

WORKERS COMPENSATION COMMISSION



CERTIFICATE OF DETERMINATION

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

MATTER NO: WCC9058-2007
APPLICANT: Jamie Ross
RESPONDENT: NSW Police Force
DATE OF DETERMINATION: 31 March 2008

The Commission determines:

1. That the Applicant's psychological injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by the Respondent with respect to promotion, performance appraisal or discipline (s.11A(1), WCA 1987).
2. That the Respondent pay the Applicant weekly compensation at the rate of \$1141.00 from 26 July 2007 to 25 January 2008 pursuant to section 36 of the *Workers Compensation Act 1987*. It is noted that such payment may involve a re-crediting of sick leave, annual leave and/or long service leave.
3. That the Respondent pay the Applicant weekly compensation pursuant to s.37 of the Act at the maximum statutory rate for a worker with a dependant child from 26 January 2008 to date and continuing in accordance with the provisions of the Act.
4. That the Respondent pay the Applicant's medical and treatment expenses pursuant to s.60 of the *Workers Compensation Act 1987* on production of accounts or receipts.
5. That the Respondent pay the Applicant's costs as agreed or assessed. The matter is certified as complex and each party is entitled to an uplift of 15% on costs agreed or assessed.

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

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 S. DUNCOMBE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

For REGISTRAR

Lucy Golic
Acting Dispute Assessment Officer
By delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Jamie Ross, the Applicant, commenced proceedings in the Commission on 27 November 2007. Mr Ross seeks payment of weekly compensation and medical expenses as a result of a psychological injury he claims to have suffered as a result of the nature and conditions of his employment with the Respondent from 1995 until 25 July 2007.
2. According to his statement dated 20 November 2007, Mr Ross was involved in a number of violent situations as part of his duties as a policeman. He was initially stationed in the City of Sydney Patrol and was later transferred to the Hunter Region, where he resided.
3. The incidents he claims led to his injury are summarised in his statement. They involve attendances on a pub brawl, where he was attacked; attendances at a murder investigation, a robbery in progress, a drug supply in progress with a consequent struggle with an alleged offender, physical assaults and vehicle pursuits at high speed. Mr Ross said that he was not offered a debriefing or counselling after any of these incidents.
4. In 1999 Mr Ross stated that he was involved in a struggle with an armed psychiatric patient. He also attended numerous serious and fatal motor vehicle accidents, including one where he knew the victim.
5. After a brief period with the Hunter Region Target Action Group, he continued with the Lower Hunter LAC and at Beresfield police station. He attended many domestic violence situations. He attended one such incident at Woodberry. He needed back up from officers at Raymond Terrace and Maitland, about 10kms away. He became aware of the isolation associated with the work he was doing at Beresford. He said that he began to feel 'on edge' at work, and became anxious. He began to consume more alcohol off duty and took many days off as sick leave.
6. On 25 April 2002 Mr Ross was involved in a violent attack by offenders on a fellow officer. He was forced to try to restrain one of the offenders while others attacked his colleague. Following this incident he said that he felt increasingly anxious and his sick leave again increased. So did his consumption of alcohol outside work hours.
7. He was then transferred, at his request, to Maitland police station. I have detailed the above and some incidents below but will not continue to detail all of the incidents Mr Ross reports in his statement. I have taken them all into account in this determination.
8. I note that in September 2003 he made a claim in respect of a psychological injury, which was denied by the insurer at that time, GIO. He spent time away from work, stopped drinking, underwent some counselling and was able to return to work in January 2004, although I note that he says he felt pressured to do so as a result of his claim being denied. On new years' eve, 2004, he was involved in an incident where he didn't feel that he handled the situation appropriately, 'it didn't feel right'.
9. He continued to perform his duties well until March 2006. During this time, however, he says that he was 'struggling mentally'.

10. In March 2006 there was another incident where an offender with a knife tried to stab him. There was a violent arrest but no debriefing. His fears of violence resurfaced although he continued to work well in his duties as a police officer.
11. In June 2006 he was involved in another incident where capsicum spray was used on an offender. There was a complaint, which was investigated informally and then 'reinvestigated'. He says that he was not kept informed of the progress of the matter and that 'as time passed and my complaint matter was still ongoing I was further anxious'.
12. In January 2007 he was increasingly anxious. He raised his concerns with his supervisors and also spoke to Commander Superintendent Organ about the length of time taken to resolve the complaint matter.
13. On 8 May 2007 he received a telephone call from Chief Inspector Fox. He was on annual leave at the time. CI Fox told him that the assault allegation had not been sustained but a second allegation had been sustained. He said that at that stage he was not aware of another allegation. He was advised that there had been an allegation by Kristy Hawkins, a colleague. He had not been informed about this allegation and became 'anxious and upset'.
14. As at 11 October 2007 he was not aware of what was happening in relation to the second allegation. He had approached the Police Association to get information on the progress of that matter.
15. He took sick leave as a result of flu in July 2007. He tried to contact a psychologist, Dr Peters, in early July 2007.
16. He also applied for a permanent position as a Detective and was unsuccessful in that application but was placed on an eligibility list for future positions.
17. He felt 'at the end of my limit' and spoke to Sergeant Burnell about his fears of violence towards himself and potentially others. He ceased work on 25 July 2007 and sought treatment from his general practitioner, Dr Hashmi, the next day. He was diagnosed with Post Traumatic Stress Disorder.
18. On 3 October 2007 the insurer advised Mr Ross that it denied his claim for workers compensation pursuant to s.11A(1) and 11A(3) of the 1987 Act. The Insurer maintained that the predominate cause of the distress, related to the ongoing investigation and Mr Ross' recent application for promotion and further, that the actions of the Respondent in relation to the internal investigation were reasonable in the circumstances.

ISSUES FOR DETERMINATION

19. The parties agree that the following issues remain in dispute.

Matters Previously Notified As Disputed

20. Whether or not the Applicant's injury, being a psychological injury, is wholly or predominantly caused by the reasonable actions of the Respondent in relation to promotion, performance appraisal and/or discipline (s.11A, 1987 Act).

Matters Previously Unnotified

21. Whether the Respondent is limited to the issues raised in its notice pursuant to s.74 of the Act. If not, can the Respondent now dispute that the Applicant suffered an injury (s.4 of the 1987 Act) and if there is such an injury, that the nature and conditions of employment with the Respondent were not a substantial contributing factor to such injury (s.9A, 1987 Act). There is also a question in respect of the admissibility of medical reports, being those of Dr Lee dated 21 January 2008 and Mr Peters dated 22 February 2008 which result from the determination of the issues which can be raised in these proceedings.

PROCEDURE BEFORE THE COMMISSION

22. The parties attended a conference on 13 March 2008. 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.

EVIDENCE

Documentary Evidence

23. The following documents were in evidence before the Commission and taken into account in making this determination:
- (1) Application to Resolve a Dispute and attached documents;
 - (2) Reply and attached documents
 - (3) Documents produced under direction by Dr S. Hashmi

Oral Evidence

24. Mr Ross was cross-examined on limited issues for a limited time. He denied knowing, at the time he left work, anything about an investigation related to disobeying instructions. He said he knew, as detailed in his statement, that there was an ongoing investigation but not what it was about. He denied knowing specifically what the investigation was about. He did know who was conducting the investigation and had not been told who made the complaint. He did know that Detective Peter White was conducting the investigation.

FINDINGS AND REASONS

Issue 1: Is the Respondent permitted to raise issues in the arbitration which were not notified to the Applicant in the notice sent to the Applicant pursuant to s.74 of the 1998 Act? Specifically, can the Respondent deny liability based on s.4 and s.9A of the 1987 Act?

25. This issue was the subject of an ex-tempore decision at the time of the arbitration. I referred to the principles enunciated by Deputy President Roche in *Mateus v Zodune Pty Limited t/as Tempo Cleaning Services* [2007] NSWCCPD 227.
26. After considering the issues required of me as outlined in *Mateus*, and taking into account the lengthy submissions of each counsel on these issues, I declined to exercise my discretion (pursuant to s.289A of the 1998 Act) to allow the Respondent to raise issues of injury and causation at the arbitration. In addition, and consequent upon this decision, I declined to

admit the report of Dr Lee dated 21 January 2008. I also declined to admit the report of Dr Lee because to do so would have infringed Rule 10.3(2) and Regulation 42 and/or Regulation 43AA(3) of the Workers Compensation Regulations 2003.

27. As a result of these determinations, the Applicant did not press the admission of a report of Mr Peters dated 22 February 2008 and it was therefore not admitted into these proceedings.
28. A sound recording of the reasons for these decisions is available to the parties.

Issue 2: Section 11A of the 1987 Act: Whether or not the Applicant's injury, being a psychological injury, is wholly or predominantly caused by the reasonable actions of the Respondent in relation to discipline and/or promotion and/or performance appraisal.

29. The first evidence upon which the Respondent based its denial is a report of clinical psychologist Ms Fahey. In a detailed report, Ms Fahey took a history largely consistent with that given by Mr Ross and as summarised above. As part of the investigation and report, Ms Fahey interviewed Detective Sergeant Burnell (Burnell), Detective Chief Inspector Fox (Fox), Sergeant Craig Oliver (Oliver), Dr Hashmi and Dr Peters. The record of interviews with Burnell, Fox and Oliver were not properly sworn. Ms Fahey has summarised her understanding of what each of them said in an interview with her, and each of them has signed a statement that the 'statement' is true.
30. However, especially given the nature of this Respondent's activities, it is extraordinary to find statements in such form. Each of these 'statements' is written in the third person, with Ms Fahey noting, for example, that 'Detective Sergeant Burnell said that apart from the two week period....' and 'she added that further, whilst Mr Ross was back on...'. Words such as 'commented', "said", "stated", "suggested" were all used to recall Ms Fahey's recollection of what Detective Sergeant Burnell said. Similar comments apply to the 'statements' of Detective Chief Inspector Fox and Sergeant Oliver. There are no direct comments recorded, only what Ms Fahey records each of them as saying.
31. This form of evidence is not acceptable. While the Rules of Evidence do not apply in Commission proceedings, it is unacceptable for statements written by third parties to be given in evidence on such critical matters. While I have accepted the records of interview as some evidence, I cannot give them much weight because of the hearsay nature of this evidence. It was within the power of this Respondent to properly record the statements of these witnesses and to have them considered and given due consideration as a result. The weight I have given these statements has been reduced because of the form in which this evidence is given. This is not a matter which should be taken lightly. The Respondent seeks to deny liability based on its reasonable actions in respect of discipline, performance appraisal and promotion. The evidence of the Respondent, as contained in the report of Ms Fahey, is diminished by the form in which such evidence is given.
32. Notwithstanding these comments, I have considered the content of Ms Fahey's pre-liability report. Based on her interviews with key personnel and medical practitioners treating Mr Ross, she concluded that Mr Ross was suffering from Adjustment Disorder with Mixed Anxiety and Depressed Mood. She also concluded that there 'do not appear to be any significant personal stressors currently impacting on Mr Ross'.
33. At page 22 of the report, Ms Fahey notes that 'although employer representatives did not seem to note any obvious distress in Mr Ross, it appears that he has remained anxious and ambivalent about Police work since at least 2003...albeit at a sub-clinical level...It seems

that he has experienced private ongoing symptoms such as severe irritability and vomiting before work on some occasions, and whilst these factors may not have been readily evident to the employer, his self report seems to suggest an accumulation of distress and burnout for Mr Ross. Mr Ross' treating GP, Dr Hashmi also alluded to a likely level of ongoing vulnerability where an incident with a knifed offender in 2006 seemed to re-exacerbate prior levels of distress to a more significant level".

34. After referring to Mr Ross' earlier claim (in 2003) which was rejected and finally settled in the Commission, Ms Fahey stated that Mr Ross' 'pre-existing vulnerability associated with his sub-clinical levels of distress related to the 2003 claim seems to have been exacerbated by recent work factors". Ms Fahey, in her summary of workplace factors at page 23 of the report, concluded that the recent workplace factors, including an incident in 2006 with an offender with a knife, were substantial causal factors in Mr Ross ceasing work in 2007.
35. In relation to the investigation of Mr Ross' conduct by Internal Affairs (referred to as IA in the report at page 24), Ms Fahey thought that this could have contributed to an exacerbation of his distress which in turn was as a result of being 'exposed to difficult and challenging incidents through the course of his policing career, and including more recent exposure to potentially violent situations'.
36. In relation to the alleged lack of success in applying for a position as a permanent Detective, Ms Fahey concluded that 'this incident is the precipitator to Mr Ross going off work on this occasion rather than being substantial. It seems that this event however has exacerbated Mr Ross' pre-existing distress from 2003".
37. It is on the basis of this evidence, and the 'statements' from Burnell, Fox and Oliver (as well as a medical certificate from Dr Hashmi) that the Insurer declined liability pursuant to s.11A of the 1987 Act. I agree with the submissions of the Applicant that it is difficult to see how this occurred. The Respondent's own evidence is that the investigation and the alleged lack of success in application for promotion were at best contributing factors to Mr Ross going off work. They were not, according to the Respondent's own evidence, the predominant cause of his psychological injury. The Respondent's own evidence is that Mr Ross was psychologically vulnerable and then was subjected to a number of violent incidents in the course of his duties as a police officer. His supervisors and colleagues all seem to agree that such incidents are normal parts of the work of a policeman. They also agree that it is difficult to predict how a particular person will react in some violent situations.
38. Ms Fahey reported that although Detective Sergeant Burnell was not familiar with the incident involving an offender running at Mr Ross with a knife (in 2006) she was of the view that 'such an incident would not be considered run-of-the-mill and would likely be a stressful situation'. While noting my earlier comments in relation to the unsatisfactory nature of this evidence, it appears that Ms Burnell could not predict how a person would react to particular situations but acknowledged that such a situation was not normal even for police work.
39. I note the report of Dr Synnott in 2004 in which he concluded that Mr Ross was not suffering from a psychiatric condition at that time. However, at paragraph 5 he also opines that Mr Ross 'is fit for any policing duties that do not involve confronting violent situations". His duties since 2004 have involved him in many such situations.
40. In determining this case I must have regard to the provisions of section 11A of the 1987 Act. It provides that 'no compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action

taken or proposed to be taken by or on behalf of the employer with respect to ...promotion, performance appraisal, discipline....". In *Department of Education and Training v Sinclair* [2005] NSWCA 465, Spigelman CJ stated that it is necessary to determine 'whether or not the sole or predominant cause of the employer's contribution to the Respondent's psychological injury was reasonable action' of the Respondent in respect of those matters listed in the section and as summarised above (in this case, discipline, performance appraisal and/or promotion). It is for the Respondent to satisfy the onus of proof in this regard.

41. As stated above, the Respondent's own evidence does not support such a conclusion. Ms Fahey, in her professional opinion and relying on statements she took from supervisors and colleagues of Mr Ross, concluded that there were a number of workplace issues which contributed to Mr Ross' psychological injury in 2007. She does not conclude that the predominant or sole cause was either the ongoing investigation (discipline) or the failure to be appointed as a permanent Detective (promotion). She says that there were many incidents of violence that affected Mr Ross, all of which occurred at work and none of it involving the reasonable actions of the employer in respect of discipline or promotion.
42. The Respondent submitted that the evidence of Dr Hashmi shows no attendances for assistance with psychological problems once the 2003 difficulties had been dealt with. The Applicant first consulted Dr Hashmi about his anxiety and psychological state after he left work. The Respondent submitted that this is not normal and that it would be reasonable to see attendances on the treating doctor leading up to the time when the Applicant had had enough and left work. The Applicant has answered this submission by stating that he generally wanted to cope at work, did not want to seem vulnerable, had mentioned difficulties to some of his colleagues and superiors but did not seek treatment. He tried to get some help in early July with Dr Peters but did not obtain an appointment.
43. I am not persuaded that Mr Ross' failure to seek treatment until it all became too much is problematic for his claim. He clearly was trying to keep going as well as he could and for as long as he could. He was waiting to see if the position with the Detectives would come up so that he could get away from some of the stressors of his current job with the Respondent. He was just managing until it all became too much on 25 July 2007.
44. The Respondent has not discharged its onus of proof in respect of section 11A of the Act. However, for completeness I also note that Mr Peters and Dr Wade, on behalf of the Applicant, conclude that the general nature and conditions of employment led to the psychological injury, rather than matters dealing with promotion or discipline. I accept their opinions, which are largely unchallenged except the actual diagnosis. It is clear that all of the doctors in 2007 agree that there was a diagnosable psychological condition.
45. Dr Wade opined on 30 October 2007 that Mr Ross was suffering from Post Traumatic Stress Disorder. He said that 'issues to do with Mr Ross having a permanent position in the detectives are a bit of a red herring, in that Mr Ross tried the detective career as a way of getting away from the front line of violence....Mr Ross' final decision and really his 'snapping' as it were, of 25 July 2007 was really the result of the years of not coping, it was not about not receiving a permanent position with the Detectives as he had found this not be a solution'. Dr Wade went on to conclude that section 11A did not apply 'because Mr Ross' injuries were well established over many years....dealing with horrific scenes, even ones including where he might have to kill another human being, or nearly being killed himself'. I note that Mr Peters, psychologist, also agrees with this diagnosis and the causes.

46. For the reasons given above, I am not persuaded that Mr Ross' psychological injury has been wholly or predominantly caused by the reasonable actions of the Respondent in respect of discipline, performance appraisal and/or promotion. The Respondent's own evidence does not support such a conclusion. The Applicant's medical evidence and his statements further support the view that he is suffering from a psychological injury, being Post Traumatic Stress Disorder, as a result of the nature and conditions of his employment over many years, culminating in his leaving work on 25 July 2007. Pursuant to s.15 of the 1987 Act, the deemed date of injury is 25 July 2007.

Weekly compensation

47. I note that the Applicant has claimed weekly compensation on the basis that he is totally incapacitated for employment. The Respondent has not disputed this aspect of the claim. The Applicant is therefore entitled to an award pursuant to s.36 for the first 26 weeks of unemployment. There may have been payments during this period as sick leave or annual leave. It is appropriate that the Applicant have such leave re-credited during this period. After the first 26 weeks, the Applicant is entitled to an award pursuant to s.37 at the maximum statutory rate, noting that he has a dependant son born on 4 April 2007.

Medical expenses

48. The Applicant also sought the payment of his medical expenses pursuant to s.60 of the Act. As he has been successful in establishing his entitlement to compensation for an injury received in the employment of the Respondent, it is appropriate that a general order for the payment of his reasonable expenses should be made.

Costs

49. The Applicant submitted that this matter was complex and that there should be an uplift on costs at the upper end of the range. The Respondent made no submissions on this issue and the Applicant's counsel was of the view that if the Applicant received an uplift then the Respondent should also. I agree that this matter is complex. The nature of the claim has required special care and skill in ascertaining the facts, responding to the evidence and commissioning the correct evidence to prove entitlement. I do not think it is in the higher range of complexity. I certify that each party is entitled to an uplift of 15% of the costs as agreed or assessed.

SUMMARY

50. It is not disputed that Jamie Ross suffered a psychological injury as a result of the nature and conditions of his employment as a police officer from 1995 to 25 July 2007. Employment was a substantial contributing factor to this injury.
51. The injury suffered by Mr Ross was not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the Respondent with respect to "...promotion, performance appraisal, discipline...." (Section 11A).
52. The Applicant should be paid weekly compensation pursuant to s.36 and then s.37 of the *Workers Compensation Act 1987*. I have no evidence to dispute the amount claimed by the Applicant, being \$1,141 per week, for the first 26 weeks of total incapacity. It is appropriate that any periods paid in this period as sick or other leave should be re-credited to the Applicant.

53. The Applicant is also entitled to receive compensation for the costs of his reasonably necessary medical and treatment expenses. A general order will be made.
54. The Respondent is to pay the Applicant's costs as agreed or assessed. The matter is complex and each party should receive a 15% uplift on such costs.