WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3308/20**
Appellant:	**Jill McGrath**
Respondent:	**State of New South Wales (Hunter New England Local Health District)**
Date of Decision:	**23 February 2021**
Citation No:	**[2021] NSWWCCMA 38**

Appeal Panel:	
Arbitrator:	**Brett Batchelor**
Approved Medical Specialist:	**Professor Nicholas Glozier**
Approved Medical Specialist:	**Dr Doug Andrews**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 24 November 2020, Jill McGrath (the appellant/Ms McGrath) 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 26 October 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 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. Ms McGrath worked for the respondent employer, Hunter New England Local Health District, as a clinical business analyst between 2001 and 2017. She suffered psychological injury arising out of or in the course of her employment, which is deemed to have occurred on 26 June 2017. She ceased work at about that time and has not worked since.

7. The appellant was independently medically assessed by Associate Professor Michael Robertson, consultant psychiatrist, (Dr Robertson) on 28 August 2019 who produced a report dated 19 September 2019[1]. Dr Robertson diagnosed the appellant as suffering from a chronic major depressive disorder that had emerged through the nature and conditions of her employment and assessed her as having sustained 17% whole person impairment (WPI) as a result of such injury.

8. On 17 October 2019, the appellant submitted a claim for compensation for permanent impairment pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) based on the assessment of Dr Robertson[2].

9. On 31 January 2020, the appellant was independently medically assessed by Dr Mark Kneebone, consultant psychiatrist, at the request of the solicitor for the respondent[3]. In a report of that date Dr Kneebone assessed Ms McGrath as suffering from a major depressive disorder as a result of which she sustained 10% WPI.

10. On 16 April 2020 the respondent's insurer, QBE Treasury Managed Fund (QBE) issued to the appellant a notice under s 78 of the 1998 Act[4] in which it denied liability for her claim, relying on the assessment of Dr Kneebone. QBE noted that the assessment of 10% WPI by Dr Kneebone fell below the 15% WPI required by s 65A(3) of the 1987 Act for Ms McGrath to be entitled to permanent loss compensation pursuant to s 66 of that Act.

11. On 15 July 2020, the Commission remitted the matter to the Registrar for referral to an AMS for assessment of WPI resulting from psychological injury deemed to have occurred on 26 June 2017. The AMS, Dr Hong examined Ms McGrath on 16 October 2020 and issued his MAC on 26 October 2020 containing an assessment of 9% WPI as a result of injury deemed to have occurred on 26 June 2017[5].

PRELIMINARY REVIEW

12. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.

13. 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, while the appellant requested re-examination by an AMS who is a member of the Appeal Panel, there were no submissions made in support of such a request. The appellant's submissions addressed the matter with reference to the evidence that is before the Appeal Panel only. The respondent asserted that the appeal can be decided by the Appeal Panel solely on the basis of the written application and any written notice of opposition lodged. The Appeal Panel considers that there is sufficient material in the Appeal Papers to enable it to deal with the appeal.

Fresh evidence

14. There was no application by either party to lodge fresh evidence.

[1] Appeal Papers p 86.
[2] Appeal Papers p 76.
[3] Appeal Papers p 357.
[4] Appeal Papers p 68.
[5] Appeal Papers p 28.

EVIDENCE

Documentary evidence

15. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

16. The 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

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

Appellant

18. In summary, the appellant submits that the AMS failed to make reference to several significant events when preparing the MAC. She notes that after leaving work in June 2017, she was initially treated by a general practitioner and subsequently came under the care of psychiatrist Dr Blackwell. Dr Blackwell was reported to have found the appellant permanently incapacitated by reason of the psychological injury. Further, in December 2018, the respondent medically retired the appellant from the employment, having determined that she was medically unfit.

19. In respect of employability the appellant notes the comments of the AMS that:

> "[The appellant] has not worked since the subject injury and her anxieties impact on her work capacity. Her psychological symptoms are significant and would impact on her capacity to work consistently. Her role in the family and contribution to the household operation is limited and ***she is not completely devoid of productivity and adaptation***." (emphasis in submissions)

20. The appellant submits that, based upon the evidence before the AMS, the only possible class finding for the category of Employability and Adaptation was that of Class 5. Alternatively, the appellant submits that the AMS has failed to provide any, let alone sufficient, reasons for the class 4.

21. The appellant submits that for the purposes of the Workers Compensation Act, the concept of incapacity (and by extension capacity) is well settled. In an overarching sense incapacity is based on a practical enquiry of fitness for work grounded in the real world labour market in which the worker was working or might reasonably have been expected to work. The appellant submits that it is not sufficient to identify a capacity to perform some theoretical work, and refers to Mills *Workers Compensation NSW*[6] and the discussion of s 33 of the 1987 Act therein.

22. The appellant submits that as a matter of law this practical assessment of incapacity, and by extension employability, would apply to the Guidelines for the following reasons:

    (a) as a matter of comity, the Guidelines should be construed as to conform with the general law applicable under the Workers Compensation Act;

[6] Mills CP *Workers Compensation New South Wales*, LexisNexis (*Mills*).

(b) were it otherwise, it is difficult to see any person ever satisfying Class 5 in Table 11.6, in that (to use the test seemingly embraced by the AMS) all persons have some degree of 'productivity or adaptation', and

(c) whilst not definitive, it is illustrative to note the 'Employability' as used in Chapter 1.9 of AMA5 indicate a practical, as opposed to theoretical, approach is to be preferred.

23. Within the parameters of the practical assessment to determine the existence of a work capacity as described in 22 above, the appellant submits that the bland statement of AMS of the appellant "not being completely devoid of productivity or adaption [sic, adaptation]" falls far short of what was required by law. As such the MAC was either made with the wrong criteria and or contains a demonstrable error within the meaning of s 327(3). Moreover, the assessment of the AMS is difficult to reconcile with the fact that the appellant:

(a) has not worked since the deemed date of injury;

(b) was medically retired by the respondent, and

(c) was considered permanently incapacitated by the treating psychiatrist, Dr Blackwell.

24. Given those three matters, the failure of the AMS to provide any reasoning for his statement is telling, and would, it is submitted, fail to enable the Registrar to understand the reasoning process of the Assessor as required by *Wingfoot Partners (Aust.) Ltd v Kocak*[7].

25. The appellant notes that although it was not stated in the MAC, it is possible that the assessment of the AMS was based on what was said at page 17 of Dr Kneebone's report dated 31 January 2020. On the assumption that such was the case, the MAC contains error in that Dr Kneebone's analysis is mistakenly predicated on a theoretical, as opposed to a practical, assessment of capacity and accordingly is wrong in law. As Dr Kneebone's opinion in respect of capacity to work for less than 20 hours per week is so heavily qualified by reference to the pace of work being reduced, the "extremely limited" labour market and a labour market well below the appellant's education and employment background, the only practical conclusion is that the appellant is unemployable. "If in fact the In a Certificate was dependant [sic, dependent] on an opinion that was wrong in law, it follows that the Certificate is also wrong in law for the reasons identified… above."[8]

26. In respect of social and recreational activities the appellant refers to the assessment of the AMS in determining class 2 is appropriate in respect of such activities. The finding of the AMS is set out in detail.

27. The appellant refers to the case of *Ballas v Department of Education (State of NSW)*[9], and the comment of Bell P and Payne JA (Emmet JA concurring).

28. The appellant submits that the MAC contains a demonstrable error as the AMS has fallen into the error identified above in *Ballas* by not correctly characterising "contact with her own friends" as falling under the 'social functioning' scale.

29. The appellant submits that based upon the evidence before the AMS regarding 'social and recreational activities' scale, more weight should have been given to the appellant's recreational activities including her not attending her art classes anymore which was mentioned in the history recorded by the AMS but not mentioned in his assessment on page 11 of the MAC.

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[7] [2013] HCA 43.

[8] Appellant's submissions – Appeal Papers p 15.

[9] [2020] NSWCA 86 (*Ballas*).

Respondent

30. In reply, the respondent notes the observations of the AMS on p 4 of the MAC that the appellant's condition has improved with treatment, and that she now showers every day without prompting, has no problem with her hygiene, eats regularly and has a sensible diet. She occasionally visits retail supermarkets and recently has had contact with a few friends, every two months, and a friend who she has known for 20 years who has moved back into the local area. She speaks to some fiends at the gym but does not socialise outside with them. The appellant visits the gym regularly to attend classes since the easing of COVID-19 restrictions.

31. The appellant travelled to Italy and Croatia in 2019 with her husband and enjoyed the four week trip; she visits restaurants with her husband every one or two weeks and occasionally her husband's friends will join them, when she has no trouble communicating with them.

32. On p 5 of the MAC the respondent draws attention to the further improvement of the appellant with the introduction of new anti-depressant medication.

33. The respondent submits that the comment of the AMS that the appellant "**is not completely devoid of productivity and adaptation**", (emphasis in respondent's submissions) does not demonstrate total incapacity for work, but rather suggests that she is not unable to work.

34. The respondent submits that this interpretation of the opinion of the AMS is supported by the history recorded from the appellant during the assessment and his review of the medical evidence. The AMS considered that the appellant had improved since review by Dr Robertson and Dr Kneebone. The respondent notes that the assessment of employability by the AMS is the same as that of Dr Robertson and Dr Kneebone. The respondent emphasises that the AMS has based his assessment on clear objective findings on examination, consistent with paragraph 1.6 of the Guidelines which stress that a claimant must be assessed as they present on the day of assessment, taking account of the claimant's relevant medical history and current functioning.

35. The respondent submits that the AMS has not applied incorrect criteria nor is there a demonstrable error in relation to the assessment of the appellant as falling within Class 4 of the psychiatric impairment rating scale (PIRS) for employability.

36. In response to the appellant's submissions in respect of social and recreational activity, the respondent relies on Table 11.2 of the PIRS scale and quotes the finding of the AMS when selecting this Class. The respondent notes that the appellant, in arguing that more weight should have been given to the appellant's recreational activities including her not attending art classes anymore, relies on the finding of the Court of Appeal in *Ballas but* does not provide any further examples to justify her argument.

37. The respondent submits that the examples given of activities falling under the various PIRS categories are precisely that, examples only. Paragraph 11.12 of the Guidelines is relied upon.

38. The respondent submits that the AMS has provided sufficient and substantial reasoning for assessing the appellant under Class 2 of the PIRS scale for social and recreational activities, and that there is no demonstrable error in the MAC nor did the AMS err in assessing the appellant under that class.

FINDINGS AND REASONS

39. 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. An Appeal Panel is limited to determining error as alleged by the appellant but must assess in accordance with the Guidelines. Once error is made out, the Panel may "review" the MAC (see *Siddik v Workcover Authority of NSW*[10] and *NSW Police Force v Registrar of the Workers Compensation Commission of New South Wales*[11]*).*

40. In *Campbelltown City Council v Vegan*[12] 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.

Employability

41. The Appeal Panel notes that the AMS refers to "Employability and Adaptation" in the Table 11.8 PIRS Rating Form on p 11 of the MAC, whereas the Table itself refers only to "Employability". Nothing turns on this; the appellant's submissions are directed to the issue of employability. The Panel does not accept the appellant's submissions based on the concept of incapacity as found in s 33 of the 1987 Act, and the reliance upon the commentary in *Mills*. The appellant refers to cases such as *Moran Health Care Services v Woods*[13], *Lawarra Nominees Pty Ltd v Wilson*[14] and *Arnotts Snack Products Pty Ltd v Yacob*[15] noted in the *Mills* commentary in support of her submissions. These cases were decided before the amendments to Division 2 of Part 3 of the 1987 Act, including the insertion of s 32A, effected by the *Workers Compensation Legislation Amendment Act 2012*.

42. Section 32A, which commenced on 1 October 2012, contains a definition of 'suitable employment' which is more demanding than the concept of incapacity for work referred to in the cases abovementioned. That concept denotes "…a physical incapacity for doing work in the labour market in which the employee was working or might reasonably be expected to work." Relevantly, the s 32A definition refers to suitable employment in relation to a worker as meaning employment in work for which the worker is currently suited:

> "(a) having regard to:
>
> (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
>
> (ii) the worker's age, education, skills and work experience,
>
> …
>
> (b) regardless of:
>
> (i) whether the work or employment is available, and

[10] [2008] NSWCA 116.
[11] [2013[NSWSC 1792.
[12] [2006] NSWCA 284.
[13] CA (NSW), No 40195/96, 18 April 1997, unreported.
[14] (1996) 25 NSWCCR 557.
[15] (1995) 155 CLR 171 at 177 (*Arnotts Snack Products*).

(ii) whether the work or employment is of a type or nature that is generally available in the employment market, and

(iii) the nature of the worker's pre-injury employment, and

(iv) the worker's place of residence."

43. The Appeal Panel is obliged to consider the employability of the appellant with reference to Part 11 of the Guidelines. Part 1 of the Guidelines notes that they are made under s 376 of the 1998 Act and are to be used within the NSW workers compensation system to evaluate permanent impairment arising from work-related injuries and diseases. These do not contain any reference which would suggest to the Appeal Panel that, in respect of employability, the Guidelines should be construed to conform with the general law applicable under the 1987 Act as submitted by the appellant.

44. The appellant submits that "While not definitive, it is illustrative to note that 'employability' as used in Chapter 1.9 of AMA 5 indicate a practical, as opposed to theoretical approach is to be preferred."[16] The introduction to Chapter 11 of the Guidelines contains the following statement:

> "AMA5 Chapter 14 is excluded and replaced by this chapter. Before undertaking an impairment assessment users of the Guidelines must be familiar with (in this order):
>
> - the Introduction in the Guidelines
> - chapters 1 and 2 of AMA5.
> - the appropriate chapter(s) of the Guidelines for the body system they are assessing.
>
> The Guidelines replace the psychiatric and psychological chapter in AMA5."

45. An AMS and an Appeal Panel must be guided by Table 11.6 of the PIRS in the Guidelines in respect of employability.

46. The Appeal Panel accepts the assessment of the AMS that the appellant should be placed within Class 4 under Table 11.6. It is in the following terms:

> "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."

47. This Class acknowledges that a worker is severely impaired in respect of employability and imposes a low threshold for acceptance into the Class.

48. The AMS notes that Ms McGrath's condition has improved since the assessment by the other two independent medical examiners (Dr Robertson and Dr Kneebone) and that her treatment has offered substantial improvement. Both Dr Robertson and Dr Kneebone placed the appellant in Class 4 for employability. Dr Robertson, in making his assessment, acknowledged that Ms McGrath had been determined by Dr Blackwell (the treating psychiatrist) as being permanently incapacitated because of her chronic major depressive illness. Nevertheless, he determined Class 4 on his assessment determining that Ms McGrath was not totally impaired.

[16] Appellant's submission 6.3, Appeal Papers p 14.

49. The AMS notes from a late document from Dr Blackwell dated 23 June 2020 that the appellant initially was sedated on Cymbalta "…but then noticed definite improvement in her mood after four weeks – less anxious, able to do more sleep, sleep is good, mostly not waking at all."[17] He then said:

> "It is certainly my impression from Dr Blackwell's updated report, as consistent with mine, that she had gained substantial improvement since the assessments by Professor Robertson and Dr Kneebone."

50. In his report dated 31 January 2020 following his assessment of the appellant on that day, Dr Kneebone acknowledged the appellant's view that she was currently unable to work in any capacity because of tiredness, anxiety and impaired concentration. Nevertheless, he assessed Ms McGrath as being able able to work in a low stress environment for less than 20 hours a fortnight.[18]

51. The Appeal Panel does not find any error on the part of the AMS in placing the appellant in Class 4 for employability, a consistent finding of all assessing independent clinicians.

Social and recreational activities

52. The Appeal Panel notes that the appellant participates in activities with social and recreational elements. The AMS noted that she has been attending a balance class at the gym without prompting since the easing of COVID restrictions, went on a four week trip to Italy and Croatia with her husband in 2019 which she enjoyed and goes to a restaurant once every one or two weeks, sometimes with her husband only and at other times in the company of her husband's friends. She can talk to these friends without major difficulty.

53. Class 2 of the PIRS category for social and recreational activities is as follows:

> "Mild impairment: occasionally goes out to such events eg without needing a support person, but does not become actively involved (eg dancing, cheering a favourite team)."

54. Whilst acknowledging what the Court of Appeal said at [93] and [96] in *Ballas*, namely:

> "Whilst it is no doubt correct that an AMS must exercise a degree of clinical judgment in assigning a class of seriousness to each area which he or she is required to address in completing a medical assessment, the characterisation of conduct as going to 'social and recreational activities' on the one hand, as opposed to any of the other five scales on the other hand, is not a matter of discretion."
>
> and
>
> "Whilst it could be said that seeing a friend is a form of social activity, in the context of a process that has a distinct category or scale dealing with relationships and in circumstances where the AMS is directed by s 11.15 of the Guidelines to address each area of functional impairment separately, the degree of regularity of seeing a friend or friends fell squarely within the 'Social functioning (relationships)' scale.",

the Appeal Panel does not accept the reference to engaging in social and recreational activities with friends (indeed it would be surprising if such were not the case in many instances) should derogate from the assessment of the Panel that the appellant should fall within Class 2 for social and recreational activities. Quite clearly, Class 3:

[17] Appeal Papers p 35.
[18] Appeal Papers p 376.

> "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.",

is not appropriate.

55. The Appeal Panel notes the improvement in the appellant's condition since the assessment by Dr Robertson (Class 3 on 28 August 2019) by the time she was assessed both by Dr Kneebone in January 2020 and by the AMS in October 2020.

56. The Appeal Panel is of the view that, if the reference by the AMS to the appellant having "regular social and recreational contact with her own friends" under 'social and recreational activity' had been used by the AMS under 'social functioning', although the appellant does not take issue with that PIRS categorisation in Class 2, the result would not have been different in respect of either category.

57. For these reasons, the Appeal Panel has determined that the MAC issued on 26 October 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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar