WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M2-5922/16**
Appellant:	**Broadspectrum (Australia) Pty Ltd**
Respondent:	**Fiona Louise Wills**
Date of Decision:	**23 January 2019**
Citation:	**[2019] NSWWCCMA 13**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Julian Parmegiani**
Approved Medical Specialist:	**Dr Nicholas Glozier**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 23 October 2018 Broadspectrum (Australia) Pty Ltd lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by A/Prof Michael Robertson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 25 September 2018.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 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 Guides) 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. This matter has been the subject of prior litigation. On 11 October 2016, an Arbitrator issued a Statement of Reasons regarding an application by the worker for weekly compensation and s 60 expenses in which it was determined that, amongst other things, Ms Wills had suffered a psychological injury.

7. On 18 July 2016, a claim was made pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) which was referred to an AMS on 9 December 2016. The MAC was issued on 2 February 2017 and confirmed on appeal on 5 June 2017.

8. The matter then came before the Supreme Court and on 31 August 2018 Harrison AJ allowed the appeal. The matter was remitted back to the Commission for reassessment by an AMS.

9. As indicated, on 12 September 2018 a referral was made to A/Prof Michael Robertson on 3 May 2014, the MAC issued on 25 September 2018, and the appeal was referred to the Panel on 23 October 2018.

10. In finding the appellant employer liable on 11 October 2016, the Arbitrator said[1]:

> "The incident
> 51. Ms Wills was rostered to work from 9 am to 9 pm on Saturday 3 May 2014 at the Regional Processing Centre on Manus Island.
> 52. About 4.15 pm on that day, Ms Wills accompanied by another female case manager, went to Charlie Compound to see a male transferee named Ali.
> 53. Ms Wills and the other case manager sat down on a lounge when another transferee named Reza came and sat on the lounge on the left side of Ms Wills. While the other case worker was speaking to Ali, Reza started to untie the lace on Ms Wills' right boot. He then did the lace up and rubbed Ms Wills' right leg with his hand just above the boot. Ms Wills told Reza to stop, putting her hand up. Reza then grabbed Ms Wills' photo identification and played with it and saying, "ooh you very beautiful". He then brushed Ms Wills' waist just below her breast with his hand. Ms Wills thought that Reza was attempting to touch her breast without being seen by the other case manager and the other persons present. Reza continued to make noises like "ooh", which made Ms Wills feel very uncomfortable because she believed the actions of Reza to be a "sexual thing". Reza then said, "Come to the beach." Ms Wills said, "I've got to work." Reza repeated "why not, why not". Ms Wills stood up and said to the other case worker "we need to go". Ms Wills stood up. Reza then grabbed Ms Wills' left buttock and squeezed it and whilst looking at her bottom said "ooh". Ms Will then left the compound with the other case manager. She told the other case manager what Reza had done.
> 54. Ms Wills reported the matter to her manger that afternoon, and submitted an incident report the following day.
> 55. Ms Wills had a conversation with one of the health workers in "Psycare". She also spoke with other staff about the incident."

11. The Arbitrator also set out Ms Wills' background. He said:[2]

> 23. "Ms Wills was born in New Zealand, the youngest of three children of her parent's marriage. She suffered with a club foot and a lazy eye which required surgery in early childhood.
> 24. Ms Wills' parents separated and divorced when she was eight years of age.
> 25. Ms Wills was sexually assaulted by an elderly male person who resided near a friend's house. She told her mother about the assault but apparently no action was taken by her other than to warn her daughter not to visit her friend's house, and to stay away from the man.

[1] ARD 136
[2] ARD 134

26. Ms Wills completed secondary education to year 10. On leaving school, she obtained a traineeship at an Art Gallery in Plymouth.
27. Ms Wills came to Australia in 1987, and resided in Brisbane.
28. Ms Wills returned to New Zealand in either 1988 or 1989 when she was 19 years of age because she wished to report the sexual assault to the police for action to be taken against the offender. Apparently, the police decided not to take action because of the age of the offender and the state of his health.
29. Ms Wills then returned to Australia.
30. Ms Wills underwent counselling at this time to deal with the sexual assault, and the failure by the police to prosecute the offender. It is uncertain whether the counselling was in New Zealand or Australia.
31. Ms Wills worked in administrative positions in Brisbane.
32. Ms Wills was in a relationship with the father of her two children, a son born in either 1989 or 1990 and a daughter born in 1993, for several years before the relationship irretrievably broke down due to domestic violence and abuse.
33. Ms Wills undertook adult tertiary education, obtaining a degree in social work in 2005.
34. Ms Wills then commenced work as a social worker with Queensland Health in 2006.
35. Ms Wills worked at the Moreton Bay residential facility, managing psycho-geriatric dementia patients.
36. Ms Wills was sexually assaulted in 2007. She reported the matter to the police but no action was taken against the offender.
37. Ms Wills continued in her employment despite the personal and medical issues she was having as reported by the various medical providers, including independent medical experts, until 2012 when she became emotionally distressed when two men with histories of paedophilia were assigned to her management.
38. Ms Wills was referred by Dr Dare in August 2012 to Dr Guha, psychiatrist, for treatment and management of her psychiatric condition.
39. Ms Wills was also referred by Queensland Health to Mr Botha, clinical psychologist, for counselling.
40. Ms Wills was off work for a period of about three months, returning to work on a graduated return to work programme.
41. Dr Guha reported that Ms Wills was coping well, and that he recommended she work with her employer to ensure she was supported in her return to work.
42. Ms Wills continued to work for Queensland Health until resigning to take up the position as a case manager with The Salvation Army on Manus Island in November 2013.
43. Ms Wills was required to undertake a medical examination by The Salvation Army as a pre-request condition to an offer of employment. The medical assessment was conducted on 28 October 2013.
44. Ms Wills said that she underwent a telephone conference with a psychologist appointed by the agency employing personnel on behalf of The Salvation Army. Ms Wills said that she disclosed to the psychologist the previous traumatic sexual assault in 2007. Ms Wills said that she did not disclose the sexual assaulted committed upon her when she was a child because of the lapse in time.
45. Ms Wills disclosed in the medical questionnaire completed for The Salvation Army on 28 October 2013 that she was taking the prescribed medication of Lovan for depression."

12. The AMS found that Ms Wills suffered from 22% WPI from which he deducted one tenth pursuant to s 323 of the 1998 Act, leaving an entitlement of 20%.

PRELIMINARY REVIEW

13. 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.

14. The appellant employer did not seek to have the worker re-examined by the Panel. Such a re-examination was in any event not relevant to the issue, which principally concerned the evidence regarding the worker's pre-existing condition, and its relevance to the s 323 deduction.

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.

FINDINGS AND REASONS

18. 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.

19. 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.

20. The issue raised by the appellant employer related to the deduction made pursuant to the provisions of s 323 of the 1998 Act.

21. Section 323 provides relevantly:

> (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.

(2) If the extent of a deduction under this section (or a part of it) 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.

22. Chapter 11 of the Guides provides the criteria for assessment of psychological injuries. No challenge has been made to the methodology employed by the AMS in the application of those criteria for the assessment of WPI caused by the subject injury, but the appellant employer has relied upon Chapter 11.10, which deals with pre-existing conditions. It provides:

> "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."

23. The appellant employer submitted that there was 'an avalanche' of medical evidence that demonstrated that Ms Wills required on-going treatment at the time of the subject injury, such treatment having been necessitated by the presence of a pre-existing condition, as we understood the submission.

24. It is not necessary to analyse every reference in the medical evidence, as the histories taken are consistent, and it is not disputed that there were prior psychiatric conditions. They were usefully outlined by the Arbitrator, as has been seen.

25. We would add to that outline, however, that Ms Wills was also assessed by Dr Nicholas Jetkinoff on 24 April 2013.

26. Dr Jetkinoff was a Consultant Psychiatrist, who provided an opinion as to Ms Wills' mental state on 24 April 2013, one year before the occurrence of the subject injury of 3 May 2014, and indeed before her employment with the Salvation Army commenced. Dr Jetkinoff had been retained by Q Super Pty Ltd to advise as to a claim Ms Wills had made against her Superannuation fund when she was working for Queensland Health.

27. Dr Jetkinoff gave a thorough and reasoned report regarding diagnosis. He found that at the time of assessment, Ms Wills was then not suffering from any psychological condition, but that she had suffered in the past from a variety of them.

28. Dr Jetkinoff said:[3]

> "It would appear that Ms Wills has had recurrent Major Depressive Disorder and features of Posttraumatic Stress Disorder at times. She has also had social phobia which probably began around 2007. Her Major Depressive Disorder has occurred on several occasions in the last 20 years at least although she also had a suicide attempt apparently at the age of 18 …..

[3] Reply 483 [at the bottom of the page]

> As regards current illness, there is limited evidence of any current active psychological problems at all at the time of relevance. Her current Major Depressive Disorder could have been diagnosed first in 1994 and she was still on active treatment 10 years later.
>
> I cannot diagnose Posttraumatic Stress Disorder based on the information provided although I acknowledge that anxiety was evident in the description she provided in 2012 it was also significant prior to 2006 and she may well have had a similar reaction In childhood to what she described as an adult. Nothing particular was able to allow me to make a specific diagnosis which was not pre-existing other than social anxiety which was not a cause of her being off work for four months in 2012 ending in October."

29. As to current treatment as at the date of his report, Dr Jetkinoff said:[4]

> "Ms Wills takes Neulactil 2.5mg nocte and Lovan 40mg dally. She sees her psychiatrist once a month, Dr Guha. She sees a psychologist Mr Botha approximately once a fortnight."

30. Also of relevance to Ms Wills' pre-existing psychological condition, was the assessment made on behalf of her first employer at Manus Island. Ms Wills was originally employed by the Salvation Army on 24 January 2014, but that employment ceased the following month when the contract for Manus Island was taken over by the appellant employer, which then employed her from 14 February 2014. Prior to being accepted by the Salvation Army, Ms Wills was assessed on 24 September 2013 by Dr Paul McMurray as being suited to her placement and assignment.[5] She also completed a questionnaire on 28 October 2013.[6] In both assessments it was noted that Ms Wills was taking Lovan, which Ms Wills said was "for depression."

31. The AMS approached the question of Ms Will's pre-injury condition on the basis that there was conflicting evidence, and he could not reliably ascertain a degree of WPI other than a 1/10th deduction. He said in his summary[7]:

> "The conflicting information about her mental state in the period immediately prior to her deployment to Manus Island and noting the insistence of her daughter that there was no evidence of any psychosocial impairment prior to her working in Manus Island indicates that there is no reliable way to formulate a degree of WPI other than a one tenth deduction."

32. Ms Wills' submissions conceded the presence of a pre-existing psychological condition, but submitted that the MAC should be confirmed because the evidence showed that she was asymptomatic prior to the time she suffered the subject injury.

33. In describing Ms Wills' background, the AMS noted that she had worked for the Queensland Health System for eight years and said, "after the instability brought about the Newman Government", alternative employment was found with the Salvation Army and then with the appellant employer. He noted that Ms Wills was was deployed to work providing support services for asylum seekers detained on Manus Island. He took a history of the assault made on Ms Wills by the Iranian man which was consistent with the findings of the Arbitrator in his 2016 Statement of Reasons.

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[4] Reply 481
[5] ARD 66 The references are to the ARD page numbers at the top of each page].
[6] ARD 67
[7] MAC 7

34. The AMS noted a report of Dr Guha regarding the increasing severity of Ms Wills' condition subsequent to the injury of 3 May 2014, including four occasions of hospitalisation at Belmont Hospital, and that she had been unable to return to any voluntary or paid employment since these events.

35. The AMS noted the "considerable amount of medico-legal assessments" that had already been obtained in Ms Wills' case. He noted the reports of Dr Danesi, Dr Huntsman, Dr Christensen, and Dr Lotz. He summarised those opinions.

36. He said that Dr Danesi accepted Ms Wills' response as being a reasonable emotional response and that her previous history of sexual violence did not present as a pre-existing significant psychiatric disorder but that there was a vulnerability to disassociate.

37. Dr Huntsman noted comorbid diagnoses of major depression and dysthymia which were multifactorial in origin, he thought.

38. Dr Christensen was Ms Wills' treating psychiatrist and he found in November 2016 that Ms Wills was suffering from a chronic PTSD and depression and that although she had a previous diagnosis of PTSD it had been *"quiescent"* at the time of her employment.

39. Dr Lotz noted a significant pre-existing psychiatric disorder and thought that Ms Wills had a vulnerable personality with poor coping skills and a tendency to rapidly decompensate after what he thought was a relatively minor incident. He thought that Ms Wills had a "sense of entitlement".

40. The Panel concurs with those comments as being an accurate summary of those reports.

41. The AMS returned to them later in his MAC. In dealing with Ms Wills' previous condition he said[8]:

> "This has been the subject of considerable discussion. I have noted the views of Dr Lotz, Dr Danesi and Dr Christensen in a previous section. It is clear that Ms Wills had been previously traumatised by sexual violence and had a propensity to experience recurrence of these symptoms when triggered.
>
> Her treating psychologist Ms Wagner noted in November 2014 that she had experienced symptomatic intensification triggered by working with paedophiles whilst in the employment of Queensland Health.
>
> Her daughter had been involved in a motor vehicle accident in 2014 and suffered a possible traumatic brain injury but has since recovered and now has become a de facto main carer Review of Ms Wills' general practitioner's notes report the initiation of antidepressant medication in March 2004 until 2006 possibly related to difficulties parenting her daughter. She was commenced on fluoxetine for a premenstrual dysphoria in 2007 around the time of the sexual assault.
>
> She developed a likely atypical eating disorder in July 2008 with co morbid depression. She had further exacerbation of depressive symptoms in 20l0 resuming treatment with fluoxetine in mid 20l0.
>
> In early 2011, she was treated with alprazolam for anxiety and referred for treatment via a mental health care plan.

[8] MAC 4-5

I note the opinion of Dr Jetnikoff, dated April 2013, who wrote *"it would appear that Ms Wills has had recurrent major depressive disorder and features of post-traumatic stress disorder at times. She has also had social phobia which probably began around 2007. Her major depressive disorder has occurred on severe occasions in the last 20 years at least although she also had a suicide attempt apparently at the age of 18 and never mentioned this to me either. This would suggest there is a lot of information that she has not provided that would be of relevance".*

On the issue of her mental state around the period immediately prior to deployment to Manus Island Ms Wills' daughter's statement described her as being outgoing, independent and confident."

42. The AMS thought that Ms Wills suffered from a chronic dissociative subtype Post Traumatic Stress Disorder with a chronic Major Depressive Disorder. He said[9]:

> "The picture that emerges from the extensive information available from the brief of evidence and also the history indicates that Ms Wills had longstanding psychiatric difficulties dating from childhood and that there was clear evidence of pre-existing psychosocial impairment and symptomatic distress that had not attenuated over time. I note in particular Dr Benioff's detailed review of Ms Wills' medical records indicates that there were persisting difficulties that had manifested in different psychopathological states over time. That being noted I believe that Dr Lotz's minimisation of the significance of the incident on Manus Island is overly simplistic and fails to understand the complexity of Ms Wills' vulnerabilities to be triggered into severe psychopathological states."

43. It can be seen that in his thorough and extensive review of the evidence the AMS accepted that there had been a past history of psychological issues and discrete pre-existing psychiatric disorder.

44. In answer to the standard form question at 8(e) of the MAC enquiring as to the impact of pre-existing condition (relevantly) the AMS noted that he had addressed this in some detail and he said:

> "There is clear evidence of a longstanding previous psychiatric disorder".

45. In paragraph 11 the AMS explained further his reasons for making a 1/10th deduction:

> **"11. DEDUCTION (IF ANY) FOR THE PROPORTION OF THE IMPAIRMENT THAT IS DUE TO PREVIOUS INJURY OR PRE-EXISTING CONDITION OR ABNORMALITY**
>
> a) In my opinion, the worker suffers from the following relevant previous injuries, pre-existing conditions or abnormalities:-
>
> i) Previous chronic or subacute PTSD and other symptomatology including depressive illness and atypical eating disorder.
>
> b) The previous Injury, pre-existing condition or abnormality directly contributes to the matters that were taken into account when assessing the whole person impairment that results from the injury, being the matters taken into account in 10 a., and in the following ways:-

[9] MAC 7

i) There was an extant degree of psychopathological distress and low-grade psychosocial impairment from previous traumatic stress exposure and underlying vulnerability to further psychiatric decompensation.

c) The extent of the deduction is difficult or costly to determine so in applying the provisions of s 323(2) I assess the deductible proportion as one tenth."

DISCUSSION

46. The appellant employer relied upon the number of cases to submit that the AMS fell into error. The principles contained within those authorities are tolerably well known and it is not necessary to rehearse them in these reasons. The AMS was required firstly to assess the overall impairment caused by the subject injury. He found a total WPI of 22%, and no challenge has been made to this part of his reasoning.

47. The AMS was then required to consider whether that WPI has been contributed to by any prior injury or pre-existing condition or abnormality. In this respect, he identified the prior injuries, adopting Dr Jetkinoff's opinion that "there were persisting difficulties that have manifested in different psychopathological states over time." These states were identified as a "chronic or subacute PTSD and other symptomatology including depressive illness and atypical eating disorder." Each of these is sufficient to constitute a pre-existing condition.

48. The third step for the AMS was to quantify the amount of the deduction that should be applied in the light of that finding. In this regard, the AMS has fallen into error. The reasons given by the AMS for the 1/10th deduction were based upon the proposition that Ms Wills' pre-existing "traumatic stress exposures" and associated disorder caused a "low-grade psychosocial impairment". Whilst in *Clinen* Campbell J found that a vulnerability of itself did not constitute a pre-existing condition within the terms of s 323, the evidence demonstrates that the "pre-existing stress exposures" were in fact previous psychological conditions.

49. The meaning of the term 'pre-existing condition' was considered by Campbell J in *Fire & Rescue NSW v Clinen.*[10] He concluded at [35]:

> "The natural meaning in that restricted context of "condition" is "medical or like condition" in the sense of a diagnosable, or established, clinical entity [authority omitted]."

47. Those conditions identified by the AMS were medical or like conditions and diagnosed accordingly. As such they were "pre-existing conditions" within the terminology of s 323 (1).

48. There was no shortage of medical evidence upon which the AMS was able to rely. Indeed, he canvassed it in a comprehensive and accurate summary. Accordingly, the provisions of s 323 (2), which require as an example the "absence of medical evidence," were not apposite.

49. However, the authorities require that all the evidence be considered in the assessment of the appropriate deduction pursuant to s 323. It is erroneous to rely on assumption or hypothesis to formulate such an assessment. With respect, the finding by the AMS that there was "conflicting information" as to Ms Wills' psychological condition at the time she undertook her employment with the appellant employer, was not borne out by the evidence.

[10] 2013] NSWSC 62

50. Statements were lodged by Ms Wills' mother, daughter and a fellow counsellor on Manus Island. They all spoke of Ms Wills' pre-injury state, and contrasted it with her present condition which was directly related, they said, to the subject injury. The appellant employer submitted that Ms Wills' daughter in particular, was not a psychiatrist and her assessment of her mother's capacity at the time she was injured was irrelevant to the question of whether Ms Wills had a pre-existing condition.

51. We concur that the statements by the lay witnesses as to Ms Wills' pre-injury state are unhelpful as to the existence or not of any pre-existing psychiatric condition, and it does not appear to us that they were obtained for that purpose. They are relevant to the issue of the extent to which any pre-existing psychiatric condition may have contributed to the impairment caused by the subject injury.

52. The lay evidence, together with the opinion of Dr McMurray and the unidentified psychologist who conducted a telephone conference on behalf of the Salvation Army, established that at the time Ms Wills suffered her injury on 3 May 2014 she was largely asymptomatic. Although she alleged in her statement of 12 April 2016 that she was taking Lovan for "PMT," her earlier admission on the questionnaire of 28 October 2013 that she was taking Lovan for depression, and the evidence of Dr Jetkinoff of 24 April 2013 that she was then also taking Lovan whilst in the care of her psychologist and psychiatrist, indicates that she was taking Lovan as a result of her pre-existing psychiatric condition(s). Be that as it may, there is no evidence that Ms Wills was clinically symptomatic at the time she suffered the subject injury.

53. Ms Wills has a long and complicated psychiatric history, despite which she managed to remain in employment and to obtain qualifications including a University degree. Her duties with the appellant employer involved fly- in fly-out rotations to counsel vulnerable detainees in unusual circumstances, a difficult and complex job. She was assessed on 24 April 2013 by Dr Jetkinoff as not being impaired by her prior history from continuing her employment with Queensland Health, and she was passed as suitable for her work on Manus Island by Dr McMurray on 24 September 2013.

54. Ms Wills has a relapsing and remitting psychiatric illness which did not cause her any impairment at the time of the incident but which the history shows to have been associated with recurrent periods of psychosocial and vocational impairment

55. The injury resulted from an unpleasant incident, although it occurred in the presence of her colleague and other people. It is a measure of her determination that she attempted to continue to do her work when she became symptomatic, but her condition deteriorated until she was unable to function.

56. The appellant employer submitted that the AMS had fallen into error by taking extraneous factors into account, such as referring to riots on Manus Island as a 'blood bath,' and relating that Ms Wills had ceased work with Queensland Health because of "instability brought about by the Newman Government." Whilst such expressions are not helpful in formal history taking, we do not find that they diverted the AMS from a proper consideration of his task. They were no more than examples of loose language and unhappy phrasing by an administrative decision-maker and as such, do not concern us.[11]

57. The appellant employer relied upon the provisions of Chapter 11.10 of the Guides, referring to the imperative term "must" as making compliance mandatory.

[11] See Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6, 185 CLR 259, 272, cited in BOJKO v ICM Property Service Pty Ltd & Ors [2009] NSWCA 175 @ 36.

58. The method set out in Chapter 11.10 of assessing pre-existing condition is contrary to the development of the principles applicable to the application of s 323 which had been referred to by both sides in the many authorities relied upon. Those principles require that the first enquiry is as to whether there is any whole person impairment caused by the injury, the second is as to its extent or degree, the third is as to whether a pre-existing condition relevantly has contributed to that impairment, and the fourth is the quantification of the contribution. Such a condition does not have to be symptomatic and may contribute to the level of impairment caused by the subject injury even if it were asymptomatic. In such situations, a clear explanation is required. Assumption or hypothesis is not sufficient, and there must be a reference to the relevant evidence to show the path of reasoning by which the assessment was reached.

59. Chapter 11.10 on the other hand would seem to have an outcome that is at odds with those principles. The Panel has undertaken to complete the assessment in accordance with its provisions. Chapter 11.10 is entitled "Pre-existing impairment" which gives an indication of the limitations the exercise required by the guideline illustrate. In the present situation, as we have indicated, there is no evidence supporting a pre-existing impairment, although there was at least one pre-existing condition. In these circumstances, the exercise of using the same method of calculating pre-existing condition as is set down for the calculating of the current impairment is an unhelpful task. It stands to reason that if a worker has not suffered an injury at the outset of his/her employment, it may very well be that he/she is not suffering from any impairment. It may be, as in the present case, that the person is functioning with a pre-existing condition, but if it is asymptomatic then the result of the exercise will be that at the time just before injury the injured worker had no whole person impairment that was due to his/her pre-existing condition.

60. Although the last sentence of chapter 11.10 mandates a finding of 1/10th if the percentage of pre-existing impairment could not be assessed, in the case of a worker carrying a pre-existing condition which was asymptomatic the percentage of pre-existing impairment can easily be assessed. In the present case, the assessment would be nil. In all the categories of the Psychiatric Impairment Rating Scale, Ms Wills would be assessed as a class I value, that is to say, prior to the subject injury, she had either no deficit, or a minor deficit attributable to the normal variation in the general population. The logical application of that method would be that Ms Wills is entitled to the full assessment, without deduction.

61. In any event, the AMS may have been referring to the Guideline when discussing the period immediately prior to the injury.[12] It may be that by saying that there was no "reliable" way to formulate an assessment of pre-existing impairment, he was referring to the strict wording of Chapter 11.10. It may be that he accordingly applied s.323(2) because of that difficulty. If that were the case, his reasons were not adequately explained, and the AMS has accordingly made a demonstrable error as to the application of Chapter 11.10.

62. Having complied with the requirement that we measure the WPI due to a pre-existing condition as mandated by Chapter 11.10 and then subtract this from the current WPI, we decline to apply it to the present circumstances, as it would produce an anomalous assessment contrary to the principles we have above referred to.

63. The appellant employer submitted that a deduction of at least one half should be made pursuant to s 323 (1). As we have indicated, it is significant that Ms Wills, despite her unfortunate history, had maintained a life of full employment, was able to work in difficult circumstances in a demanding job, travel regularly to Manus island, and there is no evidence

[12] At [53] above.

presented suggesting there was any impairment in her ability to care for herself, form new relationships with colleagues or concentrate at work until the subject injury, innocuous as it may have appeared within the range of sexual assaults. That injury has caused a catastrophic collapse in Ms Wills' ability to function.

64. Accordingly, the Panel is of the view that a deduction of 20% should be made. This reflects the severity and chronicity of her relapsing and remitting pre-existing conditions, the documented recurrent periods of impairment prior to the injury, but also acknowledges that Ms Wills had been asymptomatic and unimpaired at the time of the subject injury.

65. For these reasons, the Appeal Panel has determined that the MAC issued on 25 September 2018 should be revoked, and a new MAC should be 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.

A Reynolds

Antony Reynolds
A/Senior Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **5922/16**
Applicant: **Broadspectrum (Australia) Pty Ltd**
Respondent: **Fiona Louise Wills**

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 A/Prof Michael Robertson 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 WorkCover Guides**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Sub-total/s % WPI (after any deductions in column 6)**
Psychological / psychiatric	3.5.14	Chapter 11	Chapter 14	22	1/5th	18 (rounded)
Total % WPI (the Combined Table values of all sub-totals)						18

The above assessment is made in accordance with the Guidelines for the Evaluation of Permanent Impairment for injuries received after 1 January 2002

John Wynyard
Arbitrator

Dr Julian Parmegiani
Approved Medical Specialist

Dr Nicholas Glozier
Approved Medical Specialist

21 January 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*.