WORKERS COMPENSATION RECENT CASES UPDATE

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1. This paper examines some recent interesting cases decided by the Workers Compensation Commission of NSW (**WCC**).

2. Specifically, it focusses on three issues that have been the subject to recent WCC attention:

    a. The nature and quality of evidence required to make out the defence under section 11A(1) of the 1987 Act.

    b. Can the WCC make an order reinstating weekly payments that have been suspended by an insurer under to section 44A(6) of the 1987 Act?

    c. When does a worker first becomes *"aware"* that he or she has received an injury for the purposes of the time limits to bring a claim in section 261 of the 1988 Act?

The nature and quality of evidence required to make out a defence under section 11A(1)

3. Making out the statutory defence in section 11A(1) of the 1987 Act is notoriously difficult for employers.

4. Section 11A(1) provides:

> *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.*

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5. Some key principles on section 11A(1) are:

    a. An employer who seeks to make out a defence pursuant to section 11A carries the onus of establishing a defence.[2]

    b. Whether actions, in respect of one of the specified matters, were the whole or predominant cause of the psychological injury is a question of fact and degree, which involves consideration of all the factors which produced a worker's condition.[3]

    c. A series of events can have a cumulative effect, and may be causative of the psychiatric condition which does not manifest itself until a later time. That does not mean that the earlier events in the series are not causative.

    d. When considering the concept of *"reasonable action"* the court is required to have regard not only to the end result but to the manner in which the action was effected.[4] The test of *"reasonableness"* is objective and should take into account the rights of the employee. The WCC will make an assessment of the reasonableness of the action taken by the employer that is causally related to the psychological injury. The reasonableness of an employer's actions is to be determined by facts known to the employer at the time or that could have been ascertained by a reasonable inquiries. [5]

Hamad v Q Catering Limited [2017] NSWWCCPD 6 (15 March 2017)

6. The worker was employed by Qantas and was involved in the preparation of aircraft meals.

7. There was a restructure which meant that certain categories of employees were required to perform duties that had previously been allocated to different employees. This led to an industrial dispute involving the TWU.

8. The worker, along with others employees, refused to perform certain tasks and Qantas issued him a written direction. The worker refused to carry out the tasks in contravention of the direction.

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[2] *Pirie v Franklins Ltd* [2001] NSWCC 167; *Department of Education and Training v Sinclair* [2005] NSWCA 465.
[3] *Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465.
[4] *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998).
[5] *Heggie v Northern New South Wales Local Health Network* [2012] NSWWCCPD 9 (28 February 2012).

9. On 20 February 2015 Qantas called the worker to a meeting and issued him with a warning letter for failure to follow a lawful and reasonable direction, together with a Code of Conduct and a Performance Improvement Plan.

10. Earlier on 20 February 2015 and prior to the disciplinary meeting Qantas had directed the worker to attend to some urgent work which he had perceived to be below him.

11. The worker ceased work at the end of his shift on 20 February 2015, and claimed that he had suffered a psychological injury due to mistreatment, bullying and intimidation.

12. The worker alleged that the injury was caused by multiple events that had occurred during his employment, including the direction to perform work outside his *"usual"* duties on 20 February 2017. Qantas denied liability.

13. At the arbitration:

    a. The worker relied on lay evidence and medical evidence from his Nominated Treating Doctor and a psychiatrist (Dr Burke).

    b. Qantas relied on lay evidence only (factual investigation report) and did not adduce any medical evidence.

    c. Qantas conceded the worker had suffered a compensable injury, however relied on section 11A(1).

14. At first instance the WCC found that the worker's psychological injury was predominantly caused by a disciplinary action taken by Qantas in the meeting on 20 February 2015. The arbitrator found that the distress the worker alleged that he suffered as a result of the direction to perform work earlier that day had arisen from the disciplinary meeting itself.

15. The worker appealed, primarily asserting that the WCC erred in fact and/or law in finding that the injury was wholly or predominantly caused by disciplinary action, when there was no medical evidence upon which to make that finding.

16. On appeal, the Presidential Member (Deputy President Snell) found:

a. The inquiry on the section 11A defence is not only limited to the specific events are asserted to be reasonable management action (following *Shore v Tumbarumba Shire Council* [2013] NSWWCCPD 1).

b. The psychiatrist's opinion was consistent with the *"general proposition"* that the history recorded caused a diagnosed psychological injury.

c. Although the psychiatrist's opinion on causation was not specific to different work events, the worker did not carry an onus to prove the psychological injury arose from a particular work event. It was adequate for the worker to rely on a general opinion to discharge the onus of proof in respect of injury (section 4) and main contributing factor (section 9A). The available medical evidence suggested there were potential causal factors beyond the warning letter and disciplinary interview on 20 February 2015.

d. The extent to which aspects of the worker's history contributed to causing psychological injury was not something which could be decided in the absence of medical evidence:

> *"…There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s 11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the appellant's statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s 11A(1), were the whole or predominant cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed*

actions by the respondent with respect to discipline, could not be resolved on the basis of the Arbitrator's common knowledge and experience."

e. The respondent, therefore, could not in the absence of any medical evidence dealing appropriately with the topic, discharge its onus of proving that the worker's psychological injury resulted wholly or predominantly from its *"reasonable action taken or proposed to be taken"* with respect to discipline.

17. This matter emphasises the heavy onus on employers to make out a defence under section 11A.

18. Factual evidence alone will not always be sufficient to make out a defence. Where factual evidence is adequate, it will usually be cases in which there is an allegation of a single event that has given rise to psychological injury. These cases are rare.

19. Where a worker asserts that there have been multiple events that give rise to psychological injury, as is typically the case, employers should attempt obtain specific evidence addressing which aspects of the history contributed to the psychological injury and to what extent.

Can the WCC make an order in relation to reinstatement of weekly payments that have been suspended pursuant to section 44A(6) of the 1987 Act?

20. Section 44A(6) is a useful provision for insurers. It permits insurers to suspend weekly payments in circumstances where a worker refuses to attend a work capacity assessment or the assessment cannot not take place because of a worker's failure to participate in the assessment process. The right to weekly payments is suspended until the assessment has taken place.

Jackson v TAFE Commission t/as Sydney Institute of Technology [2017] NSWWCC 1

21. The worker brought a claim for compensation for a consequential injury and sort, amongst other things, an order to reinstate weekly compensation benefits that had been suspended under section 44A(6).

22. The claim for weekly compensation had moved beyond the second entitlement period of 130 weeks and the claim was therefore brought under section 38 of the 1987 Act (Special requirements for continuation of weekly payments).

23. The insurer attempted to arrange a medical examination so as to conduct a work capacity assessment before the expiry of the second entitlement period.

24. The worker consistently frustrated the insurer's attempts to have him assessed, amongst other things stating that he wanted to be consulted in relation to the choice of Injury Management Consultant (**IMC**) and that he did not agree with the insurer's choice (although he provided no alternative when requested to do so). The worker failed to attend three scheduled appointments.

25. Whilst the WCC did not provide a conclusive view on whether it had jurisdiction to make an order reinstating the benefits, it found that the insurer's decision to suspend weekly payments had been *"validly made."* The WCC (Arbitrator Snell) was satisfied that the work capacity assessment did not take place due to the worker's failure to properly participate in the process.

26. This matter shows that the work capacity assessment process is one that requires cooperation from both parties.

27. Insurers should communicate very clearly when they wish to have a worker examined and explain the legislative provisions to them and the timeframes in which an assessment should take place.

28. However, decisions to suspend weekly payments pursuant to section 44A(6) should not be made lightly. Insurers should ensure a paper trail is set up in the event of a challenge to a decision.

When is a worker *"aware"* that he has received an injury to which section 17 applies (loss of hearing, or further loss of hearing)?

29. It is common practice for insurers to rely on a failure by a worker to bring a claim for compensation promptly to attempt to defeat a claim. Delay in bringing a claim is ordinarily

relied on as one of a number of matters contained in a section 74 notice, usually as a supplementary ground for denying liability.

30. Section 261 of the 1988 Act sets the timeframes for bringing claims:

> (1) Compensation cannot be recovered unless a claim for the compensation has been made within 6 months after the injury or accident happened or, in the case of death, within 6 months after the date of death.
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> (2) …
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> (3) …
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> (4) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause, and either:
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> > (a) the claim is made within 3 years after the injury or accident happened or, in the case of death, within 3 years after the date of death, or
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> > (b) the claim is not made within that 3 years but the claim is in respect of an injury resulting in the death or serious and permanent disablement of a worker.
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> (5) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if the insurer concerned determines to accept the claim outside that period. An insurer cannot determine to accept a claim made more than 3 years after the injury or accident happened or after the date of death (as appropriate) except with the approval of the Authority.
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> (6) If an injured worker first becomes aware that he or she has received an injury after the injury was received, the injury is for the purposes of this section taken to have been received when the worker first became so aware.

31. Determining when a worker is actually *"aware"* that they have received a compensable injury is often problematic.

32. *"Awareness of injury"* is not merely awareness of a physical problem.[6] The definition of *"injury"* in section 4 includes a physical (frank) injury and also a disease contracted in the course of employment where employment was the main contributing factor (or an aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration).

33. Determining when a worker is aware of injury in hearing loss claims (boilermaker's deafness) is particularly problematic and may be crucial to the outcome of a claim for compensation. A worker may have been aware of diminished hearing for many years, however the time limits for making a claim do not run until the worker becomes aware that he or she has received a section 4 injury.

34. Generally, *"awareness"* requires two things:

    a. The worker is aware that he has sensorineural hearing loss (i.e. hearing loss of such a nature to be contracted by a gradual process);

    b. The worker is aware that the hearing loss has been contributed to by his employment.[7]

35. The state of knowledge required is actual knowledge, and not constructive knowledge.[8]

Qantas Airways Ltd v Gittoes [2017] NSWCCPD 8 (24 March 2017)

36. The worker had been employed by Qantas as flight attendant from 1974 until October 2006.

37. The worker had first sought treatment for loss of hearing from around October 2014.

38. On 15 December 2015 the worker made a claim for compensation for industrial deafness. The worker relied upon a report of an ENT dated 4 December 2015.

[6] *Roads and Traffic Authority of NSW v McNally* [2006) NSWWCCPD 359 at [35] – [40].
[7] *Inghams Enterprises Pty Ltd v Jones* [2012] NSWWCCPD 17 at [90]. This approach was endorsed by the Court of Appeal in *Unilever Australia Ltd v Petrevska* [2013] NSWCA 373.
[8] *Unilever Australia Ltd v Petrevska* [2013] NSWCA 373 at [22].

39. The insurer sought to resist the claim on the basis that it had been commenced beyond the time limits stipulated in section 261 (six months after the worker first became aware of the injury).

40. At the arbitration, the worker was cross-examined by the respondent's counsel. The worker conceded that he had been aware from a least October 2014 that he had a hearing problem and that the problem was occasioned or caused by work with Qantas.

41. At first instance the arbitrator found that although the worker had first become aware of the cause of his hearing loss in October 2014, the claim had been made within the extended timeframe (section 261(4)(a) of the 1998 Act), due to ignorance or other reasonable cause. The ignorance and/or other reasonable cause was that the worker was not advised of his legal rights to claim compensation until October 2015 and had not received the written medical opinion (ENT report) supporting his case against Qantas until 4 December 2015. After receipt of the ENT report the claim was promptly made.

42. The insurer appealed, submitting that the arbitrator erred in law by making a finding that the worker first became aware of the course of his hearing loss in October 2014 in the absence of any supporting evidence.

43. On appeal, the insurer the WCC (President Judge Keating): referred to and applied *Inghams Enterprises Pty Ltd v Jones* [2012] NSWWCCPD 17:

> *89. The test* [for determining awareness of an industrial deafness injury] *is an objective one, but is based on the individual worker's knowledge, not the knowledge of some hypothetical reasonable person. The worker must be actually aware, not constructively aware. In determining when a worker became aware he has received an injury it is necessary to have regard to the worker's state of knowledge at the relevant time. A worker cannot be said to be aware he has received a work injury if he is unaware of the nature of the condition said to constitute the injury or is unaware that it has been caused by work. Because of the insidious nature of boilermaker's deafness, and lack of general knowledge in the community of its cause, awareness that a worker has received a s 17 injury will usually require specialised knowledge that will normally come from an appropriate expert in the field.*

90. In a claim for compensation for boilermaker's deafness, a worker is aware that he has received an injury to which s 17 applies when he is aware of two things. First, that he has sensorineural hearing loss (boilermaker's deafness and any deafness of a similar origin (s 17(2)), which is a loss of hearing of such a nature as to be contracted by a gradual process. As noted above, because many things unrelated to employment can cause hearing loss, it is not sufficient that the worker is merely aware of a gradual loss of hearing. In addition, and second, though liability will ultimately fall on the employer who last employed the worker in employment to the nature of which the injury was due, as opposed to the employer who actually caused the hearing loss, the worker must be aware that his hearing loss has been contributed to by his employment.

44. Further, the President held that it was not necessary for an arbitrator to identify the precise *"piece of information"* that gave rise to awareness – a worker may become aware on receipt of one and only one piece of information or alternatively a worker may first become aware that he or she has received an injury after receiving several pieces of information gathered overtime. This is what had occurred in this case.

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