

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO: 702/18
APPLICANT: David Horton
RESPONDENT: Global Valve Technology Ltd
DATE OF DETERMINATION: 18 April 2018
CITATION: [2018] NSWCC 101

The Commission determines:

1. The applicant sustained a primary psychological injury arising out of or in the course of his employment prior to 5 May 2014 (deemed).
2. The applicant sustained a secondary psychological condition resulting from the injuries sustained to his right wrist on 21 March 2008 and to his right shoulder, wrist and hand on 6 March 2013.
3. The applicant's employment was the main contributing factor to his primary psychological injury.

The Commission orders:

4. I remit this matter to the Registrar for referral to an Approved Medical Specialist pursuant to section 321 of the *Workplace Injury Management and Workers Compensation Act 1998* for assessment of the whole person impairment due to a psychological injury sustained on 5 May 2014 (deemed).
5. The documents to be reviewed by the Approved Medical Specialist are:
 - (a) Application to Resolve a Dispute and attachments, and
 - (b) Reply with attached documents.
6. No order as to costs.

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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

Trish Dotti
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. David Horton (the applicant) is 59 years old and was employed by Global Valve Technology Ltd (the respondent) as a senior engineering manager on 1 July 2005. His services were terminated on 5 May 2014. He is currently in receipt of weekly compensation in respect of physical injuries. A claim for a psychological injury was submitted on 3 November 2014.
2. On 17 December 2014, QBE Workers Compensation (NSW) Ltd (the insurer) issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant had sustained a psychological injury on 5 May 2014 and that his employment was a substantial contributing factor to his condition. It denied that the applicant was incapacitated and required medical treatment. It cited ss 4, 9A, 33 and 60 of the *Workers Compensation Act 1987* (the 1987 Act).
3. On 13 January 2017, the applicant's solicitor served a notice of claim on the insurer in respect of lump sum compensation.
4. On 4 May 2017, the insurer issued a further notice pursuant to s 74 of the 1998 Act, disputing that the applicant had sustained a psychological injury on 5 May 2014 and that his employment was a substantial contributing factor to his condition. It also denied that the applicant required medical treatment and that he had sustained any permanent impairment. It cited ss 4 and 9A of the 1987 Act.
5. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 9 February 2018, the applicant claims lump sum compensation pursuant to s 66 of the 1987 Act due to a psychological injury sustained during the course of his employment prior to 5 May 2014 (deemed).

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conciliation conference and arbitration hearing on 3 April 2018. 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.

ISSUES FOR DETERMINATION

7. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant sustained a primary and/or secondary psychological injury during the course of his employment with the respondent – s 4(b)(i) of the 1987 Act;
 - (b) whether his employment was a substantial or the main contributing factor to his injury – ss 4(b)(i) and 9A of the 1987 Act, and
 - (c) quantification of the applicant's entitlement to lump sum compensation – s 66 of the 1987 Act.
8. The parties agreed that in the event that the applicant succeeded, his claim should be referred to an Approved Medical Specialist (AMS).

Documentary evidence

9. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application and attached documents, and
 - (b) Reply and attachments.
10. The applicant sought leave to tender a report from a treating psychologist that was served on the last business day before the hearing. The respondent objected to this late evidence. Leave to have this report admitted into evidence was declined by me. My reasons were recorded and will be contained in the transcript.

Oral evidence

11. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

REVIEW OF EVIDENCE

12. At the outset, the manner in which the parties have prepared the evidence shows a lack of focus and attention to the issues. The Application comprises 809 pages, most of which are of little relevance to the matters in dispute. According to the applicant's solicitor, Mr Driscoll, it was necessary to include all annexures that were attached to the dispute notices, otherwise the Application would be rejected by the registry. My enquires have suggested otherwise.
13. The volume of material was further compounded by the respondent's solicitor, Ms Tancred, who filed a Reply with 505 pages attached. There are multiple copies and unnecessary documents that were already attached to the Application. Part 6 of the Reply only requires copies to be attached if they are not already attached to the Application. This is inconsistent with the simple model under which we operate and unnecessarily complicates what in essence is a simple dispute.

Applicant's statements and emails

14. The applicant's statement dated 26 January 2017 comprises 28 pages and was obviously drafted by him with little, if any, input from his solicitor. The document includes references to attachments that number in excess of 450 pages. Further, the statement deals with various allegations and they are not in a chronological order. This is singularly unhelpful. I will attempt to put the sequence of events in some order, something that should have been done with the assistance of the applicant's solicitor.
15. The applicant confirmed that he had received no treatment for any psychological condition prior to commencing employment for the respondent in 2005. He alleges that his psychological condition was caused by bullying, harassment and stress caused by his dealings with the CEO, Rod Wakefield.
16. According to the applicant, this stress arose from unpaid fees of \$9,000 for the period from 1 December 2005 to 28 March 2008, threats, allegations and lies, failures in his company credit card, particularly when he was overseas, which resulted in him incurring personal bank charges and interest, and issues arising from the reimbursement of expenses claims. The issue regarding unpaid fees from 2005 to 2008 was rectified in March 2008.
17. The applicant stated that he was provided with a new laptop in 2010, and he was forced to continue using this due to a lack of funds to purchase a replacement. This caused him stress. He also claimed that when there were issues with the server or other equipment, he was threatened, bullied and harassed.

18. The applicant stated that in 2008, Mr Wakefield received a broadband account from Telstra. A copy of the account is in evidence. Mr Wakefield instructed the applicant to “make this go away”. The applicant stated that he adjusted the agreement and he then told Telstra that there was an error at its end. This resolved the issue.
19. The applicant stated that in April 2013, Mr Wakefield directed him to falsify the dates of photographic evidence in a legal dispute relating to the termination of a lease of the respondent’s Pymble office. There are a number of emails regarding this in evidence and statements provided by the applicant for the purpose of the dispute. The applicant stated that he was greatly distressed and his anxiety level increased as a result of these events.
20. The applicant stated that in April 2013, the respondent moved from Pymble to premises in Chatswood. He brought in his own tools that were kept in six unsecured metal boxes, so that he could construct and maintain test rigs and other devices. In November 2013, he found that his belt sander was missing and he spent several days looking for it. When he told Mr Wakefield about the theft, Mr Wakefield admitted that he had taken the belt sander to do some work at home as he thought the tools were the respondent’s property. The applicant claimed that he was deeply distressed and concerned, so he decided to take his tools home over the weekend.
21. The applicant stated that in July 2013, he was directed by Mr Wakefield to establish a fictitious company, SGS-CSTC Standards Technical Services Co. Ltd, to reduce potential costs arising from overseas testing of the respondent’s products prior to their import into Australia. A domain name was also registered.
22. The applicant advised that “Mr Hu Tan Wang” was the fictitious contact and a counterfeit Certificate of Compliance was sent to the respondent. There was an error in the certificate so an amended one was sent. Various emails passed between Mr Wakefield, Mr Abdi, the applicant and “Mr Hu Tan Wang”.
23. The applicant stated that in September 2013, he was instructed by Mr Wakefield to falsify a legal document that was to be sent to the US Patent Office by signing the document for the late Allan Meyer. He later found out that Mr Meyer was still alive. There are various emails dealing with this in evidence. The applicant stated that he experienced fear and intimidation, and he felt vulnerable and anxious.
24. Mr Wakefield failed to respond to an email sent by the applicant in December 2013 regarding water meters. He felt insulted and picked on when he read the email about the water meters that he received from Mr Wakefield on 25 March 2014. This caused him a great deal of distress and anxiety.
25. The applicant apparently responded to the email but the date has not been particularised. He became distressed by Mr Wakefield’s comment that he was “not the team player or team contributor that I saw in you in the past”.
26. On 29 March 2014, the applicant re-sent the false patent documentation to Mr Abdi as requested. He stated that he was very anxious, was losing trust, became isolated and felt very stressed.
27. The applicant advised that he sent a series of emails to Mr Wakefield and the accountant regarding the credit card issues in 2011, 2013 and 2014. These form part of the attachments to his statement and speak for themselves, and yet the applicant has unnecessarily included copies of the email trail and has quoted some of them in his statement.

28. When the applicant raised the credit card issue on 11 December 2013, Mr Wakefield recommended that he ensure that he had adequate credit available on his credit card before he conducted any business travel. He also assured the applicant that any interest incurred on his personal credit card for work purposes was a legitimate expense claim that would be approved.
29. The issue regarding non-reimbursement of expenses was the subject of a series of emails in early 2014. It would seem from Mr Wakefield's email dated 30 April 2014 that he was unaware that there was still an issue regarding reimbursement of expenses and he asked the applicant to confirm same, so he could have Mr Rodriguez look into it.
30. The applicant's services were terminated by Mr Wakefield via email on 5 May 2014 and via a letter sent by registered post on 5 May 2014 that was received by the applicant on 8 May 2014. This was after the applicant sent a copy of a medical certificate to him via email.
31. The balance of applicant's statement deals with matters that occurred after the applicant's termination. Given the nature of the pleadings regarding conflict up until his termination on 5 May 2014, these events are not relied upon. Nevertheless, I propose to make some comments.
32. In his termination correspondence, Mr Wakefield assured the applicant that any outstanding expenses, salary and leave entitlements would be paid to him. Mr Rodriguez sent an email to that applicant on 12 May 2014 and indicated that he owed \$187. He replied to this email but there was no response.
33. In an email dated 17 May 2014, Mr Wakefield gave the applicant an update following his trip to China and possible projects that he could be involved in in the future. It was clear from the email that the applicant's termination was to proceed. According to the applicant, he was confused and concerned by this and was unsure whether he was employed or not. He indicated that "This really did my head in".
34. The applicant's response on 18 May 2014 to Mr Wakefield's email dated 30 April 2014 questioned Mr Wakefield's memory. The applicant stated that he felt that Mr Wakefield's response was full of lies and denial.
35. In an email on 19 May 2014, Mr Wakefield raised his concerns about the applicant's "rude behaviour" and he requested a full and final claim for any unpaid or unclaimed expenses that had not yet been provided, as well as the return of any company property.
36. The applicant stated that he reviewed his past claims and found that Mr Wakefield had responded to 24 of 26 expense claims over 47 months. He discovered that he had not been paid for seven invoices totalling \$3,431.02. He received \$4,467.17 on 12 May 2014, but there was an underpayment of \$385.
37. The applicant stated that he sent his final invoice to Mr Rodriguez on 26 May 2014. This included unpaid credit card interest, bank charges and unpaid expenses amounting to \$14,720.04.
38. In an email dated 27 May 2014, Mr Rodriguez explained that the respondent provided a corporate credit card and when reasonably requested, cash advances and additional funds were transferred to the card. He advised that the respondent did not accept that it was liable for any interest charged on the applicant's credit card expenses because he chose to use his personal credit card rather than the company credit card.

39. Mr Rodriguez stated that the applicant was promptly reimbursed for company expenses charged to the applicant's personal card, but if he chose not to pay off the card with those funds, it was illogical to ask the respondent to pay for the interest. The applicant referred to an earlier email from June 2012 and suggested that there was a double standard being applied by Mr Wakefield.
40. The applicant stated that he was mentally depressed and anxious from late 2013. When he made a claim, the insurer advised him the insurer [sic] had paid him for the period 5 May 2014 to 25 June 2014, but the respondent had not passed on these funds to him. He received a partial payment in late November 2014 and the insurer resolved the payment issue on 3 December 2014.
41. The applicant claimed that the stress that he experienced because of his treatment by the respondent affected his willpower and he began to again smoke heavily. He stated that he felt psychologically and emotionally assaulted by the respondent. He had lost faith in the system and he had lost his motivation and self-respect. He was emotionally detached and numb, and he had feelings of abandonment and hopelessness.
42. The applicant stated that he had sleeping difficulties, was irritable and lacked concentration. He suffered from stress ulcers and had lost interest in day to day activities. He was detached and isolated himself from friends and family. He had feelings of failure, entrapment, a sense of unresolved injustice, and diminished self-worth. He continued to take various forms of medication including Cymbalta for his depression.
43. The applicant acknowledged that he had experienced some problems due to his impending divorce and past failed marriages, but this was only temporary. He attributed his problems to the abusive and bullying behaviour of Mr Wakefield.

Applicant's claim form

44. The applicant completed a claim form for a psychological injury due to on-going workplace issues on 3 November 2014. Attached to this form was a 32-page document that described 20 events and the psychological impact they had on him.
45. These events have been largely dealt with in the applicant's statement and are the subject of some discussion in the factual investigation. Items 1 to 12 deal with the events prior to the applicant's termination on 5 May 2014. The remaining matters post-date this period and are not relied upon by the applicant.
46. The applicant described his symptoms as feelings of abandonment, entrapment, belittlement, coercion, bullying, intimidation, victimisation, emotional detachment, shock and loss of self-esteem.
47. There is also a 13-page summary of the workplace events but this is more focussed on physical injuries sustained by the applicant in China in February 2014 and some discussion of the Fair Work Commission hearing on 2 July 2014 and a Deed of Release. These are not matters of concern in these proceedings.
48. The remaining matters in this summary were described in more detail in the applicant's statement and require no further comment.

Factual Investigation Reports

49. Procare Investigations reported on 9 January 2015. The investigators interviewed Mr Wakefield in respect of the 20 items raised in the document that was annexed to the applicant's claim form. Curiously, they did not obtain a signed statement from him as one might expect in a matter of this nature. I propose to discuss this evidence below.

MEDICAL EVIDENCE

50. Given that injury is in dispute, the lack of medical evidence attached to the Application is remarkable. One would have thought that some effort could have been put into obtaining medical reports or at least the clinical notes of the applicant's treating general practitioner, psychiatrists and psychologist. This further highlights the unsatisfactory preparation of this matter by the applicant's solicitor.
51. Some of the medical evidence relates to the applicant's shoulder and wrist injuries and are irrelevant for purposes of the current dispute.

Reports of Dr Wan

52. The only medical evidence from the applicant's general practitioner, Dr Wan, comprises multiple copies of a letter of referral to Dr Teoh dated 15 December 2014. He advised that the applicant had depression, anxiety and an adjustment disorder that was triggered by work related stressors that resulted in his termination in May 2014. The applicant was also troubled by chronic pain due to injuries to his shoulder and wrist. Significantly, there are no reports or clinical notes from Drs Wan and Teoh in evidence.

Report of Dr Kaye

53. Dr Kaye, the applicant's treating psychologist, provided a report to the insurer on 3 November 2014. Significantly, this report is more than three years old and it is unclear what treatment he has provided since 2014.
54. Dr Kaye confirmed that he first examined the applicant on referral from Dr Wan on 3 June 2014. Dr Kaye did not record any history, but merely referred to the voluminous chronology (Annexure "G")¹ and the attachment to the applicant's claim form (Annexure "H")². It is unclear whether he obtained any background history of other stressors, such as the applicant's history of multiple marriages and the pending divorce, which presumably would have been the cause of some emotional upset.
55. Dr Kaye diagnosed an Adjustment Disorder with Mixed Anxiety and Depressed Mood in response to numerous injuries and the subsequent termination of his employment. He stated that the applicant's symptoms had deteriorated, causing impairment in his physical, psychological, social and cognitive functioning.
56. Dr Kaye stated that the applicant's symptoms were significantly perpetuated by physical restrictions affecting his activities of daily living, his ability to care for himself and participation in social and recreational activities. The psychologist advised that the symptoms seemed to be of gradual onset and were causally related to his employment.

Reports of Dr Singer

57. Dr Singer, psychiatrist, reported on 19 May 2015. He reported that the applicant presented with a history of multiple injuries in the context of litigation against his previous employer. The doctor referred to the applicant's pain arising from his right wrist and shoulder injuries, back and neck pain, co-morbid atrial fibrillation and urticaria.
58. Dr Singer recorded brief details of the applicant's personal history which he described as extremely complex. Significantly, he did not identify any issues arising from the applicant's employment apart from his termination.

¹ Application, pp 26 – 41.

² Application, pp 42 – 54.

59. Dr Singer noted that the applicant presented as depressed, anxious and extremely somatically focused. He was angry and his thoughts were directed at litigation and revenge against those who he felt had wronged him.
60. Dr Singer diagnosed an Adjustment Disorder with Mixed Anxiety and Depressed Mood, with a differential diagnosis of a Major Depressive Disorder. Personality factors also contributed to his presentation. The doctor prescribed medication and recommended that the applicant continue to consult Dr Kaye and attend a pain management program.
61. When the doctor reviewed the applicant on 18 August 2015, the applicant stated that the Duloxetine had made little impact on his mood. He had completed five physiotherapy sessions but this had made his shoulder and hernia pain worse. The applicant also told him that he was initiating a worker's compensation claim for a psychological injury as well as his other claims. The doctor noted that the applicant was very focused on litigation and he remained depressed and anxious. He concluded that active pain management should be deferred until the applicant had shoulder surgery.
62. In his report dated 27 October 2015, Dr Singer noted that the applicant had undergone shoulder surgery and this had resulted in significant improvement in his neck pain. There had been an altercation at home and the applicant's wife had taken out an AVO. He was living in rented accommodation and he had a variety of outstanding medical issues and impending litigation. The doctor recommended on-going medication. The doctor provided a copy of this report to seven treating doctors and a psychologist, Isobel Maher. There is no evidence from Ms Maher in these proceedings.
63. Dr Singer provided a further report on 1 March 2016. He noted that the applicant had separated from his wife and there were outstanding legal issues. He still had back and neck pain, but his right shoulder pain and mood had improved. The doctor reported that the applicant was no longer seeing a psychologist.
64. In his final report dated 3 May 2016, the doctor noted that the applicant was involved in on-going conflict with his wife and he anticipated that they would be divorced before the end of the year. His physical symptoms were the same and his mood was fairly stable. He recommended that the applicant continue to take medication.

Report of Dr Westmore

65. Dr Westmore reported on 23 May 2016. He was provided with a copy of the annexure to the applicant's claim form. He noted that the applicant was in the process of divorcing his wife who took out an AVO against him in October 2015 when she left the family home. This was withdrawn in February 2016.
66. Dr Westmore noted that the applicant set up the respondent but he resigned in 2002/2003. He returned to work as a contractor from 2005 to 2010, and was then made an employee. He claimed that his emotional issues commenced in 2005. The doctor also noted issues that the applicant faced during his early years.
67. Dr Westmore recorded that the applicant complained that there was a written agreement that the respondent did not want to stick to and the respondent wanted him to falsify documents. He saw a doctor in May 2015 and was certified fit for light duties. When he presented the certificate to the respondent, his services were terminated.
68. Dr Westmore noted that apart from receiving treatment for his various physical complaints, he was seeing a psychologist through Victim Services because his wife had been harassing and stalking him. He was taking Cymbalta.

69. Dr Westmore reported that the workplace difficulties had caused sleeping and eating difficulties, weight loss, and loss of energy and libido. His mood was low and he had thoughts of self-harm. He had difficulty concentrating, focusing and reading. He was unable to work.
70. The applicant stated that he did not go out and he could not go to the mall for fear of suffering panic symptoms. He stared at the television and no longer enjoyed his previous recreational activities. He had nowhere to go when he went walking. He was comfortable at home. He travelled by bus to the appointment but it seemed to take forever and he broke out into a sweat because there were people around him. He had only one friend left and he was pushing him away.
71. Dr Westmore noted that the applicant had been with his wife for four years and the relationship was going reasonably well despite language difficulties. His wife came to Australia one month after he was terminated. His termination impacted on his mood state and their relationship.
72. Dr Westmore diagnosed a Depressive Disorder, an Adjustment Disorder with depression and anxiety, or a Major Depressive Disorder in the context of workplace difficulties. He also felt that the applicant's chronic pain symptoms impacted on his mood state. He stated that it was impossible to separate the impact of the applicant's pain from the impact of psychosocial stressors. He confirmed that the applicant's depression was multi-determined in its aetiology.
73. Dr Westmore stated that the applicant was totally unemployable and this probably had been the case since December 2013. He recommended that an opinion be sought from the general practitioner and the treating psychiatrist. He declined to provide an assessment of whole person impairment in the absence of a report from the applicant's treating psychiatrist.
74. Dr Westmore reported on 20 June 2016. He noted that the applicant was scheduled to see a new psychiatrist in the next few weeks, but the identity of that doctor was not disclosed. Not surprisingly, the doctor indicated that the reports from Drs Kaye and Singer were of little assistance. Nevertheless, he assessed 19% whole person impairment.

Reports of Dr Lee

75. Dr Lee reported on 8 December 2014. The applicant told the doctor that he had created the respondent and resigned because of politics among the board members. He returned to try and salvage the company. He married his second wife in August 2012, but they slept apart because of he had no self-worth. He was terminated after he presented a claim form for his shoulder injury. His dealings with the insurer also contributed.
76. Dr Lee noted that the applicant could not bear to be amongst people. He had problems with his memory and had difficulty focusing. Dr Lee stated that there was no evidence of clinically significant depression, anxiety or any other psychiatric disorder.
77. Dr Lee concluded that the applicant did not have a psychiatric disorder attributable to his employment with the respondent, based on the description of reported symptoms, his clinical presentation and the fact that two physical claims that were lodged after his services were terminated. There was a significant functional overlay that affected his presentation and he doubted that treatment would be of benefit. He thought that the applicant's employment was not a significant factor in the development of his psychiatric condition.
78. In his report dated 28 March 2017, Dr Lee recorded a detailed history of the applicant's physical injuries and treatment. He noted that the applicant's psychological injury related to bullying, being lied to and being coerced by the respondent. The company wanted him to commit fraud in order that it could save money and bring products to Australia from China.

79. The applicant told the doctor that the company credit card failed whilst he was overseas and he had to use his personal cards. There were issues regarding reimbursement of his expenses and interest charges. The applicant perceived this as bullying. Although Mr Wakefield had assured him that the respondent would reimburse him for interest incurred on his credit card, Mr Rodriguez indicated that he was responsible for this and the respondent was not liable.
80. Dr Lee noted that the applicant was seeing a psychologist regarding his divorce. He did not go out much and kept his blinds drawn. He experienced stress in public areas that caused atrial fibrillation and panic attacks. He did not trust people and his relationship with his wife had broken down. She had issued an AVO, and after it was withdrawn in February 2014, she had watched and stalked him. This had caused him stress. He also took out an AVO on her but withdrew it in April 2014. He had financial problems and attended the Fair Work Commission without legal representation.
81. Dr Lee reported that the applicant complained of threats, allegations and lies in the workplace. He was praised for managing to replace information on the new server, but was then was accused of theft of computer equipment, when in fact he was attempting to repair the server at home. He conceded that he was probably not good at self-care and hygiene, and he had difficulty coping with one hand and usually cooked soft food.
82. Dr Lee noted that the applicant was forced to deceive the US Patents Office by fabricating signatures and he also falsified photographic evidence in respect of the Pymble lease dispute. His hernia, haemorrhoids, physical injuries and agoraphobia caused him stress. He rarely socialised and did not socialise with friends or family for fear of suffering anxiety attacks. He could travel alone at times depending on his panic attacks. He was able to read documents, but at times his vision became blurry due to stress.
83. Dr Lee was not satisfied that there was any objective evidence of a psychiatric injury. He could not exclude the possibility of an abnormal illness behaviour. He noted that the factual material placed in some doubt the authenticity of the applicant's allegations.
84. Dr Lee stated that there were non-work factors at play including cardiac arrhythmia and social difficulties, which made assessment of whole person impairment almost impossible. He recommended psychometric testing.

APPLICANT'S SUBMISSIONS

85. The applicant's counsel, Mr Morgan submits that according to Dr Lee, it was unlikely that the physical injuries and disabilities exacerbated any relevant pre-existing condition, and he indicated that the employment was not a significant factor in the development of the applicant's psychiatric condition, which seemed to suggest an acceptance of a psychiatric condition. The doctor's opinion was confusing and the report of little assistance.
86. Mr Morgan submits that in the second dispute notice, the insurer indicated that it relied on the Procure report and the fact that Mr Wakefield "in general" denied the applicant's allegations. It is unclear what Mr Wakefield said or did not say to the investigator, or what questions were put to him. In the circumstances, the report of the interview given by Mr Wakefield to the investigators was of little probative value in the absence of a signed statement from him.
87. Mr Morgan submits that when Dr Lee provided his further report, he was provided with a copy of the Procure investigation. The doctor stated that there was no objective evidence of a psychiatric condition and presumably this was based on his history and examination.

88. Mr Morgan submits that Dr Lee raised the possibility of an abnormal illness behaviour, which was presumably a secondary condition. The doctor inappropriately commented on the doubts that were raised regarding authenticity of the applicant's allegations. He referred to non work-related factors and then indicated that these factors made it almost impossible to assess the whole person impairment. This seemed to represent an acceptance of some work-related condition. Therefore, this report was of limited assistance.
89. Mr Morgan submits that often a worker suffered from both primary and secondary conditions. It was uncontroversial that there could be multiple causes of damage. This was consistent with the principles in *ACQ Pty Ltd v Cook*³ and *Bushby v Morris*⁴. Once the factual matters were established, then it was the task of the AMS to determine the whole person impairment due to the primary and secondary conditions.
90. Mr Morgan submits that Dr Wan diagnosed depression, anxiety and an adjustment disorder in his letter of referral to Dr Teoh. He identified two concurrent contributors, namely work-related stressors and chronic pain due to the applicant's physical injuries.
91. Mr Morgan submits that Dr Kaye relied on and adopted the chronology of events provided by the applicant. The psychologist saw the applicant from June 2014 on 11 occasions. He diagnosed an Adjustment Disorder with Mixed Anxiety and Depressed Mood in response to numerous injuries, which represented a secondary condition, and the subsequent termination. Therefore, there was a concurrent and primary psychological condition. He stated that the applicant's symptoms had deteriorated, causing impairment in his physical, psychological, social and cognitive functioning.
92. Mr Morgan submits that Dr Singer recorded a history of the applicant's multiple injuries and noted that he was depressed, anxious and somatically focused with thoughts directed at litigation and revenge against those that he felt had wronged him. Therefore, he acknowledged that the applicant had concurrent conditions.
93. Mr Morgan submits that more weight should be given to the opinion of Dr Westmore, as he obtained a more detailed history about the issues at work as well as the applicant's physical issues. He was critical of Dr Lee's opinion and diagnosed a Depressive Disorder, an Adjustment Disorder with depression and anxiety, or a Major Depressive Disorder in the context of workplace difficulties. He also acknowledged that the applicant's chronic pain impacted on his emotional state. Therefore, the applicant's depression was multidetermined and this was a question for the AMS.
94. Mr Morgan submits that the applicant's allegations were contained in his statement. He had no prior issues. He provided details of the nature of his work and the difficulties regarding his employment agreement. There were credit card failures and issues with reimbursement of his expenses and termination. Dr Singer thought that the termination was a relevant factor in the applicant's condition. The insurer did not raise a defence under s 11A of the 1987 Act.
95. Mr Morgan submits that in the applicant's statement, he identified issues regarding threats, allegations, lies, falsification of photos and the issues in respect of the US Patent Office. He was directed to set up a fictitious company and his personal property was removed from the premises.
96. Mr Morgan submits that the attachment to the applicant's claim form described issues relating to his employment that gave rise to his psychological injury. These were matters considered by Dr Kaye. The applicant provided detailed information, but the only response from the respondent was the factual investigation.

³ [2009] HCA 28; 237 CLR 656; 258 ALR 58; 83 ALJR 986 (*Cook*)

⁴ [1980] 1 NSWLR 81 (*Morris*)

97. Mr Morgan submits that Mr Wakefield conceded that the applicant's payment shortfall may have been raised after his termination. This was a real event and was not imaginary. Mr Wakefield stated that he had no record of receiving emails from the applicant regarding his physical injury in March 2013, contrary to the applicant's evidence. One could only accept that they were sent or that the applicant fabricated this evidence.
98. Mr Morgan submits that there were issues concerning the landlord and both parties agreed that they occurred. Mr Wakefield agreed that he took the applicant's belt sander but the applicant did not make a big issue of it. He may have also said words about being a team player, but these were directed to the team. Nevertheless, this event occurred.
99. Mr Morgan submits that there was no dispute that the fictitious company was set up, but Mr Wakefield denied any involvement. The fact that the company was set up was not denied. There was an issue with the deed of assignment involving Mr Meyer. This was a real event that was not denied by the respondent.
100. Mr Morgan submits that the issue that the applicant had with his credit card exceeding its limit was real. The event occurred and the applicant had to use his personal card. The credit card issue arose out of the applicant's employment and was not denied by the respondent.
101. Mr Morgan submits that Mr Wakefield acknowledged that he received emails from the applicant following his injury in February 2014. Although he could not locate the emails, he did not deny that he had received them.
102. Mr Morgan submits that there were a further 10 items in the attachment. When the material and attachments were analysed, there was ample factual evidence to support the applicant's evidence regarding real events and the effects that they had on him. There was evidence of a primary psychological injury that should be assessed by the AMS any secondary psychological condition caused by his physical injuries will be disregarded.
103. Mr Morgan submits that there was no other identifiable cause of the applicant's depressive condition. Despite the opinion of Dr Lee, if one was satisfied that the applicant had a psychological condition, then this was due to the workplace events and the abnormal illness behaviour arising from the physical injuries. Drs Westmore and Kaye diagnosed a primary psychological condition due to the applicant's treatment in the workplace.
104. In reply, Mr Morgan submits that the applicant had no treatment prior to the termination of employment. The manner in which he was terminated and treatment in the workplace were relevant factors that caused his psychological condition. There was no defence relied upon by the respondent in accordance with s 11A of the 1987 Act. If the applicant felt that he was unjustly treated and unfairly terminated, it was very relevant as to whether he suffered a primary psychiatric injury. This was what was treated when his employment ceased. It was clear from the report of Dr Kaye that the applicant was struggling with his treatment at work and his termination. The emails, photos and the like showed elements of discontent.

RESPONDENT'S SUBMISSIONS

105. The applicant's counsel, Mr Callaway, submits that the applicant bore the onus of showing that he suffered a primary psychological injury due to the events at work. There was an absence of any evidence of any such events that could give rise to an injury.
106. Mr Callaway submits that there was a factual dispute. Whilst some of the events occurred, it was significant that the applicant did not seek treatment and this was because there were none causative of an injury.

107. Mr Callaway submits that Mr Wakefield indicated that the decision to terminate the applicant was a business decision and it had nothing to do with his physical injury. The applicant saw Dr Wan, but there is no evidence from Dr Wan, Dr Teoh, the psychologist that the applicant consulted in 2016, and the doctors who he has seen since 2016.
108. Mr Callaway submits that there is nothing in the report of Dr Kaye to suggest that the applicant had a primary rather than secondary condition. Dr Kaye referred to depression, paranoia and anxiety that stemmed from the deterioration in his quality of life and functioning as a result of the injuries that he sustained at work and his inability to prevent the consequences of his injuries and the events that led to his termination. He diagnosed an Adjustment Disorder with Mixed Anxiety and Depressed Mood due to his numerous injuries and termination. This description is consistent with the physical injuries and the secondary effects thereof.
109. Mr Callaway submits that Dr Singer was a psychiatrist and pain management specialist, who treated the applicant for the psychological effects of his physical injuries. This was a secondary condition.
110. Mr Callaway submits that Dr Lee stated that the applicant had no evidence of a psychiatric injury, but he could not exclude the possibility of an abnormal illness behaviour and there were non-work factors in play that made assessment difficult. The condition would be secondary in nature, if there was one, but Dr Lee's primary opinion was that there was no psychological condition.
111. Mr Callaway submits that Dr Westmore was uncomfortable in providing an assessment. He noted that the applicant provided a complex history with both physical and psychological injuries at work. He noted complaints of on-going symptoms and he wanted to see a report from the treating psychiatrist. This was not sufficient evidence to provide a diagnosis of a primary psychiatric injury.
112. Mr Callaway submits that Dr Westmore stated that based on the history, the applicant's depression occurred in the context of workplace difficulties as well as the chronic pain symptoms, and he thought that it was impossible to separate these from each other. Given that conclusion, one could not say that the applicant had a primary psychiatric injury in the absence of support from the treating doctors or contemporaneous complaints. In the circumstances, there should be an award for the respondent.

REASONS

Was the applicant exposed to bullying and harassment during the course of his employment up to 5 May 2014?

113. The first question to be considered is whether the alleged events relied upon by the applicant did in fact occur, and if so, whether those events amounted to bullying and harassment. Then one needs to consider whether these events caused or contributed to his psychological injury.
114. I have already commented on the poor preparation of the matter by the applicant's solicitor. Mr Callaway highlighted the fact that there was little or no medical evidence from the applicant's treating doctors. There is merit in such a submission. Whether the minimal evidence was due to a lack of attention on the solicitor's part or was because the treating doctors did not support the applicant's claim is unknown. The matters in dispute were clearly enunciated in the dispute notices and should have been more closely addressed.
115. According to the applicant's lengthy and at times unhelpful statement, he was exposed to events at work that caused his emotional distress. He claimed that he was exposed to bullying and harassment by Mr Wakefield and this led to his psychological injury.

116. The applicant complained about unpaid fees, credit card failures, the problem with his laptop and IT issues, the falsification of records relating to a Telstra bill, the leasehold dispute, the fictitious company and the US Patent Office application. Mr Wakefield borrowed the applicant's belt sander without permission and there were issues regarding the water meters.
117. There was reference to "not being a team player" and finally the circumstances surrounding his termination that included a dispute regarding reimbursement of interest charges incurred as result of using his personal credit card for company purposes. Therefore, according to the applicant's evidence, there were a series of events since 2005 that he perceived as constituting bullying and harassment.
118. The respondent's case is based on an interview that an investigator had with Mr Wakefield. The investigator did not provide a signed transcript of the interview. He merely provided a summary of what Mr Wakefield allegedly told him.
119. Given that the insurer based its denial of liability on the contents of the factual investigation, it is remarkable that it did not retain the investigator to draft a proper statement to be signed by this witness. However, it is even more remarkable that respondent's solicitor did not identify this major flaw in the respondent's evidence and failed to take steps to obtain a signed statement. This impacts on the weight that can be given to Mr Wakefield's interview. Nevertheless, despite these issues, it is still important that I make some comment about it.
120. In respect of the issue relating to unpaid fees and superannuation, Mr Wakefield advised that he was not aware of any shortfall being brought to his attention until the Fair Work proceedings, although it may have been raised after the applicant was made redundant.
121. Mr Wakefield claimed that the applicant conceded that there was no shortfall during the Fair Work proceedings. Those proceedings resolved by a deed of release and the applicant received a payment of \$15,000. The actual deed is not in evidence and there is no evidence from the applicant challenging this, so the evidence regarding this issue is inconclusive.
122. Mr Wakefield denied that there was any communication with the applicant that his physical injury in March 2013 was not work related or that there was a lack of support given to the applicant when he was injured. The respondent allowed the applicant to be absent from work in order to attend the medical examinations. Therefore, the applicant's evidence has been disputed and it is basically one person's word against the other.
123. Mr Wakefield denied that he requested the applicant to falsify the records and that the applicant took it on himself to date and time stamp the previously undated photos. The wrong date was inserted due to an error on the part of the solicitor. There is no email from Mr Wakefield to the applicant in evidence regarding this issue apart from the emails that passed between them on 25 April 2013 and 28 April 2013.
124. In the applicant's email dated 25 April 2013, he enclosed copies of the photos and said, "If you want to add or change anything, let me know"⁵. In his response dated 28 April 2014, Mr Wakefield commented, "Brilliant. The only problem that we have is that our premises are now better or exactly as they were five years ago"⁶. This seems to suggest that Mr Wakefield certainly had some knowledge of the applicant's activities, so it seems that there is some substance to the applicant's allegations. It would have been preferable to address Mr Wakefield's denial in the applicant's statement.
125. Mr Wakefield admitted that he may have used the applicant's belt sander, but he assumed that the tools were owned by the respondent. He returned the sander as soon as the applicant raised this with him. He may also have said "Not a team player" but this was directed at all staff. Therefore, there is confirmation that these events were real.

⁵ Application, p 347.

⁶ Application, p 370.

126. Mr Wakefield denied that he knew anything about the fictitious company and he thought that maybe it was created by the applicant because he had expressed a desire to set up his own company.
127. A number of emails passed between Mr Wakefield, Mr Abdi, the applicant and the fictitious “Mr Hu Tan Wang”.
128. Despite Mr Wakefield’s denials, the terminology and tone of the emails sent to “Mr Hu Tan Wang” by Mr Wakefield on 29 July 2013⁷ seem to suggest some knowledge, because I doubt that a CEO of a company would call a service provider or customer a “goose” or complain about a wrong telephone number in such a manner in an email sent to someone who he had never met before. Mr Wakefield’s denial should have been addressed by the applicant in his statement.
129. In respect of the US Patent Office allegation, Mr Wakefield advised that the respondent had a deed with Mr Meyer, but he had been unable to contact him. He denied that he told the applicant that Mr Meyer was dead and he denied that he instructed the applicant to falsify documents. No firm conclusions can be drawn regarding this issue as the contemporaneous emails do not assist and the applicant has not addressed Mr Wakefield’s denial in his statement.
130. In respect of the credit card issue, Mr Wakefield conceded that there were occasions when the applicant exceeded the limit on the company credit card, and needed to use his personal credit card, but he confirmed that the applicant was reimbursed. The emails certainly confirm that the credit card limit and use of his personal credit card was an issue. This was a real event.
131. Mr Wakefield indicated that the applicant had raised this issue during the proceedings in the Fair Work hearing and the allegations were rejected. In the absence of any of the documents from the Fair Work proceedings, no conclusions can be drawn about this.
132. Mr Wakefield stated that the applicant was reimbursed but he claimed that he used the money for other purposes and did not pay off his credit card. The applicant tried to claim all of the credit card charges, interest and other expenses, but these were not recoverable. Mr Rodriguez’ post termination email provides some corroboration. The applicant has not addressed this allegation in his statement.
133. Mr Wakefield conceded that the applicant informed him about his injury by email in February 2014, but he denied that he had received emails in March 2014. He thought that the applicant was receiving treatment in China and that there was nothing that could be done. No firm conclusion can be drawn from this.
134. Mr Wakefield stated that the notebook entry referred to by the applicant applied to all staff and the applicant was not singled out. This seems a logical explanation.
135. Mr Wakefield stated that expense claims were paid within 10 to 14 days, although it may have taken longer in the event that an investigation was necessary. There is no suggestion in the emails that the claim submitted by the applicant would be or was delayed due to an investigation. According to the evidence, the claim was submitted on 29 March 2014 and a payment was received on 12 May 2014. Therefore, Mr Wakefield’s comments are inconsistent with the evidence. This was a real event.

⁷ Application, p 477 and 485.

136. Mr Wakefield confirmed that he was aware of the applicant's physical restrictions and instructed him to refrain from lifting anything. He claimed that the applicant ignored his direction. He claimed that he issued something in writing to the applicant, but he was unable to locate it. Therefore, the evidence of the parties is at odds.
137. Mr Wakefield advised that the decision to make the applicant redundant was purely for business purposes and he denied that it had anything to do with his physical injury. However, given that the applicant's employment was terminated a little over an hour after Mr Wakefield received the WorkCover certificate, common-sense suggests that this was more than likely the reason.
138. Further, had there been a plan to terminate the applicant on 5 May 2014, one would have expected that the respondent would have already calculated the applicant's termination benefits and reimbursements for any unpaid credit card and business expenses. The calculation was not in fact done until 12 May 2014. Therefore, there is confirmation of a real event.
139. The balance of the matters that are the subject of comment by Mr Wakefield occurred after the applicant's termination and are not relevant to the matters in dispute, even though the applicant indicated in his claim form annexure that these events caused various psychological symptoms.
140. In *Attorney General's Department v K*⁸, Deputy President Roche summarised relevant authorities in relation to a worker's perception of real events at work (at [52]):
 - "(a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in *State Transit Authority of NSW v Chemler* [2007] NSWCA 249 (*Chemler*) at [40]);
 - (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);
 - (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
 - (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Leigh Sheridan v Q-Comp* [2009] QIC 12);
 - (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in *Wiegand v Comcare Australia* [2002] FCA 1464 at [31]), and
 - (f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered."

⁸ [2010] NSWCCPD 76 (*Attorney General's Department v K*), [52].

141. The applicant has identified a number of instances where he perceived that he was being bullied and harassed by Mr Wakefield. It is true that little weight can be given to Mr Wakefield's unsigned "interview". On the other hand, the applicant has failed to address the contents of the factual investigation in his extensive statement as should have been the case. Nevertheless, some of the applicant's allegations have been corroborated by a series of emails and documents, and Mr Wakefield acknowledged that some of the events did in fact occur.
142. On review of the applicant's evidence and the evidence as a whole, and even though the applicant has not addressed some of the issues raised in the "interview", I am satisfied that at least some of the events raised by the applicant did in fact occur and were not imaginary. He had issues with Mr Wakefield regarding his treatment during the course of his employment as well as with the manner in which his services were terminated. The applicant viewed his interactions with Mr Wakefield as bullying and harassment and I have no reason to doubt the veracity of his evidence or his perception of these real events. In any event, little weight can be given to Mr Wakefield's "interview", so the applicant's evidence is largely unchallenged.
143. Curiously, the insurer did not rely on a defence under s 11A of the 1987 Act, so in the circumstances, one might infer that it did not think that Mr Wakefield's actions were reasonable. Alternatively, and more likely, the person who drafted the dispute notices gave no thought to such a defence. In any event, it is not a matter that concerns me.
144. Therefore, I am comfortably satisfied on the balance of probabilities that the applicant was exposed to bullying and harassment during the course of his employment with the respondent. The next question to consider is whether the applicant sustained an injury in terms of s 4 of the 1987 Act.

Did the applicant sustain a primary and/or secondary psychological injury or condition – s 4(b)(i) of the 1987 Act?

145. In *Stewart v NSW Police Service*⁹, Neilson CCJ referring to his earlier decision of *Kirby v Trustees of the Society of St Vincent de Paul (NSW)*¹⁰, unreported, stated:

- "6. To succeed in this Court, the applicant must prove that the conduct complained of constituted 'injury' within the meaning of the Act. Where, as here, a psychiatric injury is alleged the applicant must prove either:
- (i) that the nervous system was so affected that a physiological effect was induced, not a mere emotional impulse: *Yates v South Kirkby Collieries Ltd* [1910] 2KB 538; *Austin v Director-General of Education* (1994) 10 NSWCCR 373; *Thazine-Aye v WorkCover Authority (NSW)* (1995) 12 NSWCCR 304; *Zinc Corporation Ltd v Scarce* (1995) 12 NSWCCR 566, or
 - (ii) the aggravation, acceleration, exacerbation or deterioration of a pre-existing psychiatric condition: *Austin's* case.

Frustration and emotional upset do not constitute injury: *Thazine-Aye's* case; nor, semble, where a mere 'anxiety state': the *Zinc Corporation* case per Meagher JA at 575B. A 'straight litigation neurosis' is not compensable: *Karathanos v Industrial Welding Co Ltd* [1973] 47 WCR (NSW) 79 at 80. A misperception of actual events, due to the irrational thinking of the worker leading to a psychiatric illness is not compensable: *Townsend v Commissioner of Police* (1992) 25 NSWCCR 9.

⁹ [1998] NSWCCR 57; (1998) 17 NSWCCR 202, [6].

¹⁰ NSWCC, No. 20708/94, 11 April 1997

It follows that subsequent rationalisation of earlier innocuous events, which rationalisation leads to psychiatric illness is also not compensable. Furthermore, once the applicant has established 'injury' she must prove that an incapacity for work resulted therefrom..."

146. Further, in *Commonwealth of Australia v Smith*¹¹, Handley JA stated:

"Thus, the law does not recognise that emotional and mental problems constitute an injury unless they constitute a psychiatric illness that has been recognised as such by 'professional medical opinion'."

147. The issue for me to determine is whether the applicant sustained a psychological injury arising out of or in the course of his employment prior to 5 May 2014 (deemed). This requires a consideration of s 4 of the 1987 Act.

148. Section 4 of the 1987 Act defines injury as follows:

"In this Act-

Injury-

- (a) means personal injury arising out of or in the course of employment,
- (b) includes a disease injury, which means:
 - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
 - (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers' Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined".

149. In order to be satisfied that an injury has occurred, there must be evidence of a sudden or identifiable pathological change: *Castro v State Transit Authority (NSW)*¹², or as stated by Neilson CJ in *Lyons v Master Builders Association of NSW Pty Ltd*¹³, "the word 'injury' refers to both the event and the pathology arising from it".

150. The issue of causation must be determined based on the facts in each case. Until recently, the accepted view regarding causation was set out in *Kooragang Cement Pty Ltd v Bates*¹⁴ where Kirby J stated:

"The result of the cases is that each case where causation is in 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

¹¹ [2005] NSWCA 478, [16].

¹² [2000] NSWCC 12; 19 NSWCCR 496.

¹³ (2003) 25 NSWCCR 422, [429].

¹⁴ (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*), [463].

subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common-sense 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 to compensation."

151. The High Court in *Comcare v Martin*¹⁵ raised some concerns about the common-sense evaluation of the causal chain in a matter that concerned Commonwealth legislation. The Court stated:

"42. Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose. It has been said more than once in this Court that it is doubtful whether there is any 'common sense' approach to causation which can provide a useful, still less universal, legal norm. Nevertheless, the majority in the Full Court construed the phrase 'as a result of' in s 5A(1) as importing a 'common sense' notion of causation. That construction, with respect, did not adequately interrogate the statutory text, context and purpose."

152. Therefore, the legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose. This is not a new concept. Sections 4(b), 9A and 11A of the 1987 Act contain specific requirements and the provisions need to be interpreted using standard principles of interpretation. This does not mean that the common-sense approach has no place in the application of the legislation to the facts of the case.
153. According to the applicant's evidence, his distress was caused by the bullying and harassment by Mr Wakefield. He indicated that he was mentally depressed and anxious from late 2013. He described a number of symptoms that he alleged arose from this experiences in the workplace and he continued to take medication. He also suffered emotional issues caused by his physical injuries and marital problems.
154. There is merit in Mr Callaway's submission regarding the lack of evidence from the applicant's treating doctors. The state of the evidence and the dated nature of the material attached to the Application was raised by me at the telephone conference. Despite my concerns, the applicant's solicitor chose to proceed to an arbitration hearing rather than discontinue the matter. Therefore, it was not surprising that the respondent's counsel objected to the late report of the treating psychologist.
155. On the other hand, even though the applicant's medical evidence is poor, nevertheless, it is evidence. According to the medical referral of Dr Wan, the applicant had depression, anxiety and an adjustment disorder, which was triggered by work related stressors that resulted in his termination in May 2014. Therefore, he supports a primary psychological condition. He also acknowledged that the applicant had chronic pain arising from his shoulder and wrist injuries. There was no suggestion in his referral or in his medical certificates that the applicant had a secondary psychological condition.
156. Dr Kaye's report is now more than three years old. He had access to the applicant's chronology and the claim form attachment, so he would have been aware of the applicant's allegations. He attributed the applicant's Adjustment Disorder with Mixed Anxiety and Depressed Mood to his response to numerous injuries, presumably his physical injuries, and the subsequent termination of his employment. Therefore, it seems that the psychological condition was caused by the impact of his physical injuries (ie. secondary) and by his termination (ie. primary), but that is by no means clear.

¹⁵ [2016] HCA 43, [42].

157. Dr Singer recorded that the applicant was suffering from pain in his right wrist and shoulder. Therefore, it seems that he was treating the applicant for his pain symptoms, and presumably the emotional issues arising from his pain. The only work issue that he identified was the applicant's termination. In his later reports, he recorded details of the applicant's marital and legal issues. He diagnosed an Adjustment Disorder with Mixed Anxiety and Depressed Mood, or a Major Depressive Disorder. He did not comment on causation, so his reports are of little probative value.
158. Dr Westmore provided a similar diagnosis to Dr Singer, but he felt that the condition arose due to workplace difficulties. The doctor stated that the applicant's chronic pain contributed to his condition. He was also mindful of the other non-work stressors. His acknowledgment that the applicant's condition was caused by a number of factors is consistent with an acceptance of a primary psychological injury caused by the events at work and a secondary psychological condition caused by his chronic pain, as well as other non-work stressors.
159. In my view, the lack of evidence from the treating doctors does not negate Dr Westmore's opinion, even though he expressed some reservations about providing an assessment of whole person impairment. The doctor still provided a whole person impairment assessment, so presumably he was satisfied that he could do so. His concerns about how one could differentiate between the impact of the applicant's pain and psychosocial stressors will ultimately be a matter for an AMS.
160. The only doctor to take issue with the applicant's allegations of injury is Dr Lee. He recorded a far more detailed history in his second report, which is not surprising, given the brief history recorded earlier. He reported that the applicant was seeing a psychologist for stress arising from the AVO and his divorce. There were also financial and legal problems.
161. In coming to his conclusion, the doctor disregarded the applicant's history and the substantial documentation drafted by the worker. The doctor was not satisfied that the applicant had any psychological condition, and yet he conceded that the applicant had a significant functional overlay, which was presumably secondary to the applicant's chronic pain.
162. However, he also stated that the applicant's employment was not a significant factor in the development of his psychiatric condition. This suggests that it was a factor, albeit not a significant factor. Therefore, to suggest that there is no psychological condition is internally illogical and inconsistent. His opinion is also completely at odds with the evidence of Drs Wan, Kaye and Westmore.
163. What does seem consistent is the acceptance that there are other non-work factors in play. However, the fact that the doctor indicated that the non-work stressors made an assessment of whole person impairment almost impossible, would seem to suggest a concession on the doctor's part that there is a component that might be due to a primary psychological injury.
164. Dr Lee also had regard to the contents of the factual investigation and Mr Wakefield's version of the events. This may well have coloured his opinion about the issue of injury. However, I have accepted that there was an element of truth in what the applicant claimed. In the circumstances, given these apparent inconsistencies in his reports, I consider that minimal weight should be given to the reports of Dr Lee.
165. Having regard to the totality of the medical evidence and the statements of the applicant, coupled with the histories that he provided to the various doctors and psychologist, the common-sense evaluation of the causal chain supports the contention that the applicant sustained a primary psychological injury arising out of or in the course of his employment on 5 May 2014.

166. Further, I am comfortably satisfied that the applicant is also suffering from a secondary psychological condition resulting from the impact of chronic pain caused by the injuries sustained to his right wrist on 21 March 2008 and to his right shoulder, wrist and hand on 6 March 2013. Even Mr Morgan conceded this during his submissions. The evidence supports the existence of two separate and distinct psychological conditions consistent with the reasoning in *Cook and Morris*.

**Was the applicant's employment a substantial or the main contributing factor to his injury?
– ss 4(b)(i) and 9A of the 1987 Act**

167. The next question to consider is whether the applicant's employment was a substantial or the main contributing factor to the psychological condition. In order to understand what "main contributing factor" means, one must look to the ordinary and grammatical meaning of the text and its context. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*¹⁶, Hayne, Heydon, Crennan and Keifel JJ stated:

"This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied upon to displace the clear meaning of the text. The language which is actually employed in the text of the legislation is the surest guide to legislative intention".

168. According to the online version of the Macquarie Dictionary, "main" is defined as follows:

"main

adjective

1. chief; principal; leading: *the main office*.
2. sheer; utmost, as strength, force, etc.: *by main force*.
3. of or relating to a broad expanse: *main sea*.
4. *Grammar* See main clause.
5. *Obsolete* strong or mighty...."

169. Therefore, "main" contributing factor can be interpreted as the "chief" or "principal" contributing factor.

170. Such an interpretation is not dissimilar to the interpretation of "wholly or predominantly caused" used in s 11A of the 1987 Act, which has been held to mean "mainly or principally caused": *Kooragang, Ponnan v George Weston Foods Ltd*¹⁷; *Temelkov v Kemblawarra Portuguese Sports and Social Club Ltd*¹⁸, and *Smith v Roads and Traffic Authority of NSW*¹⁹.

171. However, the term "wholly" seems to connote "entirely" or "totally" to the exclusion of everything else, whereas the terms "mainly", "chiefly", "principally" and "predominantly" suggest a slightly lesser degree, but those terms seem to demand a level more than "substantially".

172. I have determined that the applicant was exposed to what he perceived to be bullying, harassment, and intimidation from 2005 to 5 May 2014 (deemed). Whilst it seems that the applicant did not seek any treatment before his services were terminated, this event appears to have been the catalyst. His marital and other stressors developed after his termination. The proximate and principal cause of his primary psychological injury and the need for treatment was the effects of bullying and harassment up to and including 5 May 2014.

¹⁶ [2009] HCA 41, [47].

¹⁷ [2007] NSWCCPD 92.

¹⁸ [2008] NSWCCPD 96.

¹⁹ [2008] NSWCCPD 130.

173. Bearing in mind the statutory requirements of s 4(b)(i) of the 1987 Act and the principles set out in *Kooragang*, I am satisfied that the applicant's employment was the main contributing factor to the contracting of the psychological condition or disease on 5 May 2014 (deemed).
174. As there was no dispute regarding the applicant's physical injuries, whether the employment was a substantial contributing factor to those injuries is not a matter that I need to determine.

Quantification of whole person impairment

175. I will remit this matter to the Registrar for referral to an AMS pursuant to s 321 of the 1998 Act for assessment of the whole person impairment due to a psychological injury sustained on 5 May 2014 (deemed). Any whole person impairment arising from the secondary psychological condition is a matter for the AMS, even though that might prove to be difficult to assess.

Costs

176. There will be no order as to costs.

FINDINGS

177. The applicant sustained a primary psychological injury arising out of or in the course of his employment prior to 5 May 2014 (deemed).
178. The applicant sustained a secondary psychological condition resulting from the injuries sustained to his right wrist on 21 March 2008 and to his right shoulder, wrist and hand on 6 March 2013.
179. The applicant's employment was the main contributing factor to his primary psychological injury.
180. I remit this matter to the Registrar for referral to an AMS pursuant to s 321 of 1998 Act for assessment of the whole person impairment due to a psychological injury sustained on 5 May 2014 (deemed).
181. The documents to be reviewed by the AMS are:
- (a) Application to Resolve a Dispute and attachments, and
 - (b) Reply with attached documents.
182. No order as to costs.