

# Management action “taken in a reasonable way”, perceptions of management action and evidentiary matters

Presented by Mr Gary O’Grady

## In this paper, the following topics are addressed:

- Determining whether reasonable management action has been taken in a reasonable way;
- Determining whether the psychiatric or psychological disorder is due to the worker’s expectation or perception of reasonable management action being taken against the worker; and
- A brief mention of when the injury is due to action by WorkCover or a self-insurer in connection with the worker’s application for compensation.

## Determining whether reasonable management action has been taken in a reasonable way

Section 32(5)(a) of the *Workers’ Compensation and Rehabilitation Act 2003* (hereinafter to be referred to as the “Act”) provides that *injury* does not include a psychiatric or psychological disorder arising out of, or in the course of “reasonable management action taken in a reasonable way” by the employer in connection with the worker’s employment.

The first part of this paper deals with determining whether such reasonable management action has been taken in a reasonable way. The Act purports to give, at the end of s.32, examples of actions that may be reasonable management actions taken in a reasonable way. These are:

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker;
- a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker’s employment.

## The effect of the *Acts Interpretation Act 1954*

Before considering these provisions in more detail, it should be noted that section 14D of the *Acts Interpretation Act 1954* headed “Examples” provides:

If an Act includes an example of the operation of a provision:

- a) the example is not exhaustive; and*
- b) the example does not limit, but may extend, the meaning of the provision; and*
- c) the example and the provision are to be read in the context of each other and the other provisions of the Act, but, if the example and the provision so read are inconsistent, the provision prevails.*

With respect to the examples in s.32(5) of the Act, s.14D(a) and (b) are particularly important and show the examples are not exhaustive, the examples do not limit the meaning of s.32(5) and they may extend the meaning of the provision.

Turning then to the wording of the examples in s.35(5), two points must be made. First, the use of the word “may” in the examples indicates that they do not purport to set out conclusive examples of “reasonable management action taken in a reasonable way”. Indeed it is apparent they do not even set out conclusive examples of “reasonable management action”. By way of illustration, discipline of a worker by an employer where no circumstances at all existed which required such discipline would not be reasonable management action. Secondly, and far more importantly, the examples only describe actions or decisions taken. They do not provide any guidance at all as to what is a reasonable way to take these actions or decisions. Therefore it is necessary to turn to the decided cases to find some guidance as to whether reasonable management action has been taken in a reasonable way.

## Principles of interpretation from the decided cases

- The conclusive nature of the decisions of the Industrial Court

The express provisions of s.349(2) and (3) of the *Industrial Relations Act 1999* have the effect of excluding the Supreme Court's jurisdiction in granting prerogative relief under the *Judicial Review Act 1991* in respect of a decision made within jurisdiction of the President of the Industrial Court of Queensland<sup>1</sup>.

- The onus of proof

The worker initially bears the onus of proving that the injury is within the definition in s.32<sup>2</sup>. This means that s.32 "amounts to a statement of the complete factual situation which must be found to exist before anybody obtains a right or incurs a liability under the provision"<sup>3</sup>

An appeal to an appeal body (an Industrial Magistrate or the Industrial Commission)<sup>4</sup> is a hearing *de novo*<sup>5</sup>. The appellant has traditionally been required to discharge the onus of establishing the decision was incorrect<sup>6</sup>. Where the Industrial Court is entertaining an appeal, this is by way of a re-hearing by s. 561(3) of the Act. The Court exercises its appellate powers only if satisfied that there was error on the part of the primary decision maker. The appellant in such a case has the onus of establishing error on the part of the primary decision maker.<sup>7</sup>

- The susceptibility of the worker to psychiatric/psychological injury

The *WorkCover Queensland Act 1996* (the precursor of the present Act) in s.34(5)(b) excluded a psychological disorder arising out of, or in the course of, any of the circumstances in which a reasonable person, in the same employment as the worker, would not have been expected to sustain the injury. This provision meant that even if the employer knew of the susceptibility of a worker to a psychiatric/psychological injury, the management action did not have to be adjusted to take this susceptibility into account. In *Ivey v. WorkCover Queensland*<sup>8</sup> President Hall observed that there was certainly mismanagement by officers of Education Queensland involving inappropriate transfers of a school teacher who had difficulties in dealing with stress which must have been known to the officers at the time. However he went on to find "mismanagement" was an appropriate word only if one has regard to the appellant's susceptibility to psychiatric or psychological disorder. At that time by s.34(5)(b) in deciding in a particular case whether the management action was reasonable or whether the management action was taken in a reasonable way, regard must not be had to a particular worker's susceptibility to a psychiatric or psychological disorder.

---

<sup>1</sup> *Squires v President of Industrial Court Qld* [2002] QSC 272

<sup>2</sup> *Ivey v. WorkCover Queensland* [1999] QIC 65 (25 November 1999); 162 QGIG 392

<sup>3</sup> *Vines v. Djordjevitch* (1955) 91 CLR 512 at 519.

<sup>4</sup> s.548A of the Act

<sup>5</sup> *Otis Elevator Company Pty Ltd v. WorkCover Queensland* (No. C7 of 2001)

<sup>6</sup> *supra*

<sup>7</sup> *Garrett v WorkCover Queensland* (2000) 105 QGIG 217; *Allesch v Maunz* (2000) 74 ALJR 1206 at 1211 to 1237 per Gaudron, McHugh, Gummow and Hayne JJ, and *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1353 [14] per Gleeson, CJ, Gaudron and Hayne, JJ.

<sup>8</sup> [1999] QIC 65 (25 November 1999).

This provision was repealed on 1st July 1999. This is a return to the common law position with respect to damages where the fact that a defendant knew or ought to have known of the susceptibility of a person to psychiatric/psychological injury affects the determination of whether the defendant has breached the duty of care<sup>9</sup>. It is now the case that in determining whether the management action was reasonable or whether the management action was taken in a reasonable way, regard must be had to a particular worker's susceptibility to a psychiatric or psychological disorder which is known to management. In *Workcover Queensland v Kehl*<sup>10</sup> President Hall stated:

There seems to be no reason for concluding that the circumstances of the case do not include circumstances relating to the psychological makeup of the worker where those circumstances are known to the employer. It is not a matter of suggesting that management should speculate about the psychology of each of its workers if they are engaging in management action which may impact upon particular workers, or should require psychological evaluation of its workers. It is simply a matter of recognising that fixed with knowledge of a worker's makeup a reasonable person would take that knowledge into account in assessing what is a reasonable way in which to implement an otherwise reasonable decision.

It is submitted that, as with the common law, regard must also be had to what management ought to have known.

- The test of "ordinary fortitude"

The *WorkCover Queensland Act 1996* provided in s.34(5)(a) that, in determining whether the management action or way of taking management action was reasonable, regard must be had to what would have been reasonable for a worker of ordinary susceptibility to psychiatric or psychological disorder. This mirrored the common law position at appellate court level at that time which used, as a test of liability for psychiatric injury, whether a person of normal fortitude would sustain a psychiatric injury in the same circumstances. As mentioned above, this test didn't apply in common law where the defendant knew or ought to have known of the susceptibility of a person to psychiatric/psychological injury.

Section 34(5)(b) was also repealed from 1st July 1999. The common law was also changing. The majority in *Tame v New South Wales; Annetts v Australian Stations Pty Limited*<sup>11</sup> given by the High Court on 5th September 2002 dismissed the "normal fortitude" test as an independent test of liability and fell back on the usual test of reasonable foreseeability as set out in *Wyong Shire Council v Shirt*<sup>12</sup>; i.e. the risk is not one that is far-fetched or fanciful. However a particular susceptibility of a plaintiff to psychiatric illness is a factor to be taken into account in determining whether the risk of injury was reasonably foreseeable<sup>13</sup>. A useful summary of the common law as a result of the decisions in *Tame v New South Wales; Annetts v Australian Stations Pty Limited [2002] HCA 35* can be found in Legal Briefing Number 68 at the web site of the Australian Government Solicitor at <http://www.ags.gov.au/publications/agspubs/legalpubs/leagalbriefings/br68.htm>.

---

<sup>9</sup> There is specific recognition of the principle in *Tame v New South Wales; Annetts v Australian Stations Pty Limited [2002] HCA 35*.

<sup>10</sup> [2002] QJC 23 (17 May 2002); 170 QGIG 93

<sup>11</sup> [2002] HCA 35

<sup>12</sup> (1980) 146 CLR 40 at 47 per Mason J

<sup>13</sup> [2002] HCA 35, Gleeson CJ at para. 29, Gaudron J at para 62, Gummow and Kirby JJ at para. 189.

Gleeson CJ also noted that it was not whether a psychiatrist could say that the risk of psychiatric injury was reasonably foreseeable from the actions that occurred, but whether the party taking the actions complained of could reasonably have been expected to foresee that these actions carried a risk of harm to the plaintiff<sup>14</sup>. A similar view was expressed by McHugh<sup>15</sup>.

The issue of foreseeability of psychiatric injury to a worker with respect to a common law claim has been recently examined in the High Court in *Koehler v Cerebos (Australia) Ltd*<sup>16</sup>. However it should be noted that it is *Workers' Compensation and Rehabilitation Act 2003* rather than common law which is determinative of whether compensation is payable or not.

- What is the meaning of “reasonable” where it occurs in the phrase “reasonable management action has been taken in a reasonable way?”

In *Workcover Queensland v Kehl*<sup>17</sup> President Hall said there seemed to be no reason why “reasonable” in s.32(5)(a) should not be treated as meaning “reasonable in all the circumstances of the case”<sup>18</sup>. He then went on to say that in that case there seemed to be no reason for concluding that the circumstances of the case did not include circumstances relating to the psychological makeup of the worker known to the employer.

- When is a psychiatric/psychological injury one which “arises out of” reasonable management action taken in a reasonable way?

The meaning of the term “arises out of” is critical to an understanding of s.32. In *Avis v Workcover Queensland*<sup>19</sup> the appellant suffered a major depressive illness because of problems with student discipline that arose after the school at which he was employed introduced a new behavioural management plan. The appellant’s counsel submitted that the taking and implementation of the management action did not trigger the illness. Rather, it was contended that, in the wake of the management decision and its implementation, a set of circumstances arose in which the appellant could not do his job with a consequential loss of confidence and a feeling of inadequacy, helplessness and ineffectiveness. In essence it was submitted that his illness was not “caused by” management action and therefore did not “arise out of” management action. President Hall rejected this submission and adhered to the view that the test put forward by the words “arising out of” was wider than that put forward by the words “caused by”. He went on to hold that the phrase “arising out of” whilst involving some causal or consequential relationship between the employment and the injury, does not require that direct or proximate relationship would be necessary if the phrase used were “caused by”. In reading *McArthur’s* case which will be dealt with later, this interpretation must be kept in mind.

---

<sup>14</sup> at para 29 at paras 115-116

<sup>15</sup> at paras 115-116

<sup>16</sup> [2005] HCA 15 (6 April 2005)

<sup>17</sup> [2002] QJC 23 (17 May 2002); 170 QGIG 93

<sup>18</sup> Compare *Opera House Investments Pty Ltd v Devon Buildings Pty Ltd (1936) 55 CLR 110 at 116 per Latham CJ and at 117 per Starke J.*

<sup>19</sup> [2000] QJC 67 (7 December 2000); 165 QGIG 788

- Are the circumstances of reasonable management action limited in their scope?

In *Bowers v Workcover Queensland*<sup>20</sup>, the worker attributed the development of the depressive condition to a difficult working relationship with her immediate superior, to her immediate superior's treatment of her and to the fact that she had been entrusted with an unduly burdensome volume of work without adequate training. It appears the worker submitted that the phrase "reasonable management action taken in a reasonable way" was limited either to disciplinary action or alternatively action taken against the worker.

President Hall rejected both of these submissions. He held that there was nothing in s.32(5)(a) and there was nothing in the extrinsic materials (which he reviewed in *Priddle v WorkCover Queensland*<sup>21</sup>), to indicate that paragraph (a) was confined to the impact of disciplinary action. Further, given the specific use of the word "against" at paragraph (b), neither could there be any reason for limiting paragraph (a) to action taken against the worker, e.g. a transfer for other than disciplinary reasons.

- Can the putting into place of a system of work always satisfy the test of reasonable management action taken in a reasonable way by the employer in connection with the worker's employment?

This issue arose in *RACQ Operations Pty Ltd v Q-Comp*<sup>22</sup> where the worker was employed as a patrol officer. There were two incidents which were said to cause the worker to suffer a psychological/psychiatric injury. One of the incidents was where he was putting fuel in a car by standing on the off side when a particular vehicle drove atypically close to the edge of the road, and caused him to fear for his safety. The other was where he was on the driveway approaching the entrance of the member's residence when a dog appeared and lunged at him. The employer submitted that reasonable management action taken in a reasonable way by the employer in connection with the worker's employment for the purposes of s.32(5) (a) was the employer's system of work, constituted by the giving of directions about sites to be attended, and the provision of a detailed workplace health and safety manual detailing how specific incidents were to be dealt with. President Hall accepted the counter submission that the judgments required of patrol officers and the discretions reposed in patrol officers by the manual are so substantial as to render the preparation/circulation of the manual and the giving of directions about vehicle location too remote from the injury to allow one to characterise the injury as "arising out of reasonable management action taken in a reasonable way by the employer".

- Can the employer's system of work and its implementation be found to be reasonable if the work environment is found to be a significant cause of the a psychiatric/psychological injury?

In *Bowers v Workcover Queensland*<sup>23</sup> it appears a submission was made that where the work environment is found to be a significant cause of a depressive illness, the employer's system of work and its implementation cannot be found to be reasonable. President Hall rejected this submission noting that the circumstance that a system of work or its implementation has miscarried does not necessarily lead to the conclusion that either the system of work or its implementation was unreasonable. Reasonable schemes reasonably implemented can miscarry<sup>24</sup>.

---

<sup>20</sup> [2002] QIC 18 (23 April 2002); 170 QGIG 1

<sup>21</sup> (1999) 162 QGIG 170

<sup>22</sup> [2003] QIC 162 (23 October 2003); 174 QGIG 824

<sup>23</sup> *supra*

<sup>24</sup> See also *Avis v. Workcover Queensland* [2000] QIC 67 (7 December 2000); 165 QGIG 788; *RACQ Operations Pty Ltd v Q-Comp* [2003] QIC 162 (23 October 2003); 174 QGIG 824

- For there to be a finding that there was reasonable management action taken in a reasonable way does the action have to be without blemish?

The issue of minor blemishes in management action was also considered in *Bowers v Workcover Queensland*<sup>25</sup> where the respondent freely acknowledged that it was not a case in which the conduct of the appellant's immediate supervisor and the employer's systems of work were without blemish. Despite these blemishes, the management action still fell within s.32(5)(a).

However, where one of a number of events and courses of conduct to be considered would be merely a blemish in management action if considered in isolation, and where the events and courses of conduct are not truly discreet then there may be a case for a global assessment<sup>26</sup> depending on the particular situation. Once a number of events which may otherwise individually be considered as blemishes are repetitive, there is a stronger indication of a need for a global assessment.

In *Delaney v Q-COMP Review Unit*<sup>27</sup> a number of the incidents complained of which had been described by the Industrial Magistrate as blemishes, were:

- joined by subject matter, time and personality;
- in a discordant workplace;
- in respect of a worker who had decompensated once before in the face of workplace stress.

President Hall held that the appellant was entitled to a much more "global" evaluation of the actions in which the management team had engaged.

In *Prizeman v Q-COMP*<sup>28</sup> two incidents complained of were potentially significant because both occurred on the same day and because both involved a superior causing embarrassment to a worker in the presence of customers. However a finding by the Industrial Magistrate that these incidents were merely blemishes was not disturbed on appeal. President Hall noted in relation to both incidents, the superior was engaging in reasonable management action. Although the Industrial Magistrate was critical of the way in which the superior had conducted herself, on balance he came to the view that the lapses from "proper or reasonable staff treatment" were but "blemishes". The Industrial Magistrate noted neither incident was of long duration and that it was difficult to assess the actual effect that same had on the appellant, based on comparatively brief evidence provided to the court in relation to both incidents. President Hall observed that the Magistrate was also giving consideration to the issue whether the stressors should be put aside in any event.

- Does the test of "reasonable management action taken in a reasonable way" involve notions of "fairness"?

Courts often reject attempts to place glosses placed upon the words of a statute preferring to give the words their ordinary meaning. In *Delaney v Q-COMP Review Unit*<sup>29</sup> counsel for the appellant sought, if not to subsume "reasonableness" in "industrial fairness", to elevate "industrial fairness" to a dominant consideration. President Hall rejected this gloss and stated:

Whilst I accept that because s.32(5) operates upon occurrences in the course of an employment relationship and work related disorders of the mind, considerations of "fairness" will always be relevant, I can see no advantage in seeking to improve on the statutory test. Indeed, in cases in which an employer bears the burden of displaying fairness to multiple employees with divergent interests the improvement may well prove a distraction.

However he did go on to say:

None of those remarks I should add, are intended to detract in any way from the cardinal role to be played by "fairness" when (as here) management are dealing with a staff member known to management to have decompensated in the face of workplace pressure on an earlier occasion.

---

<sup>25</sup> (1999) 162 QGIG 170

<sup>26</sup> *Delaney v Q-COMP Review Unit* [2005] QIC 11 (2 March 2005); 178 QGIG 197

<sup>27</sup> [2005] QIC 11 (2 March 2005); 178 QGIG 197

<sup>28</sup> [2005] QIC 53 (14 September 2005); 180 QGIG 481

<sup>29</sup> QIC 11 (2 March 2005); 178 QGIG 197

- What is the proper approach when there are multiple work related events complained of?

It should be noted that the cases referred to in this part, *Delaney v Q-COMP Review Unit*<sup>30</sup>, *Q-COMP v Education Queensland*<sup>31</sup> (*McArthur's case*) and *Prizeman v Q-COMP*<sup>32</sup> will be dealt with in considerable detail later in this seminar.

In *Delaney v Q-COMP Review Unit*<sup>33</sup> a decision given on 2nd March 2005 President Hall was faced with a not uncommon situation where there were undisputed findings that:

- the appellant suffered from an adjustment disorder with mixed anxiety and depressed mood, which was an “injury” within the meaning of s.32.
- that the appellant’s employment had been a significant contributing factor to that “injury”.

Further, as is not uncommon, there were a number of transactions and series of events said to have brought about the injury. President Hall observed:

Given the history of the legislation, it would, be wrong to start at the other end, eliminate all work related causes which might be characterised as reasonable management action reasonably taken and inquire whether any remaining causes might be characterised as significant causes of the injury.

Despite this approach President Hall went on to say:

This not being a case in which the “injury” was said to have been withdrawn from the definition by one event or one course of conduct the necessities of exposition forced the Acting Industrial Magistrate to tease out the transactions and series of events said to have brought about the injury and said to have been reasonable management action reasonably taken.

Nevertheless a global approach was required because as President Hall found the events and courses of conduct marshalled up by the Acting Industrial Magistrate were not truly discreet.

On the other hand, a consideration of individual events may be appropriate when there is an issue as to whether any particular event (often referred to as a stressor) had in fact contributed to the onset of the injury<sup>34</sup>.

A problem arises where there are multiple stressors which are accepted as contributing to the onset of the injury and one or more is not management action. The confusion arises in part because, in *Delaney v Q-COMP Review Unit*<sup>35</sup>, one of the matters complained of was not management action<sup>36</sup>. President Hall held that as the activity was not management action there could be no question of the activity removing the appellant’s “injury” from the definition at s.32. It should be noted however that it was held that there was a nexus between this activity and other events and courses of conduct complained which did fall within “management action” and which were found not to have been “taken in a reasonable way”.

---

<sup>30</sup> QIC 11 (2 March 2005); 178 QGIG 197

<sup>31</sup> [2005] QIC 46 (8 July 2005); 179 QGIG 491

<sup>32</sup> [2005] QIC 53 (14 September 2005); 180 QGIG 481

<sup>33</sup> QIC 11 (2 March 2005); 178 QGIG 197

<sup>34</sup> *Prizeman v Q-COMP*[2005] QIC 53 (14 September 2005); 180 QGIG 481

<sup>35</sup> QIC 11 (2 March 2005); 178 QGIG 197

<sup>36</sup> Heading 5 in the list in the decision.

In *Q-COMP v Education Queensland*<sup>37</sup> (*McArthur's case*) a decision handed down on 8th July 2005 there were two stressors that led to the injury. The major stressor was the fact of a complaint that alleged inappropriate physical contact about the worker, a school teacher. A minor stressor was the investigative process of this complaint by his employers. The Industrial Magistrate found that the management action was reasonable management action taken in a reasonable way. It should be noted that the information about the complaint was given to the worker as part of the management action in the investigative procedure.

It may be a simplification but it appears from the judgment that the submission on behalf of the appellant (*Q-COMP*, who supported the worker's claim) was that because the investigative process was reasonable management action taken in a reasonable way, it should not be relied upon to bring an alleged "injury" within the statutory definition of injury in s.32(1). If this approach were correct, then the injury would have arisen only out of the complaint, which was unconnected with management action and the appellant would have succeeded.

However it is worth repeating in the decision in *Delaney v Q-COMP Review Unit*<sup>38</sup> given a few months earlier, President Hall observed:

Given the history of the legislation, it would, be wrong to start at the other end, eliminate all work related causes which might be characterised as reasonable management action reasonably taken and inquire whether any remaining causes might be characterised as significant causes of the injury.

Therefore it is perhaps not entirely surprising that in *Q-COMP v Education Queensland*<sup>39</sup> (*McArthur's case*) President Hall stated:

It is not the concern of s.32(5) to nominate stressors which may be taken into account in determining whether a particular psychiatric or psychological disorder falls within the rubric of s. 32(1). The concern of s.32(5) is to remove certain psychiatric and psychological disorders from the statutory definition of "injury". Where a situation arises in which s.32(1) "ropes-in" a particular psychiatric or psychological disorder and s.32(5) excludes the same psychiatric or psychological disorder, there is an inconsistency which because of the use of "notwithstanding" must be resolved by allowing s.32(5) to prevail.

In *Prizeman v Q-COMP*<sup>40</sup> handed down on 14th September 2005 President Hall reinforced the decision in *McArthur's case* when he noted:

Th(is) case developed at first instance was that each of the work related stressors relied upon by Ms Prizeman was withdrawn from consideration because it arose in the course of reasonable management action taken in a reasonable way. In light of the subsequent decision in *Q-COMP v Education Queensland (2005) 179 QGIG 491*, that approach may well be argued to be flawed.

In that case although a number of stressors were relied upon by the worker, all involved management action. However, President Hall noted the case before the Industrial Magistrate had an alternative reason for considering considered the stressors individually. This was on the basis of whether any particular stressor had in fact contributed to Ms Prizeman's decompensation.

---

<sup>37</sup> [2005] QJC 46 (8 July 2005); 179 QGIG 491

<sup>38</sup> QJC 11 (2 March 2005); 178 QGIG 197

<sup>39</sup> [2005] QJC 46 (8 July 2005); 179 QGIG 491

<sup>40</sup> [2005] QJC 53 (14 September 2005); 180 QGIG 481

## Determining whether the psychiatric or psychological disorder is due to the worker's expectation or perception of reasonable management action being taken against the worker.

Section 32(5)(b) of the Act provides that injury does not include a psychiatric or psychological disorder arising out of, or in the course of "the worker's expectation or perception of reasonable management action being taken against the worker".

### Principles of interpretation from the decided cases

- Does s.32(5)(b) apply to the worker's expectation or perception of future management action?

In *Exide Australia Pty Ltd v Workcover Queensland*<sup>41</sup> the case concerned a worker who decompensated in consequence of a restructuring of his employer's business and an associated increase in his workload.

President Hall found that because 32(5)(b) refers to "reasonable management action" rather than "management action" then 32(5)(b) was intended to operate only where there is actual management action and has no role where the management action lies all in the perception of the worker.

- What is the meaning of reasonable management action being taken against the worker?

In *Exide Australia Pty Ltd v Workcover Queensland*<sup>42</sup> President Hall contrasted the provisions of s.32(5)(a) which refers to reasonable management action taken in a reasonable way "by the employer" with s.32(5)(b) which refers to reasonable management action "being taken against the worker". That case concerned a worker who decompensated in consequence of a restructuring of his employer's business and an associated increase in his workload. There was no evidence that any action, whether characterised as reasonable management action or not, was being taken against the worker or against any group of which the worker was a member<sup>43</sup>.

- Must the worker's perception of events always differ from reality if the worker has suffered a psychological/psychiatric injury?

In *Prizeman v Q-COMP*<sup>44</sup> the Industrial Magistrate had distinguished between the worker's perceptions and that which had in fact occurred. However President Hall was at pains to point out that there was no suggestion that in taking that course, the Industrial Magistrate was acting on the view that the perceptions and/or recollections of perceptions of a person who has decompensated were inherently unreliable.

---

<sup>41</sup> [2002] QJC 24 (17 May 2002); 170 QGIG 95

<sup>42</sup> [2002] QJC 24 (17 May 2002); 170 QGIG 95

<sup>43</sup> See also *Workcover Queensland v Kehl* [2002] QJC 23 (17 May 2002); 170 QGIG 93

<sup>44</sup> [2005] QJC 53 (14 September 2005); 180 QGIG 481; see also *Svenson v Q-COMP* [2006] QJC 16 (31 March 2006); 181 QGIG 629

- Does the reasonable management action referred to in s. 32(5)(b) which is taken against the worker need to be taken in a reasonable way?

In *Prizeman v Q-COMP*<sup>45</sup> President Hall stated:

And it must be remembered that it is a consequence of s.34(5)(b) of the *WorkCover Queensland Act 1996* (s.32(5)(b) of the Act) that, in determining whether action was reasonable management action taken in a reasonable way by the employer in connection with the worker's employment, it is the reality of the employer's conduct and not the employee's perception of it which must be taken into account.

It would appear from this passage that the first step is to see if s.32(5)(a) applies. In carrying out this task it is necessary to look at the reality of the employer's conduct. If s.32(5)(a) applies, the injury is removed from consideration. In many cases where a worker's perception is different from reality, the test under s.32(5)(a) will determine the matter if the management action is reasonable and being taken in a reasonable way.

Section 32(5)(b) operates where the worker's perception of this action being taken rather than the reality of the action was the cause of the illness. Such cases appear to be rare and the main use for s.32(5)(b) appears to be to reinforce the effects of s.32(5)(a).

- Evidentiary matters with respect to perception

The best indication of the worker's perception of the management action being taken is usually to be found in the application for compensation and the report of a treating psychologist/psychiatrist. Often these accounts will differ from those given by the employer and/or co workers. This does not mean that the worker's account is necessarily incorrect, however it does point to a conflict which has to be resolved. Further there is a tendency for some medical experts to attempt to usurp the role of the appeal bodies and courts in determining where the reality lies in the various accounts. Such a role is often fraught with danger. While there is no bar on medical experts pointing to inconsistencies in symptoms, differing accounts given to them on different occasions and the failure of a worker to adequately disclose previous illnesses and stressors, the conclusions are often reached without giving the worker or other witness a chance to reconsider, recollect or recant. In effect there is a denial of natural justice. In some cases the experts appear to identify too willingly with the interests of the party paying for the report.

- A brief mention of when the injury is allegedly due to action by insurer or the Authority in connection with the worker's application for compensation.

While anecdotal evidence indicates that there are a number of occasions where workers complain that the actions by an insurer or Authority in connection with the worker's application for compensation have caused a psychiatric/psychological injury, there does not appear to be any case law on the point.

---

<sup>45</sup> [2005] QIC 53 (14 September 2005); 180 QGIG 481; see also *Svenson v Q-COMP* [2006] QIC 16 (31 March 2006); 181 QGIG 629