



Psychological injuries claims

Under the *Workers' Compensation and Rehabilitation Act 2003 (the Act)*, injured workers face certain challenges in establishing an entitlement to compensation for a psychological injury.

This area of law is constantly evolving in the wake of a series of Industrial Court decisions interpreting the entitlement provisions relating to psychological "injury" within section 32 of the Act. Understanding the court's approach, and accordingly that of Q-COMP (the workers' compensation regulatory authority) in deciding applications for administrative review and defending appeals, will assist injured workers, employers and their advocates to negotiate the challenges inherent to these claims.

Workers' compensation is payable to a worker who sustains an injury within the meaning of the Act. Section 32(1) defines "injury" as "personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury". However, section 32(5) excludes from the definition of "injury" psychiatric or psychological disorders "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".

Applications for compensation are decided in the first instance by WorkCover Queensland

Recent caselaw highlights the challenges that must be faced when seeking entitlement to compensation for a psychological injury.

Report by **Alana Macaulay**.



or employers who are self-insured under the Act. Injured workers or employers aggrieved by a decision about an application can apply to Q-COMP for an independent review of the decision. If aggrieved by the review decision, injured workers and employers can appeal to an Industrial Magistrates Court or the Queensland Industrial Relations Commission.

As respondent to the appeal, Q-COMP's role is then to defend the review decision. Decisions of the Industrial Magistrate or the Queensland Industrial Relations Commission can be appealed to the Queensland Industrial Court.

Prior to the Industrial Court decision of *Q-COMP v Education Queensland* [2005] QIC 46, Q-COMP's approach to deciding psychological injury claims focused on determin-

ing the proximate or the most significant stressors causing the injury. That is, where there were multiple stressors involving reasonable management action and non-management action, or reasonable management action and unreasonable management action, more weight may have been placed on the stressor or stressors directly proximate to the day the worker stopped work due to the psychological injury, or the stressor or stressors considered to be more significant in causing the injury. However, the line of reasoning subsequently developed by the Industrial Court has identified a different approach.

Q-COMP v Education Queensland

This case, often referred to as McArthur's case, involved Mr McArthur, a physical education teacher who was the subject of a complaint about alleged inappropriate conduct towards three female students. Education Queensland's Ethical Standards Unit acted quickly to advise Mr McArthur of the complaint the following day, and remove him from duty for two days while he and the three students were interviewed. At the end of the two days, Mr McArthur was advised that the complaint had been resolved in his favour, and a written report was produced the following week.

Mr McArthur returned to teaching after two weeks of school holidays, but after two weeks he suffered an acute stress reaction and stopped work. >>

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Mr McArthur's application for compensation was accepted by Q-COMP at the review stage.

Q-COMP determined that the allegations made against Mr McArthur and the investigation into the complaints by Education Queensland were significant contributing factors to Mr McArthur's psychological injury. Although Q-COMP considered the investigation process to be reasonable management action taken in a reasonable way by Education Queensland, Q-COMP determined that the allegations made against Mr McArthur were of sufficient significance to found a decision to accept the application. This decision was overturned by the Industrial Magistrate on appeal by the employer. On appeal to the Industrial Court, President Hall noted the Industrial Magistrate's findings that while the "major contributing factor" to Mr McArthur's psychological injury was the students' allegation of inappropriate conduct (non-management action), the employer's investigative process (management action) was a "lesser significant contributor".

Nevertheless, Hall P held that the finding that the injury arose out of reasonable management action meant that it was excluded from the definition of "injury" – notwithstanding that the "major contributing factor" was not found to be management action. The appeal was dismissed.

Hall P addressed the issue of whether a psychological injury is excluded from the definition of "injury" because it arose out of, or in the course of, reasonable management action taken in a reasonable way. The often quoted section of Hall P's decision (addressing section 34 of the *WorkCover Queensland Act 1996*, which is equivalent to section 32 of the current Act) is as follows:

"It is not the concern of s34(5) to nominate stressors which may be taken into account in determining whether a particular psychiatric or psychological disorder falls within the rubric of s34(1). The concern of s34(5) is to remove certain psychiatric and psychological disorders from the statutory definition of 'injury'. Where a situation arises in which s34(1) 'ropes-in' a particular psychiatric or psychological disorder and s34(5) excludes the same psychiatric or psychological disorder, there is an inconsistency which because of the use of 'notwithstanding' must be resolved by allowing s34(5) to prevail."

The Industrial Court's approach

Following the decision in *Q-COMP v Education Queensland*, there has been much debate about Hall P's interpretation greatly reducing an injured worker's chances of successfully establishing an entitlement to compensation for a psychological injury. However, this decision is but one in a line of authority developed in the

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Industrial Court, which should be considered in its entirety.

In *Lackey v WorkCover Queensland* [2000] QIC 43, *Avis v WorkCover Queensland* [2000] QIC 67 and *WorkCover Queensland v Curragh Queensland Mining Pty Ltd* 172 QGIG 6, the court confirmed that the test of "arising out of" does not require a direct or proximate causal relationship between employment or management action and the psychological injury. This means that section 32(5) may apply even if management action is only indirectly related to the psychological injury.

However, in *RACQ Operations Pty Ltd v Q-COMP* [2003] QIC 162, the court indicated that the test of "arising out of" still requires a minimal causal nexus, and a psychological injury does not arise out of management action if the action is too remote or a background matter (for example, a procedures manual or system of work designed by management compared with direct traumatic incidents experienced at work).

In *Delaney v Q-COMP Review Unit* [2005] QIC 11, the court made a "global evaluation" of a series of incidents considered individually to be "mere blemishes" rather than instances of unreasonable management action, on the basis that the incidents were joined by subject matter, time and personality, in the context of a discordant workplace, and related to a worker who was known by management to have previously decompensated due to workplace stress. When considered globally in this context, the "blemishes" were found overall to be unreasonable management action.

In *Prizeman v Q-COMP* [2005] QIC 53, the court upheld the Industrial Magistrate's global consideration of a number of allegations and found that the worker's psychological injury arose out of reasonable management action. In relation to a further final allegation, Hall P found that the Industrial Magistrate's inability to make a finding about what transpired during a meeting between the worker and her manager was decisive to the conclusion that the injury arose out of reasonable management action taken in a reasonable way. In light of the test in *Q-COMP v Education Queensland*, this was sufficient to exclude the psychological injury from the definition of "injury" in section 32.

In *Parker v Q-COMP* [2007] QIC 25, the court upheld the Industrial Magistrate's decision that the psychological injury arose out of or in the course of reasonable management action, notwithstanding the finding that the injury was caused by workplace bullying by a co-worker, which was a significant contribut-

ing factor to the development of the injury. The management action involved the manager investigating the appellant's allegation of bullying by the co-worker and subsequently issuing a written warning to the co-worker. Further management action involved responding to the appellant's further complaints of retaliatory bullying by the co-worker and her repeated requests that the manager not take action.

The court found that the initial investigation of the complaint was inextricably linked to the subsequent events, and the Industrial Magistrate was correct in finding that there was one overall continuum of management action. The court declined to enter into an "exhaustive analysis" of the parameters of the phrase "arising in the course of" management action, observing only that section 32(5) excludes a psychological injury that is causally traceable to reasonable management action, and it is not legitimate to distort the balance between sections 32(1) and (5) by limiting the scope of the phrases "arising out of" or "arising in the course of" to maximise the reach of section 32(1).

In *Q-COMP v Hohn* [2008] QIC 56, the court confirmed that for the section 32(5) exclusion to apply, the reasonable management action does not need to be "a significant contributing factor" to the psychological injury. It is sufficient if the injury "arises out of, or in the course of" the management action, even if the management action was not a significant contributor to the injury. Hall P also observed that the mere occurrence of reasonable management action will not activate the exclusionary provisions; for example, if the worker decompensates before reasonable management action is taken, or prior or contemporaneous management action is discrete or too remote from the worker's decompensation.

In the recent decision of *Q-COMP v Rowe* [2009] QIC 17, the court overturned the Queensland Industrial Relations Commission's decision that the respondent sustained an "injury" in circumstances where the injury was the result of multiple stressors, some of which were found to involve reasonable management action taken in a reasonable way.

The court found that the earlier stressors (involving the reasonable management action) exhausted the respondent's coping mechanisms to the point where the events leading to the end of his employment (involving unreasonable management action) resulted in his final decompensation. On these findings, the court held that the section 32(5) exclusion applied.

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President Hall commented further that the effect of the decision in *Hohn* was that a claimant may succeed although some of the stressors arose out of or in the course of reasonable management action taken in a reasonable way, but this does not mean that a claimant will succeed where at least one stressor does not arise out of or in the course of reasonable management action. In all cases, the appeal body will be required to embark on the relevant enquiry based on the particular circumstances of each case.

As a final note, the recent decision of the Court of Appeal of the Supreme Court of Queensland in *Parker v The President of the Industrial Court of Queensland & Q-COMP* [2009] QCA 120 found that President Hall's decision of *Parker v Q-COMP* was not affected by jurisdictional error so as to deprive the Industrial Court of the authority to determine the appeal.

Significantly, Justice Keane observed that it was not at all clear that there had been error in the interpretation of sections 32(1) and (5). Justice Keane noted that the introductory words of section 32(5) ("despite subsection (1)") clearly indicate a legislative intention that where both provisions apply, the exclusionary effect of section 32(5) overrides the inclusive effect of section 32(1). This reflects the Industrial Court's interpretation in *Q-COMP v Education Queensland*.

Further, the issue of whether a psychological injury is the result of reasonable management action must be resolved by reference to the evidence in the case rather than by glossing the statute.

Deciding psychological claims

In making review decisions about psychological injury claims, and defending them at appeal, how then does Q-COMP reconcile and

apply the above decisions? The answer is that there is no one-size-fits-all approach. Instead, the approach is to weigh the evidence and decide each psychological injury claim based on its particular facts and having regard to the line of authority established by the Industrial Court, rather than broadly applying a particular principle of case law to every claim.

This approach can be summarised as:

1. Did the worker sustain an "injury" within the meaning of section 32(1) (that is, personal injury, arising out of or in the course of employment, to which employment is a significant contributing factor)?

2. If so, did the psychological injury "arise out of, or in the course of," management action? (In particular, consider *Avis*, *RACQ* and *Hohn* to determine whether the minimum causal nexus between instances of management action and the injury is satisfied.) If the injury did not arise out of or in the course of management action, section 32(5) does not exclude it from the definition of "injury" within section 32(1).

Where there are multiple stressors, a relevant issue will be how to apply section 32(5) to address factual circumstances including stressors involving instances of non-management action and stressors involving instances of management action.

3. If the injury did arise out of or in the course of management action, was the management action reasonable and taken in a reasonable way? If management action was unreasonable, or taken in an unreasonable way, section 32(5) does not exclude the psychological injury from the definition of "injury" within section 32(1).

However, if management action was reasonable and taken in a reasonable way, section 32(5) excludes the psychological injury from the definition of "injury" within section 32(1), even if management action is not a significant

contributing factor (*McArthur*, *Prizeman*, *Parker*, *Hohn*, *Rowe*). Again, where there are multiple stressors, a relevant issue will be how to apply section 32(5) to address factual circumstances including stressors involving instances of unreasonable management action and stressors involving instances of reasonable management action.

4. For multiple instances of management action, consider whether a global evaluation is appropriate. (Refer to *Delaney* – management actions linked by subject matter, time or personality, or in circumstances where a worker is known by management to have previously decompensated due to workplace stress, considered globally may lead to the conclusion that overall the injury arose out of unreasonable management action, even if individual actions are found to be reasonable.)

The approach to deciding psychological injury claims will be continually refined as the Industrial Court further develops the line of authority interpreting the provisions of section 32 of the Act.

Q-COMP will continue to pay close attention to the principles developed by President Hall, and look to apply them fairly and equitably in its administrative decision-making and litigation practices.

Legal practitioners looking for guidance about how to interpret the Act provisions relating to claims for psychological injuries can search for relevant case law on the QWCDec database (Queensland workers' compensation decisions) located on the Q-COMP web site – www.qcomp.com.au.

Also, Q-COMP is developing online training courses for legal practitioners, including a module for psychological injuries. These courses will be made available on Comprehend, Q-COMP's e-learning web site – www.comprehend.com.au.

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