RECENT DECISIONS

The role of medical evidence in assessing the whole or predominant cause in section 11A cases

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

Link to decision

Summary

The decision in Hamad demonstrates the importance of reviewing the available evidence in determining liability in matters involving section 11A. Particular importance should be given to a worker's statement as to the causes of their psychological injury and the necessity to obtain expert medical evidence to comment on the whole or predominant cause.

In the present case, DP Snell noted that there was a relative paucity of medical evidence dealing specifically with what aspects of the history contributed to the worker's psychological injury. The Deputy President also considered to what extent the arbitrator had dealt with the causation issue largely by reference to the lay evidence and his conclusions drawn from that evidence.

DP Snell concluded that there were a number of conclusions relevant to the causation issue which could not be appropriately made in the absence of medical evidence. Whilst DP Snell accepted that the arbitrator was entitled to have regard to the sequence of events and to his common knowledge and experience of ordinary life, "a series of events can have a cumulative effect, and may be causative of a psychiatric condition which does not manifest itself until a later time".

Background

The worker (the appellant) was employed by the insured as a leading hand, level 5, in the 'consolidation' of aircraft meals. The worker took responsibility for the assembly of aircraft meals and leading hands in transport took responsibility for transferring food to the aircraft. From 2013, the employer amalgamated the two activities. The worker signed an agreement on 1 July 2013 to participate in this process. An issue subsequently arose whether workers performing the combined roles were entitled to be paid as level 6 rather than level 5. Shortly before Christmas 2014, the transport leading hands declined to continue to participate in the combined roles. Similarly, in February 2015, the consolidation leading hands also declined to participate in the two roles. The members of these groups were only prepared to carry out the role they had initially performed.

The employees' refusal to perform the combined roles led to the employer issuing a letter of direction to perform the combined roles. In the worker's case, a meeting was held on 19 February 2015 when the worker refused to take the letter issued by the employer. The letter was sent to his home by express post. On 20 February 2015, the

worker attended work and again refused to carry out the combined role. He was given other tasks and at 12:36 was called to a meeting with his immediate manager and with the business manager. The worker had a support person with him from the union. He was given a "letter of warning" for failure to follow a "reasonable and lawful direction". At 3:15pm, the worker was asked to complete the meals for a flight which was due out in 2 hours. The worker ceased work at the end of his shift and came under the care of his ntd and treating psychiatrist. The worker returned to suitable duties for the period 3 April 2015 to 16 March 2016 when he again ceased work. The worker has not resumed employment.

The worker submitted a claim for compensation which was declined by his employer.

The worker filed an Application to Resolve a Dispute (ARD) in which he stated that he sustained a psychological injury with a deemed date of 20 February 2015 as a result of "mistreatment, bullying and intimidation" he was subjected to by his employer. At the initial hearing, the employer conceded the occurrence of a psychological injury but pleaded a defence to the claim on the basis of section 11A(1) of the *Workers Compensation Act 1987* (the '1987 Act'), relying on its reasonable action with respect to performance appraisal and discipline.

Arbitrator's Decision

The arbitrator issued a reserved decision dated 6 October 2016 in which he accepted that a section 11A defence had been made out. The arbitrator found that the letter and meeting on 20 February 2015 came within discipline. The arbitrator also accepted that the disciplinary action was the whole or predominant cause of the psychological injury. The arbitrator referred to five other matters raised in the worker's submissions which arguably contributed to the worker's injury in a causal sense, namely; failure to accede to worker's request for extra pay; the employer's request to undertake combined duties; the employer's failure to allow the worker to go home after he had been given the warning letter; the direction to perform work which "fell below his usual classification" and, the level 1 work the worker was requested to perform on the afternoon of 20 February 2015 after being given the warning letter. It was the worker's view that the direction to perform this work was punitive and deliberately intended to specifically target the worker.

The arbitrator was satisfied on the balance of probabilities that the worker's psychological injury was predominantly caused by the disciplinary action taken by the employer in meeting with and handing him a warning letter. The arbitrator in coming to this view referred to the worker's evidence, the worker's medical histories and the statement of Mr Festa, the airline services co-ordinator. The arbitrator stated that this documentation was consistent with receipt of the warning letter having a significant effect of the worker's psyche. The extent to which the "direction to undertake level 1 duties was also causative was due to the worker's "erroneous" perception, which was itself directly caused by the disciplinary action and the worker's psychological reaction to it."

The arbitrator lastly dealt with the issue of reasonableness, specifically, whether it was reasonable to issue the warning letters to the worker and other workers and, whether that action was carried out in a reasonable way. The arbitrator concluded that it was reasonable for the employer to take disciplinary action in the circumstances.

Appeal decision

The appeal filed by the worker centred on the arbitrator's finding that the injury was wholly or predominantly caused by disciplinary action, when there was no such medical evidence.

DP Snell stated that the issue was whether the arbitrator erred in deciding the whole or predominant cause issue without expert evidence or against the weight of the evidence and/or whether the arbitrator misdirected himself as to the relevant test.

In assessing the evidence DP Snell stated that it was clear that the level 1 duties assigned to the worker were assigned in the morning prior to the disciplinary interview and letter and therefore the arbitrator's reasoning with

respect to the misperception of these duties could not stand. In short, the worker's perception of the duties when they were assigned could not have been due to the psychological effect of the disciplinary interview which occurred later that day.

DP Snell cited the High Court decision of *Stead v State Government Insurance Commission* [1986] HCA 54;161 CLR 141

> "All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result."

DP Snell concluded that the arbitrator's factual error regarding what time the level 1 duties were conducted and his conclusions, affected the overall result and was an appealable error.

DP Snell stated that the need for medical evidence dealing with the causation issue in section 11A(1) of the 1987 Act, will depend on the facts and the circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the worker's statement and the medical histories. Proof of whether those factors, which potentially provide a defence under section 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 employer with respect to discipline could not be resolved on the basis of the arbitrator's common knowledge and experience.

DP Snell concluded that the employer could not on the available evidence, 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.

Implications

The worker's statement and the history taken by medical examiners must be carefully reviewed to ascertain the basis or the reasons for a worker's claim for psychological injury as there can be a number of potentially causative factors.

Expert medical evidence should be obtained to comment on what factors/issues were the whole or predominant cause of injury.

For more information, please contact:

Mary Karekos
Partner
T: 02 8257 5731
M: 0419 281 720
mary.karekos@turkslegal.com.au