WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

(Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act* 1998)

MATTER NO: **10758/10**
APPLICANT: **Kerry Newman**
RESPONDENT: **Muswellbrook Crane Service Pty Ltd**

DATE OF DETERMINATION: **10 June 2011**

The Commission determines:

1. Respondent to pay the applicant weekly payments of compensation of the rate of $1,405.40 from 16 July 2010 to 13 January 2011 pursuant to section 36 of the *Workers Compensation Act* 1987.

2. Respondent to pay the applicant weekly payments of compensation at the maximum statutory rate for a worker with a dependent child from 14 January 2011 to 7 February 2011 pursuant to section 37 of the *Workers Compensation Act* 1987.

3. Respondent to pay the applicant weekly payments of compensation at the maximum statutory rate for a single worker with one dependent child from 8 February 2011 to date and continuing, as adjusted in accordance with the provisions of the Act, pursuant to section 40 of the *Workers Compensation Act* 1987.

4. Respondent to pay the applicant's reasonably necessary medical and related treatment expenses pursuant to section 60 of the *Workers Compensation Act* 1987.

5. The respondent to pay the applicant's costs as agreed or assessed. For the purposes of Schedule 6 Table 4 Item 4 of the *Workers Compensation Regulation* 2010, I certify this as a complex matter with a 25 per cent increase in costs otherwise available to the parties.

A brief statement is attached to this determination setting out the Commission's reasons for the determination.

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF GRAHAME EDWARDS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

FOR REGISTRAR

Trish Dotti
Senior Dispute Services Officer
By delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Kerry Newman, 63 years of age, filed an Application to Resolve a Dispute (the Application) in the Workers Compensation Commission (the Commission) on 23 December 2010 claiming weekly payments of compensation at the rate of $1,791.87 with a dependent child from 19 July 2010 to date and continuing. Mr Newman also claims medical and related treatment expenses, seeking a general order pursuant to section 60 of the *Workers Compensation Act* 1987 (the 1987 Act).

2. Part 4 of the Application sets out the following injury details:

   Date of injury
   "arising from the nature and conditions of employment – 9 July 2010 (date adopted by insurer)"

   Place of injury
   "within the environs of the respondent"

   Injury description
   "psychological"

   Describe how the injury occurred
   "The Applicant sustained psychological injury arising from harassment, bullying and intimidation in the workplace. Further, the Applicant has sustained injury arising from failure by management to adequately address and respond to his concerns including concerns in relation to workplace safety."

3. The applicant stopped work on or about 16 July 2010. He has not been paid compensation benefits by the respondent.

4. The insurance scheme agent for the respondent, Allianz Australia Workers' Compensation (NSW) Limited issued a notice pursuant to section 74 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the section 74 notice) dated 13 August 2010 declining liability for the following reasons:

   "

   - Your psychological injury is not a workplace injury within the meaning of Section 4 of the Workers Compensation Act 1987 ("the 1987 Act") and/or Section 9A of the 1987 Act.
   - You have not sustained a workplace injury for which compensation is payable under the workers compensation legislation: Section 4 and/or 11A of the 1987 Act.
   - You are not prevented from working because of a workplace injury: Section 33 of the 1987 Act.
   - You do not require treatment for a workplace injury: Section 60 of the 1987 Act.

   …

   The information which supports your claim for compensation indicates that you are suffering from an anxiety disorder attributable to your employment as advised by your Nominated Treating Doctor Dr Bev Brookes on the 16th July 2010.

(a) You assert that a widespread and systemic lack of safety in Muswellbrook Cranes was causing you distress.
(b) You allege you have been subjected to poor management from previous and recent management including unreasonable workplace demands and decrease in supporting staff in late 2009 and more recently in 2010 performance review.
(c) You state concerns that you were subjected to performance management which has also contributed to your distress.

The information which supports a decline of your claim for compensation indicates that the symptoms of distress at the time you went off work and at the present time were not and are not of adequate frequency and severity to warrant a clinical diagnosis as defined by the Diagnostic and Statistical Manual of the Mental Disorders, Fourth Edition as reported by Psychologist Simon Matthews. Therefore, even though your employment with Tutt Bryant Group [acquired the respondent in or about 2008] has caused your current sub-clinical levels of distress it is not adequate to warrant a psychological diagnosis and hence entitlements to a Workers Compensation claim.

Furthermore, you have had several recent and concurrent life stressors that have reported to have served to increase your vulnerability to distress at work.

It has also been determined through collective statements you did not raise any recent concerns with management regarding these matters until the commencement of a review by Mr Ng and the formalisation of this through an amended contract of employment. In general, there is no evidence available to suggest that you have been subjected to recent improper management or that any other workplace factors has impacted you of recent times.

We prefer the information which supports the decline of your claim to that of Dr Brookes because Mr Matthews is a consultant psychologist, and he has reviewed all documentation and administered all of the appropriate tests and interviews to identify your presenting symptoms/complaints.

…

Based on the information considered we have concluded that:

(d) You have not sustained a workplace injury for which compensation is payable under the workers compensation legislation: Section 4 and/or 9A of the 1987 Act.

    Why?

    Mr Matthews has stated that your signs and symptoms of distress were and are of inadequate frequency and severity to warrant a clinical diagnosis as defined by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition. However, due to the reasons outlined above Mr Matthews does not believe that work is a substantial contributing factor to your current presentation.

    Even in the event that it is deemed that you are suffering from a diagnosable condition within the meaning of and Section 4 and Section 9A of the 1987 Workers Compensation Act.

You have alleged that there was a generalised lack of understanding by senior management with respect to workplace safety. However based on the available information, there is insufficient evidence to support your allegations of a widespread and systemic lack of safety in Muswellbrook Cranes. While workplace reports acknowledged that historically there had been a lack of proper safety procedures which were reportedly considered to be a factor in one workplace death, these reports also noted changes over time, particularly of recent times, which had been frustrated somewhat by your own apparent lack of work performance in this area. It is noted that you had apparently not described any alleged distress relating to this factor until recently and Mr Ng's report noted that he only became aware of this information in early July 2010, approximately one week before you went off work. This factor, therefore, is not considered a major causative factor to your current subclinical distress.

Further you allege that you have been subjected to poor management by both previous and current managers. However based on the available information, while there appears to be confirmation by a number of workplace representatives of your previous Manager's poor management practices it is also noted that your own information was reportedly instrumental in your previous manager leaving the company in February 2010 after which time Mr Meyer, by whom you had been previously managed for a number of years prior to this, returned in an acting capacity. A permanent appointment to this position has reportedly been made effective 19 July 2010. The reports from Mr Ng, Mr McDonald and Mr Stein all expressed surprise that Mr Newman would still be impacted by management practices of the previous manager which ceased over six months ago. In relation to your allegations concerning your current manager, there is insufficient evidence to support allegation of your manager either directing you not to smoke in the workplace, or failing to review your performance or of placing staff under duress to remove their names from a petition.

Mr Matthews stated that it is evidence that you are experiencing concurrent life stressors which served to increase your vulnerability to distress at work. Therefore it is concluded that these pre-existing psychological factors and recent life stressors have likely increased your vulnerability to distress arising from other work factors rather than being causative to it.

It was additionally noted that you remained at work despite the presence of these factors until the recent impact of the recent performance management issues. This is further supported by the statements collected by Mr Ng, Mr Stein, Mr Cox, Mr Meyer, Ms Teague and Mr McDonald where there was no evidence available to suggest that you had been subject to recent improper management or that any other workplace impacted you in recent times.

(e) You have not sustained a workplace injury for which compensation is payable under the workers compensation legislation: Section 4 and/or 11A of the 1987 Act.

Why:

Even in the event that it is deemed that you are suffering from a diagnosable condition within the meaning of Section 4 and Section 9A of the 1987 Workers Compensation Act.

Under Section 11A of the 1987 Act compensation is not payable in respect of a psychological injury if it was wholly or predominately caused by reasonable action taken by your employer with respect to performance management and/or discipline.

It was noted that you have had ongoing management of your performance and employer reports indicate that Mr Ng and Mr Meyer have held a number of informal discussions through 2010 relating to your underperformance.

- On 1st July 2010 Mr Ng met with you to discuss various aspects of your performance.
- On the 2nd July 2010 you were given an amended contract of employment by Mr Ng subject to performance improvements as your performance had improved. At this point you signed the new contract on the evening before you went off work.

The reported history of performance management with a previous Manager and the recent informal performance management by your current Manager combined with in incentivised employment contract appear to have triggered your reported distress. Although you were reportedly unhappy about a number of aspects of your employment both past and present, it is noted that you did not raise any recent concerns with management regarding these matters until the commencement of a review by your manager and the formalisation of this through an amended contract of employment. In general, there was no evidence available to suggest that you had been subject to recent improper management or that any other workplace factor had impacted him of recent times.

(f) You are not prevented from working as a result of your workplace injury: Section 33 of the 1987 Act.

Why?

For the reasons above, any incapacity you may have for work is not attributable to a compensable workplace injury.

(g) You do not require ongoing treatment reasonable and necessary for a workplace injury: Section 60 of the 1987 Act.

Why?

For the reasons above, any treatment needs you may have are not attributable to a compensable workplace injury.”

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:

   (a) Injury;
   (b) Whether the injury was wholly or predominately caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal;
   (c) Incapacity for work, and
   (d) Whether medical or related treatment expenses were reasonably necessary.

PROCEDURE BEFORE THE COMMISSION

6. The parties attended an arbitration/conciliation hearing on 20 April 2011. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:

   (a) Application and attached documents;
   (b) Reply and attached documents;
   (c) Application to Admit Late Documents filed by the applicant on 15 February 2011, and attached documents;
   (d) Application to Admit Late Documents filed by the applicant on 8 March 2011 and attached documents;
   (e) Application to Admit Late Documents filed by the applicant on 18 March 2011 and attached documents;
   (f) Application to Admit Late Documents filed by the respondent on 4 February 2011 and attached documents;
   (g) Application to Admit Late Documents filed by the respondent on 16 February 2011 and attached documents;
   (h) Application to Admit Late Documents filed by the respondent on 15 April 2011 and attached documents, and
   (i) Exhibit A – Medical Certificate of Dr Brookes, dated 14 February 2011.

Oral Evidence

8. There was no oral evidence given at the arbitration hearing. The parties relied upon the documentary evidence; written and oral submissions made by counsel.

FINDINGS AND REASONS

Issue 1 – Did the applicant suffer an injury arising out of or in the course of his employment within the meaning of sections 4 and 9 of the 1987 Act?

9. The applicant claims he suffered a psychological injury within the meaning of section 11A(3) of the 1987 Act arising out of and in the course of his employment with the respondent.

10. Mr Newman had two periods of employment with the respondent; the first period was in the mid 1990s when he worked in the accounts and payroll section and his second period of employment commenced in 2001 when appointed as the safety officer. Mr Newman had no qualifications in occupational health and safety when appointed to this position. He successfully completed a certificate in workplace safety in 2004. Mr Newman worked as the Occupational Health and Safety Manager until he stopped work on 15 July 2010.

11. Mr Newman provided a statement to Mr Matthews, clinical psychologist qualified by the respondent, which he relies upon to substantiate the causation of his psychological injury as a result of his work with the respondent.

12. Mr Newman found the respondent's safety management system had been updated, but was based upon repealed 1983 legislation, and that policies and procedures had not been implemented with the respondent having little understanding of Occupational Health & Safety (OH&S) legislation. Mr Newman advised the respondent of its failure to adequately implement OH&S policies in accordance with the legislation. He commenced to review the legislation and write a new safety system for the respondent to meet the legislative requirements.

13. Unfortunately, a fatality occurred in 2003 when an employee of the respondent was killed at a mine site, crushed by a load dropped from a crane. Mr Newman attended the scene, assisted company employees who witnessed the accident, and informed the parents and partner of the deceased of the circumstances of the death.

14. The circumstances of the fatality were investigated resulting in the respondent and a director being charged. Mr Newman was involved in the investigation, providing information, records and documents relating to the respondent's OH&S policies and procedures. Mr Newman found the investigative process to be very stressful.

15. Whilst Mr Newman organised counselling for staff members of the respondent after the fatality, he did not seek counselling, notwithstanding he was having "clear mental images of Jamie's lifeless body lying on the ground, and the look on his daughter's face as her mother screamed when she was informed of Jamie's death".

16. Mr Newman with the assistance of a consultancy firm wrote OH&S policies and systems to be implemented prior to the hearing of the charges against the respondent and the director. Mr Newman worked long hours, sometimes seven days a week, to complete policy and safety systems to meet the requirements of the OH&S legislation. He also worked with the respondent's legal representatives in the preparation of the respondent's defence to the charges.

17. In December 2005 a second fatality occurred involving the electrocution of an employee of the respondent in its work shop. This second fatality, according to Mr Newman, had a

significant impact not only upon himself but all members of staff as the respondent was “a close knit family company”.

18. According to Mr Newman, it was decided by the legal representatives of the respondent that the director should not give evidence but instead he be called to give evidence at the hearing. The respondent pleaded guilty to the charges and, as I understand it, the charges against the director were withdrawn. There is some dispute between the respondent and the applicant whether the charges were withdrawn against the director but this is not relevant to my determination.

19. Mr Newman gave evidence for the respondent when it entered a plea of guilty to the charges. I understand the hearing was either in 2007 or 2008. Apparently, Mr Newman was the only witness called by the respondent. He was cross-examined by counsel described as a “QC”. Mr Newman found it difficult and very stressful when giving evidence and being cross-examined.

20. Mr Newman believed that no real significant changes were made by the respondent to its workplace safety management policies and procedures following its prosecution, and thought “what’s the point?”.

21. Following the court case, Mr Newman noticed that his ability to work was effected, and his attention span seemed to have shortened. He estimated that the loss of his working ability was affected by about 10 per cent. Mr Newman was still working 50 hours per week Monday to Friday, and also on either Saturday or Sunday but still felt he was “pulling my weight”. Mr Newman was a salaried employee and was not paid overtime for the extra hours of work.

22. Mr Newman, as part of his duties, spoke to staff members about work and safety issues and the cause of the fatalities. He found it difficult to speak about the fatalities which he believes took “a personal toll”.

23. In July 2009 Mr Meyer, the director who had been charged, retired. Mr Allan Crumbley was appointed the new general manager upon Mr Meyer’s retirement. Mr Crumbley worked with Mr Meyer for approximately six months before taking up his position.

24. Mr Newman alleges that Mr Crumbley told him within the first week of his appointment that he believed in the “Machiavellian theory of rolling a few senior heads to establish his power base, and that I could be one of them if my performance was not up his standard”. Mr Newman claims that Mr Crumbley told him that the OH&S management system which he had developed was “useless”, and that “everything I had done over the last 10 years was a waste of time, and certainly no benefit to the company”.

25. Mr Newman said that from July 2009 until February 2010 he came to work every day expecting to be sacked. He described the effect on him over this period as “absolutely debilitating, and at times still is the fear of losing my job was overwhelming and I found myself breaking down and crying on many occasions, both before and after work”. Mr Newman claims that Mr Crumbley’s management style resulted in the OH&S co-ordinator resigning. Mr Newman alleges that Mr Crumbley called him into his office the day after the OH&S co-ordinator resigned and said to him: “I’ve cut off your arms and legs, what are you going to do now?” Mr Newman also alleges that he was given unreasonable work expectations and tasks set by Mr Crumbley. He felt he was being set up to fail. His ability to work dropped, which he estimated to be 50 per cent of his former capacity, and that his smoking increased from 20 cigarettes a day to 80.

26. Mr Crumbley's management style caused disruption. Mr Newman was consistently told by Mr Crumbley that he was targeting him. Mr Newman said that morale in the company was low and that he was "so scared of losing my job", and that the office manager broke down crying on a number of occasions caused by Mr Crumbley's conduct.

27. In November 2009 Mr Newman went to Perth to undertake an OH&S audit and conduct training of staff. Mr Newman found that he was unable to work at his full capacity whilst in Perth, but that the break away from the respondent's office was a "pleasant relief". The result of the audit was poor. Mr Newman said that he never handed in his report because he was told by a senior manager in the Perth office that the audit result needed to be favourable.

28. In the holiday break between Christmas and New Year, Mr Newman was told by Mr Crumbley that he had planned to "sack me in March 2010 for not performing but as I had shown some contrition he would give me the 12 weeks to prove I could perform properly, but if he was not satisfied at that time I would be dismissed". Mr Newman reacted by crying uncontrollably and pleaded for his job.

29. Mr Newman said that the statement of Mr Crumbley caused him more stress and worry about losing his job, that his "self-esteem and confidence were gone and I felt defeated".

30. Mr Crumbley took away Mr Newman's staff, which he found humiliating and embarrassing. Mr Newman believed that Mr Crumbley was trying to pressure him into resigning.

31. Apparently, at the request of the respondent, Mr Newman saw a psychologist, possibly from an entity styled "AusPsych", in January 2010 because he felt "like I couldn't go on". Mr Newman claims the psychologist suggested that he should leave the workplace and find employment elsewhere. Mr Newman decided against this course deciding to obtain the assistance of some of the longer serving crane drivers to take the issue of Mr Crumbley up with management. It seems that the action instigated by Mr Newman was successful because Mr Crumbley was dismissed in February 2010. Mr Newman thought it would be the end of the matter with the dismissal of Mr Crumbley, but said he could not get back to normal productivity and was unable to concentrate. Mr Newman thought there was a gradual improvement after Mr Crumbley left believing he was working at about 80 per cent of normal capacity, the same level following the fatalities.

32. Another work accident occurred at the respondent's workplace about the time Mr Newman and other members of staff were meeting with management about Mr Crumbley. The accident was a serious one resulting in the operations manager's throat being cut. This accident, according to Mr Newman, brought back memories of the earlier fatalities; heightened his concern about the respondent's failure to implement proper OH&S safety policies and procedures, and its failure to ensure safe systems of work were in place. Mr Newman believed that the accident highlighted the respondent's lack of training of staff with OH&S.

33. On 2 July 2010 there was a meeting between Mr Newman and Mr Ng, executive director of the respondent. The meeting with Mr Ng was in relation to employment contracts which had been introduced by Mr Crumbley before his termination in February 2010.

34. Mr Ng offered Mr Newman a new contract of employment with a two per cent pay increase in contrast to four per cent being offered to other staff, advising that the contract would be reviewed, subject to performance, in January of 2011 and, if the review was satisfactory, then another two per cent salary increase would be granted meaning Mr Newman would

receive a four per cent increase in his salary. There was also discussion between Mr Ng and Mr Newman about his performance, but it appears that the discussion was in the context of the two per cent pay increase with an increment of another two per cent subject to performance review in six months time.

35. According to Mr Newman, "all the grief of the Mr Crumbley era started coming back to me after that meeting with Mr Ng. My heart was racing, I had an upset stomach, and I was worried again that I was going to lose my job. Mr Ng kept saying to me that it wasn't the case, that I would not lose my job. I tried to explain to Mr Ng what had happened with Mr Crumbley, that I felt I was again on probation and fearful, and he said that Mr Crumbley had left six months ago so it should not be an issue. I still felt panicked and extremely anxious".

36. There was also some conversation between Mr Ng and Mr Newman about smoking in the workplace, and that Mr Ng offered "patches" and support for Mr Newman to stop smoking. Mr Newman declined Mr Ng's offer as he believed "the company should not pay for something which is my problem".

37. There was another meeting between Mr Newman and Mr Ng on 7 July 2010. Mr Newman again expressed his concern with the two per cent pay offer, saying that he felt "like being on probation". Mr Newman acknowledged that Mr Ng explained to him that he was not on probation but said he was still affected by Mr Crumbley's management style; the fear of losing his job, and by the fatalities.

38. There was a further conversation between Mr Ng and Mr Newman on 14 July 2010 about the employment contract. There was a discussion about a petition which apparently had been signed by some members of staff relating to the new contracts. There was also discussion about OH&S issues.

39. The following day, Mr Newman again met with Mr Ng but on this occasion Mr Meyer [returned to the respondent after Mr Crumbley was dismissed until the new general manager was appointed on 19 July 2009] was present. There was discussion about safety issues including the fatigue of an employee who worked nine 12 hour night shifts. There was also a brief discussion, according to Mr Newman, about pay review matters. Mr Newman felt overwhelmed, and was shaking by the end of the meeting. He said he could not continue working for the respondent. This was his last day at work.

40. Mr Newman consulted Dr Brookes on 16 July 2010 who diagnosed him with "anxiety disorder", issuing a WorkCover medical certificate certifying him unfit for work from 16 July to 30 July 2010.

41. On 21 July 2010 Mr Newman attended "AusPsych" indicating the following issues of concern:

    (a) Fear of loss of job;
    (b) Conflict with manager/supervisor [Mr Crumbley];
    (c) Specific incident at work, and
    (d) Career concerns.

42. The notes of the consultation with Mr Newman of "AusPsych" indicate the following:

    "scared to go to work
    putting it off

lot of fear
no-one listens
performance down
fear will lose job
no improvement 12 months
manager brought in new guy - said better at OH&S than Kerry
new guy changes stuff
went to work 4 6 mths expecting to be sacked
Ben suggested get new job [referring to consultation in January 2010]
Decided instead to fight – complained – sacked the guy [referring to Allan Crombley]
Brought new manager back [referring to Mr Meyer] – moving backwards again OH&S
two fatalities 03 + 05
03 company manager charged OH&S
Couldn't put manager in witness box
Put Kerry in instead
Can't do it anymore – won't do it"

43. The applicant's case is that the causation of his psychological injury arising out of or in the course of his employment with the respondent, namely, the effect upon him by the fatalities, concern about OH&S, and fear of losing his job because of "bullying" by Mr Crumbley is corroborated by the notes of the psychologist at "AusPsych" dated 21 July 2010, consistent with his statements and recorded histories of complaint given to Mr Matthews, Drs Lee and McClure.

44. The applicant submitted that there was no evidence before the Commission of the consultations he had with the psychologist named "Ben" in January 2010 to whom he was referred by the respondent, and that an inference should be drawn that the documents would not be favourable to the respondent's case. It was accepted by the parties that the applicant was referred to psychologists by the respondent. An order for production of the records of "AusPsych" was granted to the respondent, and whilst records were produced they did not contain the notes of consultations in January 2010. I do not know the reason why all the records relating to the applicant were not produced by "AusPsych". In any event, the records relating to the consultations in January 2010 were not in evidence and I draw no adverse inference against the respondent. I accept that the applicant was referred to "AusPsych" by the respondent for counselling because of Mr Crumbley's management style which could be classified as "bullying".

45. The applicant also submitted that section 11A is not applicable, and in any event, the onus is upon the respondent to discharge the section 11A defence.

46. The applicant submitted that the discussions with Mr Ng were not a performance appraisal or a disciplinary matter but merely related to a contract of employment, and whilst the applicant was unhappy about receiving a two per cent salary increase it was not a matter that came within the provisions of section 11A.

47. The respondent's primary submission is that the applicant did not suffer a diagnosable psychological or psychiatric injury relying upon the opinion of Mr Matthews. Mr Matthews was of the opinion that Mr Newman had symptoms of distress which "were not and are not of adequate frequency and severity to warrant a clinical diagnosis as defined by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision" at the time he stopped work, also at the time of consultation with him on 3 August 2010. The opinion of Mr Matthews is to be contrasted with the opinions of Drs Lee and McClure.

48. Dr Lee was of the opinion that Mr Newman fulfilled the criteria for major depression characterised by persistent depressed mood with impaired concentration and social and work functioning, and that employment was a substantial contributing factor to his psychiatric condition.

49. Significantly, in my view, Dr Lee was of the opinion that whilst Mr Crumbley had left the respondent in February 2010 there was still "unresolved issues from various fatalities and because the respondent refused to provide OH&S training for its employees".

50. Dr McClure disagreed with Dr Lee's diagnosis of major depression finding that the applicant suffered with "Generalised Anxiety Disorder" as defined in the DSM-IV-TR (APA 2000). Dr McClure was of the opinion that Mr Newman "respectively believes himself to have been affected by the two fatalities (2003 and 2005) and in particular by having to testify at court in 2007 or 2008", and "is more likely that Mr Newman increasingly gave up believing in his efficacy as OH&S manager, as described by him in his repeated exclamations 'what's the point?'." His productivity declined largely as a passive aggressive statement of his opposition to the direction management were taking. He was unable, assertively, to state his objections. This would be consistent with a "somewhat dependent personality function (as evidenced by Mr Newman's long history of alcohol dependence)".

51. Dr McClure disagreed with the opinion of Mr Matthews finding that Mr Newman "does have a definable diagnosable psychiatric injury within the meaning of the Workers Compensation Act 1987 and workplace events have contributed substantially to this condition", but believed that Mr Newman's psychological injury was wholly or predominately caused by the "product of performance appraisal, discipline and other matters canvassed within section 11A of the relevant Act".

52. The respondent submitted that reliance cannot be placed upon the opinion of Dr McClure because he was not given a correct history by the applicant. The respondent relied upon the medical records of Dr Brookes which show that the applicant consulted her in 2003 with depression for which he was prescribed anti-depressive medication. The medical records of Dr Brookes show consultations for depression on three occasions being 17 February, 21 February and 11 March 2003. There is no further reference to the applicant consulting Dr Brookes or any other medical practitioner at that practice for depression after March 2003, although there appears to be an absence of medical records or consultations from 2006 until 16 July 2010. It is unknown if the applicant consulted other medical practitioners between 2006 and 2010.

53. The applicant had been forthright, in my opinion, with histories given to various medical practitioners including Dr Lee, Dr McClure and Mr Matthews about his abuse of alcohol, and that he was an alcoholic but stopped drinking in 1993 after he joined Alcoholics Anonymous.

54. Mr Newman married in 2000. He has a daughter from this relationship. Mr Newman is a step-father to his wife's son, who is either 19 or 20 years of age at the present time. There is reference to discussion between Mr Newman and psychologists at "Hunter Psychology", after he was referred to this practice in February 2011 about difficulties with his daughter and step-son but, in my opinion, the notes show nothing more than family issues which are not causative of Mr Newman's psychological or psychiatric condition. Similarly, I do not place any weight upon the failure by Mr Newman to give the history about consulting Dr Brookes's practice in 2003 on three occasions for depression when he saw Dr McClure in 2011. In my view, supported by histories given to the various medical providers, the causation of Mr Newman's psychological or psychiatric condition was the affect of the

fatalities; his concern about OH&S; giving evidence on behalf of the respondent; the management style of Mr Crumbley, and his apprehension about job security when discussing the contract review with Mr Ng in July 2010.

55. I prefer the opinions of Drs Lee and McClure to the opinion of Mr Matthews that the applicant suffers a diagnosable psychiatric or psychological condition as a result of work events.

56. In my view, the histories given by the applicant to Drs Lee and McClure represents a fair climate of the opinion expressed by them in their reports: *Paric v Holland Constructions Pty Limited* [1984] 2 NSWLR 505 at pp 509-510.

57. The tests for an injury "arising out of or in the course of employment" under sections 4 and 9, and for employment being a "substantial contributing factor" under section 9A must be considered separately: *Badawi v Nexon Asia Pacific Pty Limited t/as Commander Australia Pty Limited* [2009] NSWCA 324 (*Badawi*).

58. The phrase "arising out of" involves a causative element and is to be inferred from the facts as a matter of common sense (*Badawi*).

59. Deputy President Roche considered the meaning of "arising out of" in *Qantas Airways Limited v Watson (2)* [2010] NSWWCCPD 38 at 76:

> "as observed in *Badawi v Nexon Asia Pacific Pty Limited,* the meaning of 'arising out of employment' is settled. The majority in *Badawi* referred to and endorsed the approach in *Nunan v Cockatoo Island Docks & Engineering Co Ltd* (1941) 41 SR (NSW) 119, where the court 'adopted a commonsense approach to the application of the phrase, noting that it involved a causative element'."

60. The commonsense test of causation in workers compensation was considered by Kirby P in *Kooragang Cement Pty Limited v Bates* (1994) 35 NSWLR 452 (*Kooragang*) where his honour said at 463:

> "The result of the cases is that each case where causation is an issue in a worker's compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish at such incapacity or death 'results from' a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement of compensation."

61. Whilst the facts in *Kooragang* are different to those in this case, what is required is a commonsense evaluation of the causal chain or a causal development to establish whether there is a connection between Mr Newman's psychological injury and his employment that the injury has arisen out of.

62. The onus of proof of the commonsense test of causation is at all times on the applicant: *Flounders v Millar* [2007] NSWCA 238 per Ipp JA:

> "It remains necessary for a plaintiff, relying on circumstantial evidence, to prove that the circumstances raise the more probable inference in favour of what is alleged. The circumstances must do more than to give rise to conflicting inferences of equal degree of probability or causability. The choice between conflicting inferences must be more than a matter of conjecture. If the court is left to speculate about possibilities as to the cause of the injury, the plaintiff must fail. As I have attempted to demonstrate, there are many cases in this court that follow and adopt these principles. I would explain *Binks* simply on the basis that the court in that case was not referred to the relevant authorities. The rules governing causation in common law are those expressed in *Luxton v Vines* and *March v Stramare (E & MH) Pty Limited* (1991) 171 CLR 406, mainly, the test of commonsense, with the onus of proof at all times being on the plaintiff."

63. Applying a commonsense evaluation of the facts in this matter, the matters which the applicant sets out in his statements as the causative elements of his psychiatric or psychological condition are corroborated by the histories recorded in the "AusPsych" clinical notes when he consulted that practice on 21 July 2010.

64. I find that the applicant suffered a psychological injury within the meaning of sections 4 and 9 of the 1987 Act as a result of the fatalities; the failure by the respondent to implement OH&S policy and procedures demonstrated by its prosecution; the autocratic style of management by Mr Crumbley to such an extent that the applicant believed he could lose his job, and that the discussions with Mr Ng in July 2010 about the employment contract reinforced the applicant's concern following "bullying" by Mr Crumbley that his employment was in jeopardy despite assurances, which I accept, from Mr Ng. Any perception by Mr Newman about his employment being in jeopardy when speaking to Mr Ng was, in my opinion, a manifestation of the symptoms of his psychiatric condition. Mr Newman reacted to real events that occurred at work, and not erroneous perception of external events: *State Transit Authority of New South Wales v Chemler* [2007] NSWCA 249 (*Chemler*) and *Attorney General's Department v K* [2010] NSWWCCPD 76 at [46].

65. It is clear from *Badawi* that for employment to be a "*substantial contributing factor*" to the injury for the purposes of section 9A, the causal connection must be "*real and of substance*". The determination of whether the "*employment concerned*" was a "*substantial contributing factor*" to the injury involves a causative element to be decided after a consideration of all the evidence. "It is not merely a medical question": *Adwer Pty Limited t/as Peninsular Nursing Home v Kernick and Anor* [2006] NSWWCCPD 222 at [31] per Snell ADP.

66. "*Employment"* for the purposes of section 9A is the same "*employment*" that is under consideration in sections 4 and 9. In determining whether the applicant's employment was a substantial contributing factor the matters referred to in 9A(2) must be taken into account to the extent that they are relevant.

67. The respondent submitted that the applicant's distress or if he suffered with a psychiatric condition it was caused by "concurrent life stressors" as found by Mr Matthews and not as a result of his employment. Whilst Mr Matthews refers to "concurrent life stressors" of the applicant in his report, I think the history relating to Mr Newman's wife's illnesses (which she has suffered with for many years) and the death of two friends must be weighed against the "employment concerned", especially the fatalities; concern about OH&S matters; the adverse impact by the management style of Mr Crumbley, which Dr McClure described as "a perceived threat to ones employment and a negative evaluation by a supervisor represents significant stressors even for a person of normal psychological 'fortitude'", and his worry

about job security when discussing the employment contract with Mr Ng. I do not accept the respondent's submission.

68. I am satisfied of the causal connection between the applicant's psychological injury and his work tasks being "real and of substance", and find that employment was a substantial contributing factor to Mr Newman's injury.

Issue 2 – Was the applicant's injury wholly or predominately caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to performance appraisal or provision of employment benefits?

69. The applicant submitted that the defence provided by section 11A is not available to the respondent in this case as there was no evidence that the meetings between Mr Ng and the applicant related to "transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers".

70. I accept the respondent's submissions that the discussions between Mr Ng and Mr Newman were about the terms of the proposed employment contract and that Mr Newman was unhappy with the percentage increase of salary. I also accept that Mr Ng in the context of explaining the reasons for the percentage increase raised the subject of Mr Newman's work performance and the time spent smoking during work hours. In my view, the discussion was about "employment benefits" which falls within the defence of section 11A.

71. The onus of proof of establishing any of the matters under section 11A falls upon the employer: *Department of Education and Training v Jeffrey Sinclair* [2004] NSWWCCPD 90 at [23] and *Pirie v Franklins Ltd* (2001) 22 NSWCCR 346.

72. The medical evidence does not support the first criteria required by section 11 A that the applicant's injury was "wholly or predominantly caused".

73. "Wholly" and "predominantly" are separate concepts and a finding of one or the other needs to be considered: *Smith v Roads and Traffic Authority of NSW* [2008] NSWWCCPD 130 per Snell ADP and *Allen v Department of Community Services* [2010] NSWWCCPD 78 at [87].

74. In *Jackson v Work Directions Australia Pty Limited t/as Work Directions Australia* (1998) 17 NSWCCR 70 Walker J considered the meaning of "wholly or predominantly" in the context of section 11A(1). His Honour at [109] – [111] said:

> "'Wholly' is self explanatory. Psychiatric cases sometimes turn upon single traumatic events but more often they involve multiple stressors not all of which may be work related. If those stressors happen to fall into one of the categories as I have just found then the meaning of the word 'predominantly' will require interpretation.
>
> The Macquarie dictionary defines the verb 'predominate' as:
>
> 1. To be stronger or leading element preponderate; prevail.
> 2. To have or exert controlling power,
> 3. To surpass others in authority or influence
> 4. To be more noticeable or imposing than something else
> 5. To dominate or prevail over.
>
> The adverb 'predominantly' appears to me to be used in the sense that the s 11A(1)(b) cause was stronger and prevailed over other causes."

75. His Honour reasoned at [112] that for an employer to succeed, it must establish that its actions wholly or predominantly caused psychological injury and prevailed over all others.

76. The meaning of "predominantly caused" was considered by the Commission in *Ponnan v George Weston Foods Limited* [2007] NSWWCCPD 92 in which Handley ADP at [24] applied the dictionary meaning "mainly or principally caused". Deputy President Roche agreed with this in *McCarthy v Department of Corrective Services* [2010] NSWWCCPD 27 at [157].

77. The respondent's medical case fails to establish that the applicant's psychological injury was "wholly or predominantly caused". Mr Matthews was of the opinion that the applicant suffered with no diagnosable psychiatric condition.

78. Whilst the respondent submitted on the question of causation of the applicant's psychological injury that the diagnosis of Dr McClure should not be accepted because the applicant failed to give the history of being treated for depression in 2003, in respect of the section 11A issue it submitted that Dr McClure's opinion that the applicant's psychological injury was "wholly or predominantly the product of performance appraisal, discipline other matters canvassed within the section 11A of the relevant act" should be accepted.

79. I cannot accept this submission because Dr McClure was of the opinion that Mr Newman's psychiatric condition was caused by "work place events", referring to the fatalities, giving evidence, OH&S matters, and the problems with Mr Crumbley. None of these "work place events" could be described as "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'" within the meaning of section 11A. I found that the "work place events" referred to above were the causative elements of Mr Newman's psychological injury. The respondent has not discharged its onus to establish the defence provided by section 11A.

80. I find that the applicant's psychological injury was not "wholly or predominately" caused by action taken or proposed to be taken by the respondent with respect to performance or provision of employment benefits within the meaning of section 11A. The applicant may have been unhappy about the percentage of pay offered in the new contract but it was not the cause of his psychological injury.

Issue 3 – Was the applicant incapacitated for work as a result of his psychological injury?

81. The applicant was certified totally incapacitated for work, in accordance with WorkCover medical certificates, from 16 July 2010 except for a closed period from 30 August 2010 to 10 September 2010 when certified fit for suitable duties.

82. Dr McClure was of the opinion when he saw the applicant on 7 February 2011 that "he would be capable of at least part-time work of reduced complexity compared with his pre-injury duties".

83. Weighing up the medical evidence, I find the applicant was totally incapacitated for work as a result of his psychological injury from 16 July 2010 until 7 February 2011 when seen by Dr McClure.

84. There was no submission by either counsel as to the applicant's current weekly wage rate. There is no evidence that the applicant was paid under an award. It appears that he was

employed under a contract negotiated between himself and the respondent as evidenced by the contract offered in July 2009.

85. I find that the applicant was not a worker or employee to whom paragraphs (a), (b), or (c) of section 42 of the 1987 Act applies. I find that the applicant's average weekly earnings before becoming incapacitated was $1,405.40 being the prescribed proportion of 80 per cent for the purpose of calculating his average weekly earnings required by paragraph (d) of section 40.

86. In accordance with the opinion of Dr McClure, I find that the applicant has been partially incapacitated for work since 8 February 2011.

87. Counsel for the applicant submitted that in accordance with the opinion of Dr McClure the applicant could work 20 hours per week if he could find suitable employment but in a practical sense having regard to the realities of the labour market reasonably accessible to the applicant, it would be difficult for the him at his age to find suitable employment: *Lawarra Nominees Pty Limited v Wilson* (1996) 25 NSWCCR 206 (*Lawarra*).

88. The respondent submitted that the applicant was setting up a lawn mowing or similar type business, referring to the records of the Hunter Psychology Practice in support of this submission, and that the applicant has the ability to earn in some suitable employment. Counsel also referred to work the applicant did with a business entity set up by him and his wife to assist people with drug and alcohol issues to find employment. This business was established some years before the applicant stopped work. I understand it ceased to operate either prior to or after Mr Newman stopped work.

89. Counsel for the applicant submitted that any reference in the psychologist's records to Mr Newman looking for work was nothing more than "goal achievements" discussed with the psychologists. Counsel also submitted that there was no evidence disclosed in the taxation returns and financial records of the applicant to show he is or was earning an income since he stopped work with the respondent. I accept the applicant's submissions in this regard.

90. I am required to determine whether Mr Newman can perform work in a practical sense having regard to the realities of the labour market reasonably accessible to him; that is the labour market in which a worker might be expected to work given the worker's skill, education and other relevant circumstances: *Lawarra*; *Arnotts Snack Products Pty Limited v Yacob* (1985) 155 CLR 171.

91. What is Mr Newman's ability to earn in some suitable employment from time to time after the injury? The determination of the amount that an injured worker would be able to earn in some suitable employment is subject to the following:

    (a) The determination is to be based on the worker's ability to earn in the general labour market reasonably accessible to the worker, and
    (b) The determination is to be made having regard to suitable employment for the worker within the meaning of section 43A of the 1987 Act.

92. Section 43A is set out as follows:

    "**Suitable Employment,** in relation to a worker: means employment in work for which the worker is suited, having regard to the following:

    (a) the nature of the workers incapacity and pre-injury employment;

(b) the worker's age, education, schools and work experience;
(c) the worker's place of residence;
(d) the details given in the medical certificates supplied by the worker;
(e) the provisions of any injury management plan for the worker;
(f) any suitable employment for which the worker has received rehabilitation training;
(g) the length of time the worker has been seeking suitable employment, and
(h) any other relevant circumstances."

93. The determination whether there is incapacity, and, if so, to what extent requires a consideration of the labour market reasonably accessible to the applicant. The labour market reasonably accessible to the applicant certainly means a geographical area. The Court of Appeal in *Cowra Shire Council v Quinn* (1996) 13 NSWCCR 175 approved the approach of Burke J in *Mangion v Visy Board Pty Limited* (1992) 8 NSWCCR 175 at [180] when his Honour said:

> "When assessing a capacity to earn under section 40(2), it is not sufficient to merely identify a particular potential avenue of employment and attribute income from such a job as a man's capacity to earn. Allowance must be made for the availability of work – availability, not so much in the sense of a presently depressed labour market but in the sense of the general availability in any labour market. A rarely available niche in the labour market which carries, perhaps, substantially remuneration, does not serve as a sole criterion of capacity to earn. A good proportion of the workforce are engaged in clerical or sales type occupations. They are avenues of employment with higher than average availability as far as the less physical types of work are concerned. To someone in Brewarrina or Mungindi there is little point in considering jobs such as console operator in a self-service garage or a lift driver in a department store. Whether the man has the capacity to do such a job or not, it doesn't constitute any real part of his accessible labour market. One always seeks to assess the capacity to earn of this particular worker in his particular circumstances."

94. The applicant resides in the Muswellbrook area. He has lived and worked in the Hunter Valley all his life, holding positions of responsibility, not only with the respondent but previously as a town planner with the Scone Shire Council; branch manager for the NSW Building Society in Muswellbrook, and in accounts and payroll for various companies including the respondent. Whilst Mr Newman is 62 years of age, he has considerable clerical and administrative skills which would be attractive to a prospective employer. Office and administrative work would be, in my view, within the capabilities of the applicant in accordance with the opinion of Dr McClure, but not work in occupational health and safety.

95. I am of the view that Mr Newman has the ability to work in some suitable employment reasonably accessible to him in the range of 20 hours per week in accordance with the opinion of Dr McClure with the ability to earn $500 per week. I find no reason to exercise my discretion pursuant to section 40(1) of the 1987 Act to reduce this amount.

96. There is a slight variation between the probable earnings of the applicant if he remained employed by the respondent or in some comparable employment as set out in the respective wage schedules filed by the applicant and the respondent. No submission was made by either the applicant or the respondent as to the amount of comparable earnings which I should accept. The applicant's wage schedule indicates that the probable earnings are $1,791.87 whereas the respondent's wage schedule indicates probable earnings are $1,756.75. I assume that the respondent's wage schedule was compiled from its wage records and on that basis I

prefer the respondent's wage schedule. I find that the probable earnings are $1,756.75 if the applicant had remained in the same or some comparable employment but for the injury.

97. The difference between the applicant's ability to earn and his probable earnings if he had remained uninjured is $1,256.75 which, at all relevant times, exceeds the maximum rate prescribed by section 37(1)(a)(i) of the 1987 Act for a single worker with a dependent child.

Issue 4 – Were medical and related treatment expenses reasonably necessary?

98. Dr McClure was of the opinion when he saw the applicant on 7 February 2011 that he would benefit from further psychiatric treatment including anti-depressant medication and counselling by his general practitioner. Dr McClure was of the opinion that anti-depressant medication should be prescribed daily for a period of 12 to 18 months, and that he would also benefit from eight to twelve sessions of counselling with a clinical psychologist. I accept the opinion of Dr McClure. I propose to make a general order under section 60 of the 1987 Act that the respondent pay the applicant's reasonably necessary medical and related treatment expenses.

FINDINGS

1. The applicant suffered a personal injury within the meaning of sections 4 and 9 of the 1987 Act arising out of or in the course of his employment with the respondent.

2. The applicant suffered a psychological injury within the meaning of section 11A(3) of the 1987 Act arising out of or in the course of his employment with the respondent.

3. The applicant's psychological injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal or provision of employment benefits.

4. The applicant was totally incapacitated for work from 16 July 2010 to 7 February 2011.

5. The applicant's average weekly earnings as at 16 July 2010 was $1,405.40 being the rate prescribed by section 42(1)(d) of the 1987 Act.

6. The applicant is entitled to an award of weekly payments of compensation at the rate of $1,405.40 from 16 July 2010 to 13 January 2011 pursuant to section 36 of the 1987 Act.

7. The applicant at all relevant times has a dependent child.

8. The applicant is entitled to an award of weekly payments of compensation at the maximum statutory rate for a worker with a dependent child from 14 January 2011 to 7 February 2008 pursuant to section 37 of the 1987 Act.

9. The applicant has been partially incapacitated for work since 8 February 2011.

10. The amount that the applicant probably would have been earning as a worker but for the injury had he remained in the same or some comparable employment as at 8 February 2011 was $1,756.75.

11. Since 8 February 2011 the applicant has had the ability to work 20 hours per week in some suitable employment.

12. Since 8 February 2011 the applicant has had the ability to earn the amount of $500 per week in some suitable employment.

13. The difference between the amount that the applicant would probably have been earning but for the injury and had he remained in the same or some comparable employment and his ability to earn in some suitable employment is $1,256.75.

14. There are no grounds for the exercise of the discretion prescribed by section 40(1) of the 1987 Act to reduce this amount.

15. The amount of $1,256.75 at all relevant times exceeds the maximum statutory rate prescribed by section 37 of the 1987 Act for a single worker with a dependent child.

16. The applicant is entitled to an award of weekly payments of compensation at the maximum statutory rate for a worker with a dependent child, as adjusted in accordance with the provisions of the Act, from 8 February 2011 to date and continuing pursuant to section 40 of the 1987 Act.

17. The applicant's medical and related treatment expenses of his psychological injury were reasonably necessary.

18. The applicant is entitled to a general order pursuant to section 60 of the 1987 Act.

ORDERS

1. Respondent to pay the applicant weekly payments of compensation of the rate of $1,405.40 from 16 July 2010 to 13 January 2011 pursuant to section 36 of the *Workers Compensation Act* 1987.

2. Respondent to pay the applicant weekly payments of compensation at the maximum statutory rate for a worker with a dependent child from 14 January 2011 to 7 February 2011 pursuant to section 37 of the *Workers Compensation Act* 1987.

3. Respondent to pay the applicant weekly payments of compensation at the maximum statutory rate for a single worker with one dependent child from 8 February 2011 to date and continuing, as adjusted in accordance with the provisions of the Act, pursuant to section 40 of the *Workers Compensation Act* 1987.

4. Respondent to pay the applicant's reasonably necessary medical and related treatment expenses pursuant to section 60 of the *Workers Compensation Act* 1987.

5. The respondent to pay the applicant's costs as agreed or assessed. For the purposes of Schedule 6 Table 4 Item 4 of the *Workers Compensation Regulation* 2010, I certify this as a complex matter with a 25 per cent increase in costs otherwise available to the parties.