Independent
Review Office

IRO Annual Sydney Seminar 2022

A focus on PSYCHOLOGICAL INJURIES and COVID-19

15 June 2022 | Aerial UTS Function Centre

Morning session

Chair: Ellie Fogarty, A/Director Strategy, Policy and Support, IRO

- **10:00-10:10am:** Welcome
- **10:10-11:10am:** Panel 1 - Psychological injuries at work
- **11:10-11:45am:** Assessing whole person impairment – psychiatric and psychological disorders
- **11:45-12:05pm:** Aggregation of permanent impairment under s 66 of the *Workers Compensation Act 1987* (NSW) and s 322 of the *Workplace Injury Management Act 1998* (NSW)
- **12:05-12:10pm:** Closing comments
- **12:10-1:10pm:** Lunch

Panel 1 – Psychological injuries at work

Facilitator: Simon Cohen, Independent Review Officer

- **Natasha Flores**, Industrial Officer, WHS and WC, Unions NSW
- **Jim Kelly**, Director Health and Safe Design, Better Regulation Division, Department of Customer Service
- **Ruth Korotcoff**, Chief Claims Officer, icare
- **Rebecca Neilson**, Project Manager, HPPS Prevention & Mental Health, State Insurance Regulatory Authority
- **Carmine Santone**, Principal, Santone Lawyers

Independent
Review Office

IRO Annual Sydney Seminar 2022

A focus on PSYCHOLOGICAL INJURIES and COVID-19

15 June 2022 | Aerial UTS Function Centre

Independent
Review Office

Assessing whole person impairment – psychiatric and psychological disorders

IRO Sydney Seminar

Dr Julian Parmegiani, Consultant Psychiatrist

June 2022

Assessing Whole Person Impairment- Psychiatric and Psychological Disorders

IRO Annual Sydney Seminar 2022

Dr Julian Parmegiani

MB BS (Hons) FRANZCP

Talk Outline

- The Examination – F2F or AVL
- Information for the Assessor
- Rating WPI
- Covid-19 and workplace relationships

AVL Assessment

- Works well but preparation is necessary
- Different platforms can be used: Zoom, Facetime, Skype, MS Teams
- Instruction sheet vital. The examination is not the time to learn how to use videoconferencing or check that equipment works
- Better than F2F + Face mask, or catching Covid-19
- Saves time and expenses (air travel, hotels, childcare etc.)
- Access to medication lists, travel documents etc.
- Can see the house
- Some information not available using AVL – Self care, weight
- Some people not suitable for AVL – Speech difficulties, overly distressed, unable to use technology.

Information for the Assessor

- Clear letter of instruction
    - Issues with templates
        - Generic
        - Overinclusive
- Agreed facts- A psychiatric assessment is not a factual investigation
- Claimant's statement
- Include only relevant reports – Now common to receive 2000+ pages
- Do not burn your expert

Information Sources

- Psychiatric Impairment is rated using the PIRS
- The PIRS requires an assessment of function
    - Psychiatric interview 1-2 hours
    - Desktop investigation
        - Social media
        - Company searches
        - Business registrations
    - Factual investigation
    - Medical records

PIRS – Impairment Guidelines

- Must have a psychiatric diagnosis
- Somatoform Disorders (Somatic Symptom Disorder) excluded
- Must have reached MMI (Maximum Medical Improvement)
- Previous impairment must be deducted
- Adjustment for treatment – can add 1-3% to final WPI

PIRS – Impairment Guidelines

- Six areas of function:
  - Self Care and Personal Hygiene
  - Social and Recreational Activities
  - Travel
  - Social Functioning (Relationships)
  - Concentration, Persistence and Pace
  - Employability

- Impairment in each area rated from 1 to 5
- Median and aggregate scores used to calculate WPI

Covid 19 and WFH

- Workplace relationships significantly damaged
  - Employers losing any sense of responsibility towards WFH staff
    - Just a name on a spreadsheet – Do we need them?
    - Now dislike absent employees: What are they doing right now?
      - Monitoring software, distant micromanagement
    - We used to be a team, now we're all out for ourselves
    - Let's reboot the company
  - Employees losing loyalty towards employer
    - Why should I go in when I can work from home?
    - How to circumvent monitoring software – Mouse jiggler etc.
    - No support or guidance
    - No career opportunities

Questions?

Independent
Review Office

IRO Annual Sydney Seminar 2022

A focus on PSYCHOLOGICAL INJURIES and COVID-19

15 June 2022 | Aerial UTS Function Centre

Independent
Review Office

Aggregation of permanent impairment under s 66 *WCA* and s 322 *WIMA*

IRO Sydney Seminar

Michelle Riordan, Manager Legal Education, IRO

June 2022

Executive summary

- A review of the PIC's published decisions indicates that it frequently determines disputes about whether permanent impairment arising from multiple work injuries can be aggregated for the purposes of satisfying the thresholds imposed by the *WCA*.

- This presentation focusses on the principles that have been applied by the Court of Appeal and the PIC in determining aggregation disputes.

Section 66 *WCA* provides:

(1) A worker who receives an injury that results in a degree of permanent impairment greater than 10% is entitled to receive from the worker's employer compensation for that permanent impairment as provided by this section. Permanent impairment compensation is in addition to any other compensation under this Act.

Note - No permanent impairment compensation is payable for a degree of permanent impairment of 10% or less.

(1A) Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury.

Section 322 *WIMA* provides:

(1) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.

(2) Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.

(3) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker.

Section 322 *WIMA* (cont'd):

Note - Section 65A of the 1987 Act provides for impairment arising from psychological/psychiatric injuries to be assessed separately from impairment arising from physical injury.

(4) A medical assessor may decline to make an assessment of the degree of permanent impairment of an injured worker until the medical assessor is satisfied that the impairment is permanent and that the degree of permanent impairment is fully ascertainable. Proceedings before a court or the Commission may be adjourned until the assessment is made.

Relevant decisions:

- ***Ozcan v Macarthur Disability Services Ltd*** [2021] NSWCA 56

- ***Ghilagabar v Kmart Australia Pty Ltd*** [2022] NSWPIC 25

Ozcan v Macarthur Disability Services Ltd

- 14/11/2011 - the worker injured his thoracic and lumbar spines and right shoulder
- 3/05/2012 & 26/09/2012 - the worker injured his thoracic and lumbar spines
- An AMS assessed 3% WPI (R shoulder), 5% WPI (thoracic spine) & 7% WPI (lumbar spine)
- **An Arbitrator** held that the 2011 spinal injuries contributed to the 2012 spinal injuries, but that the 2011 R shoulder injury did not. Therefore, the shoulder impairment could not be aggregated with the spinal impairments.
- The worker appealed.

Ozcan – PIC appeal

Wood DP held that the spinal injuries could be assessed together (12% WPI), but the R shoulder impairment could not be aggregated, as it:

- was obtained in a different injurious event
- did not materially contribute to the subsequent spinal injuries &
- was not the same injury (pathology)

The appellant appealed.

Ozcan - Court of Appeal

The Court (**Macfarlan & McCallum JJA & Simpson AJA**) allowed the appeal.

- The principal issue was whether Wood DP misconstrued ss 322(2) and (3) *WIMA* and erred by finding that all of the injuries could not be assessed together (resulting in a combined 15% WPI).
- The Court cited the decision of Malcolm CJ in ***State Government Insurance Commission v Oakley*** [1990] ATR 81, as authority that where a defendant's negligence causes an injury and the plaintiff subsequently suffers a further injury, the position is as follows:

Ozcan – Court of Appeal (cont'd)

(i) Where the further injury results from the subsequent accident, which would not have occurred had the plaintiff not been in the physical condition caused by the defendant's negligence, the added damage should be treated as caused by that negligence;

(ii) Where the further injury results from a subsequent accident, which would have occurred had the plaintiff been in normal health, but the damage sustained is greater because of aggravation of earlier injury, the additional damage resulting from the aggravated injury should be treated as caused by the Defendant's negligence;

(emphasis added)

Ozcan - Court of Appeal (cont'd)

(iii) Where the further injury results from a subsequent accident which would have occurred had the plaintiff been in normal health and the damage sustained includes no element of aggravation of the earlier injury, the subsequent accident and further injury should be regarded as causally independent of the first.

The Court held:

- If the 2012 spinal injuries resulted from those in 2011, s 322(3) *WIMA* requires them to be assessed with the R shoulder impairment because the injuries all arose out of the 2011 injury.
- Therefore, all the injuries "resulted from" and "arose out of" the 2011 injury and should have been treated as one injury and assessed together: see ss 65(2) *WCA* & 322(3) *WIMA*.

Ozcan - Court of Appeal (cont'd)

The Court referred to ***Department of Juvenile Justice v Edmed*** [2008] NSWWCCPD 6 and distinguished it from the current matter, as the first injury did not materially contribute to the later injuries.

The Court also stated that the Court's approach to s 322(2) *WIMA* in ***Edmed*** does not have any limiting effect on s 322(3) *WIMA*.

Ghilagabar v Kmart Australia Pty Ltd

The worker:

- alleged disease injuries to his R shoulder, thoracic spine, both ankles and sub-talar joints and bilateral plantar fasciitis, as a result of the n and c of employment (deemed date: 1/02/2017). In the alternative, he that the ankle injuries were consequential in nature; and
- Initially claimed compensation under s 66 *WCA* for 22% WPI, comprising: 7% WPI (thoracic spine), 14% WPI (R shoulder & elbow) and 1% WPI (each foot).

Ghilagabar (cont'd)

The respondent:

- Conceded that a R shoulder injury on 31/06/2006 was aggravated in 2014, and bilateral plantar fasciitis (in November 2012);
- Disputed liability for a disease in the R shoulder and injuries to the thoracic spine and ankles;
- Disputed that the impairments could be aggregated because the cause of the injuries was different; and
- Placed a settlement offer for 12% WPI (R shoulder and plantar fasciitis) but disputed the other claims under s 66 *WCA*.

Ghilagabar (cont'd)

- On 23/11/2020, the worker claimed compensation under s 66 *WCA* for 19% WPI, comprising 8% WPI (R shoulder), 5% WPI (thoracic spine), 4% WPI (left ankle and sub-talar joint), 3% WPI (right ankle), 1% WPI (left plantar fasciitis) and 1% WPI (right plantar fasciitis).
- On 3/02/2021, he gave particulars as follows:
  - On/around 31/05/2006, he developed symptoms in the R shoulder, elbow and wrist due to the n and c of employment;
  - On/around 21/03/2019, he suffered further injuries to his feet and middle back, and aggravation of the R shoulder, elbow and wrist injuries due to the n and c of employment.

Ghilagabar (cont'd)

The respondent:

- accepted liability for the R shoulder and bilateral plantar fasciitis;
- disputed liability for injuries to the thoracic spine, R elbow and wrist and both ankles under s 4(b)(ii) *WCA;* and
- disputed that WPI for the accepted injuries could be aggregated under s 322 *WIMA* as there were different dates and mechanisms of injury.

Ghilagabar – Principal Member Bamber

Held that the worker:

- injured his thoracic spine and R shoulder (s 4(b)(ii) *WCA*) and, as these arose from the same incident, they should be assessed together: see s 66(2) *WCA* & s 322(3) *WIMA*); and
- the deemed date of injury is the date of the claim (23/11/2020), and she remitted the claims to the President for referral to a MA; however
- the bilateral plantar fasciitis and injuries to both ankles and sub-talar regions arose from a different incident and cannot be assessed with the other injuries; and
- further, those claims cannot be referred to a MA because the threshold in s 66(2) *WCA* is not satisfied.

Ghilagabar (cont'd)

- The legislation does not provide that a worker can obtain lump sum compensation by aggregating all injuries involving different body parts received over a working life with an employer regardless of how they were sustained.
- Section 66(2) *WCA* provides that if a worker receives more than one injury arising out of the same incident, those injuries are to be treated as one injury.
- Section 322(3) *WIMA* has the same effect.
- The central question is whether the injuries to the different body parts arose out of the "same incident".

Ghilagabar (cont'd)

- The legal test of causation was stated by **Kirby P** in ***Kooragang Cement Pty Ltd v Bates*** (1994) 35 NSWLR 452.
- "Because of the threshold in s 66 *WCA*, in some cases there has developed a tendency for workers to frame their injuries as resulting from the "same incident" by alleging that were caused by the "nature and conditions of employment"."
- The worker relied on Dr Dixon's opinion that all alleged conditions "*are causally related to the injuries sustained in the workplace over a period of 13 years... using both a forklift and picking and packing as well as palletising*".
- However, Dr Dixon's approach was not sufficiently reasoned.

Ghilagabar (cont'd)

The **Principal Member** held:

- work was the MCF to aggravation of a disease in the thoracic spine;
- it was appropriate to regard the R shoulder injury as encompassing the presentation in 2006, 2014 and thereafter as part of the "same incident". Therefore, s 4(b)(ii) *WCA* was satisfied;
- as the disputed injuries did not arise from the same incident as the R shoulder and thoracic spine injuries, they cannot be assessed with them. Neither of those injuries resulted from the other: see *Ozcan;* and
- as the s 66(2) threshold was not satisfied with respect to the plantar fasciitis and ankle injuries, those claims could not be referred to a MA for assessment.

Closing points

Based on ***Ghilagabar***, IRO recommends that:

- Solicitors should ensure that claims under s 66 *WCA* are carefully prepared from the outset, as a worker who makes a claim for a personal injury (under s 4(a) *WCA*) will be unable to have a "*second bite of the cherry*" by later making a claim for a disease (under s 4(b)(i) *WCA*) or aggravation etc. of a disease (under s 4(b)(ii) *WCA*) due to the n and c of employment.
- A comprehensive proof of evidence should be obtained from the worker as soon as possible after instructions are received.
- Medical experts should be instructed and provided with a copy of the proof of evidence.
- The ARD should reflect the allegations in the proof of evidence.

Closing Points (cont'd)

Remember that:

- The worker bears the onus of proving their allegations on the balance of probabilities.
- This means that the evidence presented to the PIC must provide a safe climate for the Member to find the worker's allegations proven.
- Where the evidence presented to the PIC (the worker's own evidence and medical evidence) does not provide a safe climate, it will be necessary to obtain further evidence.
- This unnecessarily complicates the determination of causation issues and findings of injury.

Independent
Review Office

IRO Annual Sydney Seminar 2022

A focus on PSYCHOLOGICAL INJURIES and COVID-19

15 June 2022 | Aerial UTS Function Centre

Afternoon session

Chair: Philip Jedlin, Director Independent Legal Assistance and Review Service, IRO

- **1:10-1:15pm:** Welcome
- **1:15-2:15pm:** Panel 2 – COVID-19 – Workers compensation system impacts – past, present and future
- **2:15-2:50pm:** Legal issues in psychological injury compensation cases – an update
- **2:50-3:00pm:** Closing comments and farewell

Panel 2 – COVID-19 – Workers compensation system impacts – past, present and future

Facilitator: Simon Cohen, Independent Review Officer

- **His Honour Justice Gerard Phillips**, President, Personal Injury Commission
- **Geniere Aplin**, Chief Executive Officer, EML Solutions
- **Michael Barnes**, Partner, Carroll & O'Dea
- **Megan May**, Work Health and Safety Professional Officer, NSW Nurses and Midwives' Association
- **Jeff Gabriel**, Director Solutions, Independent Review Office
- **Spencer McCabe**, Director Supervision, State Insurance Regulatory Authority

Independent
Review Office

IRO Annual Sydney Seminar 2022

A focus on PSYCHOLOGICAL INJURIES and COVID-19

15 June 2022 | Aerial UTS Function Centre

Independent
Review Office

Legal issues in psychological injury compensation cases

IRO Sydney Seminar

Dr Juliet Lucy, Barrister, Maurice Byers Chambers

June 2022

Legal Issues in Psychological Injury Compensation Cases

Dr Juliet Lucy, Barrister, Maurice Byers Chambers

Overview of issues

- Extent of employer's duty to ensure a psychologically safe work environment
- Relevance of *Workers Compensation Act 1987* (NSW) to compensation under *Fair Work Act 2009* (Cth)
- Challenging findings of fact about, and assessments of, psychological injury
- Assessment of expert evidence that injured person is malingering or feigning
- Other issues in recent decisions of note

"Personal injury claims by employees who allege that they have suffered psychological injury by reason of their employer's breach of duty present particular difficulties" - *Sills v State of NSW* [2019] NSWCA 4, Sackville AJA at [114]

"special difficulties may attend the proof of cases of negligent infliction of psychiatric injury" – *Hegarty v Queensland Ambulance Service* [2007] QCA 366, Keane JA at [41]

Employer's duty to ensure a safe work environment

- *Abedlkawy v ANL Container Line Pty Ltd* [2021] VSCA 342 (alleged workplace harassment, bullying) –upheld decision that reasonable employer would not have foreseen risk of psychiatric injury
- *Giles v State of Queensland* [2021] QCA 206 (firefighter exposed to trauma) – upheld decision that no breach of duty by failing to remove fire fighter from distressing scene after several hours
- *Sills v State of NSW* [2019] NSWCA 4 (police officer exposed to numerous traumatic incidents) – overturned decision that it was reasonable for the NSW Police Force not to implement psychologist's recommendations to offer police officer counselling – found breach of duty
- *Kozarov v Victoria* [2022] HCA 12 (prolonged exposure to trauma, sexual assault) – upheld primary decision of breach of duty causing psychological injury

Kozarov v Victoria [2022] HCA 12

- Solicitor in sexual offences unit in Victoria (dealing with child abuse) developed PTSD and major depressive disorder
- Applied for damages for the negligent failure to prevent psychiatric injury in the course of her employment
- State argued employer entitled to assume that employees fit to perform work unless notified otherwise
- Alternatively said Ms Kozarov was contributorily negligent for not notifying employer of her symptoms earlier
- Case shaped by *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 which dealt with circumstances in which employer was on notice that employee (in that case a salesperson) was at risk of psychiatric injury

History of *Kozarov* proceedings – first instance

- First instance (Jane Dixon J):
  - *Duty* - Employer was on notice that there was a reasonably foreseeable risk of injury that was not farfetched or fanciful (from facts which related to Ms Kozarov)
  - Her Honour also found nature and intensity of work carried an obvious risk of psychiatric injury
  - *Content of duty* – Employer required to take reasonable steps to minimise risk – these were pro-active steps: make enquiries of Ms Kozarov, monitor staff well-being, offer screening, offer to rotate persons at risk out of unit
  - *Breach* - Employer's response to risks of staff were not that of reasonable employer (OH&S framework "woefully inadequate")
  - *Causation* - Cumulative exposure to casework caused injuries. Ms Kozarov would have accepted screening and rotation out of unit
  - No contributory negligence
  - Awarded $435,000 in damages ($200,000 pain and suffering)

History of *Kozarov* proceedings – Victorian Court of Appeal

- Victorian Court of Appeal overturned decision
- Upheld finding that employer was on notice of risk of psychological injury
- Rejected finding that Ms Kozarov would have accepted offer to rotate out of serious sexual offences unit
  - No evidence from her as to what she would have done
  - State could not have compelled her to rotate
  - In August 2011, she reacted strongly against suggestion she was not coping
  - Sought promotion within sexual offences unit
  - She had not established on balance of probabilities that she would have accepted rotation in August 2011
  - Steps of screening and offering her rotation would not have avoided exacerbation of PTSD

Gageler and Gleeson JJ

- Vicarious Trauma Policy identified vicarious trauma as consequence of working with survivors of trauma, and that it could have prolonged effects on staff member
- The question that arose in *Koehler*, whether psychiatric injury to the particular employee was reasonably foreseeable, was answered in the affirmative by the Vicarious Trauma Policy
- Notice finding was preferable conclusion (rejecting State's notice of contention)
- Court of Appeal erred in finding that Ms Kozarov had not established that she would have accepted a rotation
- Court of Appeal did not refer to expert opinion that a majority of people accept advice of psychiatrist when properly communicated

Kiefel CJ and Keane J

- Misunderstanding of *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44
- Where work performed by an employee is inherently and obviously dangerous to his or her psychiatric health, employer has duty to be proactive in dealing with such risks of psychiatric injury.
- Vicarious Trauma Policy the employer indicated that Victoria owed a duty of care to Ms Kozarov in respect of psychiatric injury from the time her employment commenced
- No further warning signs were necessary to establish that the content of the duty of care owed by the State to Ms Kozarov included active steps for the care of her psychiatric health and that of her fellow employees
- State did not comply with own policy (which encouraged rotations) and breached duty of care to Ms Kozarov from outset

Gordon and Steward JJ

- The primary question is whether Victoria's failure to provide Ms Kozarov with a safe system of work caused the exacerbation and prolongation of her PTSD
- State on notice of risk (dismiss notice of contention)
- State had duty to take all reasonable steps to provide Ms Kozarov with safe system of work
- Trial judge found this should have included training, welfare checks, offers of rotation. Finding of breach not challenged
- Court of Appeal wrong to find Ms Kozarov would not have accepted offer of rotation, reducing injury – if she had received training, been diagnosed with PTSD and been offered rotation

Edelman J

- Agreed with reasons of Gageler and Gleeson JJ and Gordon and Steward JJ
- An employer will not comply with the common law duty to ensure a safe place of work by acquiescing in the refusal of an employee to be rotated from a position that, by reason of some physical characteristic of the employee, involves a high risk of serious physical injury to that employee. Psychiatric injury is no different.

Recent developments addressing psychosocial risks in the workplace

- 2018 Review of the model Work Health and Safety laws (Boland review) published by Safe Work Australia in 2019 – recommended making regulations dealing with psychological health
- Productivity Commission Inquiry Report, Mental Health (June 2020)
- Ministers responsible for work health and safety (WHS) from the Commonwealth and each state and territory met on 20 May 2021 – agreed to amend model WHS Regulations to deal with psychological injury
- Code of Practice, "Managing Psychosocial Hazards at Work," Safework NSW, May 2021
- Amendments to model WHS regulations dated 14 April 2022, published 6 June 2022
- *Occupational Health and Safety Regulations 2017* (Vic) – proposed Ch 5A - positive duties for employers with respect to psychosocial hazards (proposed commencement 1 July 2022)

NSW Code of Practice – Managing Psychosocial Hazards at Work (Safework NSW, May 2021)

- *Work Health and Safety Act 2011* (NSW), s 274 – approved code of practice
- Section 275 – code of practice admissible in proceedings for offence against WHS Act
- Identifies psychosocial hazards
- Requires a person conducting a business or undertaking (PCBU) to assess and prioritise then control psychosocial hazards
- Also requires monitoring and review of the effectiveness of control measures
- Potential relevance in negligence case

Model WHS regulations (as at 14 April 2022)

55A Meaning of psychosocial hazard

A psychosocial hazard is a hazard that:

(a) arises from, or relates to:

(i) the design or management of work; or

(ii) a work environment; or

(iii) plant at a workplace; or

(iv) workplace interactions or behaviours; and

(b) may cause psychological harm (whether or not it may also cause physical harm).

55B Meaning of psychosocial risk

A psychosocial risk is a risk to the health or safety of a worker or other person arising from a psychosocial hazard.

Model WHS regulations – Part 3.2, Div 11

55C Managing psychosocial risks

A person conducting a business or undertaking must manage psychosocial risks in accordance with Part 3.1 other than regulation 36.

55D Control measures

(1) A person conducting a business or undertaking must implement control measures:

(a) to eliminate psychosocial risks so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate psychosocial risks—to minimise the risks so far as is reasonably practicable.

Relevance of workers compensation legislation to *Fair Work Act* remedies

Leggett v Hawkesbury Race Club Limited (No 4) [2022] FCA 622 (Rares J)

- Finding that adverse action by employer, contrary to s 340 of *Fair Work Act 2009* (Cth), caused Mrs Leggett to suffer psychiatric injury
- Section 545 of the *Fair Work Act 2009* (Cth) empowers the Federal Court to make any order it considers appropriate where a person has contravened a civil remedy provision (including awarding compensation)
- Issue as to whether Part 5, *Workers Compensation Act*, relevant to Court's order eg s 151A(1)(b) – deduction of weekly payments of compensation from damages
- Finding: *Workers Compensation Act* cannot direct how a court exercising jurisdiction under the *Fair Work Act 2009* should assess compensation for loss caused by contravention of civil remedy provision
- Parties rights under State law inoperative by force of s 26(2)(b)(vi) of *Fair Work Act 2009*

Challenging findings of fact or assessments in psychological injury cases

Relevant provisions

- *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 352(5): Appeal limited to a determination of whether the decision appealed against was or was not **affected by any error of fact, law or discretion,** and to the correction of any such error. The appeal is **not a review or new hearing**.
- *Motor Accident Injuries Act 2017* (NSW), s 7.26(5): The President is to refer a medical assessment to a review panel if "satisfied that there is **reasonable cause to suspect** that the medical assessment was **incorrect in a material respect**"
- s 7.26(6) The review of a medical assessment is "to be by way of a **new assessment** of **all the matters** with which the medical assessment is concerned."

Sydney Trains v Batshon [2021] NSWCA 143 (Leeming JA, White and McCallum JJA agreeing)

- Mr Batshon, a construction manager for Sydney Trains, suffered a primary psychiatric injury as a result of his employment
- Dispute about WPI referred to medical assessor, Dr Hong, who found 8% WPI (meaning no entitlement to compensation for permanent impairment). Said Mr Batshon suffered from condition best characterised as adjustment disorder but may also fit within major depressive disorder
- Appealed to medical appeal panel – requested that Mr Batshon be re-examined
- Medical Appeal Panel rejected Mr Batson's contention that Dr Hong failed to provide reasons for preferring adjustment disorder over major depressive order. Decided that it was unnecessary for Mr Batson to undergo further medical examination as no error
- On application for judicial review, primary judge found that Medical Appeal Panel committed jurisdictional error by failing to consider Mr Batshon's request to be re-examined

Sydney Trains v Batshon [2021] NSWCA 143 (cont'd)

- Court of Appeal – primary judge appeared to be unaware of panel's explanation of rejection of application for further examination
- Significant different between medical assessment under motor accidents legislation and medical assessment under workers compensation legislation
  - Motor accidents – review should generally include re-examination of claimant; to be by way of new assessment
  - Workers compensation – grounds of appeal such as assessment on basis of incorrect criteria and medical assessment certificate contains a demonstrable error. Review limited to ground of appeal
- If AMS reached wrong diagnosis this not "demonstrable error"
- Appeal allowed, Mr Batshon's summons dismissed

Insurance Australia Group Ltd t/as NRMA Insurance v Welsh [2021] NSWSC 1368 (Macfarlan JA)

- Medical assessor issued certificate under the *Motor Accidents Compensation Act 1999* that Mr Welsh's WPI as result of psychological injury was greater than 10%
- NRMA applied to have medical assessment referred to review panel
- NRMA said the assessor certified that three psychiatric disorders (namely, a bipolar disorder, depression and a mood disorder) were caused by the motor accident, whereas later in his certificate he found that only one of those disorders (namely, "Depression") was so caused, with the other two conditions being unrelated to the accident
- Proper officer was not satisfied that there was reasonable cause to suspect that the medical assessment was incorrect in a material respect and did not make referral

Insurance Australia Group Ltd t/as NRMA Insurance v Welsh [2021] NSWSC 1368 (cont'd)

- The assessor identified "Depression" as the psychiatric injury caused by the accident and "Bipolar mood disorder" as an injury not caused by the accident
- He then referred only to anxiety and depression as pre-existing conditions suggesting that he included "Bipolar mood disorder" as a contributor to Mr Welsh's impairment, but he did not deduct its impact from his calculation of WPI
- Court found that the certificate does not state clearly the degree of Mr Welsh's permanent impairment attributable to the motor accident because, on its face, it identifies a pre-existing psychiatric condition for which the assessor has not made allowance
- As a result, the proper officer ought to have suspected that the assessor's assessment was "incorrect in a material respect"
- Matter remitted to the President of the Personal Injury Commission to be referred to medical assessor for redetermination according to law

Secretary, Department of Education v BB [2021] NSWPICPD 21 (Wood DP)

- School teacher claimed compensation for 17% WPI as a result of psychological injury incurred in course of employment
- Employer contended injury **wholly or predominantly caused by reasonable action** taken by it under s 11A of the 1987 Act with respect to performance appraisal, discipline and transfer
- Teacher alleged ongoing bullying, unjustified criticism and lack of support – principal and others perceived him to be aggressive and performing poorly
- Senior Arbitrator rejected opinion of Dr Martin, forensic psychiatrist, qualified by employer, as to causation. Dr Martin considered claim of bullying and unfair treatment not objectively supported by the evidence and that real stressor was negative performance appraisal.
- Senior Arbitrator did not accept Dr Martin's view of causation because, inter alia, he failed to deal with some additional stressors - employer had onus of providing s 11A defence

Secretary, Department of Education v BB [2021] NSWPICPD 21 (Wood DP) - Appeal

- Main ground of appeal was that senior arbitrator erred in rejecting Dr Martin's opinion on basis that he had not properly considered effect of student aggression, teacher's workload and relationship with careers adviser, without first determining that those matters caused psychological injury
- Wood DP found reasons were logical and she properly evaluated medical evidence
- It was implicit that senior arbitrator accepted teacher's medical case that events that fell outside s 11A were causative of injury
- Senior arbitrator was not required to determine casual relationship between events and injury and to provide reasons before assessing weight to be given to Dr Martin's opinion
- Senior arbitrator's reasons for rejecting Dr Martin's opinion were sufficient to discharge statutory duty

Sdrolias v Allianz Australia Insurance Ltd [2022] NSWCA 20 - Background

- Traffic controller on building site witnessed explosion, injuring two men, which she claimed caused PTSD
- Brought proceedings against head contractor and sub-contractor (common law)
- Primary judge (Fagan J) accepted sub-contractor's employee was negligent (causing explosion) but did not accept negligence caused plaintiff's psychological injury
- Found plaintiff not to be credible witness
  - Did not accept her account of what she saw in aftermath of explosion
  - Did not accept histories given to medical practitioners
- Rejected plaintiff's claim

Sdrolias v Allianz Australia Insurance Ltd [2022] NSWCA 20 (McCallum JA, Macfarlan and Meagher JJ agreeing)

- Dismissed appeal
- Turned on credibility findings
- Tribunal of fact must reach a state of actual persuasion before finding of fact can be made even where evidence unchallenged
- Considered primary judge's subordinate findings including that it was inconceivable appellant suffered flashbacks but said nothing to employer and sought additional shifts
- Not inconceivable but this only small part of judge's reasoning
- It was open to primary judge to make subordinate findings and reach ultimate conclusion he did – findings not demonstrated to be wrong by incontrovertible acts or uncontested testimony, or glaringly improbable or contrary to compelling inferences

Assessment of expert evidence that injured person is malingering or feigning

Addison v BHP Billiton Iron Ore Pty Ltd (No 3) [2021] NSWSC 1031 (Cavanagh J)

- Truck driver sustained accident in WA leading to psychological injury (PTSD)
- Psychiatrist gave evidence that plaintiff no longer suffering from PTSD and that he was feigning, based on psychological testing
- This testing not usually done by psychiatrists
- Process only fair if the medico-legal practitioner discloses and reveals the processes undertaken and all of the results obtained
- Cavanagh J – psychiatrist did not disclose all validity results and over-reporting does not necessarily mean feigning
- When exposing the results, it will be necessary for the expert to explain in some detail the significance of the test results, bearing in mind that the results can mean different things, depending on context and other factors
- Preferred opinion of treating psychiatrist

Damirdjian v Nominal Defendant [2021] NSWDC 706

- Similar approach taken in District Court (Judge Levy SC)
- Psychiatrist expressed opinion that plaintiff presenting herself in negative light or exaggerating her symptoms
- Basis for opinion was not explained by adequate reasons as required by UCPR Sch 7, cl 5(c)
- Contradicted by plaintiff's answers to test questions
- Assertion of exaggeration not put to plaintiff (procedural fairness)
- Judge found her to be credible – rejected psychiatrist's opinion

Other issues in recent decisions concerning psychological injury

Other recent decisions of note

- In proceedings involving a claim for the birth of a child, CL Act s 71(1) does not preclude the award of damages for economic loss in respect of loss of earnings attributable to psychiatric injury- *Dhupar v Lee* [2022] NSWCA 15 at [175]
- "Personal injury damages" in CL Act means damages "for" personal injury, including psychological injury (so costs not capped under legal profession legislation in case for professional negligence) - *Osei v P K Simpson Pty Ltd* [2022] NSWCA 13
- Compulsory attendance at medical examination with psychiatrist under UCPR r 23.4 - for purpose of obtaining evidence about medical condition not for purpose of obtaining evidence as to plaintiff's veracity - generally not in interests of justice if real risk of re-traumatisation - *Hill v Sydney Night Patrol & Inquiry Co Pty Ltd t/as SNP Security* [2021] NSWSC 1425

Other recent decisions of note (cont'd)

- Extension of time granted to commence proceedings for psychological injury following train derailment where many persons killed and injured (delay in onset of symptoms) - *Watson v NSW* [2021] NSWSC 765
- At common law (see CLA, s 3B), appropriate to award aggravated damages for distress, hurt feelings and shame for historical sexual assault, where psychiatric injury is delayed - *Miles v Doyle (No 2)* [2021] NSWSC 1312 (Cavanagh J)
- Leave granted to commence proceedings under *Felons (Civil Proceedings) Act 1981* (NSW) in relation to historical sexual and physical abuse causing psychiatric and psychological injuries - *Reid v Trustee of the Vincentian Fathers* [2021] NSWSC 877 (Walton J)

Conclusion

- Growing awareness of and articulation of duty to take steps to minimise or avoid psychological injury in employment space
- Psychological injury not subject to similar degree of differentiation from physical injury in motor accidents regime (except insofar as Part 3 (Mental harm) of *Civil Liability Act 2002* (NSW) applies)
- Many obstacles to successfully challenging factual findings concerning, or assessments of, psychological injury, with greater flexibility in motor accidents regime
- Some evidence of greater willingness of courts to accommodate claims of psychological injury following sexual assault

Contact

- Any questions or comments, please feel free to get in touch:
  - Juliet Lucy, Maurice Byers Chambers
  - (02) 8233 0337; j.lucy@mauricebyers.com

Independent
Review Office

IRO Annual Sydney Seminar 2022

A focus on PSYCHOLOGICAL INJURIES and COVID-19

15 June 2022 | Aerial UTS Function Centre