

# the front page

a seasonal bulletin for self insurers

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**Stress: OH&S, Worker's Compensation and Common Law:** Bruce Butler

**Recent Decisions: Court of Appeal:** Kirstin Follows

**Medical Panels: Recent Developments:** Steven Notarianni

**Have you been 'directed' lately?:** Nadia Spiller

## STRESS: OH&S, WORKER'S COMPENSATION AND COMMON LAW Bruce Butler - Partner

Traditionally, the perceived causes of occupational stress were limited to incidents of workplace bullying or the experience of traumatic events. Since the 1980's the accepted causes of occupational stress have been expanded. Four new categories can be identified: job security, managerial direction, work conditions and relationship breakdown. Government and the Courts have dealt with this growing and changing phenomenon in different ways.

### Occupational Health & Safety Act 2004

Under the OH&S Act employers are obliged to provide a safe working environment without risk to health, including physical and psychological health, so far as it is 'reasonably practical'. The principal concern regarding psychological health is occupational stress caused by workplace bullying. However, the growth in accepted causes of work-related stress requires employers to consider the psychological health of employees more broadly to fulfil their obligations under the OH&S Act.

### Accident Compensation Act 1985

Occupational stress conditions or disorders are compensable under the no fault worker's compensation legislation. However, Section 82(2A) operates to exclude compensation if a stress illness or disorder arises wholly or predominantly from reasonable action taken in a reasonable manner to transfer, demote or discipline the employee. The burden of proof rests on the Defendant employer to prove reasonableness. In establishing reasonable action the Court considers procedural fairness, compliance to policies and procedures, prompt investigation and the provision of information to employee. Although not addressed in the case law, it is arguable that reasonable action must also include a review of preliminary steps prior to the final disciplinary action.

Theoretically, this could create a situation where employers could be prosecuted under the OH&S Act but have no obligation to pay compensation for occupational stress through WorkCover. However, the Courts have interpreted discipline narrowly to mean formal 'admonishing' as distinct from normal direction from a superior severely limiting the exclusion under Section 82(2A). Thus, the vast majority of stress claims are successful.

### Common Law

Finally, Victorian employees suffering work related stress may bring a common law claim against the employer subject to establishing serious injury requirements and negligence. The 2005 High Court case **Koehler v Cerebos (Aust) Ltd [2005] HCA 15** determined stress requires special analysis. The decision limits an employers' liability for stress claims, finding an employer may not be liable as they cannot be expected to reasonably foresee psychiatric injury. It remains, however, unclear whether an employer could be successfully prosecuted under the OH&S Act but not liable under common law.

The expanded notion of occupational stress has thus resulted in Victorian employers being confronted with a complex matrix of conflicting obligations and tests.

## RECENT DECISIONS - COURT OF APPEAL Kirstin Follows - Lawyer

The Court of Appeal has upheld three rejections of workers' applications to seek damages pursuant to section 134AB of The Accident Compensation Act. These cases all involve issues with respect to the worker's credibility. The issues have arisen out of the use of surveillance material and the inability of the worker to provide a consistent history.

One of the most important matters to have arisen out of these cases is the significance of the

credibility of the worker as a witness giving evidence under oath during the hearing.

In the matter of **Gjorgovska v AFM Cleaning Services P/L & Anor [2006] VSCA 104** the worker abandoned her claim in respect of her physical injuries after being cross examined. She did not actually require the use of a walking stick as claimed. The worker was employed as a cleaner at LaTrobe University and was involved in an incident interrupting a sleeping intruder. She fell down some stairs while attempting to find her co-worker, complained of flashbacks, being frightened in the night and panic attacks.

The worker was found to have changed her General Practitioner on the basis that he had recommended she return to work. She had also refused to speak English to medical practitioners asked to examine her, however conversed with her own GP in English.

The trial judge relied on one particular medical report and the Court of Appeal found that it was open to a trial judge to show a preference for a particular medical opinion and reject other medical evidence. The fact that the worker lacked credibility was not in itself enough to dismiss the application. The entirety of the evidence presented to the Court had failed to objectively support her claim.

In the cases of **Dordev v Norman and Anne Cowan and VWA [2006] VSCA 254** (Dordev) and **Yakup Sumbul v Melbourne All Toya Wreakers P/L [2006] VSCA 292** (Sumbul), the issue of the credibility of the worker arose as a result of the employer tendering surveillance footage of the worker. In *Dordev*, the worker was shown to be an unreliable witness. Her recollection of when she had returned to work after sustaining her injury differed to the records of the employer. Video footage showed the worker moving without any of the restrictions she had reported to doctors. She also admitted to receiving social security payments fraudulently.

The worker in *Sumbul*, had undergone a surgical intervention in the form of a laminectomy and a discectomy as a result of his injury. The worker reported to the Court that he was in constant pain and severely restricted in his daily activities and was not able to engage in employment. Surveillance footage showed the worker moving without any of his stated restrictions. It was argued in both cases, that the footage attacked the veracity of the worker and put into question the medical evidence that they were seeking to rely upon.

The trial judges found that the volume of evidence, including evidence given under oath did not support the contentions that they had suffered a "serious injury". These judgements have all upheld the original decision of the trial judges and prevented the workers from being able to pursue damages at common law. The most significant of these decisions is *Sumbul* where the serious injury certificate was rejected despite the worker having undergone surgical intervention and where it was common ground that the worker had suffered a permanent impairment.

Fundamental to the ultimate decision of the trial judge is how the worker presents both in evidence in chief and under cross examination. In terms of deciding to run a trial where credit is in issue, it is important to understand that much will rest on the presentation of the worker, a factor which is unable to be determined prior to hearing.

It is also important to understand that to simply have a worker who is not credible is not enough to ensure a favourable decision by a Court for an employer. The credibility of the worker, or lack thereof, must also impact on the other evidence that is before the Court, such as the medical evidence. The Court must be satisfied that the overall evidence put to the Court does not objectively support the worker's application.

#### **MEDICAL PANELS - RECENT DEVELOPMENTS** **Steven Notarianni - Lawyer**

Recent decisions in the Victorian Supreme Court and the Court of Appeal have considered Medical Panels and their role in the workers compensation scheme.

In **Paul Taylor v Mountain Pine Furniture P/L & Ors [Supreme Court of Victoria, 6234/2005]** the Court had to determine whether the Medical Panel had properly applied the Injury Model at Chapter 3 of the AMA Guides 4th Edition in assessing the degree of impairment associated with the worker's neck injury.

The Medical Panel assessed an impairment of 15% and in its opinion clearly stated that the consequences of successful surgery had been taken into account in making that assessment. Further, the opinion stated that if the effects of surgery had not been taken into account, the assessed degree of impairment would have been 25%.

Specifically, the worker contended before the Court that the Medical Panel did not properly apply the

requirement of the injury Model that no regard should be had to any change in the worker's condition consequent upon surgery in reaching its assessment of impairment. Justice Bongiorno delivered judgment on 15 December 2006 in favour of the worker, finding that the Medical Panel had wrongly discounted the worker's impairment based upon his post-surgery condition.

This decision has obvious potential ramifications for impairment assessments where a worker has been assessed pursuant to Chapter 3 of the AMA Guides 4th Edition and where surgery (whether successful or detrimental) has been taken into account in determining the degree of impairment. Assessments that take account of successful surgery will have resulted in lower payments of compensation to workers than would otherwise have been the case, and vice versa. (**NB:** This decision is currently under appeal).

The Court of Appeal in **Pope v Walker & Sons P/L [2006] VSCA (25 October 2006)** considered whether a County Court Judge hearing a serious injury application pursuant to section 134AB was bound by the opinions of a Medical Panel in regards to medical questions referred to it in a dispute concerning compensation benefits. The Court of Appeal held that a County Court Judge is not bound to treat as final and conclusive, although it might well have regard to them, the opinion of a Medical Panel obtained in relation to a compensation claim.

This decision is particularly relevant to the issue of 'work capacity' and especially in regards to situations where a worker is attempting to satisfy the loss of earning capacity test contained at section 134AB(38). Whilst there may exist a prior Medical Panel opinion certifying a worker as totally incapacitated for suitable employment, the County Court is not bound by this opinion in its consideration of the worker's serious injury application. It may have regard to that opinion, but the Judge is free to consider all available material relating to the worker's employment capacity in forming his view on the issue.

Effectively, the only part of the common law process in which a Medical Panel opinion is binding is at the section 98C/E stage, in regards to disputes involving liability for rejected injuries and/or disputes as to the degree of impairment assessed which are referred to the panels.

In **Kumar v Mercantile Mutual Workers Compensation [2006] VSCA 103 (10 May 2006)** the worker's entitlement to weekly payments beyond

104 weeks and the issue of 'current work capacity' was reviewed. The Court of Appeal was called upon to decide whether the Court in determining the weekly payments issues was bound by the opinion of a Medical Panel retrospectively.

This case involved a Medical Panel decision of 23 January 2005, which found that the worker had a current work capacity. Weekly payments had been terminated from 20 July 2001 on 104 week grounds, on the basis that the worker was determined to have a work capacity. The worker issued proceedings seeking payments from that date and the issue of capacity was referred to the Medical Panels for determination. Upon receipt of the Panel's opinion, the worker argued that a Medical Panel opinion dated 23 January 2005 was not, and in fact could not be, determinative of his employment capacity as at the date payments were terminated.

The Court of Appeal concluded that the opinion of the Medical Panel as to the worker's employment capacity was not conclusive of the issue and that the worker should have been presented with the opportunity to present further information to the Court.

**HAVE YOU BEEN 'DIRECTED' LATELY?  
Nadia Spiller - Lawyer**

Less than 1% of all matters relating to weekly payments and medical and like expenses result in a 'direction' by a Conciliation Officer.<sup>1</sup>

So what do you do if you are one of the unlucky 1% to get directed?

Where there is a dispute relating to weekly payments or medical expenses and the Conciliation Officer is unable to bring the parties to an agreement by conciliation the Officer may make a direction. The Officer may direct the VWA/Self Insurer to pay or continue to pay compensation if the Officer is satisfied that there is no genuine dispute (section 59(3)). Other powers relating to directions are contained in section 59.

If a Conciliation Officer directs that weekly payments are payable, payment must be commenced within 7 days after the direction (section 114C). A person who fails to comply with a direction of a Conciliation Officer

<sup>1</sup>Accident Compensation Conciliation Services, 'Annual Report 2005/2006', page 7. 1% is 137/14987.

is guilty of an offence (Section 588).

A direction given by a Conciliation Officer may be revoked by the Conciliation Officer or by any other Conciliation Officer (section 60(1)).

Where a person who is liable to make payments of compensation in accordance with a direction of a Conciliation Officer applies to the Court, the Court may revoke the direction (section 60(2)). Application can be made to either the Magistrates' or County Court.

### Practical Steps

Ensure that the Conciliation Officer recorded their reasons for the direction in the Outcome Certificate. Further consider if the evidence/information is sufficient to create a 'genuine dispute'.

After you have completed an internal review and you disagree with the direction/s made by the Conciliation Officer then act quickly in applying for a revocation. This can be done in writing with a reference to section 60(1) of the Act addressing the letter to the Senior Conciliation Officer.

It is recommended that any application for revocation be lodged with the Magistrates' Court as such matters are able to be dealt with in two days from lodgement. Also the Magistrates' Court is well versed in the issues of revocation and is able to quickly determine whether there is an arguable case.

Applications for revocation can be made at any time after the direction however we recommend that they be made within 7 days. If an application is made and the Court revokes the direction before the expiration of the 7 days referred to in section 114C, the obligation to make the payment under the direction ceases.

This early intervention is important where a Conciliation Officer has directed retrospective payments of up to 24 weeks and directed continued payments of up to 12 weeks. If this is not achieved a worker entitled to the statutory maximum, could potentially receive \$43,000.00 and not be required to repay the amount (unless the claim is fraudulent or made without proper justification) despite the fact that the determination is revoked (section 60(4)).

Upon application to the Court, Affidavit material must be prepared this must contain all the information on which you intend to rely. Time should also be allowed for filing documents with the Court and serving documents with the other party. It is usually our practice to bring an Application in the Magistrates' Court as they usually list matters within 3 days.

Claims managers should monitor and anticipate when a direction is likely to be made. In the past clients have not received the Outcome Certificates for 3 or 4 days after the direction was made and in some cases after the expiration of the 7 day period. Time to action the direction commences when the direction is made and not when it is received.

Whether or not you succeed in your application for revocation, section 50(2B) requires the Court to order costs against the person who made the application. This means that costs are most likely to be born by the self insurer.

Whilst directions are an infrequent occurrence at Conciliation, the application for revocation provisions contained in the Act are an important tool for all claims managers. Application for revocation for strategic and commercial reasons need to be actioned immediately.

## something for the back page

**dates for the diary — Autumn Seminar — Conference for Self Insurers — Wednesday 2 May 2007**

**am: Is Self Insurance for you? Comcare or State?**

**pm: Strategic Claims Management Issues — including managing employment issues**

**Issues surrounding Medical Panels: Guest Speaker — David Ellis**

**The impact of bullying and stress**

- The High Court has handed down its decision in "The Optus Case", **Attorney-General (Vic) v Andrews [2007] HCA9**, in favour of Optus allowing them to enter the Commonwealth Workers' Compensation Scheme (refer to [www.mrlaw.com.au/publications](http://www.mrlaw.com.au/publications)).
- Tim Holding is the new Victorian Workcover Minister and it has been reported in the Workers Compensation Report, Issue 632, that he is considering a review of the Accident Compensation Act.