PERSONAL INJURY COMMISSION

WORKERS COMPENSATION DIVISION

AMENDED CERTIFICATE OF DETERMINATION

Matter Number: **6815/20**
Applicant: **Michael Ibbett**
Respondent: **Toll Global Logistics**
Date of Determination: **25 February 2021**
Date of Amendment: **5 March 2021**
Member: **Jacqueline Snell**
Citation No: **[2021] NSWWCC 64**

The Commission determines:

1. The name of the respondent is amended to Toll Global Logistics.

2. The applicant sustained psychological injury arising out of or in the course of his employment on 13 June 2019 (deemed date). The applicant's employment with the respondent was the main contributing factor to his psychological injury.

3. The applicant's psychological injury was not wholly or predominately caused by reasonable action taken by the respondent with respect to discipline.

4. The applicant requires medical and related treatment as a consequence of the psychological injury he has sustained. The respondent is to pay the applicant's medical and related treatment in accordance with s 60 of the *Workers Compensation Act* 1987.

5. The applicant's claim against the respondent for permanent impairment compensation resulting from the psychological injury he sustained on 13 June 2019 (deemed date) is to be remitted to the Registrar for referral to an Approved Medical Specialist for the purpose of assessment of whole person impairment.

6. The following documents are to be forwarded to the Approved Medical Specialist:

    (a) Application to Resolve a Dispute and attached documents;

    (b) The Reply and attached documents;

    (c) Application to admit late documents lodged by the applicant on 28 January 2021 and attached documents.

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

Issued by:

S Naiker

Sarojini Naiker
Dispute Officer

STATEMENT OF REASONS

BACKGROUND

1. Michael Ibbett (the applicant) worked with Toll Global Logistics (the respondent) as a truck driver. He is 57 years of age. He was a casual employee. The applicant alleged he sustained psychological injury (being injury in the nature of a disease injury) during the course of his employment with the respondent, with a deemed date of injury of 13 June 2019.

2. In his application before the Commission, the applicant described the circumstances of injury of terms of being subjected to bullying and harassment during the course of his employment from 2018 to June 2019, with particular reference to being targeted by his operations manager before being stood down without being provided valid reasons.

3. While the claim for compensation in these proceedings initially included a claim for weekly benefits, the applicant's claim for weekly benefits was discontinued at the arbitration hearing. Accordingly the claim for compensation in these proceedings involves the following:

    (a) Past medical or related treatment payable under s 60 of the *Workers Compensation Act 1987* (the 1987 Act) in the sum of $617.03, and

    (b) Permanent impairment compensation payable under s 66 of the 1987 Act for 19% whole person impairment resulting from psychological injury with deemed date of injury of 13 June 2019.

4. The respondent issued notice in accordance with s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 8 October 2019 [1]. Injury was placed in issue, and while the notice canvassed defence available under s 11A of the 1987 Act it was unclear from the notice as to whether such defence had been raised, in the alternative. Relevantly, treatment and permanent impairment were also placed in issue. Following a request for review of the decision to decline the applicant's claim, the respondent issued notice on 29 April 2020 [2] in which the applicant was advised the decision to decline his claim was maintained. The respondent issued further notice in accordance with s 78 of the 1998 Act on 12 August 2020 [3]. Injury was again placed in issue as was relevantly, treatment and permanent impairment.

5. The matter proceeded to arbitration hearing on 2 February 2021, conducted by telephone. Eraine Grotte of counsel appeared for the applicant, instructed by Jolene Chandra, solicitor. Brendan Jones of counsel appeared for the respondent instructed by Chantelle Bauer, solicitor. The applicant and Glenn Hill, Workers Compensation Manager of the respondent, were present.

Respondent's application for leave to raise defence available under s 11A of the 1987 Act

6. Through Mr Jones of counsel, the respondent made application for leave under s 289A of the 1998 Act to raise defence available under s 11A of the 1987 Act.

7. The respondent drew attention to the notice dated 8 October 2019 issued to the applicant in accordance with s 78 of the 1998 Act, which recited applicable legislation including s 11A of the 1987 Act, and made reference to the reasons as to why the respondent declined the applicant's claim, which included consideration of what the applicant said had occurred and what Ms Butler said had occurred. The respondent said it was evident from very early on the applicant was provided with notice of defence raised under s 11A and was also provided with the information available to it that supported such defence. The respondent also pointed to

[1] Application to Resolve a Dispute (ARD) at page 34
[2] Reply at page 26
[3] Reply at page 31

the conduct of the parties in these proceedings, particularly at teleconference where there was concession by the solicitor who appeared for the applicant on that occasion that defence had been raised under s 11A of the 1987 Act, with supplementary report subsequently being obtained from Dr Takyar relevant to such defence.

8. The respondent referred to the matter of *The Office of Public Guardian v Manning* [4] and said that in the event the Commission found in favour of the applicant as regards injury, the injury could only relate to the conduct surrounding the allocation of his duties, with transfer, performance appraisal and discipline (being categories in s 11A of the 1987 Act) being of relevance. The respondent argued that while there was no actual prejudice occasioned to the applicant by raising defence under s 11A of the 1987 Act in the alternative, prejudice would be occasioned to the respondent if leave was not allowed.

Applicant's opposition to the respondent's application for leave to raise defence available under s 11A of the 1987 Act

9. Through Ms Grotte of counsel, the applicant opposed the respondent's application for leave under s 289A of the 1998 Act to raise defence available under s 11A of the 1998 Act.

10. The applicant essentially pointed out that until now there had been no mention by the respondent of any categories in s 11 A of the 1987 Act other than discipline. The applicant referred to the matter of *Department of Corrective Services v Bowditch* [5] and to that of *Mateus v Zodune Pty Limited t/as Tempo Cleaning Services* [6], which are relevant to the principles to be considered in the exercise of discretion contained in s 289A of the 1998 Act. As regards prejudice, the prejudice to the applicant was obvious in that the applicant's medical evidence before the Commission was restricted to the issue of discipline and not transfer and/or performance appraisal.

Determination of the respondent's application for leave to raise defence available under s 11A of the 1987 Act

11. I carefully consideried submissions made by counsel and I carefully considered the matters of Manning, Bowditch and Mateus, being matters that were referred to me by counsel.

12. I accepted that while it was not clearly articulated in the notice dated 8 October 2019 which was issued to the applicant in accordance with s 78 of the 1987 Act that the respondent raised defence under s 11A of the 1987 Act in the alternative, it was evident at teleconference in these proceedings that the applicant knew the respondent sought to rely on defence under s 11A of the 1987 Act in the alternative, relevant to the category of discipline and subsequently obtained and served a supplementary report of Dr Takyar canvassing this particular issue. In such circumstances, I was of the view there is no prejudice to the applicant in granting leave to the respondent to raise defence under s 11A of the 1987 Act in the alternative, relevant to the category of discipline. I was however of the view there is real prejudice to the applicant in granting leave to the respondent to raise defence under s 11A of the 1987 Act in the alternative, relevant to the category of transfer and performance appraisal and note that these further categories were not canvassed at the teleconference.

13. For the reasons referred above, I granted leave to the respondent to raise defence under s 11A of the 1987 Act in the alternative, but only in relation to the category of discipline. I did not grant leave to the respondent to raise defence under s 11A of the 1987 Act in the alternative, in relation to the categories of transfer and/or performance appraisal.

[4] [2008] NSWWCCPD 94 (*Manning*)
[5] [2007] NSWWCCPD 244 (*Bowditch*)
[6] [2007] NSWWCCPD 227 (*Mateus*)

ISSUES FOR DETERMINATION

14. The following issues are in dispute:

    (a) Psychological injury with deemed date of injury of 13 June 2019;

    (b) In the alternative, defence was raised under s 11A of the 1987 Act relevant to discipline, and

    (c) The requirement for medical or related treatment for primary psychological injury.

PROCEDURE BEFORE THE COMMISSION

15. 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

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

    (a) ARD and attached documents;

    (b) The Reply and attached documents, and

    (c) Application to admit late documents lodged by the applicant on 28 January 2021 and attached documents (AALD).

Oral Evidence

17. Neither party sought leave to adduce oral evidence or cross examine any witnesses. Both counsel made oral submissions and a copy of the recording is available to the parties.

FINDINGS AND REASONS

Review of evidence

18. A brief summary of the evidence follows.

The applicant's statement

19. In his statement dated 16 September 2019 [7], the applicant said he commenced working with the respondent in or about February 2018, working as a truck driver on a permanent-casual basis. His duties involved delivering loads from the respondent's facility at Minchinbury (the depot) to various Woolworth supermarkets across Sydney.

[7] ARD at page 1

20. The applicant relevantly explained that on 18 February 2019 he attended the Woolworths supermarket in North Sydney (WOW NS) as part of his delivery run, and after positioning his truck in the dock he waited for the dock hand to remove the seal to enable unloading to commence. He said the dock hand started a conversation with him regarding the security guard on the dock, telling him that he had gone to a table near the locker to retrieve a pen for use in his job and the security guard had left the dock to report to the store that the dockhand had been observed accessing the locker without permission "to make him lose his job". The dock hand reportedly told the applicant that he had found the security guard very difficult to deal with. The applicant further explained that while the security guard passed him by a few times while he was in the dock, there was no altercation or interaction between them at all. He admitted however that he had seen the security guard on previous occasions and did not like the way he spoke or dealt with people.

21. The applicant said about two or three days after this particular run he received notification from the respondent he was suspended without pay pending an investigation. He said he received a telephone call from Lindsee Butler (Ms Butler) during which he was told he had been stood down and should not attend work, but with no explanation as to why. The applicant told Ms Butler he suspected the situation he found himself in might have something to do with the security guard at WOW NS and told her about the tension between the security guard and the dock hand. Mr Butler said she would speak to the depot Operations Manager, Robert Hancock (Mr Hancock) and when the applicant heard nothing further from Ms Butler, he telephoned the WOW NS to ascertain if any issues had arisen involving truck drivers, which reportedly had not. There was reportedly however "something between the dock hand and the security guard". Ms Butler expressed concern about the applicant's direct contact with the WOW NS.

22. A couple of weeks later, the respondent was advised by either Ms Butler or Sally Ann Clark (Ms Clark) that his employment with the respondent was terminated, with reason being that he swore at the security guard in WOW NS. Following union involvement, the applicant's employment was reinstated and he returned to work.

23. On or about 12 or 13 June 2019 the applicant was again at the WOW NS for a delivery when the security guard attempted to shake the applicant's hand, an attempt which the applicant rebuffed. The applicant reported this incident and was subsequently told "all good, its reported".

24. The applicant was overseas on holiday for a couple of weeks in the latter part of June 2019 and when on his return he confirmed his availability with the respondent, there was a reported downtown in work. In or about 17 or 18 July 2019 the applicant became aware a colleague had been contacted regarding availability for work, and as he had not been contacted the applicant, made enquiry as to why he had not been contacted. Ms Clark indicated to the applicant he had again been stood down, again without explanation. The applicant felt this recent situation he found himself in related to the security guard at WOW NS, and raised the more recent incident he had reported with Ms Clark. Ms Clark indicated that pending investigation, she could provide the applicant with work at sites other than WOW NS. Although the applicant did work at these alternate sites, he reportedly became very stressed about his employment with the respondent.

25. After speaking with a colleague on 18 July 2019, the applicant consulted with his general practitioner, Dr Girgis. On 24 August 2019 he met with a social worker but found the session of little assistance and made no further appointment to meet. On 11 September 2019, he attended psychological counselling with Amie Hollands, which was "really helpful".

26. In a subsequent statement dated 18 November 2020 the applicant explained in some detail the effect his psychological injury has had on his day to day life [8].

[8] ARD at page 16

Incident statements

27. In a document with photographs [9], the applicant described an incident occurring on 16 November 2018 when he damaged his truck while attending a delivery at the Woolworths store in Pitt Street, Sydney.

28. In a further document with photographs [10], the applicant described an incident occurring on 17 November 2018 when he damaged his truck while attending a delivery at a Woolworths store in Randwick, Sydney.

Record of complaint

29. In an email dated 19 February 2019 from John Cheung (Mr Cheung), Transport Supervisor, [11] Mr Cheung asked Ms Butler to investigate a complaint made by the dock master at WOW NS that the applicant had been rude on two occasions, the most recent occasion being on 18 February 2019, with his behaviour described in terms of "swearing and yelling". Mr Cheung told Ms Butler that contact would be made with the WOW NS for the purposes of obtaining a statement and footage.

Incident notification form

30. An incident notification form [12] recorded an incident occurring on 13 June 2019, which was noted as reported on 28 August 2019. A description is provided in the following terms:

> "18/2/2019 complaints received from WOW North Sydney around behaviour (swearing and yelling).
> 13/6/2019 driver states he had an altercation with security leading to physiological injury.
> 26/8/2019 driver provides medical certificate reporting injury"

31. Immediate action taken relevant to the incident included reference to "19/2/2019 incident investigated, driver indicated no incident. Driver flagged not to delivered [sic] to North Sydney".

32. Investigation of the incident indicated acceptance the incident had occurred because "Driver returned to store on 13/6/2019 after Toll/WOW agreed he would not be sent back to North Sydney following Feb incident" due to supervisor oversight. A description of the investigation findings follows:

> "Following the first inciden,t a direction was given to the site supervisor team not to send the driver to North Sydney Store. Basic HR investigation was completed as no injury was reported and the matter was deemed closed.
> In July 2019, supervisor over site led to driver being sent back to store at which point another incident occurred. The second incident was escalated to Toll people as another HR incident.
> The driver went on a period of leave at which point his services was no longer required from Toll Minchinbury as part of the normal downsizing activities.
> Upon being aware of injury, Toll Minchinbury has taken actions to ensure requirements of workers RTW plan are met and controls are put in place to ensure drivers are not sent to the stores they are restricted from".

[9] ARD at page 8
[10] ARD at page 10
[11] Reply at page 1
[12] ARD at page 19

Worker's injury claim form

Lindsee Butler's statement

34. In her statement dated 2 October 2019 [14], Ms Butler confirmed she was employed by the respondent in the capacity of Team Leader, with her role involving management of five recruitment consultants and the overseeing of the day to day recruitment of temporary staff.

35. Ms Butler confirmed that as a driver with the respondent, the applicant would usually work various shifts, depending on the volume of work. She explained October to late January and Easter are typically the busiest times, with winter being quiet.

36. Ms Butler detailed a couple of incidents occurring in November 2018 when the applicant damaged his truck, which he reported. Although Mr Hancock requested the applicant be excluded from working at the depot, he ultimately changed his mind due to the Christmas period being very busy, and the applicant continued to work out of the depot.

37. Ms Butler confirmed she received the email from Mr Cheung on 19 February 2019 with complaint about the applicant's unpleasant behaviour on two occasions, with the latest occasion having occurred the day before. She also confirmed that in June 2019 a further complaint about the applicant's unpleasant behaviour was received by Mitch Varnam Operations Manager (Mr Varnam). Mr Varnam told Ms Butler WOW NS had again complained about the applicant. As the applicant was about to leave on an overseas holiday, Ms Butler did not let him know about the complaint until his return at the end of June 2019. Ms Butler also told him she would find alternate duties. While for a period the applicant worked in a warehousing role, this was short lived due to complaint about him. The only other work the applicant undertook with the respondent was in the nature of traffic control for a few days while the regular traffic controller was on leave.

38. Ms Butler said on 23 August 2019 she received a telephone call from the applicant requesting "workers compensation paperwork" and while the applicant also told her he was seeing a doctor; he did not disclose the nature of his injury. Later that day, Mr Butler received a text message from the applicant together with a photo of a WorkCover Certificate of Capacity, which certified the applicant as fit for his pre-injury duties but noted he suffered stress and anxiety as a result of "alleged bullying at work". On 30 August 2019 the applicant was assigned a shift at Coca Cola Alexandria, but with negative feedback from the client, the applicant was offered no further work.

39. Ms Butler confirmed the applicant was not "terminated or stood down" as a result the complaint made in February 2019. She said however that ultimately a decision was made by the respondent to provide him with no further work, and as a casual employee there was no obligation on the respondent to provide the applicant with work.

Factual report

40. Nicholas Anthony & Associates prepared a factual investigation report dated 7 October 2019 [15], which comprised interview with the applicant and Ms Butler. The report confirmed the applicant to be a casual worker with the respondent, with the applicant having worked as a truck driver. The applicant was offered work when work was available, with his predominant work being to deliver goods to Woolworths supermarkets throughout the Sydney metropolitan area. There were reported incidents and complaints about the applicant, and ultimately the respondent did not provide the applicant with work, which affected his financial position and resulted in the applicant seeking medical assistance for psychological distress and making a claim for compensation.

[14] Reply at page 2
[15] Reply at page 40

Treating medical evidence

Cronulla Medical Practice

41. The clinical records of Cronulla Medical Practice [16] indicated the applicant consulted with Dr Girgis on 18 July 2019 with complaint of depression. There was a note at that time of "Buleing and Arrest", which I assume to be reference to "bullying and harassment" as the applicant consulted with Dr Ibrahim the following day with complaint of being bullied and harassed. On this occasion reference is made by Dr Ibrahim to "manager" and "bills mounting up". The applicant consulted with Dr Girgis again on 14 August 2019 and on this occasion, reference is made to the applicant not being provided with work. When the applicant consulted with Dr Ibrahim on 23 August 2019, Dr Ibrahim recorded the applicant having not worked for 12 weeks and noted he had a mortgage and was very stressed.

42. In a report dated 11 September 2019 [17] Dr Ibrahim confirmed the applicant presented on that occasion for treatment for anxiety resulting from "bullying harassment and intimidation" by the respondent, which had been "going on of several months now". Dr Ibrahim described the applicant as being keen to work but felt that he was discriminated against as he was not being given any work despite his colleagues being given work. Dr Ibrahim described the applicant as suffering financial loss as a result of the downturn in his work and this caused "distress".

43. On 29 October 2019, Dr Girgis described the applicant as being "happy to go back to work".

Amie Hollands

44. The applicant had a pre-existing psychological injury, and it is evident from Ms Holland's clinical records [18] he has been under her care since at least 2015. It is clear the applicant has had relationship difficulties, but in a letter dated 5 June 2015, Ms Hollands reported the applicant had also required psychological intervention regarding anxiety and mood management in response to the suspension of his security licence with Allianz Insurance, which resulted in him being unable to work as a surveillance officer with Allianz Insurance.

45. The applicant first consulted with Ms Hollands with complaint of bullying at work by his "boss" Mr Hancock on 11 September 2019. Ms Hollands noted the applicant having been "laid off" as a result of the incidents occurring in February and June 2019 and noted of the applicant that he suffered stress, was "cranky", and had reduced tolerance. She noted too there was tension at home. She described "financial strain" as the main trigger for the applicant's mood.

46. In a report dated 27 September 2019 [19], Ms Hollands provided opinion the applicant was suffering from adjustment disorder, which was reactive to the stress of being stood down from his role with the respondent as well as the secondary financial stress. She described the applicant as being fit to return to work "immediately".

Independent medical evidence

Dr Takyar

47. The applicant was psychologically assessed by Dr Takyar on 26 March 2020. Dr Takyar provided a report dated 3 April 2020 [20].

[16] ARD at page 199 and 295
[17] Reply at page 60
[18] ARD at page 134 and Reply at page 61
[19] ARD at page 96
[20] ARD at page 58

48. The history of injury given to Dr Takyar detailed the two incidents occurring in February and June which resulted in complaint and the applicant being stood down from work. The applicant explained to Dr Takyar he had consulted with his general practitioner. The applicant also described an acceleration of anxiety, stress and financial worry. Although the applicant accepted, he had been provided with intermittent shifts, he told Dr Takyar his colleagues were getting more work than he was.

49. The applicant accepted he had suffered previously psychological injury in May 2015 in the context of a relationship breakdown but reported having made a full recovery. While the applicant had returned to the care of Ms Hollands in recent times, he was unable to continue with treatment because he was unable to afford it.

50. Following mental state examination, Dr Takyar provided opinion the claimant presented with adjustment disorder with mixed anxiety and depressed mood (chronic), which developed in the context of interpersonal conflict with a security guard where he worked. He provided opinion the applicant's employment with the respondent was a substantial contributing factor to injury. He considered the applicant would benefit from psychological treatment and considered the applicant had reduced capacity for work. He assessed the applicant with 19% whole person impairment.

51. In his supplementary report dated 27 January 2021 [21], following review of the clinical records provided by Cronulla Medical Practice and Ms Hollands, and also the report of Dr Smith dated 10 July 2020, Dr Takyar provided opinion it was not the disciplinary issue of being stood down that led to the development of the applicant's psychological injury, but rather it was the difficulties with the security guard and the feeling he was being bullied at work.

Dr Smith

52. The applicant was psychologically assessed by Dr Smith on 7 July 2020. Dr Smith provided a report dated 10 July 2020 [22]. At the time of assessment the applicant was working in traffic control with the respondent and was also working as a casual courier for StarTrack. The applicant accepted he had suffered previous psychological injury in the context of a relationship breakdown many years ago, but reportedly proved evasive when asked about symptoms which led to his treatment with Ms Hollands in 2015.

53. The history of injury provided to Dr Smith canvassed the security guard who worked at the dock having been instrumental in the applicant's downturn in work and resulting financial stress. Dr Smith cautioned the applicant's guarded and evasive presentation during assessment reduced his confidence in the history provided to him by the applicant.

54. Following mental state examination and review of the documents made available to him, Dr Smith also provided diagnosis in terms of adjustment disorder with mixed anxiety and depressed mood. He said that in the event the applicant's account is to be accepted, then the applicant's employment with the respondent contributed to the development of adjustment disorder with mixed anxiety and depressed mood. He considered the predominant factor however was the disciplinary issue of being stood down/suspended. Dr Smith accepted on the balance of probabilities the applicant's employment with the respondent was the main contributing factor to injury. Dr Smith did not provide assessment of permanent impairment as he was of the view the applicant had yet to reach maximum medical improvement and would likely benefit from psychiatric treatment.

[21] AALD at page 3
[22] Reply at page 45

Respondent's submissions

55. Through Mr Jones of counsel, the respondent accepted in general terms there were two categories of events the medical evidence drew on to find injury, the first being the involvement of the security guard at WOW NS in February and June 2019 and the second being the allocation of his work, the latter giving rise to the s 11A defence in the alternative.

56. In essence, the respondent argued the applicant became stressed, not by his interactions with the security guard at WOW NS but rather by the work he perceived wasn't being made available to him "rightly or wrongly".

57. The respondent referred to the matters of *Patrech v State of NSW* [23] and *AP v NSW Police Force* [24] with submission medical reports must always be read having regard to the context in which they were obtained, and comment the opinion offered by Dr Takyar could not be accepted in circumstances where there was no reasoning for such opinion. The respondent pointed out the applicant did not speak with the security guard and yet his interactions with the security guard reportedly precipitated the onset of his psychological injury. The respondent pointed out too Dr Takyar had applied the wrong statutory test in that he did not make reference to "main contributing factor" but accepted this did not necessary render his opinion obsolete.

58. The respondent turned to Dr Smith's report, in which he said that if everything the applicant said was true, his symptoms are explained by diagnosable psychological injury. Relevant to the credit of the applicant, the respondent noted in his supplementary statement dated 18 November 2020 the applicant said he had not mown grass or attended to his garden in over 18 months, whereas clinical notes demonstrated the claimant has complained to both his treating physiotherapist and his treating general practitioner about the physical difficulties he experienced when doing lawns during the relevant time, with an entry on 18 May 2020 made by Dr Ibrahim that he had a lawnmower business. In his statement while the applicant too made reference to the fact that he had attended a gym regularly prior to sustaining injury and had trained on very few occasions since, he failed to make reference to the physical difficulties he obviously had. The respondent noted Dr Smith reported the applicant had denied a history of suicide attempt whereas the clinical notes demonstrated a suicide attempt on 10 December 2008. The respondent noted Dr Smith reported the applicant had denied any disciplinary issues in previous employment whereas the clinical notes demonstrated on 28 May 2015 that he had been "suspended from duties indefinitely, significant financial strain".

59. The respondent pointed out Ms Holland provided opinion the psychological injury the applicant suffered was related to him being stood down and Dr Ibrahim provided opinion the injury was contingent on bullying/harassment and discrimination in that the applicant was not being provided with work. The respondent also pointed out the medical certificates relied on by the applicant fell afoul of s 11A(7) in that they simply state "stress and anxiety, alleged bullying at work".

60. Relevant to defence raised under s 11A of the 1987 Act which is confined to the discipline of the applicant in July and thereafter, the respondent said it was not the first occasion the applicant's performance had come under scrutiny, and made specific reference to incidents which occurred on 16 and 17 November 2018. Against that background, the respondent said the situation was that the applicant had had a complaint made against him, perceived he was stood down when there was in fact just a downturn in work. He was offered work at an alternative depot, which is not unreasonable action on the part of the respondent in circumstances of two instances of conflict.

[23] [2009] NSWCA 118 at [89]
[24] [2013] NSWWCCPD 11

Applicant's submissions

61. Through Ms Grotte of counsel the applicant explained the injury he had sustained during the course of his employment with the respondent was diagnosed by both independent medical examiners an adjustment disorder, which is not just stress and anxiety.

62. The applicant noted that while Ms Butler provided comment the applicant typically worked two to six shifts each week under his contract with the respondent as a casual truck driver, this changed when he came back from his overseas holiday at the end of June 2019. It was the applicant's belief that his downturn in work was linked with the security guard at WOW NS and when the union became involved, he was re-offered some alternate work, but not much.

63. The applicant initially accepted his limited offer of work was due to the usual downturn in work at that time of year. He then realised his colleagues were offered more work than him. On enquiry however the applicant received no explanation as to why he had not been offered more work than he had been. The applicant became stressed and anxious about the fact he had been stood down, with consequential lack of work and financial hardship, and sought medical treatment with complaint of bullying and harassment and work, and complaint of bills mounting up. The applicant was referred for psychological counselling with Ms Hollands, who talked about the difficulties he experienced as a result of being stood down at work.

64. With regard to the two incidents that occurred in November 2018 which involved damage to the applicant's truck, these incidents were reported by the applicant. While it appeared Mr Hancock initially requested the applicant be excluded from working at the depot, he changed his mind and the applicant continued to work there. Ms Butler accepted "to some degree, the incidents concerning Michael from November had been forgotten".

65. In so far as Dr Takyar's opinion is concerned, the applicant noted both Dr Takyar and Dr Smith are ad idem as to diagnosis resulting from work related events, with submission s 4 of the 1987 Act is satisfied in that no other contributing factors have been identified in the development of injury. Both independent medical examiners had significant material made available to them, including the factual report. The applicant's perception was that he was being denied work for reasons that were not being made clear to him, and in this regard the applicant relied on *State Transit Authority of NSW v Fritzi Chemler* [25].

66. In so far as defence raised under s 11A of the 1987 Act is concerned, the applicant reminded the Commission that this is an objective test and the "reasonableness" of the actions taken or proposed to be taken by the respondent must be looked at. In essence, the applicant said the respondent had decided the applicant was "troublesome" and because he was a casual employee, they didn't have any obligation to engage him regarding the reason he was not being provided with work. This was not "reasonable" and indeed one must query whether there was any discipline process in train in any event. The applicant submitted the respondent had not discharged the onus required of it to establish the actions it took in not providing the applicant with work were "reasonable".

67. Relevant to the applicant's claim for medical and treatment expenses, with Dr Takyar expressing opinion the applicant requires ongoing treatment, the applicant sought a general order in the event the Commission found in favour of the applicant on the issue of compensable injury.

[25] [2007] NSWCA 249 (*Chemler*)

Respondent's submissions in reply

68. The respondent made a number of points in reply to the applicant's submissions. There was objection to the applicant's seeking of a general order for medical and treatment expenses, as the respondent said this would change the nature of the applicant's claim and the applicant's claim for costs payable under s 60 of the 1987 Act should be confined to those claimed in the proceedings. In terms of work provided to the applicant after he returned from his overseas holiday, this work was consistent with the situation in July 2019 onwards. In terms of noncommunication, Ms Butler said the applicant was asked for his availability for work. In terms of Dr Takyar's report it is very clear, particularly from his supplementary report, that it was the interpersonal conflict with the security guard that resulted in his psychological injury, rather than everything that might have flowed from it.

69. In terms of the applicant's credit, the Commission was entitled to find the applicant is not a witness of truth notwithstanding he has not been cross-examined (*JB Metropolitan Distributors v Kitanoski* [26]).

Determination

Injury

70. Section 4 of the 1987 Act defines "injury" to mean personal injury arising out of or in the course of employment and includes a disease injury, such as that sustained by the applicant, but relevantly only if the injured worker's employment was the main contributing factor to contracting the disease.

71. The law in relation to "main contributing factor" was considered by the Deputy President Snell in *AV v AW* [27] with comment that the test of "main contributing factor" is one of causation which involved consideration of the evidence overall.

72. Relevant to the issue of causation, in *Kooragang Cement Pty Ltd v Bates* [28] Kirby J said:

> "The result of the cases is that each case where causation is in issue in a workers 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 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 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 tie between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation".

73. Relevant to the issue of causation of psychological injury, particularly when considering the issue of establishing psychological injury in circumstances of a worker's perception of real events occurring at work, in *Attorney General's Department v K* [29] former Deputy President Roche usefully summarised the principles to be applied 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' (Spiegelman CJ in *State Transit Authority of NSW v Chemler* [2007] NSWCA 249 (*Chemler*) at [40];

[26] [2016] NSWWCPD 17
[27] [2020] NSWWCCPD 9
[28] (1994) 35 NSWL 452; 10 NSWCCR 796at [463] (*Kooragang*)
[29] [2010] NSWWCCPD 76

(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*);

(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 all 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] FAC at 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."

And said at [54]:

> "The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an 'offensive or hostile working environment', and a psychological injury has resulted, it is open to find that causation is established. A worker's reaction to events will always be subjective and will depend upon his or her personality and circumstances. It is not necessary to establish that the worker's response was 'rational, reasonable and proportional…"

74. As noted, the respondent has placed injury in issue and it is true the applicant has the onus of proving he has sustained psychological injury with deemed date of 13 June 2019. This is a question of fact in his matter and consideration of the lay evidence and medical evidence is required. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited* [30] McDougall J stated at [44]:

> "A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA; (1938) 60 CLR 336. His honour's statement was approved by the majority (Dixon, Evatt and Mc Tierman JJ) in *Helton v Allen* [1940] HCA; (1940) 63 CLR 691 at 712".

75. The applicant essentially argued the psychological injury he sustained in the nature of adjustment disorder with mixed anxiety and depressed mood developed in the context of interpersonal conflict with a security guard and a feeling he was being bullied at work in that there was a downturn in his work without adequate explanation by the respondent. The respondent essentially argued the applicant had not been bullied at work, and while there had been a downturn in the applicant's work this was due to complaint made against him and the respondent's action in this regard had been reasonable. The respondent also raised the credibility of the applicant.

[30] [2008] NSWCA 246

76. It is not disputed there was a downturn in the work offered to the applicant following his return from holidays in late June 2019. While the applicant initially thought this downturn in work was due to the fact it was typically a quiet time of year for work, he then realised a colleague had been contacted regarding availability for work, while he had not. On enquiry of Ms Clark, the applicant was reportedly advised he had been stood down "or words to that effect" again, without explanation. The applicant felt this second period of being stood down related to the more recent incident with the security guard, which he had reported. When the applicant raised this with Ms Clark, she indicated that pending investigation, she would provide him with work at alternate sites. There is no statement from Ms Clark before the Commission to dispute the applicant's version of events, and I accept them. Although Ms Barker had said the applicant had not been "stood down" following incident occurring in February 2019, this phrase is used by the respondent in the issuing of notice under s 78 of the 1998 Act and I accept the applicant was stood down by the respondent on this later occasion, pending investigation into the complaint made against him.

77. The applicant consulted with his general practitioner as early as 18 July 2019 with complaint of depression and I have assumed reference is made to bulling and harassment that particular day as certainly reference is made to bullying and harassment when the applicant again consulted with his general practitioner the following day. Within the month, the applicant complained to his general practitioner he was not being provided with work and on 11 September 2019 the applicant's general practitioner described the applicant as keen to work but feeling discriminated against because he was not provided with work.

78. The applicant consulted with his psychologist on 11 September 2019 with complaint of being laid off following the incidents involving the security guard in February and June 2019, with his psychologist subsequently providing opinion on 27 September 2019 the applicant was suffering from adjustment disorder, which was reactive to the stress of being stood down by the respondent as well as the secondary financial stress occasioned by the applicant not being provided by work.

79. Dr Takyar provided two independent medical examination reports and expressed opinion the applicant presented at assessment with adjustment disorder with mixed anxiety and depressed mood, which he said in his supplementary report resulted from his "difficulties with the security guard and feeling bullied at work". While in his independent medical examination report Dr Smith cautioned the applicant's guarded and evasive presentation reduced his confidence in the history that was provided to him by the applicant, he too provided diagnosis in terms of adjustment disorder with mixed anxiety and depressed mood but said the predominant factor to the development of the psychological injury was the disciplinary issue of being stood down from work.

80. Despite submission by the respondent to the contrary (and I am mindful of comment by the High Court in *Devries v Australian National Railways Commission* [31] which was cited by former President Keating in *Brines v Westgate Logistics Pty Ltd* [32]), I am of the view the applicant provided a consistent and credible history to his general practitioners, his psychologist and the independent medical examiners regarding the circumstances of his psychological injury, albeit there are evidenced inconsistencies elsewhere in the documents before the Commission going to other matters.

81. Following review of the evidence as a whole and consideration of both counsels' submissions, I accept opinion provided by Dr Takyar the applicant developed psychological injury in the nature of adjustment disorder with mixed anxiety and depressed mood in the context of his difficulties with the security guard at WOW NS and the feeling he was being bullied at work. While the respondent argued the applicant never spoke with the security guard at WOW NS and denied the applicant was bullied at work, it is evident the applicant

[31] [1993] HCA 78
[32] [2008] NSWCCPD 43

had difficulties with the security guard at WOW NS, which led to him ultimately being unable to work at WOW NS for reasons the respondent failed to be adequately explain to him. It is this inadequate explanation for the downturn in the applicant's work when colleagues were being offered work that gave the applicant the perception he was being bullied by the respondent, and perception of real events, which are not external events, will satisfy the test of injury (*Chemler*).

82. While I accept both Dr Takyar and Dr Smith had significant material available to them when preparing their reports relevant to causation, including the factual investigation, I prefer the opinion of Dr Takyar to that of Dr Smith in that both the applicant's general practitioners and his treating psychologist (both of who the applicant consulted on a number of occasions) have taken histories of the applicant being bullied at work, with the handwritten notes of the treating psychologist making specific reference to the incidents that involved the security guard and the consequential sequelae of a downturn in the applicant's work.

83. Although Dr Takyar did not use the terminology "main contributing factor", this is not fatal to the applicant's claim as consideration of the evidence overall demonstrates the applicant's employment with the respondent was the main contributing factor to the psychological injury he has sustained. There is no satisfactory evidence to suggest any other cause for the development of the applicant's psychological injury and I am satisfied the applicant's employment with the respondent was the main contributing factor to injury.

84. For the reasons discussed above I accept the applicant as a credible witness and I accept the applicant has discharged onus required of him. I accept the applicant sustained psychological injury with deemed date of 13 June 2019 arising out of or in the course of his employment with the respondent and that his employment with the respondent was the main contributing factor to injury as defined by s 4 of the 1987 Act.

Defence raised under s 11A of the 1987 Act

85. The respondent has raised defence under s 11A(1) of the 1987 Act in the alternative, and the respondent has the onus of establishing such defence. There are two aspects to this defence.

86. Firstly, the injury must be "wholly or predominantly caused" by the respondent's actions regarding one of the categories referred to in s 11A(1) and in the applicant's case the respondent relies on discipline. Principles were discussed by the Commission as regards the "wholly or predominately caused" aspect of s 11A(1) of the 1987 Act in *Hamad v Q Catering Limited* [33] with suggestion medical evidence is required to determine the causation issue. In *Smith v Roads and Traffic Authority of NSW* [34] Snell ADP accepted "wholly" and "predominately" are different concepts.

87. Secondly, if it is established the applicant's psychological injury was "wholly or predominately" caused by the respondent's actions regarding discipline, then the respondent is required to establish the respondent's actions were "reasonable". In *Northern New South Wales Local Health Network v Heggie* [35] Sackville AJA set out the following statements of principle regarding s 11A (1) at [61]:

> "Ordinarily, the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time, taking into account relevant information that the person could have obtained had he or she made reasonable inquiries or exercised reasonable care. The language does not readily lend itself

[33] [2017] NSWWCCPD 6
[34] [2008] NSWWCCPD 130
[35] [2013] NSWCA 225; 12 DDCR 95

to an interpretation which would allow disciplinary action (or action or any other kind identified in s 11A(1)) to be characterised as not reasonable because of circumstances or events that could not have been known at the time the employer took the action with respect to discipline."

88. In circumstances where Dr Takyar provided diagnosis of adjustment disorder with mixed anxiety and depressed mood, which developed from his difficulties with the security guard at WOW NS and the feeling he was being bullied at work (being opinion I accept for reasons discussed above) I do not accept the psychological injury sustained by the applicant was either "wholly" or "predominately" caused by actions taken by or on behalf of the respondent with respect to discipline.

89. The respondent made submissions relevant to defence raised under s 11A of the 1987 Act and if, for the sake of argument, one was to accept the applicant's psychological injury was wholly or predominately caused by action taken by or on behalf of the respondent with respect to discipline, the respondent has the onus relevant to the reasonableness of its actions.

90. While certain steps taken by the respondent relevant to discipline of the applicant may be regarded as "reasonable action", the applicant was emotionally and financially distressed when he was initially stood down in February 2019 and when it appeared history was to repeat itself after the second incident occurring in June 2019, which the applicant reported, the applicant sought medical assistance, was diagnosed with psychological injury and was ultimately unable to maintain a successful return to work with the respondent. It is evident following investigation of the first incident, the respondent reportedly issued direction to the site supervisor team not to return the applicant to WOW NS, but despite this specific direction the applicant was provided with work that returned him there. The applicant was then exposed by the respondent to the risk of crossing paths with the security guard who he believed had made complaint about him in February 2019, which occurred, and the applicant found himself again stood down pending investigation. In such circumstances I am not of the view the actions taken by the respondent with respect to discipline of the applicant can be regarded as "reasonable".

91. For the reasons discussed above I am not satisfied the respondent has discharged the onus of proof required and the respondent cannot rely on defence raised under s 11A of the 1987 Act.

Treatment

92. While in these proceedings the applicant made a claim for a past medical or related treatment payable under s 60 of the 1987 Act with a specified monetary amount, submission was made by the applicant that in the event the Commission found in his favour, a general order would be appropriate. This was opposed by the respondent who was of the view that a general order would change the claim "at the eleventh hour".

93. Particularly bearing in mind both Dr Takyar and Dr Smith were of the view the claimant would benefit from psychological treatment, with Dr Smith having declined to assess permanent impairment having provided opinion the claimant had yet to reach maximum medical improvement "as he would likely benefit from psychiatric treatment", I am of the view a general order is appropriate. I draw comfort from the notice issued by the respondent on 8 August 2019 in accordance with s 78 of the 1998 Act that a general order will not take the respondent by surprise, as in this notice the applicant was notified he does not "require any further treatment that is reasonably related to your alleged psychological injury within the meaning of Section 60 of the Act".

94. As I accept the applicant has sustained psychological injury arising out of or in the course of his employment with the respondent with a deemed date of injury of 13 June 2019 and I accept his employment with the respondent was the main contributing factor to injury, it follows he has an entitlement to compensation for the cost of medical or related treatment payable under s 60 of the 1987 Act for that injury.

Permanent impairment

95. In these proceedings the applicant has made a claim for 19% whole person impairment resulting from psychological injury arising out of or in the course of his employment with the respondent with a deemed date of injury of 13 June 2019. The claim is grounded in the assessment of Dr Takyar.

96. As I accept the applicant has sustained psychological injury arising out of or in the course of his employment with the respondent with a deemed date of injury of 13 June 2019 and I accept his employment with the respondent was the main contributing factor to injury, it follows he may have entitlement to permanent impairment compensation payable under s 66 of the 1987 Act for that injury and I remit the claim to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment.

97. I consider it appropriate the following documents are to be forwarded to the Approved Medical Specialist:

    (a) ARD and attached documents;

    (b) The Reply and attached documents, and

    (c) AALD and attached documents.

SUMMARY

98. The applicant sustained a psychological injury arising out of or in the course of his employment with the respondent with deemed date of injury of 13 June 2019. The applicant's employment with the respondent was the main contributing factor to injury.

99. The applicant's employment with the respondent was not wholly or predominately caused by reasonable action taken by the respondent with respect to discipline.

100. The applicant has an entitlement to medical or related treatment payable under s 60 of the 1987 Act resulting from the psychological injury he sustained with deemed date of injury of 13 June 2019.

101. The applicant's claim against the respondent for permanent impairment compensation resulting from the psychological injury he sustained with deemed date of injury of 13 June 2019 is to be remitted to the Registrar for referral to an Approved Medical Specialist for the purpose of assessment of whole person impairment.

102. The following documents are to be forwarded to the Approved Medical Specialist:

    (a) ARD and attached documents;

    (b) The Reply and attached documents, and

    (c) AALD and attached documents.