WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

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

Matter Number: **908/19**
Applicant: **DANIEL HORTON**
Respondent: **CORRECTIVE SERVICES NSW**
Date of Determination: **8 AUGUST 2019**
Date of Amendment: **13 AUGUST 2019**
Citation: **[2019] NSWWCC 271**

The Commission determines:

1. The following awards for payment of weekly compensation are made in favour of the applicant against the respondent:

    (a) From 10 October 2018 to 9 January 2019 in the sum of $1,490.85 per week pursuant to section 36 (1) (a) of the *Workers Compensation Act 1987*, as amended (1987 Act);

    (b) From 10 January 2019 to date and continuing in the sum of $1,255.46 per week pursuant to section 37 (1) (a) of the 1987 Act.

2. Liberty is granted to the applicant to apply, if necessary, in respect of any claim for section 60 expenses.

3. Liberty is granted to the respondent to apply, if necessary, in relation to the application of section 44C (1) (b) of the 1987 Act in respect of the amount of the payment of weekly compensation on and from 10 October 2019.

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

PHILIP YOUNG
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Daniel Horton (the applicant) is a 35-year-old man who was employed by Corrective Services NSW (the respondent) as an overseer. He worked at the respondent's premises at Cessnock. The applicant alleges a series of bullying and harassment events between April 2018 and October 2018 which were allegedly instigated by a fellow worker, Mr Adrian Johnson.

2. The applicant claims weekly payments of compensation from 10 October 2018 to date and continuing. The relevant pre-injury average weekly earnings have been agreed to be for the first 52 weeks $1,569.32 per week and thereafter (excluding overtime) $1,544.18 per week. There was amendment to the particulars of injury, as appears below.

ISSUES FOR DETERMINATION

3. The respondent has conceded in its written submissions (at [35]) that the applicant suffers a psychological condition. However, the respondent does not concede that the condition is a compensable injury.

4. As identified by the applicant's written submissions the issue for determination is whether the applicant's psychological condition constitutes a compensable injury as contemplated by either section 4(b) (i) or 4(b) (ii) of the 1987 Act. The respondent has added an additional issue, namely section 4 of the 1987 Act in that it is submitted that the applicant's psychological condition did not arise out of or in the course of the applicant's employment.

5. At the conciliation and arbitration hearing the applicant amended the "particulars of injury" in Part 4 of the Application to Resolve a Dispute (Application), by consent, to add the following:-

> "The employer failed to take appropriate action in relation to the applicant's grievances, complaints and difficulties in relation to Adrian Johnson and caused the applicant to feel powerless and marginalised".

PROCEDURE BEFORE THE COMMISSION

6. The matter came for conciliation and arbitration hearing in Newcastle on 18 June 2019. Mr C Tanner of Counsel instructed by Mr Joy, Solicitor, appeared for and with the applicant. Father J Alexander accompanied the applicant as a support person. Mr S Hunt of Counsel appeared for the respondent.

7. There were a series of Applications to Admit Late Documents (AALD), the details of which are included below.

8. The matter proceeded to conciliation but was incapable of resolution. I am satisfied that the parties to the dispute understand the nature of the allegations and the evidence before the Commission and have made reasonable but unsuccessful attempts to resolve the matter. The matter therefore proceeded to arbitration hearing.

EVIDENCE

Documentary evidence

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

    (a) Application dated 25 February 2019 and attached documents;
    (b) Reply dated 19 March 2019 and attached documents;
    (c) Applicant's AALD dated 16 May 2019 and attached documents;
    (d) Respondent's AALD dated 21 May 2019 and attached documents, and
    (e) Applicant's AALD dated 14 June 2019 and attached documents.

10. There being insufficient time to conclude the matter on 18 June 2019, the parties were directed to file and serve written submissions. The submissions in chronological order are as follows:

    (a) Respondent's submissions prepared by Mr Hunt dated 1 July 2019;
    (b) Applicant's submissions prepared by Mr Tanner dated 26 July 2019, and
    (c) Respondent's submissions in reply prepared by Mr Hunt dated 29 July 2019.

11. There was agreement between the parties that the respondent would make the first submissions.

Oral evidence

12. No oral evidence was given.

SUBMISSIONS

13. Both Counsel have provided extensive written submissions. It is unnecessary to detail those submissions; however, I will endeavour to outline the main submissions raised.

Respondent's submissions

14. The applicant transferred from Wellington Corrections Centre to Cessnock Corrections Centre in January 2018. Previously, in April 2013 and September 2013 the applicant injured his neck whilst working in the coal mining industry for which he underwent a C6/7 foraminotomy and discectomy. Additionally, he suffered a psychological condition and received treatment which included consulting his general practitioner, Doctor Harfield on several occasions throughout 2015 because of exacerbations of depression resulting from poor treatment by human resources staff. Ultimately, he was referred to Doctor C Bench, psychiatrist, who diagnosed adjustment disorder with depressed and anxious mood and alcohol dependence.

15. The applicant was admitted to Mater Hospital in February 2016 following an overdose and was referred to Doctor Anand, psychiatrist, in March 2016 and seen by Doctor Bench again on 23 June 2016. Treatment for mental health issues continued throughout 2016 by his general practitioner, Doctor Parikh. After settlement of his workers compensation claim and when seen by Doctor Parikh on 22 March 2017, a little over six weeks after settlement, the applicant was happy and positive and discussing retraining.

16. Notwithstanding the alleged improvement in the applicant's condition, he remained taking medication namely Seroquel and Pristiq until 19 April 2018. This was three months after the applicant started work at Cessnock Corrections Centre.

17. The applicant's brother provided air conditioning services generally and gave quotes to Mr Adrian Johnson (a work colleague of the applicant) in or around April 2018. A dispute arose between Mr Johnson and the applicant's brother (and hence vicariously with the applicant) concerning those quotes. The respondent says that it is clear that this dispute arose from a personal matter, unrelated to the applicant's employment.

18. The applicant says that this dispute developed into bullying and harassment by Mr Johnson, including abusive text messages, the applicant being called derogatory names and intimidated. The applicant claims that the respondent did not properly handle the applicant's complaints concerning Mr Johnson.

19. The applicant alleges that Mr Johnson telephoned him on 19 April 2018 saying that he was going to "cave in your head after I finish caving in your dog brother's" and made threats about the applicant's continued employment. The respondent says that the text messages are silent as to any threat of violence towards the applicant by Mr Johnson. Indeed, the applicant consulted Doctor Parikh on 19 April 2018 and Mr Barrett on 20 April 2018 and made no complaint about these alleged threats. Mr Barrett's GP mental health plan raised issues concerning back pain, depression, neck pain with radiculopathy and L5/S1 disc tear/ desiccation. No threat of violence was recorded.

20. Regarding the threat of violence on 19 April 2018, the first evidence of any allegation of that threat was not made by the applicant until 22 September 2018.

21. On 19 April 2018, the applicant emailed his manager, Mr Pat Towns. The email concerned the applicant's workload and did not include any allegation of any threat by Mr Johnson that day. The applicant saw Doctor Ahmed, general practitioner, on 24 April 2018 but made no mention of psychological symptoms, threat or injury.

22. The applicant made a complaint about Mr Johnson which was dealt with by Governor Mumford in April/May 2018. The applicant complained about the outcome and in doing so did not mention any threats of violence made by Mr Johnson. The complaint was escalated to Mr Glen Scholes and the applicant emailed Mr Scholes on 30 May 2018 indicating that he was satisfied with the way the matter had been handled. The matter was "resolved".

23. The next incident alleged is that on 14 June 2018 at the gatehouse of the respondent's premises. Mr Johnson entered the area and pulled a face at the applicant, clenched his teeth and raised his left hand like a fist. The respondent suggests that CCTV footage concerning this interaction reveals little, if any, interaction.

24. Further allegations by the applicant concern events allegedly occurring on 14 and 15 June 2018 where Mr Johnson on the latter date called the applicant "a f… maggot". The applicant had been told he could not use the Officers' Mess and complained again to Mr Scholes on 23 July 2018 that he felt ostracised.

25. Although the applicant saw Doctor Sadashivappa, general practitioner, on 28 August 2018 and 6 September 2018 there was no mention of psychological symptoms, nor the alleged actions of Mr Johnson, nor any failure of the respondent in handling the applicant's complaints.

26. The applicant described as "significant" an incident of 21 September 2018 when Mr Johnson started pointing at him, staring at him and beckoning him and says that he (the applicant) walked away and suffered a panic attack. In a late document (AALD 16 May 2019), the applicant alleges he discussed these threats with Mr Towns the following week, however, this evidence post-dates an earlier statement made 22 October 2018 where the applicant had opportunity to, but did not, raise this conversation.

27. The applicant's grievance form completed 22 September 2018 only alleges Mr Johnson's behaviour of 19 April 2018 and makes no mention of the incidents which allegedly occurred on 14 and 15 June 2018, or more importantly the 21 September 2018, which had allegedly occurred the day before. Further, despite the "significance" of the panic attack of 21 September 2018, there is no evidence that the applicant sought medical treatment at that time.

28. The next incident allegedly occurred on 5 October 2018 when the applicant says that he attended the "Officers' Mess" and experienced intimidating and belittling behaviour by Mr Johnson. The applicant did not report this behaviour.

29. On 6 October 2018, when intoxicated, the applicant rang Mr Johnson at home requesting that Mr Johnson "meet me, meet me". Mr Johnson alleges numerous abusive phone calls from the applicant and reported them to Cessnock Police resulting in the applicant receiving an email from Governor Fitzgerald advising him the matter had been referred to the Professional Standards Branch (Corrective Services). The applicant was directed to immediately cease any contact with Mr Johnson. He had a meeting with Mr Towns on 9 October 2018 and ceased duties that day.

30. The respondent has raised issues concerning both section 4 and section 4 (b) (i) and section 4 (b) (ii) of the 1987 Act. In relation to section 4, the genesis of the events alleged by the applicant lay with a matter completely unrelated to employment, namely the dispute over the air conditioning quote. The text messages relate to matters which occurred outside of work hours and do not support any allegation of physical violence threatened by Mr Johnson. No such threats were made. Even if they were, they occurred outside work hours and concern a dispute over a quote for air conditioning work. Whilst Mr Towns' evidences supports that something was said by Mr Johnson to the applicant on 14 June 2018, the exchange is not related to the applicant's employment with the respondent, other than that the exchange occurred in the workplace. The test in *Tarry*[1] requires a direct and unbroken causal connection between the dispute and the applicant's employment with the respondent.

31. The respondent dealt with the complaints about Mr Johnson's behaviour in a manner which the applicant's own email of 30 May 2018 regards as satisfactory. All of the alleged events arose out of conflict from matters completely unrelated to the applicant's employment. The applicant's telephone calls on 6 October 2018 take him outside the test laid down in *Speechley*[2]*.*

32. In terms of the "main contributing factor" test, Doctor Parikh's referral of the applicant to Mr Peate, psychologist, dated 20 April 2018 did not provide an opinion on causation. Mr Peate was unable to provide an opinion as to whether the 2018 alleged injuries were the sole reason for the applicant's current condition and did not opine as to whether the applicant had fully recovered from his previous injury. Mr Anning, whilst alleging that the applicant suffered major depressive disorder as a result of workplace events, made no attempt to separate the effects of the various events. Whilst Doctor Whetton diagnosed an adjustment disorder with anxiety and panic attributable to the relationship between the applicant and Mr Johnson, Doctor Whetton did not apportion causation between the events. Notwithstanding the applicant's complaints about Mr Johnson between April and September 2018, none of these issues were raised with his general practitioners until 9 October 2018.

33. None of the events relied upon by the applicant, which all flowed from the "air conditioning dispute", have sufficient connection to his employment to satisfy section 4 of the 1987 Act. If any of the events do satisfy section 4, they do not satisfy the "main contributing factor" test for disease/aggravation (etc) of disease (sections 4 (b) (i) and/or 4 (b) (ii)) because the applicant's evidence is to the effect that **all** of the events combined to cause his alleged injury.

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[1] *Tarry v Warringah Shire Council* [1974] 48 WCR (NSW)
[2] *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126 [133]

Applicant's submissions

34. The respondent seeks to emphasise what it characterises as a "private dispute between the applicant, the applicant's brother and Mr Johnson". This approach is at odds with the reasoning of the Court of Appeal in *Kelly*[3]. Although *Kelly* concerned section 9A, its reasoning concerning the subjective basis of the dispute between two workers is equally applicable to section 4 (b) (i) and/or 4 (b) (ii) of the 1987 Act.

35. In *Kelly*, both Mrs Kelly and the co-worker were employed by the same employer at the same location when a confrontation took place. Basten JA noted the Arbitrator's finding that employment was the key connection between the parties which provided the opportunity, time and the place for the confrontation. Although the Arbitrator's decision was overturned by Deputy President O'Grady, the Court of Appeal found for Mrs Kelly on appeal. His Honour Basten JA held that the starting point must be the terms of the particular section (in that case section 9A). His Honour Basten JA said:-

> "27. The subjective basis of an attack by one co-worker on another, during the course of their common employment may be a relevant factor in some cases, but in many it will not be…Where it is the common employment of two workers which leads to the outbreak of aggression in the course of the employment, in circumstances where such an incident would probably not have occurred absent the common employment, the source of the grievance felt by the aggressor is less likely to be relevant and less likely, if relevant, to carry significant weight".

36. His Honour continued (at [28]) that the Deputy President had proceeded on the footing that there "needed to be a substantial causal nexus between the grievance which motivated the aggressor and the nature of the employment of the appellant". Basten JA held that such an approach "involved a restriction of the terms of section 9A which is not found within the language of the provision, nor does it arise by way of reasonable implication".

37. The applicant's submission relies upon *Kelly* as supporting the principle that the subjective basis of conflict between two employees (as I understand it, the reason for the original dispute) is not determinative of whether a consequent injury is compensable.

38. The common employment of the applicant and Mr Johnson, their encounters in the workplace and the manner in which the employer dealt with the escalating conflict, all indicate the relevance of the applicant's employment as a contributing factor to his psychological decline. Mr Johnson's threats of work-related consequences for the applicant's brother, his claims to have influence with management and the applicant's perception that Mr Johnson could behave with impunity, confirm that the common employment of the applicant and Mr Johnson contributed to the applicant's psychological deterioration.

39. The various text messages in April 2018 contain clear threats by Johnson concerning the applicant's employment, Mr Johnson's influence in the workplace and involves Mr Johnson's sense of power in the workplace. Mr Johnson's text messages illustrate that this is not a private dispute relating solely to the cost of air conditioning.

40. The foundation for the applicant's fears and anxiety was his perception regarding Mr Johnson's capacity to act to the detriment of the applicant's employment security. Additionally, the respondent itself recognised that it had a responsibility, as employer, to become involved and address Mr Johnson's conduct towards the applicant. Mr Johnson acknowledges that he and the applicant were directed to avoid each other and the respondent would have not referred to the Code of Conduct and would have not required Mr Johnson to undertake refresher training if it did not consider Mr Johnson's conduct as unacceptable, and work-related.

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[3] *Kelly v Secretary Department of Community and Family Services* [2014] NSWCA 102 (*Kelly*)

41. In Mr Johnson's statement dated 25 October 2018, he does not dispute the applicant's account of his (Mr Johnson's) threatening behaviour.

42. Mr Towns' statement of 25 October 2018 acknowledges that he "felt that there was some tension between the two parties" and that he "could see how Daniel (the applicant) may have perceived the comment as intimidating".

43. The respondent's suggestion that the applicant could be transferred back to Wellington or elsewhere in the complex, confirmed to the applicant that Mr Johnson "clearly had influence amongst management and his perception of powerlessness and the respondent's management were not supportive is clear from his statements".

44. As to the medical evidence, the applicant had no psychiatric treatment for a year prior to 20 April 2018. Mr Peate in October 2018 took a history of the workplace bullying and of the applicant's sense that his complaints concerning Mr Johnson were "brushed off". Mr Peate noted that the applicant had again developed depression and anxiety but that the symptoms were "not the same as last time". On 22 November 2018 Mr Peate recorded extremely severe depression, severe/extreme anxiety and severe stress. On 13 December 2018, Mr Peate noted how the applicant had previously recovered from workplace issues concerning depression and had a new future before the current events. In April 2019, Mr Peate noted the applicant's frustration and powerlessness with the way Mr Johnson had been protected by management.

45. Doctor Anning in his report dated 5 February 2019 diagnosed major depressive disorder with the applicant's employment being the main contributing factor to his suffering from a psychological injury. Doctor Anning regarded it as a new psychiatric injury because prior psychiatric problems were most likely resolved at the time of settlement of his previous (Coal Mines insurance) claim.

46. Doctor Whetton recorded a diagnosis of adjustment disorder with anxiety and panic. He also confirmed the applicant's condition was directly caused by Mr Johnson's conduct and Doctor Whetton's report of 29 January 2019 concedes specific incidents in the workplace as being causative of the applicant's condition. The applicant's perception of powerlessness has a real and work-related foundation. Doctor Whetton's conclusion about the non-work-related matter spilling into the workplace is deficient because it does not acknowledge fresh work related psychological assaults. Additionally, Doctor Whetton does not address the threats that Mr Johnson made to the applicant's employment security or the applicant's feelings of powerlessness.

Respondent's submissions in reply

47. The decision in *Kelly* can be distinguished for reasons including that it involved section 9A (not applicable in the present case); section 4(1) was conceded; the applicant in *Kelly* was in the course of her employment whereas this matter involves a number of alleged incidents; the test for "substantial contributing factor" in section 9A is broader than "main contributing factor" under section 4 (1) a and 4 (1) b [sic–sections 4 (b) (i) and 4 (b) (ii)].

48. The exchange of text messages on 19 April 2018 have no connection with the applicant's employment, other than that the applicant worked with Mr Johnson.

49. The referral by Doctor Parikh to Mr Peate on 20 April 2018 does not identify the cause of the applicant's symptoms. In any event the applicant did not take up the referral to Mr Peate.

50. The only recorded cause of the applicant's symptoms was the applicant's email to Mr Towns on 19 April 2018. This email referenced the applicant struggling with his workload and did not include any allegation of threats made by Mr Johnson.

51. The consultation with Doctor Ahmed on 24 April 2018 makes no mention of psychological symptoms or injury.

DISCUSSION AND REASONS

The applicant's medical history (before April 2018)

52. Medical records outline the applicant's prior problems with anxiety and nervousness. There were consultations with Doctor Parikh on 3 August 2016, 12 August 2016 and 30 November 2016, all mentioning either anxiety, nervousness or frustration.

53. Earlier on 17 March 2015, Doctor Harfield had seen the applicant in Mudgee and diagnosed severe anxiety/depression "triggered by work stressors". This is at AALD (p 357). The applicant was later seen by Doctor Boldery at the Maitland Hospital on 31 May 2017 and was diagnosed with extremely severe depression, extremely severe anxiety and moderate stress.

54. The applicant had previously seen Mr Peate, psychologist, on 4 May 2016 at which Mr Peate suggested a referral to a psychiatrist (AALD p 510). The applicant had previously seen Doctor Bench, psychiatrist, at the request of Slater & Gordon, Solicitors, on 25 September 2015. At this time, his level of alcohol use was a problem (AALD p 537). Reports are available in relation to the applicant's neck injury from Doctor J Christie, Neurosurgeon, Professor Ghabrial, orthopaedic and spinal surgeon, and Doctor Spittaler, Neurosurgeon (Reply pp. 544-547, among others).

55. The consultation notes of Doctor Parikh continue on 4 October 2016 (mental health), 30 November 2016 (frustrated), 30 January 2017 (anxiety disorder) and the applicant's claim against Coal Mines Insurances was settled by 7 February 2017 (Broadmeadow Medical Centre notes, pp 226-229). There is then an entry for surgical consultation recorded by Doctor Parikh on 22 March 2017. Doctor Parikh records:

> "COURT CASE DID NOT HAPPEN SETTLED OUTSIDE COURT
> WELL DONE
> HE IS SO HAPPY
> NEVER SEEN HIM SO HAPPY AND POSITIVE
> TALK RE JOB – TRAINING – CAREER
> INJURY
> R/V AS NEEDED"

There are further consultations recorded by telephone on 4 May 2017 and 1 June 2017, then a consultation with Doctor Parikh on 2 June 2017 (chest palpitations) and 19 April 2018. According to Doctor Parikh's consultations recorded between 30 January 2017 and 15 October 2018, there are no records in any way relevant to anxiety or depression for this period.

56. In the absence of any evidence that the applicant sought any medical treatment for anxiety and/or depression between 22 March 2017 and the commencement of his employment at Cessnock Correction Centre in January 2018, I accept the applicant's factual account of the matter, corroborated as it is by Doctor Parikh's consultation note of 22 March 2017. I am comfortably satisfied that the applicant was not suffering any psychological injury or condition after 22 March 2017 and before the events of April 2018.

Submission concerning the absence of complaints

57. The applicant consulted Doctor Ahmed on 24 April 2018, 5 days after his consultation with Doctor Parikh. This was at Cessnock Surgery in Cessnock. He then saw Doctor Sadashivappa of the same surgery on 28 August 2018 and 6 September 2018 and on none of these occasions complained of any anxiety or depression. The first complaint of anxiety and low mood is mentioned in the context of not coping at work due to colleague issues on 9 October 2018. He saw the same doctor the following day, 10 October 2018, on two occasions. The first morning consultation was in relation to the colleague (no doubt Mr Johnson) threatening him about his employment and doing physical harm and ongoing frequent intimidation from senior staff; the second consultation was in the afternoon where the applicant indicated he had a meeting with the worker's union that day and requested the doctor modify the description of injury to read "workplace bullying".

58. The applicant's request to Doctor Sadashivappa to modify the description of injury, at first blush, is unhelpful to the applicant's cause. We do not know what was said to the applicant in the meeting with his union. It is to be inferred that the union recommended that the applicant return to see Doctor Sadashivappa with the request just mentioned. But regardless of the request, I take the view that the applicant had already in fact been injured by the hostility of Mr Johnson before 10 October 2018, so that even if this request was prompted by the union, and self-interested, it can be explained by the applicant's psychological condition at the time. The applicant, put short, was in my view of the opinion that he, and his continued employment, were under siege, and he reacted as some persons would expect to react in those circumstances.

59. There do not appear to be any records from Mr Peate concerning any actual advice provided by him for psychological help for the applicant between April 2018 and October 2018. It appears to be common ground that the referral by Doctor Parikh was not acted upon by the applicant. Nothing can be deduced from the applicant's failure to see Mr Peate during this period.

60. In relation to the respondent's submission concerning the absence of "threats" by Mr Johnson recorded by the general practitioners, Mr Barnett, Mr Towns and Mr Scholes, the fact remains that the applicant did in fact in April 2018 complete a Grievance Complaint alleging Mr Johnson's aggressive approach to him in the text messages and continued to complain to Mr Towns throughout the period April to October 2018 concerning this type of behaviour. The "threats" included in the text messages threats of violence, threats towards the applicant's employment security and threatening statements concerning Mr Johnson's power within the respondent's chain of command. Further, it is important to note that doctors' consultation notes must be considered with caution because the absence of records does not automatically mean that no complaint was made (see the decision of President Keating in *Palisi*[4]*)*. The CCTV footage is significant in corroborating the applicant's account of the hostility, or in other words "threats", he was experiencing. The absence of complaint by the applicant to doctors in April and May 2018 may equally be explained by the proposition that he regarded the issues (specifically the "threats in the texts") as work related and being handled by work. Whilst upset by the comments, the applicant might not at that time been so distressed that medical intervention was considered necessary.

[4] *Palise v Australian and New Zealand Banking Group Limited* [2018] NSWWCCPD 13 [93] citing *Mason v Demasi* [2009] NSWCA 227 per Basten JA

April 2018 and the text messages

61. It is the applicant's uncontroverted evidence that Mr Johnson telephoned him on 19 April 2018 and threatened to "cave in" the applicant's brother's head, then the applicant's head. If this was the precipitating factor in relation to the applicant's psychological injury resulting in incapacity, my view is that the applicant would have gone off work at or shortly after that time. It is a serious threat on any view of the words used. The applicant in fact continued to work for almost a further six months. The respondent contends that because the applicant did not initially complain about Mr Johnson's conduct in terms of a "threat", a "threat" was never made. I do not accept that contention because there is no denial by Mr Johnson that the telephone call did not occur, or the words were not said.

62. That having been concluded, it is however a different proposition to conclude that this hostile comment by Mr Johnson arose out of or in the course of the applicant's employment. There was in my view no causal connection between Mr Johnson's "cave In' threat and the applicant's employment. At that stage, the comment related solely to the air conditioning dispute. It was a threat made by Mr Johnson outside of work and unrelated to work and a private dispute. I accept Mr Hunt's submission that *Tarry* is the relevant authority in this regard. This threat had no causal connection with the applicant's employment.

63. Although not causally connected with the applicant's employment, the occurrence of this pre-existing comment must have had, in my view, some consequences for what subsequently occurred between Mr Johnson and the applicant. First, it appears to be the start of the events to which the applicant was subsequently subjected by Mr Johnson. Second, it sets the scene for a correct evaluation of further events after 19 April 2018 in that it gives some insight into the extent of Mr Johnson's propensity for aggression, because the words used by Mr Johnson on 19 April 2018 demonstrate that Mr Johnson was capable of aggressive behaviour. The words used are clearly very aggressive, threatening and hostile. An expressed willingness to "cave in" someone's head suggests, at the very least, a willingness to be violent.

64. In terms of the incident of April 2018, it is clear that the applicant did lodge a grievance complaint concerning Mr Johnson's text messages and telephone comments of 19 April 2018. The content of those text messages and comments is not specifically disputed by Mr Johnson's statement of 25 October 2018, nor indeed any other statement of fact made by any person. In relation to the text messages, it is correct, as Mr Hunt says, that there does not appear to be any "threat of violence". In my view, however, that concise proposition is not the only test for generally aggressive or hostile behaviour. There were clearly threats in the text messages that Mr Johnson would use his powerful position to potentially jeopardise the applicant's employment. There is no medical evidence that the applicant was psychologically disturbed by the April 2018 events (hostile telephone call and threatening text messages). That supports the respondent's position at that time, but it is naïve in my view to conclude that those events and hostility shown to the applicant during April 2018 played no part in the applicant's resultant psychological condition by reason of events which subsequently occurred. The applicant was the recipient of hostile and abusive conduct. This occurred initially in April 2018.

The email of 30 May 2018: matter "resolved"

65. As to the applicant's email to Mr Scholes of 30 May 2018 saying that the matter had "resolved", there are a number of potential explanations for the applicant saying what he did say at that time.

66. First, the applicant does not, at least anywhere in the evidence that I observed, complain of any specific hostility by Mr Johnson after the 19 April 2018 telephone call and the text messages and before 30 May 2018. To my mind, human experience suggests that the applicant may well have been comforted somewhat by Mr Scholes' explanation following their meeting. If that were so, such that the applicant was entirely appeased, then attention is directed towards post 30 May 2018 events and whether they then became causative of the applicant's condition, or not.

67. Another possibility is that the applicant's choice of words in his email indicates that he felt powerless to take the matter any further, but still harboured underlying grievances. Another possibility is that the applicant may have entertained "wishful thinking" about the future. There may have been a combination of all possibilities just mentioned. There may well be other possibilities. But the point to be made is that none of them (nor the aggregate of all or some of them) can necessarily disentitle the applicant in respect of the causative effect of events occurring after 30 May 2019. That is to say, either the applicant had commenced experiencing psychological symptoms before 30 May 2018 (in which case his case is strengthened) or he had not (in which case he is not automatically disentitled, because one must consider subsequent events in the workplace after 30 May 2018).

The "Gatehouse" incident of 14 June 2018: after 30 May 2018

68. The statement of Manager of Industries, Mr Patrick Towns, dated 25 October 2018 deals with the incident of 14 June 2018 at the Gatehouse of Cessnock Corrections Centre. Mr Towns says (at [9]) of his statement:

> "9. On the 14th of June, 2018 I was in the Gatehouse of Cessnock CC talking to Daniel when Adrian entered. I heard Adrian make the comment, 'I will have that Overseer.' The comment was directed at Daniel. I said, 'what was that Adrian?' His comment was made in a manner that I felt there was some tension between the two parties but I certainly did not consider the comment as threatening, bullying or intimidating but due to the previous incident being still quite fresh, I could see how Daniel may have perceived the comment as intimidating."

69. Mr Towns' evidence of what was said to the applicant by Mr Johnson is important. It is consistent with the account by the applicant that Mr Johnson was showing aggression towards the applicant, at work, specifically at the Gatehouse on that day.

70. In the applicant's second statement dated 22 October 2018 he details the nature of the hostility shown toward him by Mr Johnson in the Gatehouse. At [9] of his statement he says:

> " 9… At one point, I turned around to pass some Muster Cards to an inmate and Adrian pulled a face to intimidate, which (sic-with) clenched teeth and had his left hand in a fist, which looked as though he was going to punch me…"

71. Mr Towns goes on to add in his statement (at [10]) that after the incident he spoke to the applicant and Mr Johnson. He mentioned to each of them the Code of Conduct. Additionally, he "indicated to (Mr Johnson) that his actions could have been perceived as intimidating". He adds (at [12]) that he was aware of the "October" (2018) phone call that Mr Johnson received from the applicant. Whilst Mr Towns considered this "current matter as being a civil matter that is not directly related to the workplace" he added that he had been "informed that the incident has been referred to the Professional Standards Board". The point to be made is that Mr Towns regarded Mr Johnson as the aggressor because the "penalty" imposed on Mr Johnson was more severe than that imposed on the applicant. Mr Towns was also aware that the October 2018 incident had not only a civil component, but was relevant to the respondent's dealing with the overall issues between the applicant and Mr Johnson.

72. The Governor of the Corrections Centre, Mr S Fitzgerald, gave a statement on 26 October 2018. In it he confirms (at [11]) firstly, that he has not viewed the CCTV footage of the incident on 14 June 2018 at the Gatehouse. It may well be that it is not the Governor's responsibility to be intimately involved in all matters concerning CCTV footage. Second, he confirms that he sent correspondence on 8 October 2018 to both the applicant and Mr Johnson to advise that he had referred the matter to the Professional Standards Board for advice. Mr Fitzgerald therefore also recognised local (workplace) responsibility for being involved in the matter in question, namely (at least) the October 2018 verbal exchanges. Governor Mumford and Mr Towns had also become involved in earlier events, as evidenced by directions they made to, and meetings they had with, the applicant and Mr Johnson. Clearly, there was tension between the two workers at work which those officers thought required intervention.

73. I have viewed the CCTV footage taken 14 June 2018 from 1.47 pm. The relevant part of the footage extends for about six seconds. Mr Towns has his back to the physical gestures by Mr Johnson and this would support the conclusion in his statement concerning what he heard. Mr Towns cannot and does not state what he saw. The footage clearly shows Mr Johnson (at the least) glaring at the applicant and at one stage lifting his left arm in a gesture which can, in view of what the applicant has to say, and in any event, in human experience as a matter of general body language, be regarded as a threatening physical gesture. The footage does not show Mr Johnson's hand sufficiently to see a clenched fist, but the footage is wholly consistent in my view with what the applicant says happened.

74. My assessment of the CCTV footage confirms that Mr Johnson's behaviour towards the applicant on 14 June 2018 was certainly aggressive and hostile. Not only would I take the view that (as Mr Towns puts it) one can understand why the applicant could have perceived the conduct by Mr Johnson as intimidating, it was in my view intimidating to any person the subject of that kind of behaviour. The conduct was not only real, but intimidating in human experience to any person, let alone someone with a previous psychological condition. I agree with Mr Tanner's submission that Mr Towns has down-played the severity of the "gatehouse" incident of 14 June 2018. At the time, the incident was significant enough for Mr Towns to question it, counsel both the applicant and Mr Johnson, and direct remedial measures. "Real" events in fact occurred, borne out by the CCTV and the evidence of the applicant and Mr Towns. The conduct is uncontroverted by Mr Johnson.

75. Mr Hunt's reference to the 14 June 2018 incident being "innocuous" is possibly a reference to the decision of Neilson CCJ in *Yeo*[5]. There his Honour applied *Townsend*[6] by saying (at [53]):

> "…a misperception by a worker of an otherwise innocuous matter, which misperception leads a worker to develop a psychiatric condition, does not constitute injury arising out of or in the course of employment".

76. In *Chemler*[7] Spigelman CJ thought that Neilson CCJ's conclusion was an overstatement of the law in this regard. His Honour said that a perception of real events, which are not external events, can satisfy the test of injury and that the "egg shell skull" rule applies generally, but also in particular in psychiatric cases. Regardless, I am comfortably of the view that none of the interactions can be termed "innocuous". The hostility shown in the footage is hardly "innocuous".

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[5] *Yeo v Western Sydney Area Health Service* [1999] NSWCC 1

[6] *Townsend v Commissioner of Police* (1992) 25 NSWCCR 9

[7] *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249 (*Chemler*)

77. The evidence is contemporaneous concerning many complaints by the applicant to Mr Towns and notwithstanding these complaints, nothing of substance was done by the respondent to resolve the issues whether by mediation, meetings or formal disciplinary action. Viewed in this way, it is unsurprising that in October 2018 the applicant in frustration attempted to stand up to Mr Johnson. He had enough.

Other incidents of hostility

78. In his third statement dated 16 May 2019, the applicant provides further detail of the harassment to which he was subjected. At p6 of the AALD dated 16 May 2019, there are references to Mr Johnson staring at the applicant and baulking as though he was going to lunge at the applicant; laughing at the applicant; hissing at him as he passed in the corridor, walking fast towards him in an aggressive manner; staring at the applicant whilst baring his teeth and wobbling his head and making abusive comments towards the applicant. The applicant gave evidence in his statement that he mentioned many of these matters to Mr Towns, but nothing was done. He says that every time he was intimidated he was "left with the feeling of flight or fight and panic…as well as shock, and after [sic-afterwards] feelings of injustice and anger as to why this was happening." In terms of the confrontation on Friday 5 October 2018 in the Mess, Mr Johnson does not mention anything hostile concerning his interaction with the applicant. In view of prior events which clearly occurred, the applicant's evidence is not contradicted and must be accepted. Further, it would appear that much of the dispute resolution throughout April to October 2018 was left to Mr Towns, whose response was to remind the parties of the Code of Conduct, require Mr Johnson to do some online training, and leave the matter at that level.

79. In the applicant's first statement dated 12 October 2018 he adds further examples of hostile behaviour towards him. One occurred in the carpark on 15 June 2018 when Mr Johnson called him "a f… maggot". The applicant complained and was informed that Mr Johnson would no longer intimidate him. One of the respondent's proposals (by Mr Towns) was that the applicant could be moved to the Hunter Correctional Facility. Understandably, the applicant informed Mr Towns of the serious effects these events had on him and told Mr Towns that he did not understand why it's always him (the applicant) being asked to move.

80. The applicant goes on to comment on the treatment he received from other Officers. He would hear them say "Dog" or "Dog c…" or "F… Dog".

81. On 21 September 2018 the applicant says that he encountered Mr Johnson "pointing at me while he did his psychopath stare…He started nodding and gesturing come here with his hand". On 5 October 2018 the applicant attended the Mess to fix a light and his evidence is that Mr Johnson was again harassing, ridiculing and intimidating him.

Some authorities

82. In *K*[8] Roche DP, in considering the establishment of psychological injury in circumstances concerning the worker's perception of real events at work, provided the following summary of the relevant authorities:

    (a) Employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in *Chemler* at [40]);

[8] *Attorney General's Department v K* [2010] NSWCCPD 79

(b) A perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);

(c) If events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);

(d) So long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Sheridan*)

(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* 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. (at [52])

83. I have already discussed and concluded the extent to which the applicant was subjected to real events, namely hostility and aggression, in the workplace. I am comfortably satisfied that the applicant "soldiered on" with his work under what were clearly difficult and often distressing circumstances. I certainly do not regard the applicant's reaction as entirely one of perception, because the facts demonstrate a high level of hostility and aggression towards him. Even on any objective measure, this hostility created for the applicant an offensive and hostile working environment.

Medical evidence

84. The respondent's submissions deal extensively and appropriately with the applicant's history of consultations for orthopaedic and mental health treatment up until 22 March 2017 and then conclude (at [5]):

> "Notwithstanding the alleged improvement in his condition, Dr Parikh's clinical notes indicate that the Applicant's prescriptions of Seroquel and Pritiq were not ceased until the 19 April 2018, some three months after he commenced employment at Cessnock Correction Centre. (ARD 63)"

85. The relevance of this submission is unclear. First, neither party advances any medical evidence supportive of any position that the cessation of this medication had any part to play in the applicant's post-19 April 2018 psychological condition. Second, on the assumption that medical evidence to that effect did exist, the applicant may well have had the advantage of the "egg shell psyche" and the "perception" arguments identified by Roche DP in *K*. That is to say, if the applicant's psychological condition was weak because the medication had stopped, the employer must take him as they find him and any stigma in real events (however reasonable) does not excuse the employer's primary responsibility for the consequences caused to the weak applicant.

86. The respondent submitted that in referring the applicant to Mr Peate on 20 April 2018, whilst Doctor Parikh diagnosed Depression/Anxiety/PTSD, he did not provide an opinion as to causation. In my view, having regard to the events in the days prior (namely the threatening telephone calls and text messages from Mr Johnson) it is likely that those hostile events were the subject to some discussion with the doctor, even though they were not recorded. Even if I am wrong about this, it is clear from the applicant's grievance form lodged on 22 April 2018 and the comments contained in that form that the applicant was sufficiently upset as at 22 April 2018 to lodge the grievance. The text messages appear to have been sent on 19 and 20 April 2018, just a couple of days before the grievance form was completed.

87. In relation to Mr Anning's report dated 5 February 2019, after obtaining an extensive history and conducting various psychometric tests and with the benefit of a history of the applicant's prior psychological condition, Mr Anning diagnosed major depressive disorder. Mr Anning obtained an extensive history concerning the applicant's meeting with Mr Scholes, the incident of June 2018 and the applicant's panic attack in September 2018. Mr Anning concludes (p14 of his report) that the applicant was not suffering from depression prior to the events in his workplace. In arriving at that conclusion, he notes that the applicant had ceased taking anti-depressant medication. In other words, Mr Anning knew about the cessation of anti-depressant medication, but made no comment about the significance, if any, of that cessation of medication in terms of the applicant's post 19 April 2018 psychological condition.

88. At p16 of Mr Anning's report, Mr Anning says:

> "I am of the opinion that Mr Horton's employment is the main contributing factor to his suffering from a psychological injury. Whilst Mr Horton has a history of depression there is no evidence to suggest that he was suffering this condition immediately prior to the events in the workplace".

89. Mr Anning places reliance upon the events of 14 June 2018 (in that, at p16) he says "Mr Town [sic – Towns] witnessed this behaviour and that there is CCT footage of the behaviour…".

90. Doctor P Whetton, psychologist, saw the applicant at the request of the insurer on 27 November 2018 and his report is dated 6 December 2018. Under "Summary and Assessment" Doctor Whetton records:

> "There is a history of then the development of and antagonism, anger and contention between Mr Johnson and Mr Horton, which has spilt over into their work place relationship".

Mr Horton describes threatening behaviour on the part of Mr Johnson, and although complaints were made to the prison hierarchy, as well as to the police, no actions satisfactory for Mr Horton ensued.

91. When asked about circumstances surrounding and causative of the applicant's psychological injury Doctor Whetton replies:

> "The circumstances are as outlined in the body of the report and involve the alleged threatening behaviour on the part of Mr Johnson, outside and within the work environment".

92. At p10 of his report, Doctor Whetton records the following:

> "Mr Horton's current state did not significantly relate to his pre-existing condition, or previous injury, or his duties generally. It does relate to specific incidents at work which were a continuation of the discord between Mr Horton and Mr Johnson which commenced outside of work".

93. In a further report dated 29 January 2019, Doctor Whetton reaffirmed that the interactions between the applicant and Mr Johnson commenced outside of the workplace but then continued both in the workplace and elsewhere.

94. Mr Peate has provided a number of reports dealing with the period before January 2018. He has also provided a report (Application p19) dated 24 January 2019. He deals with consultations with the applicant from October 2018 through to 13 December 2018. Mr Peate obtained a history consistent with the applicant's complaint of ongoing harassment, the "investigation" after which "he was told there was no case to answer" and the applicant's history to him that he felt "that he could not be protected from this ongoing harassment and that there was oi [sic – to] be no consequences for the abusive behaviour". Mr Peate diagnosed adjustment disorder, major depressive disorder and anxiety disorder. He was unable to give "a definite opinion as to whether his most recent alleged workplace injury is the sole reason for his current condition" because of the existence of the referral from the applicant's general practitioner dated 20 April 2018 which itemised back pain, depression, neck pain with radiculopathy, L5/S1 disc tear/ desiccation.

95. In summary, the medical evidence consists of Mr Peate's inability to ascribe the applicant's psychological condition to his work (one way or the other), Doctor Whetton's opinion that the applicant's psychological state related to the specific incidents at work which were a continuation of the discord between the applicant and Mr Johnson, and Mr Anning's opinion that the applicant suffered major depressive disorder to which the applicant's employment was the main contributing factor.

96. Accordingly, I am comfortably satisfied on the balance of probabilities that the overwhelming majority of the medical evidence supports the applicant's case that he has suffered a major depressive disorder (namely psychological injury) resulting from his employment with the respondent. The relevant deemed date of injury is 6 October 2018, subject to submissions to the contrary,

The main contributing factor

97. As in *Kelly*, a consideration of sections 4 (b) (i) and 4 (b) (ii) reveals that neither section (nor section 4) requires any substantial connection between the grievance which motivated Mr Johnson and the nature of the employment. Some events, for example the text messages, occurred outside of work but arose in relation to work and were incidental to the applicant's work. They were threats about the applicant's work and the power which Mr Johnson claimed he could exercise. In that regard, they arise out of the applicant's employment because the fact that the applicant was employed alongside Mr Johnson "caused, or to some extent contributed to" the applicant's injury (see, for example, *Nunan v Cockatoo Docks & Engineering Co Pty Limited* (1941) SR (NSW) 119 per Jordan CJ). Additionally, many of the threats occurred at work. They occurred in the course of the applicant's employment in that a common sense evaluation of the hostility at work and the applicant's reaction to this hostility demonstrates a clear causal connection.

98. The respondent has mentioned *Speechley* in an effort, presumably, to suggest that there were extraneous origins to the initial dispute which in some way therefore disentitle the applicant in the sense that any injury/condition he suffered did not arise "out of or in the course of (the applicant's) employment" as required by section 4 of the 1987 Act. Having regard to the Court of Appeal's decision in *Kelly*, however, I am satisfied that the focus is on the actual events which occurred at work and in relation to work. To the extent that Mr Hunt's submission concerned the telephone call made by the applicant on 6 October 2018, I am satisfied that the applicant's injury had occurred progressively as a result of the accumulation of injurious exposures to hostility in the previous six months and that the applicant's outburst was driven by his already injured state, not caused by those telephone calls. The opinions of Mr Peate, Dr Anning and Dr Whetton all support the causative nature of Mr Johnson's conduct at work as being responsible for the applicant's October 2018 psychological condition.

99. There is no evidence before the Commission that the applicant's psychological condition was caused or materially contributed to by any factors other than his exposures to hostility concerning his work, and at work. I accept that he presented to Cessnock Correction Centre in January 2018 with an egg-shell psyche. It is clear to my mind, at least factually, that a dispute concerning air conditioning work which was the origin of disharmony escalated to a point where a number of threats had been made by Mr Johnson to the applicant in the period from April 2018 to October 2018, culminating in the applicant's outburst via telephone calls to Mr Johnson on 6 October 2018.

100. The applicant's statements and objective evidence (Mr Towns, the CCTV footage, Grievance complaints) detail the existence and extent of the hostility subsequently shown to him. I am comfortably satisfied that the main contributing factor to the onset (section 4(b)(i)) and progression [aggravation (etc) section 4(b)(ii)] of the applicant's psychological condition was the accumulated effect of that hostility and aggression. Additionally, the hostility should have been better managed by the respondent and the absence of proper management of the issue rightly left the applicant feeling powerless and intimidated. His telephone outburst to Mr Johnson of 6 October 2018, whilst not civilly justifiable, can be readily explained as an outcome caused by the applicant's frustration at the hostility he had experienced and his powerlessness and frustration because insufficient steps had been taken by the respondent to address his continued exposure to hostility at work.

Capacity

101. In terms of capacity for work, the medical evidence on the whole supports the view that the applicant has had no capacity for work from 10 October 2018 to date and continuing. Capacity was not, in any event, raised as an issue nor the subject of any submissions.

Medical expenses

102. There do not appear to be at this time any claim for medical expenses. In case I am incorrect about this, I propose to grant liberty to apply.

Weekly payments adjustment

103. Having regard to the parties agreement, there will be adjustment to any weekly payments payable to the applicant as and from 10 October 2019.

FINDINGS

104. It is appropriate that the following findings be made:

    (a) The applicant by reason of his employment with the respondent between April 2018 and 5 October 2018 was exposed to hostility and aggression which resulted in psychological injury within the meaning of section 4 of the 1987 Act (injury).

    (b) The applicant's employment with the respondent was the main contributing factor to his injury within the meaning of section 4 (b) (i) and/or section 4 (b) (ii) of the 1987 Act.

    (c) The applicant's deemed date of injury is 6 October 2018.

    (d) Since 10 October 2018 the applicant has had total incapacity for work which results from the injury within the meaning of section 33 of the 1987 Act.

    (e) Since 10 October 2018 the applicant has had no current work capacity within the meaning of section 32A of the 1987 Act.

AWARDS

105. The following awards for payment of weekly compensation are made in favour of the applicant against the respondent:

    (a) From 10 October 2018 to 9 January 2019 in the sum of $1,490.85 per week pursuant to section 36 (1) (a) of the 1987 Act;

    (b) From 10 January 2019 to date and continuing in the sum of $1,255.46 per week pursuant to section 37 (1) (a) of the 1987 Act.

106. Liberty is granted to the applicant to apply, if necessary, in respect of any claim for section 60 expenses.

107. Liberty is granted to the respondent to apply, if necessary, in relation to the application of section 44C (1) (b) of the 1987 Act to the amount of the payments of weekly compensation on and from 10 October 2019.