WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-4117/19**
Appellant:	**Fire & Rescue NSW**
Respondent:	**Steven Cromack**
Date of Decision:	**11 March 2020**
Citation:	**[2020] NSWWCCMA 46**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr Lana Kossoff**
Approved Medical Specialist:	**Dr Doug Andrews**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 20 December 2019, the appellant lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Julian Parmegiani, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 25 November 2019.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - 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) (section 327(3)(b));

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

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

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 background recorded by the AMS at Part 4 of the MAC,

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:
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> Mr Cromack provided a detailed account of his occupational problems in an eight-page statement dated 8 July 2019. Therefore, only a brief summary will be provided.
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> Mr Cromack joined the NSW Fire Brigades in 1985. He became a station officer in 1998, and senior instructor shortly afterwards. He dated the onset of his problems to a number of incidents involving an acting superintended, Mr David Turner. Mr Cromack explained that Mr Turner walked around the office in Wyong in his underpants, and at times he was completely naked. This upset female staff, and Mr Cromack spoke with him. Mr Turner's attitude towards him changed, and he became the focus of Mr Cromack's belligerence.
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> Mr Turner often swore at Mr Cromack, and on one occasion spat at him. He repeatedly threatened Mr Cromack in person and by phone. Mr Cromack often put his phone on loudspeaker and his colleagues could witness Mr Turner's antics. On one occasion Mr Turner threw a chair at Mr Cromack, narrowly missing him. Mr Cromack eventually refused to work with Mr Turner.
>
> Mr Turner continued to stalk and harass Mr Cromack. In late 2012, after many months of not working together, Mr Turner arrived at a meeting and made a derogatory remark to Mr Cromack in front of colleagues. Mr Cromack eventually filed a formal complaint against Mr Turner. Mr Turner's colleagues then began harassing Mr Cromack. On one occasion a superintendent verbally abused him, and warned him that he could not complain about another superintendent and get away with it.
>
> Mr Cromack suffered physical injuries in 2008 and 2012. He did not take time off work, and he continued working without restrictions. Mr Cromack submitted a workers' compensation claim. He was later falsely accused of missing medical appointments. He eventually saw a doctor, who found him fit to work with restrictions. Mr Cromack was called to a meeting on 13 May 2014, and stood down immediately from his duties on medical grounds. His employment was formally terminated by text message in early 2017.
>
> Mr Cromack began to experience psychiatric symptoms in 2012. He became anxious, irritable and short-tempered. He slept poorly, and he ruminated about his work situation. He avoided answering telephone calls, in case Mr Turner was the caller. Mr Cromack became withdrawn and unmotivated. He lost interest in his previous hobbies, which included building and racing motor cars. He gradually gained 30kg in weight due to the combination of reduced physical activity and comfort-eating. Mr Cromack suffered panic attacks from 2012 onwards. Symptoms included shortness of breath, shaking and sweating. Mr Cromack became more depressed over the past two years. He was referred to a psychologist, Ms Marianna Gauci, 18 months ago. Mr Cromack was also referred to a psychiatrist in Newcastle, but he did not recall the psychiatrist's name. Mr Cromack was prescribed antidepressants, and he took them for one month. He could not tolerate side effects, including sedation."

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 for the reasons given 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.

Fresh evidence

10. The appellant seeks to rely on additional material comprising an Allied Health Recovery Request form completed by a massage provider, Mr S Bailey, on 12 December 2019 that was not available before the AMS's assessment.

11. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in additional to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.

12. In *Lukasevic v Coates Hire Operations Pty Limited* [2011] NSWCA 112 (*Lukasevic*). Hodgson JA, in the majority, says (at 78),

> "in my opinion it would be reasonable for an AP [Appeal Panel] not to admit evidence raising such a dispute unless that evidence had substantial prima facie probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, simply by raising such a dispute, going to a matter relevant to the correctness of the certificate, a worker could put the AP in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of the WIM Act."

13. In *Petrovic v BC Serv No 14 Pty Limited and Ors* [2007] NSWSC 1156 (*Petrovic*) Hoeben J said,

> "In my opinion the words 'availability of additional relevant information' qualify the words in parentheses in s327(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 s326 as to which a MAC is conclusively taken to be correct. In other words, 'additional relevant information' for the purposes of s327(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 s327(3)(c) and (d) but they do not come within subs 327(3)(b)."

14. The appellant submits that the document only came into existence after the assessment, and this appears to be the case, following a referral from a treating practitioner. There is nothing submitted as to why a report from Mr Bailey could not reasonably have been obtained before the assessment.

15. The document upon which the appellant seeks to rely is from a massage provider. The appellant submits the document could have changed or now could change the outcome. It is submitted that the comment in the form, "wife helps out when needed" in relation to Self-Care and Social Functioning and a comment that Mr Cromack is still driving could change the outcome. How this reveals demonstrable error is not apparent.

16. The Panel is of the view that the form completed by Mr Bailey has very little probative value. The elements of it sought to be relied on by the appellant are lay comments from a person unqualified in psychology or psychiatry that would not assist the AMS or the Panel given the AMS took his own history and applied his own clinical judgement to the Psychiatric Impairment Rating Scale (PIRS) Categories. This material would not change the outcome and does not have "substantial *prima facie* probative value, in terms of its particularity, plausibility and/or independent support." (*Lukacevic*). In terms of *Petrovic* the material is certainly not "additional relevant information". It is not "information of a medical kind or which is directly related to the decision required to be made by the AMS" (*Petrovic*).

17. For these reasons the Appeal Panel determines that the additional material should not be received on the appeal because it does not satisfy ss 328(3) and 327(3)(a) of the 1998 Act or the relevant authorities.

Medical Assessment Certificate

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

SUBMISSIONS

19. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.

20. The appeal concerns the assessment of all PIRS Categories by the AMS.

Appellant employer

21. In summary, the appellant employer submits that the AMS has erred in failing to properly consider the effect of physical injuries suffered by Mr Cromack on the PIRS Ratings.

22. The appellant also submits that the AMS has erred in his ratings on the basis that other assessors and Mr Manley, physiotherapist, have arrived at different conclusions or taken different history.

23. The Panel should re-examine Mr Cromack and make its own assessment.

Steven Cromack (the respondent)

24. The respondent submits the additional evidence should not be admitted due to its lack of value.

25. There is no demonstrable error by the AMS, the assessment is not based on incorrect criteria, and there is also no obligation to accept the opinions of other practitioners.

26. The MAC should be confirmed.

FINDINGS AND REASONS

27. 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.

28. 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.

Discussion

Ground of appeal – failure to consider physical injuries

29. The appellant submits that the AMS has erred in failing to address Mr Cromack's physical injuries "in any detail" because the physical injuries affect the assessment under the six categories of the PIRS.

30. The appellant does not indicate how the physical injuries affect any of the PIRS Category ratings. The reasons for decision of the AMS at Table 11.8 comprise the effect of the psychological symptoms of the injury on each Category. There is nothing in these reasons that suggests that part of the assessment in any Category ignores "the extent that his physical injuries affect the assessment of the six categories under the PIRS". The reasons are directed at the criteria and examples relevant for assessing psychiatric impairment. In the absence of any submission from the appellant pointing to evidence as to how the physical injuries have caused error in the psychiatric impairment assessment on the part of the AMS the exercise will be limited.

31. It is apparent that the AMS was aware of the physical injuries. There is a presumption of regularity for assessments by an AMS[1] which is not rebutted by the evidence. If there was any need to make an adjustment the AMS would have done so. That he does not dwell on the physical injuries is an indication that they are not pertinent to the assessment.

32. When addressing the PIRS Categories individually, the appellant does not point to how the physical injuries should result in a lower rating for the psychiatric impairment, if that is what is intended. The appellant makes a generalised submission about the physical injuries in relation to Self Care and Personal Hygiene; Travel; and Social and Recreational Activities. The appellant merely submits that the AMS has not considered how the physical injuries affect the capacity in each Category, adding "such as golf" with Social and Recreational Activities. There is no submission as to how the AMS erred in his assessments as a result of the alleged lack of consideration.

33. It can be seen at Table 11.8 that the AMS gives reasons that relate to the psychiatric symptoms. For Social and Recreational Activities the AMS places Mr Cromack into Class 3 based on the symptoms,

> "Mr Cromack lost interest in former hobbies and other recreational activities. He no longer visited recreational venues, and he had little contact with friends. One friend visited him infrequently, but Mr Cromack did not reciprocate visits."

34. Even if the evidence of Mr Manley were to be accepted, how Mr Cromack having some difficulty playing golf or being unable to play at all due to physical issues would alter the assessment of the AMS is not addressed by the appellant. The Category rating reflects the psychiatric symptoms of lost interest in Social and Recreational Activities, not attending recreational venues, and having little contact with friends.

35. For the same general reasons, in the absence of any submissions identifying how the general contention raised would have altered the outcome in any PIRS Category, the Panel sees no error. There is nothing to show that any rating would be different due to the unrelated physical injuries. The ground of appeal fails for all the PIRS Categories. The reasons given by the AMS in all Categories relate to the correct criteria of the PIRS examples for each Class of psychiatric impairment in Tables 11.1 to 11.5 commencing at page 56 of the Guidelines. No error is apparent.

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[1] *Vegan*; *Bjkov v ICM Property Services Pty Limited* [2009] NSWCA 175; and *Jones v The Registrar* WCC [2010] NSWSC 481.

Ground of appeal – Other opinion

36. The remainder of appeal is based on differences between the AMS's assessments and those of other assessors, and on differences between the history taken by the AMS and a report commissioned by the appellant from Mr Manley, physiotherapist.

37. In *Mahenthirarasa v State Rail Authority of New South Wales & Ors* [2007] NSWSC 22 (*Mahenthirarasa*) the Court said: "A demonstrable error would essentially be an error for which there is no information or material to support the finding made – rather than a difference of opinion.".

38. In *Marina Pitsonis v Registrar Workers Compensation Commission & Anor* [2008] NSW CA 88 the Court said,

> "Those dependent on the applicant showing that the doctor failed to record or to record correctly things she had told him face a double difficulty. They are not demonstrable on the face of the Certificate. And they seek, in effect to cavil at matters of clinical judgment in that matters unrecorded are likely to be matters on which the specialist placed no weight. The same can be said about factual matters recorded in one part of the Certificate that did not translate into the decision favourable to the applicant now contended for."

39. Mr Manley's report is not by a psychiatrist or psychologist but a physiotherapist and as such comprises lay comments in answer to questions framed by the appellant relating to the PIRS. This report has minimal probative value. As Mr Manley himself says, "It is outside my scope and expertise to comment on psychological injury." Additionally, there is nothing in the report that changes anything as assessed by the AMS in the PIRS due to physical injuries, and as noted above the appellant does not point in submissions to how those injuries would have altered the psychiatric assessment.

40. There is some apparent difference between Mr Manley's report and the history taken by the AMS. The AMS had Mr Manley's report before him. He notes the distinction between reports by those with expertise in the psychiatric/psychological area and others in relation to the late documents which included Mr Manley's report. The features of Mr Manley's report are not a basis for appeal on the above authorities. The AMS took his own history as he was obliged to do. This situation does not constitute a demonstrable error on the face of the Certificate.

41. As the Supreme Court noted in *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140,

> "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] NSWWCCMA 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])."

42. The difference in the assessments between the AMS and the other assessors including Dr Vickery and Dr Canaris is not an error without more than what is apparent on the face of the Certificate, being only a difference of opinion.

43. For these reasons the Panel discerns no error on the face of the Certificate; and the assessment is not based on incorrect criteria.

Findings

44. The Appeal Panel has determined that the MAC issued on 25 November 2019 is confirmed.

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

H Mistry

Heena Mistry
Dispute Services Officer
As delegate of the Registrar