Psychological injury of workers and compensation under the statutory scheme: relevant issues

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PSYCHOLOGICAL INJURY & CAUSATION:

1. A psychological injury must still satisfy the definition of injury within the meaning of section 4 of the WCA 1987.

   "injury" *:*
   (a) means ***personal injury arising out of or in the course of employment****,*
   (b) includes a
   "disease injury" *, which means:*
   (i) a ***disease that is contracted by a worker in the course of*** *employment but only if the employment was the* ***main contributing factor*** *to contracting the disease, and*
   (ii) the ***aggravation, acceleration, exacerbation or deterioration in the course of employment*** *of any disease, but only if the* ***employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration*** *of the disease, and*

2. For an Applicant to satisfy a psychological injury within the definition of s4(a) they need to prove the nervous system was so affected that a physiological effect was induced. This is a "frank injury" resulting in a change in the workers psyche. The worker must then satisfy the causal question pursuant to s9A and prove the employment was a "substantial contributing factor" to the injury.

3. In considering if a worker has suffered an injury under s 4(b), that is a disease, the first question is whether the worker is suffering from a disease[1]. If that answer is yes the commission proceeds to the question of whether the disease was:
   a. Contracted in employment and employment was the main contributing factor;
   b. Or if there has been an aggravation etc and the employment was the main contributing factor to that aggravation etc.

[1] *Austin v Director General of Education* (1994) 10 NSWCCR 373, at 378B.

4. While it is accepted that a mental illness, such as depression, is a disease[2] there must be evidence that the employment was the main contributing factor to either the contraction of same or the aggravation etc of same.

5. The question of whether employment is the main contributing factor (either to the contraction of or the aggravation etc) is not simply a question of expert evidence however expert evidence is usually required to determine same.

PLEADINGS & EVIDENCE:

6. Pleading a psychological injury in an ARD is the same process as pleading any other injury. Plead the date of injury (more often than not a deemed date) and the facts leading to the injury.

APPLICANTS PERCEPTIONS OF REAL EVENTS:

7. The important factor is the **Applicants perceptions** of **real events**. So whilst we may consider that the complaint appears trivial, if the events are real, and the Applicant perceived those events in a particular way then this can support a finding of a psychological injury[3] arising in the workplace.

8. The workers reaction to those real events does not need to be rational nor reasonable.

9. Notably, Acting President Roche provided the following general rules after reviewing a number of authorities in *Attorney Generals Department v K*[4]*:*

> *(a) employers take their employees as they find them. There is an "egg-shell psyche" principle which is the equivalent of the "egg-shell skull" principle (Spigelman CJ in Chemler at [40]);*
>
> *(b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in Chemler at [54]);*
>
> *(c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in Chemler at [69]);*
>
> *(d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in Sheridan);*
>
> *(e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an "objective measure of reasonableness" (Von Doussa J in Wiegand at [31]), and*
>
> *(f) it is not necessary that the worker's reaction to the events must have been "rational, reasonable and proportionate" before compensation can be recovered.*

[2] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34.
[3] *State Transit Authority (NSW) v Fritzi Chemler* (2007) NSWCA 249.
[4] [2010] NSWWCCPD 76, paragraph 52.

10. Acting Deputy President Roche went on to say at paragraph 54:

> *The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an "offensive or hostile working environment", and a psychological injury has resulted, it is open to find that causation is established. A worker's* ***reaction to the events will always be subjective and will depend upon his or her personality and circumstances.*** *It is* ***not necessary to establish that the worker's response was "rational, reasonable and proportional",***

11. What might be considered as supportive of a psychological injury in this context (as long as the Applicant perceives real events):
    a. being over worked;
    b. being under resourced;
    c. a hostile work environment;
    d. being ostracised;
    e. exposure to traumatic events (ie for emergency services workers);
    f. being unfairly targeted in the workplace.

BULLYING AND HARRASSMENT:

12. Importantly just because a psychological injury might arise in the workplace this does not automatically mean that there has been "bullying and harassment" to which the Applicant was subjected.

13. It will simply suffice to plead a pattern of behaviour leading to a psychological injury (should the facts call for it). Whether a finding of "bullying and harassment" is made is then left to the Arbitrator however the Applicant does not need to establish such behaviour if it is not pleaded.

EVIDENCE:

14. The instructions taken from the client are absolutely integral to bringing any action on a psychological injury.

15. The biggest issue arises in that the Applicants instructions however are often inconsistent with the medical history of the Applicant or incomplete. As such no step should be taken finalising evidence until all clinical notes are made available and the IME has a complete and consistent history from the worker. The ultimate difficulty arises from the fact that the opinion obtained from the IME almost entirely relies upon the history provided to them, ie through the interview with the worker and the clinical notes which are provided. Workers suffering a psychological injury are in many cases poor historians, this can be as a result of a number of factors. Consider for example the effects injury itself, the nature of the events exposed to and the workers perceptions in

relation to same which might skew the workers thinking with regard to the importance of particular matters.

16. It is always prudent to compare the clinical notes to the draft statement prior to execution of same. The IME should be provided with the clinical notes and the statement prior to their providing their opinion, a letter of instruction may contain references to pertinent parts of the workers history.

17. There is a distinct difference to an orthopaedic injury in which the specialist conducts a physical examination and will make certain physical findings based upon that examination.

18. What are the relevant factors in relation to a psychological injury?
    a. The workers psychological and developmental history;
    b. Whether the worker has suffered any previous psychological condition whether work related or otherwise and whether they have been treated for same including the nature of that treatment;
    c. The dates of the previous psychological condition;
    d. The facts, matters and circumstances giving rise to the injury in question;
    e. Whether there are other contributors external to the work environment;
    f. The development of the symptoms and the timing of same;
    g. Treatment undertaken since the date of injury;
    h. Current symptoms and complaints;
    i. Difficulties with activities;
    j. Current treatment and medication regime.

S11A DEFENCE:

19. Section 11A(1) of the 1987 Act provides:

    "11A No compensation for psychological injury caused by reasonable actions of employer

    (1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was ***wholly or predominantly caused*** *by* ***reasonable action taken or proposed to be taken*** *by or on behalf of the employer* ***with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.****"*

20. The employer bears the burden of proof in establishing each of the elements to be successful in the defence[5].

21. The defence must be properly pleaded in the section 74 notice, it is not sufficient for the Respondent to plead the section as a "cover all". The Respondent needs to identify which category, or categories upon which it

[5] *Department of Education & Training v Sinclair* [2004] NSWWCCPD 90, paragraph 23.

relies[6]. The Applicant is entitled to know the case it has to meet and should the category not be identified sufficiently then particulars should be sought, that being said it is often self evident from the reasoning provided in the notice.

If injury wholly or predominantly caused by:

22. The definition is worded so that "whole" or "predominant" are separate concepts.

23. Whole means the entire cause, the single cause and the only cause.

24. Predominant means the stronger or leading element, the main influence, the more noticeable or imposing or mainly or principally caused by. Acting Deputy President Roche said in *McCarthy v Department of Corrective Services*[7]:

> *157….Acting Deputy President Handley considered the phrase "predominantly caused" in Ponnan v George Weston Foods Ltd [2007] NSWWCCPD 92 and applied the dictionary meaning (at [24]) of* ***"mainly or principally caused".*** *I agree with that definition and intend to apply it in the present matter. Whilst I accept that Ms McCarthy found the meeting with Mr Kearney to be distressing and that it was one of many factors that contributed to her injury, the Department has called no persuasive evidence, and I am not satisfied, that it was the whole or predominant cause of her injury.*

25. One of the central and crucial issues in all s 11A cases, namely, what action (or actions) caused the injury. The evidence, and the parties' submissions, should always address this issue first.

26. Look at the Applicants clinical records often there is a pattern of complaints concerning the workplace **prior to the development of the complaints regarding the discipline etc**, this is indicative that the actions of the employer may not have been the "whole or predominant cause".

27. The particular complaints themselves need to be looked at to ascertain whether the character of the complaints is centred on the action upon which the Respondent relies to enliven the defence. For example if a worker's psychologists clinical records indicate the worker is complaining of the behaviour of other workers in the workplace in relation to being ostracised and an excessive workload and there is no mention of the final disciplinary action that is relied upon by the Respondent then this is supportive of an argument that the "whole or predominant cause" is not the disciplinary action that resulted in the worker eventually going off work.

28. Unless one or more of the matters listed in s 11A was the whole or predominant cause of the psychological injury, the question of reasonableness does not arise.

Reasonable action taken by the employer:

[6] *Gray v Busways Gosford EMP Pty Ltd* [2009] NSWWCCPD 124, paragraph 6.
[7] [2010] NSWWCCPD 27, paragraph 157.

29. If the finder of fact is satisfied that the action was the "whole or predominant cause" then the next element, reasonable action, is examined.

30. With regard to the question of "reasonable action" taken by the employer Sackville JA said in *Northern New South Wales Local Health Network v Heggie*[8] ("Heggie") at paragraph 61 that the reasonableness of an employer's action for the purpose of s 11A is to be *"determined by the facts known to the employer at the time or that could have been ascertained by reasonably diligent inquiries*". He went on to say:

> *The language does not readily lend itself to an interpretation which would allow disciplinary action (or action of any other kind identified in s 11A(1)) to be characterised as not reasonable because of circumstances or events that could not have been known at the time the employer took the action with respect to discipline.*

31. A test of reasonableness by reference to facts that could not have been known at the time the action is taken invites a factual inquiry far removed from the fairness or integrity of the actual decision-making process. Action with respect to the transfer, performance appraisal or retrenchment of workers may be perfectly reasonable when taken. However, in the light of subsequent, unforeseen, developments the action might turn out to have been mistaken and therefore retrospectively vulnerable to being characterised as unreasonable. Basten JA said in *Heggie* at paragraph 14

> *In short, in assessing the reasonableness of the action taken by Ms Podbury, the relevant material was that in existence at or prior to the time when the decision was made and communicated to Mr Heggie.*

However, that is not to say that evidence of events after the relevant action can never be relevant on the question of reasonableness. Reports or correspondence prepared after the action may shed light on the facts known by the employer at the time the action was taken or that could have been ascertained had diligent inquiries been undertaken.

32. The specific action itself needs to be examined, it is not relevant to look at the whole employment history relationship, however what occurred before and after an action is a guide to the reasonableness of it but is not determinative of it; *Buxton v Bi-Lo Pty Ltd*[9]*.*

33. Determination of what is "reasonable" is an objective test and is up to the finder of fact to determine whether the action was reasonable. The question is one of fact and not of law[10].

34. For example a failure to follow its own procedures in relation to a matter of discipline lead to a finding that the employer's actions were not proven to be reasonable, *Balranald Shire Council v Walsh*[11]*.*

[8] [2013] NSWCA 255, paragraph 59.
[9] (1998) 16 NSWCCR 234, paragraph 249.
[10] *Commissioner of Police v Minahan* [2003] NSWCA 239.

Transfer:

35. The word transfer, in the construction afforded by s11A means a move in the employment sphere though may not involve a move in geographical location. It can be a change in the nature and responsibilities of the work performed[12].

Performance appraisal:

36. Performance appraisal involves a structured review of a workers efficiency and performance in the workplace. In *Smyth v Charles Sturt University*[13] Deputy President Byron examined of performance appraisal in 2 different decisions saying:

> *30 …the question of what is "performance appraisal" has been considered by Geraghty J in Irwin v Director General of School Education NSWCC, No. 14068/97 (18 June 1998 unreported) ('Irwin') where his Honour said:*
>
> > *"Performance appraisal is more like a limited discreet process, with a recognised procedure to which the parties move in order to establish an employee's efficiency and performance."*
>
> *31. In Bottle v Wieland Consumables Pty Limited [1999] NSWCC 32; (1999) 19 NSWCCR 135 ('Bottle') Neilson J took a narrower view of 'performance appraisal' at paragraph 30:*
>
> > *" ... leads me to the view that (performance appraisal) is putting a value or putting an estimated value (that is monetary value) upon the work being performed by the employee."*

37. The Commission in this circumstance appeared to support the view of Geraghty J in Irwin, which is saying it was a limited discreet process, with a recognised procedure to which the parties move in order to establish an employee's efficiency and performance. This is as opposed to a focus on remuneration.

38. The focus is upon the performance and efficiency of the worker. If performance appraisal is relied upon and the worker is not afforded the opportunity to rectify any perceived deficiency, or the deficiency is not conveyed to the worker then the reasonableness of that action might be bought into question.

39. The issue of performance appraisal and discipline are quite often pleaded together and on occasion it is difficult to distinguish between each.

Discipline:

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[11] [2013] NSWCCPD 47, paragraph 50.
[12] Manly Pacific International Hotel Pty Ltd v Doyle (1999) 19 NSWCCR 181.
[13] [2007] NSWWCCPD 184, paragraph 30.

40. Acting Deputy President Candy said in *ISS Property Services Pty Ltd v Milovanovic*[14]:

> *83. I accept that the word "discipline" has a wider meaning than punishment and, with respect, agree with what was said by Neilson J in Kushwaha v Queanbeyan City Council [2002] NSWCC 25; [2006] 23 NSWCCR 339. The headnote to that case is, in part:*
>
> > *"The word 'discipline' in s11A (1) of the Workers Compensation Act 1987 has a primary meaning of learning or instruction imparted to a learner and maintained by training, by exercise or repetition. The narrow meaning of that word as punishment or chastisement is secondary to its primary meaning but is included in it."*

41. In essence the definition of "discipline", in its context concerns learning or instruction imparted, is not at all inconsistent with the meaning of performance appraisal.

42. Often, when this category is relied upon it relates to a series of steps concerning the workers learning and instruction in the workplace. Disciplinary meetings over time are often the causative factor of the psychological injury which eventually develops. In this circumstance the whole of the conduct should be considered noting the difficulties in ascertaining the causal nexus between one particular incident and the injury.

43. Sackville JA said in Heggie:

> *59. The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the WC Act:*
>
> *(i) A broad view is to be taken of the expression "action with respect to discipline". It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.*
>
> *(ii) Nonetheless, for s 11A(1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer.*
>
> *(iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.*
>
> *(iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.*
>
> *(v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of **that action** that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.*
>
> *(vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances.*
>
> *(vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact.*

44. Policies and procedures are key, in considering disciplinary matters or performance appraisal the following factors might be considered:

[14] [2009] NSWWCCPD 27, paragraph 83.

a. Whether any policy in relation to discipline was followed;
b. Whether a worker had a support person in a disciplinary meeting;
c. Whether a worker was offered a support person in a disciplinary meeting;
d. Whether the worker was provided with an agenda of the meeting or notice of the meeting;
e. Whether the worker was afforded an opportunity to reply to allegations;
f. Whether the worker was afforded an opportunity to improve performance or offered training in relation to same.

45. Some other relevant factors to consider are:
    a. The size of the organisation and the resources available to it;
    b. The particular process undertaken;
    c. The length of the process;
    d. The involvement of the worker;
    e. The end result of the action.

Retrenchment and/or dismissal.

46. The focus is not on whether the retrenchment or dismissal was reasonable action but on whether the process leading to same which was the cause of the injury was reasonable[15]. Relevant factors to consider are:
    a. The length of the period in which the action was taken;
    b. The length of service of the employee;
    c. Whether notice was provided and in what manner;
    d. The way in which the notice was conveyed.

INCAPACITY ARISING FROM A PSYCHOLOGICAL INJURY:

47. A significant issue arises in bringing a claim for psychological injury in that the Applicant perceives there is a "perpetrator" or group of "perpetrators" and in many circumstances the Applicants own medicine tends to the position that they have a capacity to work in a different work environment or away from those people.

48. As such unless the Applicant is totally incapacitated difficulties arise with the difficulty of "current work capacity" found in s32A of the WCA 1987 which provides:

    "Current work capacity" *… in relation to a work, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.*

    Suitable employment is defined as:

[15] *Temelkov v Kemblawarra Portugese Sports & Social Club Ltd* [2008] NSWWCCPD 96.

> ***"suitable employment"*** *, in relation to a worker, means 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, and*
> *(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and*
> *(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and*
> *(v) such other matters as the Workers Compensation Guidelines may specify, and*
> *(b) regardless of:*
> *(i) whether the work or the employment is available, and*
> *(ii) whether the work or the 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.*

49. The real issue being that the incapacity for employment arising from the injury is intrinsically linked to the particular workplace, or persons therein.

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