WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3081/19**
Appellant:	**Nambucca Heads Bowling & Recreation Club Limited**
Respondent:	**Karlee Amber Pollard**
Date of Decision:	**24 February 2021**
Citation No:	**[2021] NSWWCCMA 41**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Professor Nicholas Glozier**
Approved Medical Specialist:	**Dr Patrick Morris**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 4 December 2020, Nambucca Heads Bowling & Recreation Club Limited, the appellant employer lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Michael Hong, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 9 November 2020.

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

    - the assessment was made on the basis of incorrect criteria,
    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the WorkCover Medical Assessment Guidelines.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). "WPI" is reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 29 October 2020, the delegate of the Registrar referred this matter to an AMS for assessment of WPI caused by a psychological/psychiatric disorder on 26 February 2017.

7. The matter had previously been referred to the AMS who on 13 August 2019 issued a MAC stating that the applicant's condition had not yet reached maximum medical improvement.

8. The applicant was employed as a Bar Supervisor with the respondent when she was assaulted by a drunk customer who struck her head and tried to stab her with a pen. This assault provoked the onset of a wide range of psychological and physical symptoms. At the time of her injury she had been working two jobs, one with the respondent and another in her own business managing poker games at different clubs for about 10 years.

9. The AMS on 13 August 2019 thought that maximum medical improvement had not occurred and recommended that a further assessment be made at least after six months, as Ms Pollard was undergoing a pain management treatment and had not properly engaged with any psychologist at that stage.

10. The AMS issued his second MAC on 9 November 2020 and found that Ms Pollard had suffered 22% WPI.

PRELIMINARY REVIEW

11. 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.

12. The appellant employer did not seek to have the worker re-examined, and as no demonstrable error was found by the Appeal Panel, such a re-examination was not required.

EVIDENCE

Documentary evidence

13. 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

14. 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

15. Both parties made written submissions which have been considered by the Appeal Panel.

FINDINGS AND REASONS

16. 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.

17. 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.

18. The appellant employer noted that in his original MAC, the AMS thought it would be helpful for Ms Pollard to undergo a standardised assessment of cognitive impairment. Funding for that assessment was refused when sought by the appellant employer from SIRA. Several alternatives were offered to that assessment, but Ms Pollard by then would not agree. It was against this background that the appellant employer raised essentially two grounds of appeal, both of which related to the assessment pursuant to the Psychiatric Impairment Rating Scale (PIRS) and two of the six categories therein – social functioning and social and recreational activities.

The Psychiatric Impairment Rating Scale (PIRS)

19. The Psychiatric Impairment Rating Scale is established as the rating criteria for assessing psychiatric/psychological impairment, by virtue of Chapter 11 of the Guides. Chapter 11 sets out six categories of behaviour to be considered, each being divided into five classes, ranging in seriousness from 1 to 5. Class 1 relates to a situation where there is no psychological deficit, or a minor deficit attributable to the normal variation in the general population. Class 5 pertains to a person who is totally impaired.

20. Chapter 11.12[1] provides:

> "Impairment in each area is rated using class descriptors. Classes range from 1 to 5, in accordance with severity. The standard form must be used when scoring the PIRS. The examples of activities 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."

21. The assessor is required to classify each category, and to apply the resulting scores as set out in Chapter 11[2].

22. The assessment of psychiatric disorder has been considered in a number of cases. In *Ferguson v State of New South Wales*[3] Campbell J was concerned the case where the Medical Appeal Panel had revoked the MAC on the basis that the finding by the AMS had been glaringly improbable. His Honour found that the Panel had fallen into jurisdictional error. He said at [23]:

> "By reference to *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36, the Appeal Panel directed itself that in questions of classification under the PIRS:
>
> '… 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'.
>
> 24. The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.
>
> 25. The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides 'the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment': Appeal Panel reasons at [37]. The descriptors, or examples, describing each class of impairment in the various categories are 'examples only': see *Jenkins v Ambulance Service of New South Wales*[4]. The Appeal Panel said 'they provide a guide which can be consulted as a general indicator of the level of behaviour that might generally be expected': Appeal Panel reasons at [37]."

[1] Guides 55
[2] See 11.15-11.21 at Guides p 65 and Table 11.7 at Guides p 66
[3] [2017] NSWSC 887 (*Ferguson*)
[4] [2015] NSWSC 633 (*Jenkins*)

23. In *Glenn William Parker v Select Civil Pty Ltd*,[5] another case regarding assessment of psychiatric disorder, Harrison AsJ cited [23] of *Ferguson* with approval at [65]. Her Honour said at [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])….."

24. In *Jenkins* Garling J said at [73]:

> "It was a matter for the clinical judgment of the AMS to determine whether the impairment with respect to employability was at the moderate level, as he did, or at some other level. But, in seeking judicial review, a mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to judicial review."

25. It is accordingly necessary for the Panel to be satisfied that the assessment by the AMS in this category was erroneous in one of the following ways (to use the reference by Campbell J in *Ferguson*):

    (a) if the categorisation was glaringly improbable;

    (b) if it could be demonstrated that the AMS was unaware of significant factual matters;

    (c) if a clear misunderstanding could be demonstrated; or

    (d) if an unsupportable reasoning process could be made out.

26. In *Ballas v Department of Education*[6] the Court (Bell P, Payne JA, Emmett AJA agreeing) held that the conduct assessed must be consigned to the correct category (scale), and failure to do so would result in appellable error.

27. The assessments for the categories of social functioning and social and recreational activities were challenged on the basis both that the AMS had based his assessment on incorrect criteria and that incoming to the assessment that he did, a demonstrable error had been made.

Social Functioning

28. The AMS reported that:[7]

> "Ms Pollard presented as anxious and was wringing her hand all through the assessment. She appeared dishevelled. She was not thought disordered. She was unsure of herself and had difficulties recalling various aspect of her history. There was no perceptual disturbance and she was not thought disordered. Ms Pollard was consistently restricted in her affect range and reactivity. She exhibited significant mental disorganization."

[5] [2018] NSWSC 140 (*Parker*)
[6] [2020] NSWCA 86 at [94].
[7] Appeal papers page 42

29. The AMS, when asked for his comments regarding other medical opinions, referred to his discussions about them in his earlier MAC of 13 August 2019. He also had available a further report of Ms Erskine of 11 May 2020. In his earlier discussion (at page 7 of the 13 August 2019 MAC) he referred to: Ms Pollard's statement, the report of Dr Parsonage of 16 January 2019, the opinion of Dr Taneja, Neurologist of 26 May 2017, the opinion of Dr Doron Samuell on 9 April 2019 and 17 May 2019, and a report of Ms Hansen, who had provided extensive 'exposure therapy' dated 3 February 2019.

30. In dealing with Ms Pollard's social activities and activities of daily living, the AMS said:

> "Ms Pollard spends almost all of her time at home. She said she does not do anything at all and sits on her balcony and stares into space, which is how she described herself at the time of my last assessment.
>
> Ms Pollard does not walk her dog and does not help with the housework."

31. The AMS assessed a class 2 level of function, saying:[8]

> "Ms Pollard has no contact with her friends. She has supportive relationship with her immediate family but does not see her extended family. She has not had a partner for many years before the subject injury."

Submissions

Appellant employer

32. The appellant employer referred to the examples given at Table 11.4 given for both a class 1 and class 2 assessment, submitting that the description of Ms Pollard as having a supportive relationship with her immediate family was indicative of a mild deficit, attributable to the normal variation in the general population – a class 1 rating.[9]

33. The appellant employer also pointed to the fact that Ms Pollard had not had a boyfriend for about nine years which circumstance, it was argued, was clearly unrelated to her subject psychological injury. Again, it was submitted, this fact also denoted simply a degree of social withdrawal within the normal variation of the general population.

34. The appellant employer submitted that "this is not simply a case where the selection of one category over another gives a difference of opinion about which reasonable minds might differ." It was submitted that the assessment was based on an application of incorrect criteria, as we understood the submission, as the information recorded and relied upon in the MAC itself could not be interpreted as anything other than a class 1 deficit.

35. As to demonstrable error, we were referred to the well-known dicta of Hoeben J in *Merza v Registrar Workers Compensation Commission*[10] and *Mahenthirarasa v State Rail Authority of NSW*[11] as to the definition of that term.

36. The appellant employer repeated its factual submissions regarding incorrect criteria and submitted that the assessment of class 2 in this category was "unsupported by the evidence and inconsistent with [the AMS's] examination findings", and accordingly a demonstrable error had been made.

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[8] Appeal papers page 46
[9] Table 11.4 at Guides page 56
[10] [2006] NSWSC 939
[11] [2007] NSWSC 22

Respondent worker

37. The respondent worker referred to the authority we have cited, above. Ms Pollard submitted that the submission that the AMS's classification was unsupported and inconsistent with the examination findings, was "patently incorrect". Ms Pollard referred to the AMS's acknowledgement of the receipt of the documentary evidence, and his findings on physical examination.

38. Ms Pollard submitted that when viewed in its totality there was ample evidence which justified the class 2 rating that he ascribed.

39. We were referred to Ms Pollard's evidence[12]:

> "40. Since the incident:
>
> a) I now have difficulty talking to people face to face and I do not like going out in public;
> b) I have difficulties with sleeping and I experience flashbacks about the incident. As a result I am often very tired and run down;
> c) I do not talk to friends and have lost my friends;
> d) I do not catch up for coffee, lunch or dinner with anyone anymore;
> e) I avoid public places now, especially club environments;
> f) I cannot be near anyone drinking alcohol;
> g) I do not feel comfortable or safe walking my dog;
> h) I do not have anyone over to my house;
> i) Loud environments are now frightening to me; and
> j) I do not go to social events at all. I would need someone to go with me to support me now if I was to do this.
>
> …
>
> 42. My personal relationships with family and friends have changed. Since the incident:
>
> a) I have lost almost all of my friends;
> b) My family are frustrated with my changes but are trying to be supportive. It's taken its toll on them as well and my relationship with my family is strained; and
> c) I have become socially isolated."

40. We were referred further to Ms Pollard's mother's evidence[13]:

> "7. Prior to her work injury Karlee was highly capable and entrepreneurial. Karlee ran her own weekly poker tournaments. The tournaments were run in most clubs from Nambucca Heads to South West Rocks. Karlee was responsible for overseeing all of the administration of these tournaments which.
>
> ….
>
> 10. Karlee now stays at home every day and will only leave the house to attend doctor's appointments or the supermarket. Karlee will not leave the house alone and I or my husband have to take her."

41. It was noted by Ms Pollard that both medico-legal specialists had assigned a class 2 for social functioning.

[12] Appeal papers page 63 [40] and appeal papers 64[42]
[13] Appeal papers page 66 [7] and [10]

Discussion

42. Table 11.4 of the Guides give the classification of class 1 and class 2 of social functioning they provide:

> "Class 1 No deficit, or minor deficit attributable to the normal variation in the general population: No difficulty in forming and sustaining relationships (eg a partner, close friendships lasting years).
>
> Class 2 Mild impairment: existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships."

43. No allegation has been made that the AMS failed to read the material that was before him, and there is a presumption that he would have done so. It is not necessary for an AMS to detail every part of the evidence upon which he bases his opinion – indeed in cases of this nature, such would place an intolerable burden on an AMS.

44. Although the appellant employer argued that this was not a case where reasonable minds might differ, we did not find its reasoning convincing. To refer to the dicta in *Ferguson*, a class 2 value was not glaring improbable, and it could not be demonstrated that the AMS was unaware of significant factual matters. It was not suggested that there had been a clear misunderstanding on his behalf. There was also no suggestion that the AMS had made an unsupportable error in his reasoning process. The appellant employer's submissions did no more, with respect, than cavil with the MAC, on grounds that were, at best, tenuous.

45. The MAC is confirmed in this respect.

Social and recreational activities

46. The AMS ascribed a class 3 value to this category, saying "Ms Pollard does not have any social and recreational activities."

Submissions

Appellant employer

47. The appellant employer referred to a comment made by the AMS[14]:

> "Ms Pollard said she only goes out, when she has appointment with her GP or psychologist. She can go by herself to the GP but prefers to be accompanied due to her anxieties."

48. The appellant employer submitted that the error made by the AMS was that he said that Ms Pollard could go out without a support person. This was inconsistent with the class 3 example, the appellant employer argued, and we were referred to the Macquarie Dictionary's definition of the word "will," from which it followed, the employer said, that Ms Pollard had the capacity to go out by herself.

49. The appellant employer repeated its submission that this contradiction was more than a difference of opinion about which reasonable minds might differ.

50. The demonstrable error, it was submitted, was "in line with the clinical findings of [the AMS]."

[14] Appeal papers page 41

Respondent worker

51. Ms Pollard referred to the evidence she had relied in her submissions regarding the category of "social functioning," which showed that she had difficulty leaving the house, and did not go to social events at all[15]. Again her evidence was corroborated by Ms Pollard's mother that she rarely went out, it was submitted.

52. The appellant employer's submissions ignored that evidence, Ms Pollard submitted. The matters raised by the employer were no more than differences of opinion which it had unsuccessfully tried to elevate to errors requiring a revocation of the MAC.

Discussion

53. We note that the medico-legal specialists Dr Parsonage and Dr Samuell both assessed a class value of 3 in this category. As indicated, their assessments had been the same in the social activities category also. The appellant employer set itself a difficult bar to clear, as it was contending for assessments to the Medical Appeal Panel which had been contra-indicated by its own expert, Dr Samuell. Moreover, the experts on both sides of the record were ad idem.

54. It is well accepted that an AMS is not required to accept any expert before him/her, however it is also well accepted that it is incumbent for reasons to be given where there is such unanimity. We were not addressed as to any reasons why the AMS should have ignored the unanimous view of both experts, beyond the factual matters it referred to.

55. It is instructive to include the descriptors for class 1 in considering classes 2 and 3 of Table 11.2 of the Guides:

> "Class 1: No deficit, or minor deficit attributable to the normal variation in the general population: regularly participates in social activities that are age, sex and culturally appropriate. May belong to clubs or associations and is actively involved with these.
>
> 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."

56. The emphasis in this category of behavioural consequences is not whether a person went out or not, but whether he/she participated in social activities that were age and culturally appropriate. No submissions were made that explained how a visit to one's GP was part one's social and recreational activities within the context described in the class 1 descriptors.

57. We do not consider that whether Ms Pollard can or cannot go to see her GP without a support person is relevant to the category of social and recreational activities, as the panel cannot understand how this would be considered as a recreational activity. Care must be exercised in ensuring that the conduct assessed is assigned to the correct category, as stated in *Ballas*[16] and this would be considered withing travel or possibly self-care.

[15] Appeal papers page 14 [40]
[16] *Supra* at paragraph [94].

58. Further, as the appellant employer acknowledged itself, the descriptors for each class are not to be regarded as criteria but rather as examples. The fact that Ms Pollard could go to her GP unaccompanied on occasion did not raise the presumption contended for by the appellant employer, that accordingly she could attend the activities described in this category unaccompanied (or even accompanied). The evidence established that she was unable to attend such activities at all, and was reflected in the class 3 value ascribed by the specialists on both sides of the record, as well as the AMS.

59. This ground is also dismissed.

60. Accordingly, for these reasons the Appeal Panel has determined that the MAC issued on 9 November 2020 should be confirmed.

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

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar