

WORKERS COMPENSATION COMMISSION

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

Matter Number: M1-5164/19
Appellant: Robert Stines
Respondent: The GEO Group Australia Pty Limited (formerly t/as
Australasian Correctional Management Pty Limited)
Date of Decision: 18 May 2020
Citation: [2020] NSWCCMA 88

Appeal Panel:
Arbitrator: Ross Bell
Approved Medical Specialist: Dr Nicholas Glozier
Approved Medical Specialist: Dr Michael Hong

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 25 February 2020 Robert Stines (appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Christopher Bench, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 28 January 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 (section 327(3)(c));
 - 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:

The applicant noted he had been incarcerated “a year and a bit” for high-speed pursuit on top of a number of other charges at the time of the assault on a 26 December 2013. He was detained at the Parklea Correctional Centre. He had been there “a couple of months”. He reported at the time of the injury, he was working as a sweeper at Parklea Correctional Centre on a close to full time basis cleaning the pod. He noted “there’s a lot to do when you are a sweeper”.

The defendant noted he was assaulted on 26 December 2013. He stated “it was over a water bottle ... I picked up a water bottle and threw it in the garbage bin; I was cleaning up the yard. The officer called me up and asked me where his water bottle was. I told him I’d thrown it in the bin”. The applicant noted “five minutes later I was called into the clinic. There were four other officers there ... he asked me where his water bottle was, that’s when he just bashed me, bashed me a few times in my face and broke my jaw in front of his mates ... he bashed me five times ... they were just standing there letting it happen”. He noted having fallen to the ground. He pleaded to be able to retrieve the water bottle. He noted “he sent me back to my room. He gave me an ice pack ... I called up thirty to forty times because of the pain. There was blood pissing out of my mouth. I was in pain all night”. In elaboration, he noted having used the emergency contact button in his cell in order to try to have medical attention during the night, however, his pleas were ignored. He noted the following day he was advised by an officer “to tell them my cellie assaulted me or I fell over”. He consulted with the clinic nurse the following day and was transferred to Bankstown Hospital. He was transferred to Westmead Hospital where he underwent an open reduction and internal fixation of a fractured mandible (fractured jaw). He reported having been admitted for six weeks.

With regards to the mental health sequelae resulting from the aforementioned injury, the applicant noted “it felt wrong ... it felt like he pounded me real bad”. He was fearful the other officers would join in the assault. He noted, furthermore, after having reported the assault to the authorities, he was the subject of numerous threats, both by other officers as well as inmates including an officer advising him to “get out of Parklea”. He was fearful that he would be killed. He noted having had the onset of nightmares soon after the assault “from day 1”. He noted awakening feeling scared, “I feel real bad” and fearful of further assaults. He has never had any flashback per se. He reported having intrusive thoughts and images which he described as “a lot of dreams during the day, awake or asleep, I have dreams”. He has associated shortness of breath, anxiety, heart racing and sweating. He reported difficulties with hypervigilance being fearful of further assaults. He became easily startled. He had difficulties trusting others. He became isolative and withdrawn. He avoided thinking about the trauma. He avoided being around corrective services officers. He avoided Parklea Correctional Centre (and now has been precluded being housed there as a direct result of the assault).

The applicant noted the onset of mental health care in 2014 when he consulted with a Justice Health psychiatrist. He reported having initially been diagnosed with a “disability”. On the other hand, the claimant in fact reported having been formally diagnosed with Posttraumatic Stress Disorder by a Justice Health Psychiatrist during his incarceration. He was commenced on anti-depressant medication, the name of which he could not recall. He was also treated with sleeping tablets.

He reported after the assault, he was released from custody. He consulted with his general practitioner in the community, Dr Thomas St Peter who also diagnosed him with Posttraumatic Stress Disorder and treated him with an anti-depressant and sleeping tablets. He reported having been referred to counselling “on the outside” organised by the GEO Group. He noted the therapist similarly diagnosed with Posttraumatic Stress Disorder.

For somewhat unclear reasons, he has had no psychiatric or psychological treatment for the past two years (since his incarceration) noting “they won’t do it for me”.

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.

Medical Assessment Certificate

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

SUBMISSIONS

11. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.
12. The appeal concerns the assessment of all Psychiatric Impairment Rating Scale (PIRS) Categories by the AMS, except that of Concentration, persistence, and pace.

Appellant

13. In summary, the appellant employer submits that the AMS has erred in failing to consider the effect of Mr Stines’ incarceration on the assessment of the PIRS Categories.
14. The Panel should re-examine Mr Stines and make its own assessment.

Respondent

15. There is no demonstrable error by the AMS, the assessment is not based on incorrect criteria.
16. The MAC should be confirmed.

FINDINGS AND REASONS

17. 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.
18. 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

19. 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.”
20. 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.”
21. Before considering the individual PIRS categories appealed against, it is important to note the general comments of the AMS as to how he approached the assessment,

“It is noted that the applicant was detained in a correctional centre at the time of the assault. He remains incarcerated to the present time. It is noted the Psychiatric Impairment Rating Scale utilises examples from a community setting, some of which are particularly difficult to assess in a correctional setting, most notably with regard to his capacity to maintain autonomy. Clearly a correctional centre by its very nature prevents an individual from participating in the usual activities of daily living. In this context, the assessment of whole person impairment has been adjudged according to comparisons with his functioning at the time of the assault.”
22. The Panel is of the view that the above is the best possible approach for the AMS to have taken given the limited proportion of his adult life Mr Stines has spent outside the institutional setting.
23. It must be observed that “examples” are given in the SIRA Guidelines at Chapter 11, Tables 11.1 - 11.6 for the PIRS Categories, not immutable measurement tools. They are to assist the AMS in bringing clinical expertise to bear in the individual circumstances of the case. The AMS explains in the extract at point 21 above precisely how this was achieved.

24. 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] NSWSC 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]).”

25. As the respondent submits, the AMS has not failed to take account of the fact that Mr Stines has been incarcerated for much of his adult life. He has also considered Mr Stines’ inherent developmental disability.

Ground of appeal – Self-care and personal hygiene

26. The appellant submits that the AMS has erred in failing to take account of the fact that Mr Stines is incarcerated in an institutionalised setting and therefore does not live independently, nor does he prepare his own meals; the AMS has not considered how the applicant would behave outside the institutional setting; and the AMS has also failed to provide reasoning as to the applicant’s functioning outside the current environment.

27. The AMS explains at Table 11.8 regarding this Category,

“He noted he is showering “twice a day”. He is brushing his teeth “twice a day” and changing his clothes “every day, I change them”. He noted he is in a cell with one other individual. He noted “I keep the cell tidy ... every day I mop the room ... you have to keep your cell spotless because of the germs”. He noted he cleans the shower, toilets and sink “every day”. He is eating three meals a day. He is not missing meals. As such, it is the evaluator’s opinion taking into consideration the restrictions with regard to his capacity to cook for himself and the like, such is consistent with there being no assessable impairment.”

28. As noted above, the AMS has approached the rating for each Category in the most effective manner available. In the circumstances the only practical approach is, where necessary, to substitute the examples from everyday life in the SIRA Guidelines with reference points from Mr Stines’ institutional life.
29. The AMS has not applied incorrect criteria but has considered carefully how relevant changes within the institutional setting have affected Mr Stines’ functioning in the Category. The history taken by the AMS regarding this Category is clear, and he explains his clinical opinion. The Panel discerns no error.

Social and recreational activities

30. The appellant submits that the AMS has erred in failing to assess Mr Stines’ ability to interact with people other than his close friends as required in the PIRS scale. It is submitted that the AMS does not consider whether Mr Stines requires a support person to interact with others. The assessment should have been class 3 rather than class 2.

31. The Panel notes that it was made clear in *Parker* that a difference of opinion about which PIRS Category is “more appropriate” is not a ground of appeal. The AMS applies the same approach he takes for the other Categories given the constraints of Mr Stines’ circumstances,

“The applicant noted that he is forced to be out of his cell from 7.30am. He noted he spends the time in the yard “talking to my mates ... I ring my brother, I ring my mother, I ring my barrister”. He noted he plays cards including what he described as a gaol card game 41 “you’ve got to call your tricks”. He noted he is exercising. He lifts weights twice per week for approximately sixty minutes. He has limited his training due to his having had a hernia. He runs on a weekly basis for thirty to sixty minutes. He noted he has not received any visits since the time of his incarceration. He noted “I prefer phone calls ... I told them, just let me do my time”. He noted during his previous incarceration his parents were visiting “every weekend”. Taking into consideration the considerable restrictions imposed by the correctional centre, such is consistent with no more than a mild impairment.”

32. This view was open to the AMS. As with the previous Category discussed, the AMS has not based the assessment on incorrect criteria and there is no demonstrable error on the face of the Certificate.

Travel

33. The appellant submits that the AMS has erred in failing to ascertain whether Mr Stines would require a support person to travel on public transport, and this is a “prerequisite in applying the PIRS Scale”. In fact, the AMS says about travel,

“It was clearly difficult to try to assess his capacity for travel. He noted he has never held a drivers licence and is in fact disqualified until 2055. He noted he is able to move around the yard by himself. On the other hand, given he is in protection, he has to be escorted whenever he is off the yard. He noted prior to his arrest he was riding his bicycle or catching public transport. He noted he would be equally capable of riding his pushbike or catching public transport currently. He in fact stated that he is hoping to complete a traffic offenders’ course in order to have his disqualification decreased. Using best clinical judgement, based largely upon the self-report of the applicant, there has been no functional change in his capacity for travel and there is no assessable impairment.

34. The AMS has based the rating for the Category largely on the self-report of Mr Stines given the difficulty of the assessment of this category in the circumstances. Mr Stines says “he would be equally capable” of riding his pushbike or catching public transport as before his most recent arrest. Again, clinical judgment has been applied by the AMS to the individual circumstances. The rating was open to the AMS and the Panel discerns no error.

Social functioning

35. The appellant submits that the AMS has erred in not giving a moderate rather than a mild rating because he acknowledges Mr Stines has lost numerous friendships since the assault and declines visits from his family.

36. The AMS says at Table 11.8,

“The applicant noted he has phone calls with his mother “basically every day”. He noted his relationship with his mother is “very, very good”. He speaks to his brother “every day”. He described his relationship with his brother as “very good”. His brother is in fact going to visit him in two weeks’ time in order to introduce the applicant to his new niece. He reported he is close to his seven nieces and nephews,

including speaking to them on a monthly basis. He spontaneously noted “I’ve got family out there who care about me”. He reported having had a loss of a number of friendships “a lot of friends called me a dog because of it”. As such, given he would appear to have ceased his family visits, there is some evidence of impairment in social functioning. On the other hand, he reported he remains close to his family of origin including his nieces. He acknowledged having lost some friends as a direct result of the assault and reporting the assault. As such, this is most consistent with a mild impairment.”

37. The Panel notes that the loss of friendships would appear to be due to a reaction of some of Mr Stines’ friends to the assault and the reporting of the assault, rather than being a function of his psychological injury. Mr Stines said, “a lot of friends called me a dog because of it’.
38. As noted above, a difference of opinion is not a proper ground of appeal. The rating was open to the AMS and he has explained his reasoning. The ground of appeal is not made out.

Employment

39. The appellant again submits that the AMS has failed to take account of the fact that Mr Stines is institutionalised and has also erred in not considering employability outside prison. It is also submitted that the prison system requires inmates to work and this has not been taken into account by the AMS.

40. The AMS says at Table 11.8,

“The applicant is not currently able to be employed due to his being detained at the Metropolitan Reception and Remand Centre. He noted however working greater than full-time hours at Long Bay Correctional Centre in the bakery for six months in 2019 and then approximately twenty to twenty-five hours per week at Hunter Correctional Centre in the engineering department welding beds. He denied being the subject of any work performance or disciplinary issues. He noted once he is transferred to Lithgow Correctional Centre, he will again apply to complete employment having previously worked on the sewing machines during a previous detention at Lithgow Correctional Centre. He noted “I’m going to ask for five days per week”, which he noted is the maximum allowed at Lithgow Correctional Centre. As per the applicant’s report, he has worked to the maximum hours that have been allowed according to the various correctional centres he has been detained at including working greater than full time hours for 6 months in Long Bay Correctional Centre in 2019. Moreover, he reported he believes himself currently capable of completing full time work when he is transferred to his goal of classification Lithgow Correctional Centre. As such, there is no assessable impairment.”

41. It is readily apparent from the above that the AMS has, as in the other Categories appealed, taken account Mr Stines’ circumstances of being unable to pursue employment outside the correctional system. The appellant cites the requirement for inmates such as Mr Stines to work but the assessment is about the effect of the injury on employability, if any. The AMS has delved into that aspect in some depth when taking the history from Mr Stines.
42. The history taken by the AMS allows for the Rating of 1 given. There is little or no effect on Mr Stines’ employability due to the injury compared with the situation prior to the assault.
43. The Panel discerns no error, and the ground is not made out.

Findings

44. For these reasons the Panel discerns no demonstrable error on the face of the Certificate; and the ground for appeal that the AMS has failed to address the Guides¹, so the assessment is based on incorrect criteria, is not made out.
45. The Appeal Panel has determined that the MAC issued on 28 January 2020 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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar



¹ see *Pitsonis*