

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-1178/19
Appellant: Richard Marron
Respondent: RPR Maintenance Pty Limited
Date of Decision: 23 August 2019
Citation: [2019] NSWWCCMA 122

Appeal Panel:
Arbitrator: Ross Bell
Approved Medical Specialist: Dr Julian Parmegiani
Approved Medical Specialist: Dr Michael Hong

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 24 May 2019, Richard Marron lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Samson Roberts, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 13 May 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 Workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.
5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment*, 4th ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. It is convenient to extract the history reported by the AMS at Part 4 of the MAC,

“Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:

Mr Marron purchased a Spanline franchise from his former employer and built the business up successfully. He was covering a region from Wollongong to the Victorian border. In 2003, he made the decision to sell the northern territory, namely the Wollongong area. In retrospect, he acknowledged that he could have installed a manager to oversee the area that he sold.

Mr Marron also set up a window manufacturing business and another business manufacturing other material required for the construction of patios and pergolas by Spanline. It was his intention to sell the materials produced to the purchaser of the Wollongong area. He explained that the new owner was unsuccessful in the business and another owner was installed by the franchisor. This owner had previously worked in the northern area in sales and had also worked for Mr Marron. He had a poor relationship with Mr Marron when he worked for him. He stole from his business. He did not purchase windows from the manufacturing company that Mr Marron which placed financial pressure on him. He then encroached on Mr Marron's territory. This conduct persisted for a period of three to five years during which time Mr Marron sought the support of the franchisor. Ultimately, he pursued Court proceedings and it became apparent that the franchisor had given the owner of the Wollongong territory permission to encroach on Mr Marron's territory.

Mr Marron explained that once he threatened Court proceedings his relationship with Spanline Australia, the franchisor, disintegrated. Court proceedings persisted over a period of five years and required Mr Marron's focus to such an extent as to render him ineffective in running his business. The Court process was initially successful against Spanline Australia and the owner of the Wollongong region. On appeal Mr Marron was successful against Spanline Australia but not against the owner of the northern franchise. Ultimately, Mr Marron was able to sell his franchise but at significant financial impost and in the context of psychiatric deterioration.

Mr Marron expressed uncertainty with respect to the timeframe of his deterioration recalling that it was his psychiatrist who noted his decline. Mr Marron only developed insight into his psychiatric deterioration when he had lost everything. He was hospitalised in the context of depression and experienced suicidality. He underwent ECT. His recollection of his symptomatology was compromised and he was unable to provide an account."

PRELIMINARY REVIEW

7. 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.
8. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because the errors found could be corrected from the materials before the Panel, as explained in the reasons below.

EVIDENCE

Documentary evidence

9. 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

10. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

11. The appellant made written submissions. They are not repeated in full but have been considered by the Appeal Panel. The respondent did not make submissions, but will await the Panel's determination of the appeal.

Appellant

12. In summary, the appellant submits that the AMS has erred in failing to take sufficient account of the evidence including Dr George, Mr Marron, and Ms Marron. The AMS took account of Dr George's old report of 2015 but failed to take proper account of his latest report dated 13 December 2018. The AMS did not provide a proper diagnosis. The AMS also did not take account of the whole of the evidence of Dr Heiner beyond 22 February 2016 when the subsequent history is significant.

FINDINGS AND REASONS

13. 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.
14. 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.

Assessment of the Psychiatric Impairment Rating Scale PIRS Categories: Social and recreational activities; Social functioning; and Concentration, persistence and pace.

15. The appellant's submission as to the reports of Dr George has some force. The AMS has referred to an old report of Dr George but does not engage with the detail of his more recent report of 13 December 2018 in which he proceeded to a considerably higher assessment.
16. The grounds of appeal set out in the appellant's submissions concern the assessment of three of the PIRS Categories: Social and recreational activities; Social functioning; and Concentration, persistence and pace. The submissions are that these categories have been incorrectly assessed because the evidence has not been properly considered.
17. The importance of the exercise of clinical judgement by the AMS in the process of assessment must be recognised by a Medical Appeal Panel. As the Supreme Court noted in *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140 (*Parker*),

“In *Ferguson v State of New South Wales* [2017] NSWSC 887 at [23], Campbell J cited with approval *NSW Police Force v Daniel Wark* [2012] NSWCCMA 36 (“*Wark*”), where it is stated at [33]:

‘...the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face. ...’

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]).”

18. The Court said, finding the Panel in that matter erred in equating a difference of opinion with a demonstrable error at [70],

“To find an error in the statutory sense, the Appeal Panel’s task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence.”

19. *Parker* involved a different PIRS Category to those appealed here, but the principles are the same. The Court described the process as,

“The AMS took the history from Mr Parker and conducted a medical assessment, the significance or otherwise of matters raised in the consultation is very much a matter for his assessment. It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ. Whether Class 2 in the Appeal Panel’s opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS’s reasons disclose a demonstrable error. The material before the AMS, and his findings supports his determination that Mr Parker has a Class 3 rating assessment for impairment for self-care and hygiene, that is to say, a moderate impairment of self-care and hygiene.”

20. This is not a situation as in *Parker* with only a difference of opinion and where reasonable minds may differ, but an error which concerns a failure to consider adequately Dr George’s most recent report, the report and assessment of Dr Allen, and the other evidence.
21. There is for example inadequate consideration shown in the MAC of the evidence which differs considerably from the history taken by the AMS that Mr Marron had “no friends” before the injury. There is material in relation to concentration which also differs from the conclusion of the AMS. The lack of apparent consideration of the evidence where it differs to such a degree from the AMS is a demonstrable error on the face of the Certificate.

Findings

22. The demonstrable error is in regard to the lack of attention given to the other assessments or adequate explanation as to why the AMS differs from the other opinions, that is, Dr George and Dr Allen, and why his conclusions do not appear to take full account of the other evidence. This infects the three categories that are the subjects of the grounds of appeal.
23. If a ground of appeal is successfully made out and an error identified, the Panel must correct the error or errors found “applying the WorkCover Guides fully” (see *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499).¹ The Panel is able to make the assessment and correct the errors in regard to the treatment of the evidence on the three categories of the PIRS subject to appeal without recourse to further examination of Mr Marron.
24. The three categories of the PIRS subject to the grounds of appeal are to be assessed by the Panel in accordance with the Guidelines.

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

Social and recreational activities

25. The Class allocated for Social and recreational activities by the AMS is Class 2, mild impairment. The AMS summarises at Table 11.8,

“Mr Marron engages with his children and grandchildren but he does not participate in any social events or any recreational activities other than to go swimming in Kiama. His account is reflective of mild impairment in this area.”

26. The Guidelines set out the examples for this category at Table 11.2 at page 56,

“Class 2

Mild impairment: occasionally goes out to such events eg without needing a support person, but does not become actively involved (eg 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.”

27. The Panel is of the view that the most recent report of Dr George and the report of Dr Allen are consistent with the other evidence including the statements of Mr Marron and his wife.
28. Dr George in his report of 13 December 2018 takes a detailed history as to Mr Marron’s social and recreational activities which are clearly quite limited. This includes an account outlined in Mr Marron’s statements, of an attempt to see a concert at the Opera House which lasted 20 minutes before Mr Marron had to be taken out and on to hospital due to a panic attack. Dr Allen in his report of 30 August 2018 also takes the history of very limited social activity and placed Mr Marron in Class 3. Dr George reports,

“He is engaged in a few activities and the few that he is engaged in, he does alone. He has marked anxiety, which has meant that he remains at home much of the time. He has not developed interests as such. He will do some exercises as mentioned. Class 3.”

29. Mr Marron says in his statements about this,

“I no longer have the company of friends. Paula and I had been actively engaged in the local community. When the Spanline business progressed, I was actively involved with:

- i. Engaging with related business operators on a social and business level including attending conferences, meetings, dinners, talks;
- ii. Friendships were formed with contractors. It was important that I had a personable relationship with business operators.
- iii. Paula and I regularly went to dinner engaged in the local community.
- iv. I attended Chamber of Commerce get togethers (although not a member) I received an award for our business activities in the local community and Paula and I attended a dinner for the presentation of that award.”

30. Mr Marron says that the injury has had a dramatic impact, "Not only do I avoid going out, stay at home as much as possible, I've lost contact with my friends."
31. Ms Marron says that her husband no longer goes surfing, and only occasionally goes swimming. He has given up playing the guitar, which he loved. She says because of Mr Marron's changed outlook they now rarely go camping or on excursions. She also says that their circle of friends has broken down and they no longer go out to dinner with them, to social gatherings or to others' homes.
32. As noted above, the evidence extracted in respect to Social and recreational activities is such that it must be concluded that the impairment is moderate. Class 3 is in the Panel's view correct given the loss of friends, both social and professional, and the lost interest in surfing and playing the guitar. Mr Marron is involved in very little.

Concentration, persistence and pace

33. The Guidelines give the examples for Classes 2 and 3 at Table 11.5:

Class 2

Mild impairment: can undertake a basic retraining course, or a standard course at a slower pace. Can focus on intellectually demanding tasks for periods of up to 30 minutes, then feels fatigued or develops headache.

Class 3

Moderate impairment: unable to read more than newspaper articles. Finds it difficult to follow complex instructions (eg operating manuals, building plans), make significant repairs to motor vehicle, type long documents, follow a pattern for making clothes, tapestry or knitting."

34. The AMS says about this Category at his Table 11.8 that,

"Mr Marron participated effectively in the lengthy interview process. He reported watching television but engaging in no other activities of a nature as to require concentration. He participates in various household tasks which would invariably necessitate a degree of persistence and pace but, having regard for the severity of his psychiatric condition, it is appropriate to conclude that he is mildly impaired in this area."

35. Dr George, in his most recent report takes the history, "... he said he struggled with attention, concentration and short-term memory." and, "He finds it difficult to read. He tries to finish tasks but takes much longer to do anything currently."
36. Dr George records, "He indicated that he finds it difficult to complete anything. If he does complete a task, it takes him much longer. He finds it difficult to read and focus his attention. Class 3."
37. Dr Allen concludes,

"I have scored Mr Marron Class 3. I believe he is moderately impaired. He would not be able to read more than newspaper articles and could not follow complex instructions."

38. The evidence noted above regarding Concentration, persistence and pace is entirely consistent with moderate impairment, and the Panel finds Class 3 applicable.

Social functioning

39. The Guidelines at Table 11.4 provide the following examples for Classes 2 and 3,

“Class 2 Mild impairment: existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships.

Class 3 Moderate impairment: previously established relationships severely strained, evidenced by periods of separation or domestic violence. Spouse, relatives or community services looking after children.”

40. The AMS takes the history of “good relationships with his wife and children”, and concludes at Table 11.8,

“Mr Marron engages with his children and grandchildren but he does not participate in any social events or any recreational activities other than to go swimming in Kiama. His account is reflective of mild impairment in this area.”

41. The Panel notes that in this category, Dr George concludes, “He reported good relationships with all family members. Class 1.”
42. Dr Allen concludes, “He does not describe any strain in his relationship and described being close to his children and his wife. There has been the loss of friendships, however, so he scores Class 2, in my opinion.”
43. The Panel finds the evidence consistent with the findings of the AMS. Dr George finds Class 1 and Dr Allen Class 2. The evidence overall is of good family relationships and the Panel finds Class 2 to be applicable. The examples for Class 3 are at a level beyond the restrictions experienced by Mr Marron in this category.
44. The Panel is satisfied that the impairment is permanent, and the injury has reached maximum medical improvement.
45. There is no evidence to support a deduction under s 323 of the 1998 Act for a pre-existing injury, condition or abnormality contributing to the impairment.
46. There is no deduction for the effects of treatment applicable.
- (a) The scores for the PIRS Categories derived from the order of 2,2,3,3,3,5 reflect a median of 3. The aggregate of 18 applied to the median gives 22% WPI as shown in the Panel’s Certificate.
47. For these reasons, the Appeal Panel has determined that the MAC issued on 13 May 2019 should be revoked, and a new MAC issued. The new Certificate is attached to this statement of reasons.

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*.

Anneke Vermeulen

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



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Matter Number: M1-1178/19
Appellant: Richard Marron
Respondent: RPR Maintenance Pty Limited

This Certificate is issued pursuant to s 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Appeal Panel revokes the Medical Assessment Certificate of Dr Samson Roberts and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - Whole Person Impairment (WPI)

Body Part or system	Date of Injury	Chapter, page and paragraph number in NSW Workers Compensation Guidelines	Chapter, page, paragraph, figure and table numbers in AMA5 Guides	% WPI	WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality (expressed as a fraction)	Sub-total/s % WPI (after any deductions in column 6)
Psychological /psychiatric	09/09/2015 (deemed)	Chapter 11, page 60, Table 11.		22	nil	22
Total % WPI (the Combined Table values of all sub-totals)					22%	

Ross Bell
Arbitrator

Dr Julian Parmegiani
Approved Medical Specialist

Dr Michael Hong
Approved Medical Specialist

22 August 2019

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

Anneke Vermeulen

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

