh and the AMS both agree Class 3 is appropriate, yet the appellant suggests Class 1 is appropriate rating suggesting no deficit.

126. The AMS notes the respondent was able to manage part time employment with her husband's logistics company for about nine months but described significant concentration difficulties.

127. There was some clinical evidence of impaired concentration throughout the interview with the AMS and accordingly the respondent was Classified as moderately impaired.

128. She has difficulty understanding instructions for a children's board game and cannot deal with letters received from lawyers.

The Panel's consideration and findings: Concentration Persistence and Pace

129. Dr Roberts recorded in 2017 that the worker could not think during the day; that she pushes thoughts away; that she had thoughts of running away. Dr Teoh recorded poor concentration and persistent preoccupation with negative thoughts.

130. The AMS assessed moderate impairment, Class 3. He recorded poor concentration and she is unable to manage the children's homework. There was difficulty understanding instructions for a children's board game and cannot deal with letters from lawyers. He properly noted that she was able to manage part-time employment with her husband's logistics company for about nine months following the accident, but even then described significant concentration difficulties.

131. He noted clinical evidence of impaired concentration throughout the interview. This is an important clinical observation.

132. The history recorded by the AMS is sufficiently reflective of the actual background in the evidence, and the appellant has not identified evidence to undermine the assumptions upon which the AMS has formed his views. No error is established. This ground of appeal is dismissed.

133. Moreover, if the Panel were required to reassess, the evidence is persuasively indicative of a Class 3 assessment, a moderate impairment. Her inability to understand board game instructions is obviously comparable to the example in PIRS Table 11.5 of having difficulty following "complex instructions (eg operating manuals, building plans)".

The appellant's submissions: Employability

134. The appellant asserts error in assessing Class 4. It is submitted that post injury employment records in 2018 indicate working hours between 18 and 24 hours per week, "inconsistent with the workers self report" which is asserted to be 10 to 12 hours per week (this submission is again made without identifying the contrary evidence).

135. Demonstrable error in that records of such employment with M3 Logistics were either not provided to the AMS or demonstrable error in that the AMS failed to give proper consideration to "matters relevant to the assessment resulting in a number of the errors identified" are alleged.

136. The appellant also submits the AMS has either not been provided with or has an acceptance of employment offer (not identified by the appellant but found in the materials to be dated 13 February 2018) in which the worker stated "I do not have, or have had any medical condition which might hinder my ability to perform my duties or be aggravated by my duties".

137. The appellant submits the employment was entirely voluntary and there is nothing to suggest the worker could not have worked that job or other work full time.

138. The appellant urges "Class 1 or at the very most under Class 2".

The respondent worker's submissions: Employability

139. It is noted that Dr Teoh has assessed Class 3 and the AMS assessed Class 4, but since Dr Teoh's assessment the worker became unemployed. It is submitted that "Class 4 is the most appropriate rating, if not Class 5" (however, the worker has not appealed this rating).

140. It is conceded that the worker was able to return to some form of part time employment however was unable to deal with any form of aggression in the workplace. She would like to work two or three days per week during school hours in some form of professional role which amounts to 8 to 12 hours per week.

141. The worker adopts the descriptor for severe impairment. Class 4, in Table 11.6.

142. She is severely impaired. The respondent cannot work more than one or two days at a time. She could work up to 8 hours per week at a reduced pace and her attendance is erratic.

143. The appellant has not pointed to the fact the respondent is currently unemployed. Her employment with her post accident employer was terminated and she has been unable to obtain subsequent employment due to her psychiatric injury.

144. In relation to the appellant's final submission in relation to the referral not specifically identifying the documents referred, this is incorrect. The Workers Compensation Commission forwarded the parties the relevant referral to the AMS and the documents referred to the AMS.

145. The respondent is unsure why the records from M3 Logistics are *extremely important*. They simply demonstrate the respondent worked in a part time capacity with her husband's logistics company following cessation of her employment with the appellant. The fact that the AMS has not referred to the documents from M3 Logistics does not suggest he did not consider them.

146. The AMS obtained a history from the respondent, outlined in the last paragraph of page 3 of the report that the respondent attempted to return to work on a part time basis with the company that employed her husband. He was a manager with M3 Logistics and she was employed, without interview, in January 2018. She worked in their office one day per week during school hours and did a few hours of part time work at home on three other days. This may have been three or four hours each day but it took her that long to do a one hour job due to her difficulty with concentration and anxiety.

147. It is clear the AMS obtained a history of the respondent's employment with M3 Logistics and the documents produced by M3 Logistics did not take the matter any further.

The Panel's consideration and findings: Employability

148. Dr Robert's noted in late 2017 that the worker felt that she wanted to return to work but needed time "to get back together".

149. The Panel notes that no medical assessor suggests the worker can work full time in any role. The appellant's submission in that regard is baseless.

150. The material regarding the worker's hours of work in 2018 and the acceptance of employment were before the ASM and are before the Panel. It was not necessary for the AMS to explicitly refer to them because the hours of work conceded by the worker were consistent with the documented pay records.

151. The return to work in 2018 is described in the applicant's further statement in September 2018. She says that happened with the encouragement of her psychologist, Dr Lee, and with the help of her husband, who works for the employer. She says her husband "was able to convince the HR department there for me to do some work principally from home preparing WHS and job descriptions". The work is performed from home and, as opposed to the respondent's submission, she said she worked "20 hours a week working across four days although sometimes I work longer hours".

152. The worker also described on occasions not being able to work at all depending upon her psychological state. She said she did not think she could increase the hours.

153. The benefits from working at home are noted by the worker. She says she would have great difficulty going out into the workforce, working and interacting with others. Sometimes she goes into the workplace and finds that quite confronting.

154. This evidence is consistent with the other observations. The AMS recorded sleep disturbance with initial insomnia. She does not want to get out of bed in the morning, feels depressed, and has strange thoughts about self-harm and suicide. She wants to be invisible, and will not attend school activities with the children on her own.

155. She is anxious and experiences panic quite often for no apparent reason. She has spent three days in bed. At times her body tingles and she feels exhausted and overwhelmed sometimes leading outbursts of rage at her husband and children. She has morning headaches about two days per week when she then spends all day in bed.

156. The AMS, however, did record a history of a return to work for three days per week, with a total of 10 to 12 hours per seek. However, the AMS also recorded that she struggled with social anxiety while in the office and had difficulty with concentration while attempting to work, even at home. The work ended when her husband changed jobs in October 2018 and she has not felt confident to seek work since then on the open market.

157. When recording the workers wishes, the AMS said she would like to return to work but does not believe she could manage that without more therapy.

> "She said she is unable to deal with any form of aggression in workplace. She would like to work 2 to 3 days per week during school hours in some form of professional role where people behave decently towards each other. This amounts to 8 to 12 hours per week. She is severely impaired.

158. PIRS Class 4 is "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".

159. It must be kept in mind that the PIRS descriptors are examples only, and the full picture must be assessed to arrive at the rating. The worker has demonstrated, during 2018, obtaining a job, but only with the help of her husband and an accommodating HR manager. However, the work was mainly at home, sheltered from personal interaction with others, or the pressure of direct supervision. The variability of hours per week suggests variability of effort required, and the periods during which such effort is over four days.

160. The PIRS descriptors relate to everyday employment situations. The worker's situation in 2018 was significantly different and adapted, to an extent, to the psychological deficits she describes. The AMS has explained the history upon which he bases his impairment rating, including all the symptoms and deficits. Accordingly, even though the AMS as incorrectly assumed the worker worked only 10 to 12 hours per week, there is no error established in the AMS's final assessment of Class 4, severe impairment, and this ground of appeal is dismissed

161. Additionally, if reassessment were required, the history, including the ability to undertake the part-time, home based work in 2018 lead the Panel to the same conclusion. That is, the Panel considers the evidence establishes a severe impairment, and would rate the PIRS category as Class 4.

162. The appeal is dismissed.

DECISION

163. For the reasons set out in this statement of reasons, the decision in this matter is that the Medical Assessment Certificate given in this matter should be confirmed.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE MEDICAL 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