

**Australian Lawyers Alliance – Queensland Psychiatric Injury Claims  
New Developments and Cases – 14 June 2017**

**WorkCover Psychiatric Injury Claims: Developments Post Newman**

Speaking Notes

**Overview**

1. I was asked to speak briefly on the topic of “WorkCover Psychiatric Injury Claims: Developments Post Newman”.
2. My first point is that I try not to keep time by reference to pre- and post- Newman, so I have not quite focused on that.
3. Rather, I will just speak about a few current issues in terms of things that have passed through my field of vision regarding WorkCover psychiatric injuries.
4. The main topic that I wish to discuss is liability for psychiatric injuries under the *Workers' Compensation and Rehabilitation Act 2003 (WCRA)*. I will also briefly mention permanent impairment.

**Liability**

*The test of causation*

5. For psychiatric injuries the WCRA, section 32(1)(b), sets the test of whether “employment is the major significant contributing factor to the injury”.
6. That is the critical test for acceptance of liability.
7. Psychiatric injuries remain subject to a higher bar than physical injuries.
8. An onus is on the worker to prove the injury – both the nature of the condition and causation.
9. WCRA section 32(5) is the exclusionary provision. It withdraws certain psychiatric injuries from being compensable injuries by providing that an “injury does not include a psychiatric or psychological disorder arising out of, or in the course of ... reasonable management action taken in a reasonable way by the employer in connection with the worker’s employment [etc]”.
10. The corresponding, although different, Commonwealth provision has seen a bit of action in recent times.<sup>1</sup>
11. In that jurisdiction, the statute refers to “reasonable administrative action taken in a reasonable manner in respect of the employee's employment”.

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<sup>1</sup> *Safety, Rehabilitation and Compensation Act 1988*, s 5A(1). *Comcare v Martin* [2016] HCA 43 and *Lim v Comcare* [2017] FCAFC 64, as well as litigation arising from the application of the decision in *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463.

12. Some emphasis there has been placed on the fact that the test refers to “action taken ... **in respect** of the employee's employment”. It has been held that “in respect” of the employment is an important qualification.<sup>2</sup> There remains some considerable contest about the scope of the exclusion, but it is said that it does not cover operational action – such as instructing an employee how to work or where to work.
13. There was a Bill<sup>3</sup> introduced to, amongst other things, widen the scope of the federal provision so that it would simply refer to “reasonable management action taken in a reasonable manner”. The idea was that a test of “reasonable management action taken in a reasonable manner” would be significantly wider if the reference to “in respect of ... employment” was dropped. That Bill lapsed.
14. There are often two (or more) causes for a psychiatric injury, and often one cause is employment generally but another cause is reasonable administrative / management action. In those cases, the federal scheme appears to have adopted a ‘but for’ test. That is, the psychiatric injury will be excluded from being compensable if “the employee would not have suffered that disease ... if the administrative action had not been taken”.<sup>4</sup>
15. Returning to Queensland, section 32(5) of the WCRA uses similar language – it applies to “action taken ... in connection with the worker's employment”. Section 32(5) has also had some considerable attention, although it has perhaps not enjoyed quite the same level of disputation as its federal counterpart.
16. A recent example is *Workers' Compensation Regulator v Mahafferty* [2016] ICQ 10. The worker there suffered a psychiatric injury. At first instance, Kaufman DP said “a manager's interaction with staff, at least to the extent of giving them directions, making requests of them, and so on, comfortably falls within the concept of management action”. There was no detailed consideration of the qualifier of “in connection with ... employment”. Perhaps there is potential for some of the federal approach of qualifying the scope of management action to be argued in Queensland.
17. *Workers' Compensation Regulator v Mahafferty* [2016] ICQ 10 is also an interesting case on causation under s 32. In *Mahafferty*, it was found that:
  - (a) The stress of dealing with certain telephone calls was a cause the psychiatric condition, but that cause involved reasonable management action.
  - (b) The stress of certain aggressive conduct by a manager was also a cause, but that was not reasonable management action.
18. So it was a case where one cause triggered the exclusion in s 32(5) but the other cause did not.
19. On appeal to the Industrial Court, Martin J said that the question raised was (at [32]):
 

*If a particular stressor is held:*  
*(a) to have been a cause of a psychiatric or psychological disorder, and*  
*(b) to have arisen out of, or in the course of, reasonable management action reasonably taken, then*

<sup>2</sup> *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463.

<sup>3</sup> *Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015*.

<sup>4</sup> *Comcare v Martin* [2016] HCA 43, [47] and *Lim v Comcare* [2017] FCAFC 64, [38].

*is the psychiatric or psychological disorder excluded from the definition of “injury” in s 32(1) no matter what else may have caused the disorder?*

20. It was the Regulator's appeal. And the Regulator argued that the answer should be yes.
21. His Honour pointed out that the Regulator's argument would mean that if there were 10 workplace causes of a psychiatric injury, all of equal importance, and only one was reasonable management action, then the injury would be excluded.
22. The Court noted that the WCRA is beneficial legislation and rejected the Regulator's contention.
23. The Court said:

*[55] Where the only cause of a personal injury is reasonable management action etc. then s 32(5) will work to exclude it from the definition of “injury” in s 32(1). The difficulty, as has become painfully obvious over the years, is where a psychiatric or psychological disorder can be seen to have arisen from a mixture of actions including reasonable management action. Experience in this jurisdiction shows that it is not uncommon for psychiatric disorders to be the result of a number of factors.*

*[57] The difficulties in construing s 32(5) support the conclusion that more than one interpretation of s 32 is available and that, therefore, the beneficial interpretation approach should be applied. In the cases decided in this Court any attempt to provide some type of formula or application of dominant cause has been rejected. Section 32 must be applied in the light of the evidence accepted by the Commission. If, after considering all the relevant evidence and weighing up the factors which were accepted as having given rise to the personal injury, the Commission forms the conclusion that any of the conduct referred to in s 32(5) does not, on balance, displace the evidence in favour of the worker then a finding in the worker's favour must follow.*

24. The Court rejected any “dominant cause” test.
25. Justice Martin instead held (at [57]) that: “If, after considering all the relevant evidence and weighing up the factors which were accepted as having given rise to the personal injury, the Commission forms the conclusion that any of the conduct referred to in s 32(5) does not, on balance, displace the evidence in favour of the worker then a finding in the worker's favour must follow.”
26. That test does make me wonder: who bears the onus in respect of s 32(5)?
27. It is well established that, at least in an appeal to the QIRC, the appellant worker bears the onus of proving an entitlement to compensation. That includes proving that there is an injury within s 32(1) of the WCRA.
28. I wonder, though, whether once a worker proves that a psychiatric injury *prima facie* falls within section 31(1), the onus should then shift to the Regulator to prove (if it so wishes) that the injury is nevertheless excluded by section 32(5).
29. Arguably, the better view is that the employer or Regulator bears the onus of proving that an injury that would otherwise be within s 32(1) is in fact excluded by s 32(5). That, to me, seems to more comfortably fit what is said by the Court in *Mahafferty*.

### Conduct of appeals in the QIRC / Industrial Court

30. Over the last two years, the QIRC has introduced a requirement that parties must file a Statement of Facts and Contentions. In psychiatric injury cases, this replaces the former Statement of Stressors.
31. Decisions from this year and last year in the Industrial Court make it plain that parties will be held to their cases as pleaded in the Statement of Facts and Contentions: *Carlton v Workers' Compensation Regulator* [2017] ICQ 1, [18]. In *Mahafferty*, Martin J said (at [35]) that the Statement of Facts and Contentions “it serves to confine the issues which must be considered on the appeal” and that “an appellant may not depart from the Statement of Stressors [or Statement of Facts and Contentions] without leave”.
32. These cases very clearly put parties on notice that the Statement of Facts and Contentions, particularly in psychiatric injury cases, must be drawn carefully.
33. Each stressor – or aspect of employment that is said to be a cause of the injury – must be identified, because the appellant will be bound by what is effectively a pleading. Care might also be taken not to cast the net too widely, so that one avoids drawing in events that might end up being characterised as reasonable management action.
34. Finally, the form of the QIRC notice of appeal does include a section for stating the facts. One might consider incorporating the Statement of Facts (and, maybe, the Contentions) in the notice of appeal. There might be procedural advantages, because the Rules seem to permit amendment of the notice of appeal without leave (at least if it is done “7 clear days” or more before the hearing).<sup>5</sup>

### **Permanent impairment**

35. Pure psychiatric injuries tend to pose particular difficulties. There might not be a realistic prospect of succeeding in a common law claim for damages, so it might be necessary to maximise the DPI to the greatest extent possible. That might be the only way to achieve compensation.
36. Non-compliance with the GEPI might provide grounds to challenge a Medical Assessment Tribunal decision regarding a psychiatric injury. In that regard, the GEPI is quite prescriptive and there are various ways in which the MAT might fall into error. The Supreme Court decision in *Willis v State of Queensland* [2016] QSC 80 provides a useful analysis.

Dated: 14 June 2017.

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<sup>5</sup> *Industrial Relations (Tribunals) Rules 2011*, ss 4, 18, 21.