

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4704/19
Applicant: DAWN ALICE ROWLAND
Respondent: STATE OF NEW SOUTH WALES
Date of Determination: 14 NOVEMBER 2019
Citation: [2019] NSWCC 366

The Commission determines:

1. The applicant suffered psychological injury in the course of her employment with the respondent (deemed date of injury 17 July 2018). The employment was the main contributing factor to the injury.
2. The incapacity and need for s 60 of the *Workers Compensation Act 1987* treatment in the periods claimed result from psychological injury in the course of employment with the respondent (deemed date of injury 17 July 2018).
3. The applicant is entitled to weekly compensation:
 - (a) from 17 July 2018 to 16 October 2018 at the rate of \$1556.48 (s 36 of the *Workers Compensation Act 1987*);
 - (b) from 17 October 2018 to 9 December 2018 at the rate of \$1310.72 (s 37 of the *Workers Compensation Act 1987*);
 - (c) from 10 December 2018 to 27 January 2019 at the rate of \$901.12 (s 37 of the *Workers Compensation Act 1987*);
 - (d) from 28 January 2019 to 10 February at the rate of \$532.48 (s 37 of the *Workers Compensation Act 1987*);
 - (e) from 11 February 2019 to 21 April 2019 at the rate of \$327.68 (s 37 of the *Workers Compensation Act 1987*).
4. Respondent to pay the applicant's section 60 of the *Workers Compensation Act 1987* expenses on production of accounts/receipts/Medicare Notice of Charge.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. This Application to Resolve a Dispute (the Application) filed on 10 September 2019 is in respect of a claim for psychological injury on 17 July 2018 (deemed). The insurer denied the claim in a Notice issued under s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (The 1998 Act) dated 8 August 2018. The Application is for weekly compensation; and section 60 of the *Workers Compensation Act 1987* (the 1987 Act) medical expenses.

ISSUES FOR DETERMINATION

2. The following issues remain in dispute:
 - (a) Did Ms Rowland suffer psychological injury out of or in the course of her employment on 17 July 2018 (deemed)? (s 4 1987 Act)
 - (b) Was the employment a substantial contributing factor to the injury (s 9A 1987 Act); or the main contributing factor to the injury (s 4(b)(ii) 1987 Act)?
 - (c) If so,
 - (i) was Ms Rowland's incapacity for work caused by the work injury on 17 July 2018 (deemed)?
 - (ii) What is Ms Rowland's entitlement to weekly compensation due to that incapacity (ss 36 & 37 1987 Act)? and
 - (d) Is Ms Rowland's need for s 60 of the 1987 Act medical expenses reasonably necessary as a result of the injury on 17 July 2018 (deemed)?

PROCEDURE BEFORE THE COMMISSION

3. The parties attended a conciliation conference and arbitration hearing on 22 October 2019. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
4. I note that the applicant was willing to engage in conciliation, but the respondent refused to participate. In my view, given the nature of the dispute and the evidence, this was a breach of the obligations of the respondent as a Model Litigant.

EVIDENCE

Oral evidence

5. There was no oral evidence adduced.

Documentary evidence

6. The following documents were in evidence before the Commission and I have taken them into account in making this determination:
 - (a) The Application with annexed documents;

- (b) Reply with annexed documents.

SUBMISSIONS

7. The representatives made oral submissions at the arbitration hearing. As they were recorded they will not be repeated here, but I have taken them into account, and they are referred to in the discussion below.

EVIDENCE

Lay evidence

8. Ms Rowland commenced with the respondent in late 2015 as the Drug and Alcohol Hospital Consultation Liaison at Tweed Hospital. Her former husband also works at Tweed Hospital in the emergency department. In August 2017 she was referred to psychologist Ms Akers as a result of a conflict with a work supervisor. The relationship with her husband deteriorated and in May 2017 she asked him for a divorce. There were elements of domestic violence, and also the discovery of a relationship between her husband and another employee at Tweed Hospital. After some sessions with the psychologist she improved, a new supervisor took over, and she ceased sessions with the psychologist.
9. Ms Rowland was divorced in February 2018. At around the same time Ms Rowland began to receive unwanted and what she found intimidating messages from her ex-husband, including messages to her work email. Ms Rowland then discovered the identity of and met with the colleague with whom her ex-husband had had a long-term secret relationship and a child. After that meeting the ex-husband's behaviour toward Ms Rowland worsened and she obtained another referral to the psychologist.
10. On 21 February 2018 Ms Rowland together with the colleague who had the relationship with her ex-husband met with the ex-husband's line manager regarding the problems being faced including Ms Rowland's concerns for her safety at work, but she found the response inadequate. She says the response was that the issue had nothing to do with work. Ms Rowland was dismayed when despite her request for the meeting to be confidential, her ex-husband became aware of it and became more aggressive. She sought a domestic violence protection order (DVO), and a temporary order was given on 14 May 2018, requiring her ex-husband to remain at least 100 metres away from her and the children and at least 5 metres away from her at work.
11. After the DVO was issued, Ms Rowland met with her manager to give him a copy. She requested a workplace safety plan, a support person in case of any incident, removal of access to her office from her ex-husband's swipe card, and secure parking. These requests were not acceded to. Ms Rowland states that she was told that the order itself was sufficient and that she and the ex-husband were responsible for following it. Ms Rowland felt unsupported by her manager despite informing him of the past history of domestic violence, and two unexpected appearances by her ex-husband in two wards where she was working. She states, "I was very distressed and felt very intimidated." She told her manager this, but was told she could go back to court and increase the restriction if she felt intimidated.
12. On 9 July 2018 Ms Rowland attended "DV court" for a hearing and was presented with nine affidavits by colleagues she says contained observations of her going about her work. She states that these affidavits gave the deponents' positions at the Hospital, were sworn at the Hospital and witnessed by the Hospital's Justice of the Peace.
13. Ms Rowland was distressed by the affidavits, and felt her colleagues were "spying" on her in the workplace in support of her ex-husband's DVO application. She was further distressed that management seemed to her unwilling to assist her.

14. After the court matter, Ms Rowland sent an email to her management advising them that her ex-husband's application for a DVO against her was dismissed, but that her own case had been deemed "high risk" and her ex-husband described as a "sophisticated perpetrator". She also told them she had been provided with personal protection equipment as a result. She was distressed that the Hospital management did nothing in response, and that more affidavits were prepared at the Hospital among her colleagues. She felt unsafe at work, and was having panic attacks and difficulty sleeping. She was afraid to enter the Emergency Department.
15. The statement of Ms York confirms her file note from the meeting held on 21 February 2018 at which Ms Rowland expressed her fears in regard to her ex-husband. Mr Dobbie, in his statement confirms the meeting of 15 May 2018 about the DVO and Ms Rowland's requests for greater security including parking, and restricting her ex-husband's access to her office. He notes that his superiors told him the DVO itself was the operative document. He says that Ms Rowland requested a "Safety Plan" but he was unaware of any safety plan up to the time of his statement (24 May 2019).
16. There is a Temporary Protection Order (DVO) issued on 14 May 2018, including restrictions on approaching within 100 metres of Mr Rowland or her children, or within 5 metres of her at work.
17. The email correspondence between Ms York and Mr Dobbie of 15 May 2018 discusses the possible actions of the employer in response to the DVO.
18. The string of email messages between Ms Rowland and the Director of Nursing between 28 June 2018 and 8 July 2018 include reports of several incidents in the workplace involving Ms Rowland's ex-husband, her fear and sense of intimidation, and general dissatisfaction with the response of the Hospital. The Director mentions planned interventions with the ex-husband and seeking legal advice as to whether the DVO could be circulated to staff at the Hospital.

Medical evidence

19. Associate Professor Robinson says in his report of 4 March 2019 (PTSD – post traumatic stress disorder),

"The employer's failure to prevent this behaviour and provide a psychologically safe workplace was the main contributing factor to the aggravation, acceleration and exacerbation of her PTSD."
20. Dr Akosile in the report dated 28 May 2019,

"Ms Rowland had developed post-traumatic stress disorder following her relationship with AW particularly in the last twelve years of their marriage where there was a lot of domestic violence, emotional abuse. However, she was still able to function successfully at work as a Consultation Liaison Nurse. She deteriorated in 2018 from May when there were increased threats to her at work. Work was a place where she was able to function and be at her optimal best (Work is a major protective factor for Ms Rowland) but AW started bullying her at work, threatening her at work and she followed the due process to ensure that her work environment was safe for her by complaining to the management at her workplace (Tweed Hospital) where they both work as Nurses and on several occasions management refused to take the appropriate steps to ensure that her work environment is safe. This was coupled with the fact that AW was able to obtain false affidavits for work colleagues alleging he was threatened by Ms Rowland. The attitude of management made Ms Rowland perceive her work environment as exceptionally hostile and given the situation this began to impact significantly on her mood, her energy and her motivation."

She had heightened anxiety and it began to affect her functioning. During this time to ensure that she is treated and safe as she is working with clients, she took time off work. Her workplace as noted Professor Robertson contributed significantly to the precipitation of her depressive illness which seemed not to have been prominent until the escalation in AW's bullying and harassment at work coupled with the failure of her employers to provide a safe work environment. This bullying and harassment at work also contributed to the aggravation, acceleration and exacerbation of her preexisting PTSD."

21. Psychologist Ms Akers reports a similar history in her report of 7 December 2018, and her view of the impact of events on Ms Rowland,

"3.10 Due to the DVO repeatedly being breached by Mr Walton in the workplace, and due to the affidavits being obtained from employees with Mrs Walton is expected to work at the Tweed Hospital, Mrs Walton feels unsupported by her employer and unable to return to work at this time. Mrs Walton stated that at no time was she consulted about her DVO's effectiveness, Mr Walton's actions, her relationship with Mr Walton, or her well-being during this difficult time."

22. Dr Fletcher, Ms Rowland's General Practitioner, also attributes the incapacity she certifies as being caused by work. The Certificates cover the period claimed and the return to work up to resumption of full-time duties.
23. There is a Return to Work Plan dated 10 January 2019, which was completed by 22 April 2019 with resumption of full-time modified duties.

Discussion

Did Ms Rowland suffer a work injury between February 2018 and 17 July 2018 (deemed date 17 July 2018)?

24. The applicant submits that the injury should be taken to be the aggravation, acceleration, exacerbation or deterioration of a disease, under s 4(b)(ii) of the 1987 Act.

25. In *Attorney General's Department v K* [2010] NSWCCPD 76, relied on for the applicant, Roche DP summarised the principles for establishing psychological injury,

"(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]);

(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])

26. The facts of this matter should be examined in terms of the above principles. In regard to paragraph "(a)", Ms Rowland had been suffering from a psychological condition before the workplace events she relies on. This condition did not prevent her working before the events at work from February 2018 up to 17 July 2018.
27. With reference to paragraph "(b)", there were real events in the workplace that caused Ms Rowland distress. These include her meetings with Ms York and Mr Dobbie in the context of the fear she had of her ex-husband in the workplace, and the nine affidavits that appeared on 9 July 2018 for a DVO hearing signed and witnessed by Hospital colleagues. These affidavits are not in evidence but I accept Ms Rowland's account of their general nature including observations of her at work; their origins at the Hospital with the deponents citing their official position; and the affidavits being witnessed by the Hospital Justice of the Peace. The respondent relies on no evidence that refutes Ms Rowland's account of the affidavits.
28. Paragraph "(c)" is relevant to the fact that Ms Rowland perceived the events in the workplace involving her former husband and other colleagues, plus the management of the workplace situation as creating a hostile environment.
29. The evidence is that the events were real in terms of paragraph "(d)". That the meetings took place is corroborated by the respondent's statements, meeting notes, and internal emails. The subject matter of the meetings is also corroborated. There were affidavits prepared by work colleagues as described by Ms Rowland. These are not in evidence but it is clear they exist and I accept Ms Rowland's general account of their nature, which is not contradicted. The detailed content is not important for the purposes of this dispute.
30. Paragraph "(e)" relates to Ms Rowland's perception of intimidation by her former husband in the workplace, and of the employer not doing enough to support her in the situation. It is not necessary to consider whether Ms Rowland's concerns were objectively reasonable, or indeed whether the actions of the respondent were reasonable.
31. Similarly for the purposes of paragraph "(f)" Ms Rowland's reaction to the workplace events does not need to be evaluated against an objective test of what is "rational, reasonable or proportionate". What is certain from the evidence is that Ms Rowland was distressed by her perception that the Hospital would not take the steps she requested to protect her, and lacked concern for her well-being.
32. From the medical evidence Ms Rowland's psychological health deteriorated due to the workplace situation developing from February 2018. The respondent submits that there are some differences in the diagnoses between the medical specialists which means it must be established how workplace incidents caused additional issues, and further submits that the events causing Ms Rowland distress comprised private domestic violence issues unrelated to work.
33. Ms Rowland suffered from PTSD before the workplace incidents, but was coping at work. There was an aggravation of the PTSD and depression due to the work according to Associate Professor Robertson and Dr Akosile, as well as Ms Akers. The minor differences as to the exact diagnosis of additional elements emerging due to the aggravation is not significant for the purposes of the issues in dispute. The fact is there was an aggravation of the psychological condition. To the extent they differ, I prefer Dr Akisole as treating psychiatrist. In addition to PTSD Dr Akisole diagnosed depression which he says also worsened in the work events from February 2018.

34. The respondent submits that the evidence is insufficient as to what Ms Rowland's former husband did in the workplace, but there is no reason not to accept the evidence of Ms Rowland discussed above on this. Her evidence on it is uncontradicted. There is also the email string between Ms Rowland and the Director of Nursing which tends to corroborate Ms Rowland's reports of incidents including contact at the cafeteria.
35. In the Notice issued under s 74 of the 1998 Act dated 2 April 2019 the respondent says,

"The causal connection with your injury and/or any aggravation, acceleration or exacerbation of that injury was and remained the actions of your ex-husband in a domestic violence context."
36. This does not take account of the events in the workplace. There was a background of domestic conflict at an earlier time, but the context of this claim is one in which there was perceived intimidation in the workplace by a worker, that is Ms Rowland's ex-husband, against another, Ms Rowland, and also the involvement of other employees who wrote affidavits about Ms Rowland in the workplace in their capacity as Hospital staff.
37. Ms Rowland sought support from her managers, but felt rebuffed and was distressed by this perceived lack of support. What tipped the scales to further psychological damage was the perceived lack of protection from the employer against a fellow employee who was behaving in an intimidatory manner at work.
38. This workplace scenario is quite different to circumstances in which, for example, an aggressor enters a workplace or a fellow employee assaults a worker for reasons unconnected to the employment. The connection to the employment in this matter arose when the behaviour of Ms Rowland's ex-husband escalated at work, then developed further at and from the meetings between Ms Rowland and the managers, the production of affidavits by hospital staff to be used against Ms Rowland by her ex-husband, and Ms Rowland's perception of a lack of action by the employer to assist and protect her.
39. The issuing of the DVO which ordered her ex-husband to keep a distance of at least 5 metres from Ms Rowland at work was another factor that engaged the employment, as is the correspondence between managers York and Dobbie. That communication of 15 May 2018 about the DVO and what the employer might do in response, including potential changes to work activities confirms there was a connection to the employment. Similarly, the email exchanges between Ms Rowland and the Director of Nursing from 28 June 2018 to 8 July 2018 indicate the integration of the conflict into the employment.
40. It is also apparent from the evidence that since Ms Rowland went off work the respondent has taken action as part of the return to work program to address Ms Rowland's fears, and adjusted the employment arrangements, including her not working in the Emergency Department where her ex-husband works, an arrangement which has apparently helped facilitate Ms Rowland's successful return to work.
41. The opinions of Associate Professor Robertson, Dr Akisole, and Ms Akers all attribute the aggravation of the psychological condition to the employment, not historical violence at home, and those opinions are consistent with the evidence.
42. For these reasons I find that Ms Rowland suffered injury pursuant to s 4(b)(ii) of the 1987 Act at the workplace during the period of employment from February 2018 to 17 July 2018 in the form of the aggravation, acceleration, exacerbation or deterioration of a pre-existing psychological condition of PTSD and depression, causing incapacity for work and the need for medical treatment.

Main contributing factor

43. Section 4(b)(ii) of the 1987 Act requires the additional test as to whether the employment was the main contributing factor to the injury. This means the main contributing factor to the aggravation of the disease; not to the disease itself.
44. As considered above, and as opined by Associate Professor Robertson, Dr Akosile, and Ms Akers, the intimidation as perceived by Ms Rowland by her former husband at work, together with her perception of insufficient support from the employer about that behaviour and the DVO and the involvement of work colleagues in the production of affidavits were the cause of the aggravation of the psychological condition.
45. For these reasons I find that Ms Rowland's employment with the respondent was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of her pre-existing psychological condition.

Causation in regard to incapacity and the need for medical treatment

46. Roche DP in *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49, noted the established authority¹ that there may be multiple causes of an injury, and also emphasised that the test with medical expenses is whether the injury was a material contribution to the need for the subject treatment.
47. In the familiar case of *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 in which the Court said,

“The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. ... What is required is a commonsense evaluation of the causal chain.”
48. It has been suggested by the High Court since that the commonsense concept does not operate at large. All the evidence must be considered.
49. The evidence is that the Ms Rowland's pre-existing psychological condition of PTSD and depression was made worse by the circumstances in the employment as discussed above. That aggravation continued through the period of incapacity claimed. There was no intervening event before or after Ms Rowland went off work. There was material contribution by the employment to the incapacity, as the medical evidence attests. Ms Rowland also requires continuing medical treatment as a result of the aggravation in the workplace.

Entitlement to weekly compensation

50. It follows from the above findings that Ms Rowland is entitled to weekly compensation for the periods of incapacity. In the absence of a contradictory Wages Schedule for the respondent I accept the applicant's Schedule which reflects the medical evidence including the Certificates of Dr Fletcher of total and partial incapacity in the closed period claimed from 17 July 2018 to 21 April 2019.

Medical expenses

51. It follows from the above findings that Ms Rowland is entitled to section 60 of the 1987 Act expenses for the compensable psychological injury.

¹ See *Comcare v Martin* [2016] HCA 43.

SUMMARY

52. Ms Rowland suffered injury in the course of her employment with the respondent in the form of the aggravation, acceleration, exacerbation or deterioration of a disease (deemed date 17 July 2018).
53. The employment was the main contributing factor to the aggravation.
54. The incapacity claimed and the need for medical treatment results from the injury in the course of Ms Rowland's employment with the respondent on 17 July 2018 (deemed).
55. Ms Rowland is entitled to weekly compensation in the periods claimed.
56. Ms Rowland is entitled to s 60 of the 1987 Act medical expenses.

