

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5632/20
Applicant: Ethem Coskun
Respondent: State of NSW (NSW Police Force)
Date of Determination: 12 January 2021
Citation No: [2021] NSWCC 14

The Commission determines:

1. The applicant sustained psychological injury arising out of or in the course of his employment on 8 February 2020 (deemed). The applicant's employment with the respondent was a substantial contributing factor to his psychological injury.
2. The applicant's psychological injury was not wholly or predominately caused by reasonable action taken by the respondent with respect to performance appraisal, discipline and/or demotion.
3. The applicant has had no current capacity for work since 8 February 2020 due to psychological injury.
4. The respondent is to pay weekly benefits to the applicant from 8 February 2020 to 8 August 2020 under s 36 of the *Workers Compensation Act 1987* at the rate of \$1,869.61.
5. The respondent is to pay weekly benefits to the applicant from 9 August 2020 to 30 September 2020 under section 37 of the *Workers Compensation Act 1987* at the rate of \$523.10.
6. The respondent is to pay weekly benefits to the applicant from 1 October 2020 ongoing under section 40 of the *Workers Compensation Act 1987* at the rate of \$527.04 (as adjusted).
7. The applicant requires medical and related treatment as a consequence of the psychological injury he has sustained. The respondent is to pay the applicant's medical and related treatment in accordance with s 60 of the *Workers Compensation Act 1987*.
8. The respondent to pay the applicant's costs as agreed or assessed. The matter is certified as complex and a 20 per cent uplift on costs for both parties is recommended.

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

Jacqueline Snell
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 JACQUELINE SNELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. On 17 December 2009, Ethem Coskun (Mr Coskun) was attested as Probationary Constable and stationed at Burwood Police Area Command. During his period of service Mr Coskun attended a number of incidents, which he found traumatising, including a homicide on 7 April 2016 (homicide incident). Following the homicide incident, Mr Coskun was diagnosed with Post Traumatic Stress Disorder (PTSD) and certified unfit for work on or about 11 April 2016. He made a claim for workers compensation, which was accepted. Mr Coskun returned to work on restricted duties in or about September 2016 and returned to pre-injury duties in or about November 2016.
2. In or about 2017, Mr Coskun began supervisory work and he achieved the rank of Leading Senior Constable (LSC) on 14 March 2018. While Mr Coskun had undertaken supervisory work and relieved at the rank of Sergeant for periods of time since 2017, he was removed from this role in or about April 2019. Following his enquiry regarding recommencing relieving at the rank of Sergeant and undertaking supervisory work, Mr Coskun was initially rostered to undertake supervisory work “for minimal shifts” but then again removed from this work. Mr Coskun was however allocated a Probationary Constable in May for a 12 week period and a Probationary Constable in September for a six week period.
3. With concern expressed by his Team Duty Officer about Mr Coskun’s reportedly inconsistent work statistics, Mr Coskun was placed on a Performance Plan for a period of eight weeks, commencing on 21 September 2019. At a meeting on or about mid-December 2019, Mr Coskun was told by his Team Duty Officer that a report regarding his Performance Plan was to be prepared for the Local Area Commander and a decision would be made regarding Mr Coskun’s retention or otherwise of his LSC role. On 8 February 2020 Mr Coskun was informed a decision had been made to revoke his LSC role, which significantly upset him. Mr Coskun was unable to complete his shift that evening, ceased work, and submitted an Incident Notification Form, Mr Coskun sought medical attention on 10 February 2020 and was subsequently diagnosed with psychological injury. Mr Coskun was certified totally incapacitated for work and he has not returned to work since 8 February 2020.
4. The claim for compensation in these proceedings involved the following:
 - (a) Weekly benefits payable under s 36, s 37 and s 40 of the *Workers compensation Act 1987* (1987 Act) on the basis of total incapacity; and
 - (b) General order for medical treatment or related expenses payable under s 60 of the 1987 Act.
5. The respondent issued notices in accordance with s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 17 February 2020 ¹, 6 March 2020 ², 12 May 2020 ³ and 30 September 2020 ⁴. Injury was placed in issue with reliance placed on ss 4, 9A and 11A (3) of the 1987 Act. In the alternative defence was raised under s 11A(1) of the 1987 Act relevant to demotion, performance appraisal and/or discipline. Incapacity and requirement for medical or related treatment was also disputed with reliance placed on s 33 and ss 59 and 60 of the 1987 Act respectively.

¹ Reply page 1

² Reply page 19

³ Reply page 40

⁴ Reply page 50

6. Mr Coskun's claim for compensation resulting from alleged psychological injury proceeded to an Arbitration hearing on 8 December 2020, conducted by telephone. Mr Paul Stockley of counsel appeared for Mr Coskun instructed by Ms Susan McTegg, solicitor. Mr Lachlan Robison appeared for the respondent instructed by Ms Tarana Singh, solicitor.

ISSUES FOR DETERMINATION

7. The parties agreed Mr Coskun's current weekly wage rate and probable earnings but for injury is \$1,869.61.
8. The parties agreed that the following issues remained in dispute:
 - (a) Alleged psychological injury;
 - (b) Incapacity for work resulting from psychological injury;
 - (c) The requirement for medical or related treatment for psychological injury; and
 - (d) In the alternative, defence was raised under section 11A(1) of the 1987 Act relevant to demotion, performance appraisal and/or discipline.

PROCEDURE BEFORE THE COMMISSION

9. 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

10. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (ARD) and attached documents;
 - (b) Reply and attached documents;
 - (c) Application to Admit Late Documents (AALD) lodged on behalf of Mr Coskun on 27 November 2020⁵; and
 - (d) AALD lodged on behalf of Mr Coskun on 4 December 2020⁶.

Oral Evidence

11. Neither party sought leave to adduce oral evidence or cross-examine any witnesses. Both counsel made oral submissions and a copy of the recording is available to the parties.

⁵ AALD – A1

⁶ AALD – A2

FINDINGS AND REASONS

Review of evidence

12. A brief summary of the evidence follows.

Mr Coskun's statements

13. In his statement dated 16 April 2020⁷ Mr Coskun recalled he was attested as a Probationary Constable on 17 December 2009 and said save for a short period of secondment, he had been stationed at Burwood Police Area Command for the entire period of his service.
14. He described an incident occurring on 7 April 2016 which involved response to a homicide, with the apprehension of a suspect and his attempt to revive the victim, without success. The incident traumatised Mr Coskun and he came under the psychiatric care of Dr Maheshwari, who he described as "not helpful" and he also consulted with Melda Nazenin (Ms Nazenin), psychologist, who he said was helpful in that she provided him with strategies to overcome his trauma. Mr Coskun was diagnosed with PTSD, was certified unfit for work and submitted a claim for compensation, for which liability was accepted. Mr Coskun was unfit for work from on or about 11 April 2016, returned to work on restricted duties in or about September 2016 and returned to full duties in November 2016 after a period of annual leave in October 2016. He consulted with Ms Nazenin in November 2016 following his return from annual leave.
15. Mr Coskun has never forgotten the homicide incident and has attended a number of incidents since then that remind him of the homicide incident. He canvassed a suicide occurrence on 30 January 2018, which reminded him of the homicide incident. He canvassed his delivery of a death message to the parents of a young driver on 7 August 2018, which reminded him of the homicide incident. He canvassed another suicide on 28 October 2019, which reminded him of the homicide incident. Mr Coskun explained he has had to conduct CPR on persons, which reminded him of the homicide incident, and whenever possible he hands over the CPR to a colleague as he is fearful he will not be able to save this person either. He said his attendances at incidents such as these canvassed had a collateral effect on him, "on each occasion igniting my anxiety from the 2016 incident".
16. Since 2017 Mr Coskun had relieved at the rank of Sergeant for period of time and on 14 March 2018 he achieved the rank of LSC. In April 2019 Mr Coskun was informed by rostering that he was to be removed from his Acting Sergeant's role consequent on a decision made by Inspector Andrew Graham (Inspector Graham). A couple of months later 2019 Mr Coskun made enquiry about again relieving at the rank of Sergeant and undertaking supervisory duties and was subsequently rostered to undertake supervisory duties "for minimal shifts" until these duties were again removed consequent on a decision made by Inspector Graham.
17. During May through to August 2019 Mr Coskun was allocated a Probationary Constable for a period of 12 weeks and in or about September 2019 he was allocated another Probationary Constable for a period of six weeks. Shortly after this, during a meeting with Chief Inspector Stephen Parry (Chief Inspector Parry) and Sergeant Michael Wilkins (Sergeant Wilkins) Mr Coskun was told by Chief Inspector Parry he was to be placed on a performance plan "due to my stats and work being up and down" and he was "not working well as a field training officer with junior Constables".

⁷ ARD page 1

18. The performance plan referred was for a period of eight weeks and commenced on 21 September 2019. The plan was to be interrupted while Mr Coskun was on annual leave throughout most of October 2019. Mr Coskun was to be supervised by Sergeant Wilkins, but he did not speak with Sergeant Wilkins prior to commencing his annual leave or when he returned on 28 October 2019. The following week Mr Coskun received an email from Chief Inspector Parry in which he was notified that Sergeant Schiavello was to be his supervisor for the remainder of the Plan. Sergeant Schiavello spoke to Mr Coskun on two occasions and indicated that while there had been an improvement, he advised him to “get more stats”. In or about mid-December 2019 Mr Coskun met with Chief Inspector Parry and Sergeant Schiavello, with indication from Chief Inspector Parry that while there had been a major improvement in his proactive work, Mr Coskun’s reactive work was low. Chief Inspector Parry told Mr Coskun he would prepare a report for Commander Devaney to review and make the decision as to whether he should retain his LSC position. Chief Inspector Parry told Mr Coskun to prepare for a meeting with the Commander. Mr Coskun believed Chief Inspector Parry’s report would be unfavourable towards him and over the following week he prepared supporting documents in readiness for a meeting with the Commander. Mr Coskun then went to see Commander Devaney with his supporting documents but was told by the Commander that he not yet reviewed the report and would be required to wait until 20 January 2020 when the Commander returned from leave.
19. Shortly after, Mr Coskun returned from annual leave on 6 January 2020, he was deployed to the bush fires and returned to Burwood Police Area Command on 7 February 2020. The following day, he met with Chief Inspector Parry and Sergeant Schiavello and was told by Chief Inspector Parry the Commander had made the decision to revoke his LSC position. Mr Coskun felt anger and frustration at this decision and refused to read or sign acknowledgment of the revocation. He submitted an incident notification form and consulted with his general practitioner, Dr Ozme on 10 February 2020. He was certified totally incapacitated for work. He consulted with Ms Nazenin on 14 February 2020 and consulted with Dr Mayne on 3 March 2020. He was not provided with the opportunity to respond to Chief Inspector Parry’s report prior the Commander making his decision on this report alone.
20. Mr Coskun said that during 2019 he had on numerous occasions requested a transfer to a different team as he believed he was “being treated unfairly and targeted unnecessarily” but despite team changes occurring in 2019 he remained on the same team. Mr Coskun said he “was already struggling” when he placed on the Performance Plan and emphasised that the incident occurring on 28 October 2019 exacerbated symptoms of PTSD from which he had never fully recovered.

Incident notification forms

21. Incident notification form no. 211441 ⁸ described Mr Coskun as being one of the first responders to the homicide incident and assisting with extricating the victim from the water and assisting with CPR. While Mr Coskun returned to work on 12 April 2016, he terminated his shift shortly after accessing and reading the contents of the NSW Police Sitrep regarding the preliminary results of the Post Mortem of the victim.
22. Incident notification form no. 252248 ⁹ described Mr Coskun as having been subjected to bullying and targeting since April 2019 and made specific reference to being advised of the revocation of his rank on 8 February 2020 following Performance Plan and review by the Commander, which caused him “much stress and anxiety”. Reference is made the review initially being scheduled for December 2019, but not occurring at that time.

⁸ ARD page 19

⁹ Reply page 13

Chief Inspector Parry's statement

23. In his statement dated 4 August 2020¹⁰, Chief Inspector Parry acknowledged that he was Mr Coskun's Team Duty Officer and that part of his role was to monitor and review work performance of the LSCs. He said that he had a number of meetings with Mr Coskun about his performance between June 2019 and February 2020. In a meeting on 10 June 2019, Mr Coskun indicated that there was a perception by other team members that "he was not pulling his weight" and there was discussion of a team change. Chief Inspector Parry confirmed Mr Coskun's performance was not at the standard of a LSC and required lifting on a consistent basis with both reactive and proactive events. Chief Inspector Parry told Mr Coskun an improvement in his performance would increase his prospect of team change. Over the ensuing couple of months discussion with Sergeants Wilkins, Schiavelli and Gittoes revealed no significant and consistent improvement in Mr Coskun's performance and ultimately Mr Coskun was placed on a Performance Plan commencing 21 September 2019. Chief Inspector Parry and Sergeant Wilkins discussed the plan with Mr Coskun in a meeting on 20 September 2019 and it was clearly indicated to Mr Coskun that failure to satisfactorily complete the program would result in the revocation of his SLC appointment, which was met with emotional reaction by Mr Coskun.
24. Relevant to the suicide incident that Mr Coskun attended on 28 October 2019, Chief Inspector Parry said he had attended the incident and observed Mr Coskun close to the canopy that covered the deceased. So as to ensure Mr Coskun had no visual exposure to the deceased, he told Mr Coskun he was not required to assist the Crime Scene Investigators and was tasked away from the area. Mr Coskun did not attend the subsequent debrief due to roster commitment but indicated to Chief Inspector Parry he had been troubled by his attendance at the incident in that reminded him of the homicide incident. Chief Inspector Parry indicated to Mr Coskun it was open to him to submit an injury claim form, which he understood he did.
25. On 28 November 2019, Chief Inspector Parry met with Mr Coskun and Sergeant Gittoes with discussion of unsupported occasions of sick leave in the last 12 months. Later the same day, Mr Coskun told him about Chief Inspector Parry about the requirement for him to take certain medication due to fertility issues.
26. Chief Inspector Parry met with Mr Coskun and Sergeant Schiavello on 8 December 2019 to discuss Mr Coskun's performance on the plan, and while Mr Coskun believed he had performed to a higher standard than prior to entering the plan, the workload analysis did not support this belief. With the plan due to finish on 13 December 2019, Chief Inspector Parry told Mr Coskun he would prepare a report for Commander Devaney and Commander Devaney would make a decision as to the successful completion of the plan. He suggested to Mr Coskun he may wish to make arrangement to meet with Commander to discuss the plan and it's finalisation. Chief Inspector Parry prepared his report the following day.
27. Prior to 8 February 2020, Chief Inspector Parry discussed the plan with Commander Devaney and on 8 February 2020, he received an email from the Commander with revocation of the position of LSC for Mr Coskun. Chief Inspector Parry met with Sergeant Schiavello and Mr Coskun that same evening and provided Mr Coskun with the revocation and advised him of the fact there was no right to review the decision. Mr Coskun was visibly shaken by this outcome, terminated his shift a short time later and has not returned to work since.
28. Chief Inspector Parry confirmed the placing of an officer on a Performance Plan requires automatic revocation of a LSC appointment under the Police Regulations 2015, and there is no right of review of such revocation.

¹⁰ Reply page 96

Sergeant Wilkins' statement

29. In his statement dated 7 August 2020 ¹¹, Sergeant Wilkins said that during February/March 2019 issues regarding Mr Coskun reported to the team supervisors from other members of the team included the following:
- he was not taking on jobs;
 - he was allowing other members on the car crew to complete them;
 - he was not including other officers on his CAD jobs when writing them off;
 - he was sitting off jobs waiting for other car crews to arrive first before attending, and
 - he was not providing Probationary Constables with the required level of teaching or guidance.
30. Sergeant Wilkins and Sergeant Schiavello raised these issues with Mr Coskun in a meeting on 12 March 2019 and in the weeks afterwards, Sergeant Wilkins observed Mr Coskun was working towards achieving better results. The team supervising Sergeants however were of the view that Mr Coskun should not be provided with further relieving Sergeant duties until such time as there had been sustained improvement in his performance, and with an incident occurring on 13 April 2019 this view was maintained. Between May and August 2019 Mr Coskun was allocated a Probationary Constable, with reported unsatisfactory teaching.
31. Sergeant Wilkins confirmed he and Chief Inspector Parry met with Mr Coskun on 20 September 2019 at which time the Performance Plan was explained to him, as what the fact that the plan would be extended to encompass Mr Coskun's period of annual leave in October 2019. While under the plan it was Mr Coskun's responsibility to initiate meetings with Sergeant Wilkins as his program supervisor, Mr Coskun did not do so and as on 19 October 2019 Sergeant Wilkins commenced working in a different team, Sergeant Schiavello assumed the role of program supervisor for the remainder of the plan.

Commander Devaney's statement

32. In his statement dated 10 August 2020 ¹² Commander Devaney confirmed that in making his decision to revoke Mr Coskun's LSC appointment, he relied on the report prepared by Chief Inspector Parry dated 9 December 2019, which demonstrated Mr Coskun's performance was not positive in comparison to other LSCs in the Burwood Police Area Command. Commander Devaney explained Mr Coskun had not been kept in suspense as to his LSC role. He indicated to him at an unscheduled meeting on 18 December 2019 that in light of the dichotomy between Mr Coskun belief as to his performance and that of Chief Inspector Parry, in fairness to Mr Coskun he would request Acting Superintendent Graham review the matter and Commander Devaney would decide the matter on his return from leave. Mr Coskun agreed to this proposed course of action.
33. Commander Devaney confirmed the revocation letter provided to Mr Coskun detailed his LSC appointment had been revoked under s 10.2 of the LSC guidelines in that there had been a necessity to implement a Performance Plan under clause 55 of the Police Regulation 2008. Commander Devaney pointed out Mr Coskun had been provided with ample opportunity and guidance to meet the requirements of his LSC role, had failed to do so and his appointment was revoked. Commanded Devaney also pointed out he should have revoked Mr Coskun's LSC role on 21 September 2020 when he was placed on the Performance Plan but he didn't do so, which provided Mr Coskun with the opportunity to improve his performance.

¹¹ Reply page 85

¹² Reply page 74

Inspector Graham's statement

34. In his statement dated 17 August 2020¹³, Inspector Graham explained his duties as HR Duty Officer and said he first knew of Mr Coskun on 22 April 2018 when the former Ashfield and Burwood Local Area Commands merged. He said that while on 14 January 2019 Mr Coskun requested opportunity to relieve in a team leader role on a more consistent basis, from 24 February 2019 to September 2019 concerns about Mr Coskun's performance were raised by his team leaders.
35. Inspector Graham recalled that in response to proposed team changes, without complaint of harassment or bullying Mr Coskun indicated he would be happy to change teams, to which Inspector Graham responded on 15 April 2019 that due to ongoing concerns by his team leaders about performance and suitability to relieve or maintain his LSC role, his roster was changed and he had also been removed from the majority of his relieving shifts. The day before, Sergeant Gittoes had requested Mr Coskun be removed from relieving opportunity due to performance. Inspector Graham said that throughout the early part of 2019 in particular, he received negative feedback regarding Mr Coskun's abilities to train Probationary Constables which is integral for an LSC. When on 26 July 2019 Mr Coskun requested the opportunity to relieve and supervise again, while his team leaders accepted there had been a slight improvement in performance they required consistent performance for a further period before consideration could be given to further relieving opportunities.
36. Inspector Graham acknowledged he was absent on secondment from Burwood Police Area Command between late September 2019 and 14 December 2019 but said that in his role HR Duty Officer he was requested to review the Performance Plan of Mr Coskun and the report of Chief Inspector Parry and provide input to Commander Devaney. Inspector Graham provided opinion Mr Coskun was widely acknowledged by his peers and supervisors to be lazy and a poor performer, and while there were numerous discussions and strategies put in place in an attempt to improve his performance, his performance had not improved to the required standard of an LSC. With policy clearly articulating the LSC role should have been revoked at the commencement of the Performance Plan and there is no right of review, Inspector Graham was satisfied the removal of the LSC status was appropriate given Mr Coskun had not only been put on the plan but had also failed it.

Performance plan

37. Mr Coskun was placed on a Performance Plan for a period of eight weeks, commencing 21 September 2019¹⁴. The plan was extended for a period of time because Mr Coskun was on annual leave during October 2019. The information relied on in raising Mr Coskun's unsatisfactory work performance is documented and Mr Coskun's work performance expectations are documented. The responsibilities of Mr Coskun and the responsibilities of his supervisor are also documented. Relevantly, it is the responsibility of Mr Coskun to initiate and attend sessions with his supervisor on a weekly basis.
38. Sergeants Wilkins, Gittoes and Shiavello prepared a chronology of Mr Coskun's work output throughout the period of the Performance Plan¹⁵, with conclusion by Sergeant Shiavello on review that there was a reluctance by Mr Coskun to be proactive and 'hunt' out crime.

Performance plan report and sequelae

39. In his Performance Plan report dated 9 December 2019¹⁶ Chief Inspector Parry provided comment that Mr Coskun's work performance had raised concern on numerous occasions, and made reference to concerns raised by a number of Probationary Constables and belief that Mr Coskun's work load and performance was below that of other Senior Leading

¹³ Reply page 113

¹⁴ ARD page 51

¹⁵ ARD page 34

¹⁶ ARD page 30

Constables on his team. Despite informal conversation, which addressed Mr Coskun's work performance and organisation expectations, Mr Coskun's performance had not consistently improve. On 10 June 2019, Chief Inspector Parry met with Mr Coskun and warned him without such improvement, his position as LSC "could come under scrutiny". With Mr Coskun's sick leave also of concern, on enquiry, Chief Inspector Parry was told by Mr Coskun there were no issues outside of work that may affect his work performance.

40. While over the following three months Sergeant Wilkins had a number of conversations with Mr Coskun about his work performance, in early September 2019 information provided to and gleaned by Chief Inspector Parry brought about the decision to place Mr Coskun on a Performance Plan, which Chief Inspector Parry drafted and explained to Mr Coskun in a meeting on 21 September 2019, with Sergeant Wilkins as his nominated supervisor. Requirement, expectation and the consequence of failure to meet requirement (including revocation of role as LSC) were explained. Mr Coskun became emotional during the meeting and enquiry was again made as to whether there were issues outside of work that may affect his work performance, with denial.
41. On 28 November 2019 the issue of unsatisfactory sick leave during the calendar year was raised, with Mr Coskun having taken sick leave on a number of occasions unsupported by medical certificate.
42. On 8 December 2019 Chief Inspector Parry met with Mr Coskun and Sergeant Shiavello, who had assumed the role of nominated supervisor (Sergeant Wilkins having been assigned to other duties not on the team), as the Performance plan was due for completion on 13 December 2019. While Mr Coskun felt he had performed to a higher standard than prior to commencing the plan, workload analysis delivered concerning results, particularly in comparison with other LSCs on the same team. With it outlined to Mr Coskun that failure to meet requirement of the Performance Plan would leave to revocation of his role as LSC, in his report Chief Inspector Parry pointed out it was "now the requirement of the Commander, to determine the most appropriate course of action, relative to this Plan".
43. Mr Coskun's LSC role was revoked and Mr Coskun was provided with notice of the revocation under cover of letter from Chief Inspector Parry on 8 February 2020. Mr Coskun refused to acknowledge receipt of this letter¹⁷.
44. In an email dated 12 February 2020, an Injury Management Advisor with the respondent, outlined her discussion with Mr Coskun that same afternoon ¹⁸. She relevantly reported Mr Coskun had said it had all started in April 2019 when he was removed from his supervisory role due to poor performance and subsequently placed on a Performance Plan due to "poor stats". While his Performance Plan was supposed to be reviewed by the Commander in December 2019, this had not occurred because the Commander had not the opportunity to review it before going on annual leave. He had now been told on 8 February 2020 his role as LSC was revoked. When told of this decision, Mr Coskun "was upset and immediately terminated his shift". Mr Coskun sought medical assistance and was certified totally unfit for work. He said he couldn't ever return to work at Burwood Police Area Command.
45. In an email dated 13 February 2020, Commander Devaney explained Mr Coskun had been placed on a Performance Plan on 21 September 2019, which was to finalise on 13 December 2019. While according to LSC guidelines section 10.2 his LSC role should have been revoked at that time, this had not occurred and Mr Coskun was provided with the opportunity to improve his performance. During the morning of 18 December 2019 Mr Coskun met with Commander Devaney in an unscheduled meeting, wanting to discuss his Performance Plan, but Commander Devaney was not in a position to discuss it with him at that time. He enquired of Mr Coskun how he thought he was performing and in response to comment that he was performing well, Commander Devaney indicated he had been

¹⁷ ARD page 54

¹⁸ ARD page 55

briefed otherwise. With Commander Devaney commencing leave the following day, he told Mr Coskun he would seek advice on his work performance and would make a decision on his return from leave. Commander Devaney said Mr Coskun agreed to this proposed course of action. As his LSC role had not been revoked in accordance with the guidelines, Commander Devaney pointed out Mr Coskun had had the benefit of his LSC role for five months.

Dr Ozme

46. Dr Ozme provided Mr Coskun with WorkCover certificates of capacity in which he has certified him totally incapacitated for work from 8 February 2020 with initial diagnosis of "Adjustment reaction depressed mood – Anxiety" and subsequent diagnoses of "PTSD" resulting from the incident occurring on 8 February 2020.

Dr Ghannoum

47. Mr Coskun subsequently came under the care of Dr Ghannoum. Dr Ghannoum also provided Mr Coskun with Workcover certificates of capacity in which he has certified him totally incapacitated for work with diagnosis of "PTSD / adjustment disorder / depression and anxiety" resulting from performance appraisal and subsequent demotion at work. Dr Ghannoum however noted that the homicide incident may be relevant to his current psychological injury. Clinical records of Dr Ghannoum ¹⁹ demonstrated that in recent times Mr Coskun had consulted with him with psychological symptoms resulting from his "removal from supervisor duties and a removal of ranking due to performance related issues according to supervisors".

Dr Maheshwari

48. Mr Coskun came under the psychiatric care of Dr Maheshwari and in his report dated 23 May 2016²⁰ Dr Maheshwari reported he had reviewed Mr Coskun on 9 May 2019 and again that same day. He provided a history of Mr Coskun having attended the homicide incident, with reported "flashbacks, guilt, anger and helplessness" since the homicide incident. Mr Coskun was "teary and hesitant when recalling the incident". Mr Coskun denied any similar difficulty before the homicide incident. Mr Coskun had not returned to work at the time of review and while he acknowledged "feeling bored and lost without work", he harboured concern "he can't go to work because of the reminders; and what if I have to go to Cabarita again".

49. Dr Maheshwari provided opinion Mr Coskun presented with symptoms of Acute Stress Disorder resulting from the homicide incident. He relevantly provided opinion at that time:

"His time off work seems to be part of an avoidance strategy for fear of exposure to reminders of the incident. However, considering the nature of his work, risk of future exposure is always going to be there. In my opinion, at this stage, his apparent lack of motivation to consider options for returning to work is a significant barrier".

50. Dr Maheshwari felt at the time Mr Coskun would benefit from prompt engagement with a return to work co-ordinator with CBT strategy to address avoidance and improve motivation.

Dr Ingram

51. Dr Ingram provided an independent medical examiner's report dated 28 July 2016 ²¹. He noted that at the time of assessment that day, Mr Coskun was "close to tears at times, particularly when discussing the incident" occurring on 7 April 2016. At the time of assessment Mr Coskun remained off work, not having worked since 12 April 2016.

¹⁹ AALD – A1 page

²⁰ ARD page 56

²¹ ARD page 59

52. Dr Ingram provided a detailed history of the homicide incident, with Mr Coskun experiencing emotional symptoms following the homicide incident, including breaking down into tears while at the gym. Dr Ingram said Mr Coskun's insight into the onset of emotional symptoms and relationship to the homicide incident was good. While Mr Coskun reported he was not really getting flashbacks or intrusive memories anymore, Dr Ingram reported "he is avoiding things", including text messages from work colleagues.
53. Relevant to Dr Maheshwari, Mr Coskun reported he had cancelled his last appointment because Dr Maheshwari had told him "he was selfish about not returning to work". Mr Coskun said he was getting ready to return to work and had mentally prepared himself to go back to work in the next few weeks. He said his preference was to go back to 12 hour shifts, 4 days a week on desk duties or in custody.
54. Dr Ingram provided diagnosis at the time of assessment as Adjustment Disorder with Anxiety resulting from exposure to trauma on 7 April 2016, and while he did not consider Mr Coskun at that time fulfilled the criteria for PTSD he accepted he continued to experience avoidance. Dr Ingram considered Mr Coskun would benefit from sessions with a psychologist, and as to his contemplated return to work Dr Ingram cautioned prognosis was uncertain:
- "I am however concerned that there continues to be considerable avoidance in areas such as thinking about or talking about the incident. A return to work may well provide a number of triggers, which could lead to exacerbation of his symptoms and a worsening of his functioning".
55. At that time Dr Ingram said that despite Mr Coskun's motivation to return to work 12 hour shifts, 4 days a week, in non-operational duties "given the ongoing emotional symptoms he would benefit from a more graduated return to work".

Melda Nazenin

56. In her response to specific questions on 23 September 2016²² Ms Nazenin said she first reviewed Mr Coskun on 12 August 2016 and provided diagnosis of PTSD resulting from the homicide incident. At the time of reporting, Mr Coskun was working his full hours in non-operational duties but would be fit to return to return to operational duties when he returned from his annual leave in October 2016.
57. In her consultation note recorded on 14 February 2020²³ Ms Nazenin confirmed she previously last reviewed Mr Coskun in 2017 relevant to the psychological injury he had sustained at work. She recorded his current history in terms of Mr Coskun having ultimately returned to his pre-injury duties at which time he enjoyed work, had a good support network around him, was provided with supervisory duties, was provided with acting Sergeant opportunities. In 2018 he was promoted to LSC and he was also a Field Training Officer. He had again enjoyed the year, with no issues identified. In April 2019 however things appear to have changed with Mr Coskun having been removed from his supervisory duties, having been told he was not giving enough attention to the staff he was training. He was subsequently placed on the Performance Plan, which ultimately led to the revocation of his LSC role on 8 February 2020. Mr Coskun became distressed, left work and had remained off work since. Ms Nazenin reported Mr Coskun had consulted with his doctor on 10 February 2020 and been provided with a diagnosis of Adjustment Reaction.
58. Clinical records of Ms Nazenin²⁴ demonstrated that when considering his return to operational duties after time off as result of the homicide incident, Mr Coskun talked of triggers and concern for the incidents he may be confronted with. When Mr Coskun returned to work on suitable duties initially, he discussed the preparation of his statement relevant to the homicide incident (which he not previously been able to prepare) with Ms Nazenin and

²² ARD page 73

²³ ARD page 75

²⁴ AALD – A1 page 10

subsequently reported that he “experienced flashbacks, mixed emotion” when he completed it. Ms Nazenin recorded on 21 December 2016 that Mr Coskun reported he had returned to his full duties and was managing well. He had been to the homicide incident site and “dealt with it ok”. No further consultations with Mr Coskun are recorded by Ms Nazenin until that of 14 February 2020 and there are a couple afterwards.

Dr Mayne

59. Mr Coskun came under the psychiatric care of Dr Mayne on 3 March 2020, with Dr Mayne reportedly reviewing him on an approximate two week basis. Dr Mayne provided a number of reports, including a report dated 26 August 2020 that was prepared at the request of Mr Coskun’s solicitors²⁵. Dr Mayne reported a history of Mr Coskun’s difficulties having commenced when he attended the homicide incident with initial diagnosis of acute stress reaction, which was revised to PTSD after his symptoms had been present for six months. Dr Mayne reported a series of further traumatic incidents, with Mr Coskun making specific reference to the suicide in January 2018, the fatality in August 2018 and the further suicide in October 2019, had revived the symptoms of PTSD. Dr Mayne relevantly noted:

“Clearly the symptoms of his condition had interfered with his performance to some degree and in April 2019 he was criticised for his performance and indeed placed on a performance regime. At this stage he was left off various work rosters and by 20 November 2019, he was told that his appointment as a leading senior constable would be terminated”.

60. Dr Mayne expressed the view it was clear from the history provided that Mr Coskun had been under considerable stress since the homicide incident. He noted Mr Coskun had told him he had been very anxious regarding his work since that time and it had been necessary for him to take additional sick leave at various stages.
61. Dr Mayne relevantly provided diagnosis in terms of PTSD. Dr Mayne said Dr Coskun’s employment with the respondent was the primary factor relating to injury. Dr Mayne considered Mr Coskun completely unfit for work when he last reviewed him on 6 August 2020 and cautioned he considered “any future return to operational police duties to be unlikely”.
62. In a supplementary report dated 27 October 2020²⁶, Dr Mayne noted that by that time he had had the opportunity to review Mr Coskun on 12 occasions and considered him to remain totally incapacitated for work with any future return to operational police duties not possible.
63. Dr Mayne confirmed in response to specific questioning that the critical issue relevant to the diagnosis of PTSD was the trauma sustained by Mr Coskun while attending the homicide incident, with subsequent traumatic work-related incidents reviving the symptoms of PTSD. He said:

“It is my considered opinion that the initial diagnosis of post-traumatic stress disorder had not fully remitted and was indeed exacerbated by further traumatic incidents which occurred in the course of his work,

As stated by me in my initial reported dated 29 August 2020, it is likely that the symptoms of his psychiatric condition interfered with his performance as a police officer and in due course led to the criticism of his performance by senior officers. He was placed on a performance assessment regime, omitted from a series of rosters and on 20 November 2019 was informed that his appointment as a Leading Senior Constable had been terminated”.

²⁵ ARD page 81

²⁶ AALD – A1 page 1

64. Dr Mayne is critical of Dr Millar's diagnostic conclusion relevant to Mr Coskun that "he is experiencing emotional upset in the context of being demoted at work" (referred below) in that it failed to consider the totality of the history dating back to the homicide incident.

Dr Perrit

65. Clinical records of Dr Perrit ²⁷ demonstrated Mr Coskun was first reviewed on 6 August 2020 and provided a history of being "picked on at work" and demoted due to performance issues. When reviewed on 8 October 2010 after declination of his claim for workers compensation, Mr Coskun was tearful and distressed and ruminated about the various traumatic incidents he had attended, being the homicide, the death message and the suicides.

Dr Miller

66. Dr Miller provided an independent medical examiner's report dated 10 July 2020 ²⁸ following telephone assessment of Mr Coskun on 2 July 2020. She accepted the mental state examination was compromised because she could not see Mr Coskun.
67. Dr Miller noted Mr Coskun's statement dated 16 April 2020 which provided a history of presenting complaint that included report that everything reminded Mr Coskun of the homicide incident, with specific reference to any encounter with a police car reminded him of the homicide incident and caused him to feel anxious and emotional. Mr Coskun engaged in avoidance behaviour to prevent triggers. Dr Miller noted Mr Coskun had been off work between April and September 2016 as a result of the homicide incident and made a claim for workers compensation. Dr Miller noted that while Mr Coskun had not returned to any type of work, his recreational activities remained largely unchanged.
68. The history of psychiatric care under Dr Maheshwari was noted. Mr Coskun explained he was not happy with the treatment plan proposed by Dr Maheshwari as "he was trying to push" him back to work. Mr Coskun subsequently came under the psychiatric care of Dr Mayne, was initially diagnosed with Adjustment Disorder, which was later adjusted to PTSD. Mr Coskun continued under the care of Dr Mayne, with fortnightly review. The history of psychological care under Ms Nazenin was noted, with Mr Coskun having returned to her care in February 2020. He continued under her care, with fortnightly review.
69. Dr Miller provided opinion Ms Coskun had not sustained "any compensable, work-related psychiatric injury as defined by DSM-V or ICD 10". She provided opinion he was experiencing emotional upset in the context of having been demoted but acknowledged Mr Coskun had suffered work performance issues for a number of years and had taken extensive sick leave. In response to specific questioning Dr Miller accepted such emotional upset occurred wholly due to the actions taken by the respondent with respect to Mr Coskun's poor performance appraisal, subsequent demotion and consequent reduction in employment benefits. As Mr Coskun had suffered no psychiatric injury, the question of treatment was a non sequitur. Dr Miller provided opinion too that Mr Coskun suffered compensation neurosis and appeared to be knowledgeable about the symptoms of PTSD and compensation entitlement.
70. At the time of assessment, Dr Miller was of the view Mr Coskun had immediate capacity to return to his pre-injury operational duties with the respondent or to work on a full time basis with an alternate employer.

²⁷ AALD – A2 page 1

²⁸ Reply page 138

Respondent's submissions

71. Through Mr Robison of counsel, the respondent said the first issue to be resolved in this matter is whether Mr Coskun had sustained a compensable injury. If so, other matters required determined.
72. Mr Robison initially canvassed Mr Coskun's statement and said while it tended to emphasise matters of work history of interest to Mr Coskun, it would ultimately be a question of medical opinion as to whether such matters had manifested in the form of a compensable injury. Mr Coskun detailed a number of incidents he attended during the course of his employment with the respondent that caused him distress. He also detailed more recent matters of relevance, being the Performance Plan and meetings with Chief Inspector Parry about the Performance Plan. Mr Coskun took a defensive attitude towards the Performance Plan and went to the trouble of preparing documents to assist him with meetings in relation to it, which in terms of the reasonableness component required of s 11A demonstrated Mr Coskun certainly had the opportunity to prepare for these meetings. While Mr Coskun felt the attitude he believed taken by Commander Devaney to wait some weeks before discussing the Performance Plan with him was designed to cause him as much angst as possible, Mr Robison said a misperception of reasonable action in a s 11A case is not compensable. Noting that when Chief Inspector Parry asked him to sign his revocation letter, Mr Coskun refused to do so, Mr Robison said if there was any unreasonableness, it was on the part of Mr Coskun. With Mr Coskun having said he expressed frustration and anger at the decision of Commander Devaney, Mr Robison said if there was a psychiatric response to the decision by Commander Devaney it was here in mere "frustration and anger". Although Mr Coskun said he was already struggling when he was put on the Performance Plan, it appeared that his stress levels were anchored in the Performance Plan as opposed to pre-dating it. In saying this, Mr Robison accepted however that Mr Coskun had been required to attend a number of difficult scenes during the course of his employment with the respondent.
73. Mr Robison canvassed a document prepared by Chief Inspector Parry dated 9 December 2019 in which he discussed Mr Coskun's work performance and the requirement for management intervention. Not only was Mr Coskun's work performance problematic, but his poor performance filtered down to other police officers. Work reports relevant to other LSCs demonstrated his work performance was significantly below some of the other LSCs and there was a clear need for management intervention. There had been numerous informal chats held with Mr Coskun, which demonstrated "reasonableness" on the part of the respondent in that it was a lot less confrontational to engage in informal chats rather than formal appraisal. Despite these informal chats Mr Coskun's work performance did not improve satisfactorily, sick leave was often unsupported by medical certificates and workload figures were of concern. Mr Robison pointed out that ultimately, when his LSC role was revoked Mr Coskun had been given forewarning of this, which demonstrated procedural fairness. Mr Robison pointed out too that the Performance Plan clearly indicated to Mr Coskun what the problems with his work performance were and what was expected of him, and with the revocation of his LSC role, EAP, peer support officers and a chaplain were made available to Mr Coskun, which Mr Robison said demonstrated "reasonableness".
74. According to Mr Robison the report prepared by Dr Maheshwari was of no great moment as it was a report that predated the subject matter that engaged defence available under s 11A and dealt with the attendance of Mr Coskun at the homicide incident and provided diagnosis of consequent acute stress disorder. Likewise the report prepared by Dr Ingram was not particularly helpful as it went back to 2016 and it was not controversial that Mr Coskun had to attend the difficult matters summarised in the report. While Dr Ingram provided diagnosis in terms of adjustment disorder and indicated a return to work was uncertain at that stage, Mr Robison explained these matters of history are well and truly behind us when we get to the subject matter that engaged defence available under s 11A. Relevant to the report of

Dr Mayne, the matters of interest are those confined to the matters commencing in April 2019 and of note is that Dr Mayne said some of Mr Coskun's psychological fragility "may" date from the homicide incident. Mr Robison submitted limited weight could be given to Dr Mayne's opinion.

75. Mr Robison said the opinion offered by Dr Miller was the most recent one and accordingly carried more weight than most. Although it was a telephone consultation, Dr Miller was well briefed. While Dr Miller made reference to bullying, this was in the context of the work performance problem that had arisen. Dr Miller canvassed the difficult matters that Mr Coskun was required to deal with. She noted his recreational activities reportedly remained unchanged. She provided opinion Mr Coskun suffered from compensation neurosis. In essence, Dr Miller provided opinion Mr Coskun had not sustained a work-related injury and is quite plain that while Mr Coskun was not suffering from PTSD, if there was injury it is tied up with performance appraisal and demotion. Dr Miller considered Mr Coskun had immediate capacity to return to the work he used to do, either with the respondent or with an alternate employer. Prognosis is not provided because there is no injury. Treatment is not required because there is no injury.
76. Mr Robison pointed to the WorkCover Certificate issued by Dr Ozme on 10 February 2020 in which diagnosis is provided in terms of adjustment disorder with comment "at work he feels being bullied, discriminated". In the Incident Notification Form dated 10 February 2020, Mr Coskun indicated that he was being targeted, which Mr Robison accepted he was because his work performance level was not the same as his peers. In so far as capacity for work went, Mr Robison referred to an email from Ms Brillo dated 12 February 2020 that indicated Mr Coskun could work generally; he could work in work similar to what he had been doing but not at Burwood.
77. Relevant to the consultation notes recorded by Ms Nazenin on 14 February 2020, Mr Coskun enjoyed his work in 2018 and no issues were identified. It is only when we get to 2019 when work performance problems are raised that issues emerged, which engaged defence available under s 11A. It is pretty clear from the consultation notes that the workplace incidents detailed relate to performance issues rather than the terrible incidents Mr Coskun was required to attend. This is not a bullying case. It is a performance appraisal case. It is not a *Chemler*²⁹ scenario – one cannot misinterpret a s 11A factor and get around the defence that way.
78. The chronology document that is relevant to the review of Mr Coskun's work performance properly documented the review of his work output and expectations. Reasonableness of the performance appraisal process is also documented in an email from Commander Devaney that demonstrated the respondent had not had slavish adherence to policy in that Mr Coskun's LSC's position should have been revoked when he was put on performance review but rather, he was given the opportunity to improve his performance.
79. Mr Robison canvassed a number of statements. Commander Devaney denied the allegations made by Mr Coskun. He said that when he made his decision to revoke Mr Coskun's LSC's role he relied on the report prepared by Chief Inspector Parry that indicated Mr Coskun was underperforming to a significant degree. There was procedural fairness with a number of discussions occurring prior to the commencement of the Performance Plan. Sergeant Wilkins said he was promoted as a General Duties Supervisor in May 2018, which was about a year prior to Mr Coskun's problems coming to light. Sergeant Wilkins was responsible for completing the performance reviews relevant to Mr Coskun. He provided important comment about Mr Coskun's work performance and canvassed Mr Coskun's incorrect guidance to new police officers. He also canvassed the

²⁹ *State Transit Authority of NSW v Fritz Chemler* [2007] NSWCA 249; (2007) 5 DDCR 286

creation of the Performance Plan and the meeting he and Inspector Parry had with Mr Coskun about it. Chief Inspector Parry refuted suggestion Mr Coskun was kept in suspense about the possible revocation of his LSC role. He indicated Mr Coskun was given a red hot go to improve his work performance. He confirmed that when advised of the possibility of the revocation of his LSC role, there was a strong emotional reaction by Mr Coskun who started to cry. He canvassed the meeting he had with Sergeant Shiavello and Mr Coskun, and while Mr Coskun believed his work performance had improved, analysis of his work performance did not support such belief. Inspector Graham addressed the issue of causation, which is certainly there in that Mr Coskun became upset when his position of LSC was revoked and terminated his shift. He also addressed the reasonableness of the process in that there were formal monthly meetings which enabled the respondent to “keep an eye” on Mr Coskun. He said Mr Coskun raised issues with him relevant to bullying behaviours. He made reference to an email from Mr Coskun in which he was looking for supervisory work, with admission by Mr Coskun that while his performance had been lacking, he was okay now.

80. Mr Robison also canvassed the individual performance review for 25 March 2019 with indication from Sergeant Wilkins at the time that Mr Coskun completed a lower amount of events than others, despite being the second most senior constable on the team.
81. Mr Robison concluded the Commission was presented with compelling independent medical evidence provided by Dr Miller, which was not contradicted by independent medical evidence relied on by Mr Coskun. If the Commission finds injury, then defence under s 11A is available to the respondent. If the Commission does not accept the defence raised under s 11A, then there is evidence that Mr Coskun could work on a full time basis.
82. As to costs, Mr Robison submitted the matter was complex and an uplift was appropriate.

Mr Coskun’s submissions

83. Through Mr Stockley of counsel, Mr Coskun said the report provided by Dr Mayne on 20 August 2020 was in the nature of an independent medical examiner’s report in that it responded to specific questioning of Mr Coskun’s solicitors. Dr Mayne made reference to the homicide incident and concluded that the PTSD that he had sustained as a result had not remitted and had been aggravated by subsequent events. Mr Coskun’s psychological condition interfered with his employment with the respondent. This is a question regarding the chicken and the egg. Dr Mayne concluded Mr Coskun’s poor work performance resulted from his psychological condition, and this was not dealt with by the respondent. Dr Mayne’s opinion will prevail. Dr Mayne rebutted Dr Miller’s opinion. Dr Mayne considered Mr Coskun as unfit for work, opinion which is supported by his treating general practitioner as to date Mr Coskun has been certified totally unfit for work. Mr Stockley said it was not correct to say there was no up to date medical evidence to trump Dr Miller.
84. Mr Stockley said the only real issue in this matter was whether or not Mr Coskun had sustained psychological injury. He said the respondent had no medical evidence to support that defence under s 11A applied to any psychological injury sustained by Mr Coskun. Mr Coskun’s poor work performance due to his psychological injury is supported. The state of Mr Coskun’s mental health in 2016 is noted by Dr Ingram. There was considerable avoidance by Mr Coskun for fear of exposure to reminders of the homicide incident, which could lead to a worsening of his condition. Mr Coskun returned to work in September 2016 and in his statement Sergeant Wilkins canvassed the avoidance behaviour that Dr Ingram foreshadowed. While this behaviour of Mr Coskun is not characterised by Sergeant Wilkins as avoidance behaviour, it sits with what Dr Ingram cautioned and is corroborative of Dr Mayne. It is curious that a police officer would behave in this manner. Chief Inspector Parry had discussion with Mr Coskun in 2019 during which Mr Coskun cried and the meeting was paused so as to enable Mr Coskun to compose himself. Mr Coskun’s presentation on this occasion demonstrated symptoms entirely consistent with opinion provided by Dr Mayne.

Dr Mayne is Mr Coskun's treating psychiatrist and has had the opportunity to review Mr Coskun on a number of occasions. Dr Mayne formed the view the unresolved effects of Mr Coskun's earlier psychological injury represented themselves in the respondent's concerns about Mr Coskun's work performance, and if the Commission accepts that then there is no way defence raised under s 11A can succeed.

85. Mr Stockley reiterated that it came down to whether there was a psychological injury. Mr Coskun's treating psychiatrist said there was and he manages Mr Coskun's psychological condition. Mr Coskun's general practitioner certified injury in the nature of a psychological injury. Mr Coskun was treated by psychologists. There is a body of treaters who are of the view Mr Coskun has psychological injury and Dr Miller only had the opportunity to have a teleconference with Mr Coskun once. Mr Stockley was critical of Dr Miller's comment that Mr Coskun knew of PTSD symptoms. He said Mr Coskun had previously been diagnosed with PTSD and said such comment by Dr Miller was unduly sceptical and portrayed something less than an impartial view. Mr Stockley submitted the Commission is to be persuaded by the bulk of the evidence provided by the treaters.
86. Mr Stockley concluded this was a very straight forward matter with a very straight forward medical case, in that there was no evidence to support defence raised under s 11A of the 1987 Act.
87. As to costs, Mr Stockley agreed an uplift for complexity to be appropriate in that injury was in issue, incapacity was in issue and defence under s 11A was raised in the alternative.

Determination

Injury

88. Section 4 of the 1987 Act defines "injury" to mean personal injury arising out of or in the course of employment and includes a disease injury. Section 4 of the 1987 Act must be read together with s 9A of the 1987 Act, which essentially provides no compensation is payable under the 1987 Act in respect of injury if the employment was not a substantial contributing factor to injury.
89. The law in relation to "substantial contributing factor" was considered by the NSW Court of Appeal in *Badawi v Nexon Asia Pacific Pty Limited t/as Commander Australia Pty Limited*³⁰ and *Da Ros v Qantas Airways Ltd*³¹. It was said that for employment to be "a substantial contributing factor" to the injury for the purposes of s 9A the causal connection must be "real and of substance" and in determining whether a worker's employment was a substantial contributing factor the matters specified in s 9A(2) must be taken into account to the extent they are relevant.
90. Relevant to the issue of causation, in *Kooragang Cement Pty Ltd v Bates*³² Kirby J 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. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of phrase 'results from' is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation".

³⁰ [2009] NSWCA 324; DDCR 75

³¹ [2010] NSWCA 89

³² (1994) 35 NSWL 452; 10 NSWCCR 796at [463] (*Kooragang*)

91. Relevant to the issue of causation of psychological injury, particularly when considering the issue of establishing psychological injury in circumstances of a worker's perception of real events occurring at work, in *Attorney General's Department v K*³³ former Deputy President Roche usefully summarised the principles to be applied at [52]:

- “(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’ (Spiegelman CJ in *State Transit Authority of NSW v Chemler* [2007] NSWCA 249 (*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*);
- (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 all in *Leigh Sheridan v Q-Comp* [2009] QIC 12);
- (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 v Comcare Australia* [2002] FAC at 1464 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.”

And said at [54]:

“The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an ‘offensive or hostile working environment’, and a psychological injury has resulted, it is open to find that causation is established. A worker's reaction to events will always be subjective and will depend upon his or her personality and circumstances. It is not necessary to establish that the worker's response was ‘rational, reasonable and proportional...”

92. As noted, the respondent has placed injury in issue and Mr Coskun has the onus of proving he has sustained injury, with a deemed date of injury of 8 February 2020. This is a question of fact in his matter and consideration of the lay evidence and medical evidence is required. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*³⁴ McDougall J stated at [44]:

“A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA; (1938) 60 CLR 336. His honour's statement was approved by the majority (Dixon, Evatt and Mc Tierman JJ) in *Helton v Allen* [1940] HCA; (1940) 63 CLR 691 at 712”.

93. Mr Coskun essentially argued the psychological injury he sustained in the nature of PTSD as a result of the homicide incident had not completely remitted and was exacerbated by further traumatic incidents occurring during the course of his employment with the respondent, including those of 30 January 2018, 7 August 2018, 28 October 2019 (being an incident

³³ [2010] NSWCCPD 76

³⁴ [2008] NSWCA 246

occurring while he was on the Performance Plan and a result of which he submitted an injury claim form) and 8 February 2020. The respondent essentially argued Mr Coskun does not suffer psychological injury but mere emotional upset in the context of his LSC role having been revoked.

94. It is not disputed Mr Coskun attended the homicide incident, nor that he was traumatised by this incident and sought psychological help, with diagnosis of PTSD and certification he was totally unfit for work. Dr Maheshwari cautioned in late May 2016 that Mr Coskun's absence from work at that time appeared to be part of an avoidance strategy for fear of exposure to reminders of the homicide incident and accepted that given the nature of his work "risk of future exposure is always going to be there". Dr Ingram independently assessed Mr Coskun in late July 2018 and accepted at that time Mr Coskun continued to experience avoidance. He cautioned "a return to work may well provide a number of triggers, which could lead to exacerbation of his symptoms and a worsening of his functioning". The clinical records of Ms Nazenin demonstrated that when considering his return to his operational duties with the respondent, Mr Coskun talked of triggers and concern for the incidents with he may be confronted. Mr Coskun returned to work initially on restricted duties in or about September 2016 before returning to full duties in November 2016 but said he has never forgotten about the homicide incident. He said too he has attended a number of incidents during the course of his employment since that time that reminded him of the homicide incident, with "each occasion igniting my anxiety from the 2016 incident".
95. Sergeant Wilkins said that during February/March 2019 issues regarding Mr Coskun reported to team supervisors by other team members included complaint Mr Coskun was not taking on jobs, was allowing other members of the car crew to complete jobs and was sitting off jobs waiting for other car crews to arrive first before attending, and was not providing junior officers with the required level of teaching and guidance. In April 2019 Mr Coskun was removed from supervisory duties and when in a meeting with Chief Inspector Perry on 10 June 2019 Mr Coskun raised concern there was a perception from other team members "he was not pulling his weight", the Chief Inspector confirmed that Mr Coskun's performance required lifting on a consistent basis with both reactive and proactive events.
96. Dr Mayne, under whose psychiatric care Mr Coskun has come in more recent times, provided opinion it was clear from the history that Mr Coskun had been under considerable strain since the homicide incident, which "had interfered with his performance to some degree" so much so he was criticised about his work performance and ultimately put on a Performance Plan. Dr Mayne provided opinion Mr Coskun's initial diagnosis of PTSD consequent on the homicide incident had not fully remitted and had been exacerbated by further traumatic incidents that occurred during the course of his work, including those occurring on 30 January 2018, 7 August 2018 and 28 October 2019. He provided opinion Mr Coskun's employment with the respondent was a substantial contributing factor to his psychological injury. While Dr Miller has provided opinion Mr Coskun had not sustained "any compensable work-related psychiatric injury" but was experiencing emotional upset in the context of having been demoted, she accepted the mental state examination was compromised because the assessment was by telephone and she could not see Mr Coskun. She also acknowledged Mr Coskun had suffered work performance issues for a number of years and had taken extensive sick leave.
97. Following review of the evidence as a whole and consideration of counsels' submissions, I accept opinion provided by Dr Mayne that Mr Coskun's initial diagnosis of PTSD consequent on the homicide had not fully remitted and had been exacerbated by the further traumatic incidents that he attended during the course of his employment with the respondent, and that his psychological condition significantly interfered with his work performance with the respondent. I draw comfort too from both Dr Maheshwari and Dr Ingram who have provided caution about Mr Coskun's avoidance behaviour, the danger of triggers and an exacerbation of symptoms with a deterioration of function. I prefer the opinion of Dr Mayne to that of Dr Miller in that Dr Mayne is Mr Coskun's treating psychiatrist and has had the opportunity to review Mr Coskun on a number of occasions, as well as manage his psychological condition, whereas Dr Miller spoke with Mr Coskun once on the telephone.

98. I accept the psychological injury in the nature of PTSD that Mr Coskun sustained consequent on the homicide incident had not fully remitted at the time he returned to operational duties with the respondent. I am of the view this is evidenced by Mr Coskun engaging in avoidance behaviours that impacted his work performance, which in turn led to criticism of his work performance, loss of supervisory opportunity, placement of a performance plan and ultimate loss of his LSC position. I am also of the view that Mr Coskun's earlier psychological injury has been exacerbated by work-related traumatic incidents that occurred during the course of his employment with the respondent after the homicide incident, including those specific incidents occurring on 30 January 2018, 7 August 2018, 28 October 2019 and also 8 February 2020.
99. For the reasons discussed above I accept Mr Coskun has discharged the onus required of him and I accept Mr Coskun sustained psychological injury arising out of or in the course of his employment with the respondent as defined by section 4 of the 1987 Act, with a deemed date of injury of 8 February 2020, and I accept Mr Coskun's employment with the respondent was a substantial contributing factor to such injury, as prescribed by s 9A of the 1987 Act.

Defence raised under s 11A (1) of the 1987 Act

100. The respondent has raised defence under s 11A(1) of the 1987 Act in the alternative, and the respondent has the onus of establishing such defence. There are two aspects to this defence.
101. Firstly, the injury must be "wholly or predominantly caused" by the respondent's actions regarding one of the categories referred to in s 11A(1) and in Mr Coskun's case the respondent relies on demotion, performance appraisal and/or discipline. Principles were discussed by the Commission as regards the "wholly or predominately caused" aspect of s 11A(1) of the 1987 Act in *Hamad v Q Catering Limited*³⁵ with suggestion medical evidence is required to determine the causation issue. In *Smith v Roads and Traffic Authority of NSW*³⁶ Snell ADP accepted "wholly" and "predominately" are different concepts.
102. Secondly, if it is established Mr Coskun's psychological injury was "wholly or predominately" caused by the respondent's actions regarding demotion, performance and/or discipline, then the respondent is required to establish the respondent's actions were "reasonable". In *Northern New South Wales Local Health Network v Heggie*³⁷ Sackville AJA set out the following statements of principle regarding s 11A (1) at [61]:

"Ordinarily, the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time, taking into account relevant information that the person could have obtained had he or she made reasonable inquiries or exercised reasonable care. The language does not readily lend itself to an interpretation which would allow disciplinary action (or action of any other kind identified in s 11A(1)) to be characterised as not reasonable because of circumstances or events that could not have been known at the time the employer took the action with respect to discipline."

103. In circumstances where Dr Mayne has provided diagnosis of an exacerbation of PTSD resulting from exposure to traumatic incidents following his return to work after the homicide incident that included a number of incidents besides that of 8 February 2020 (being opinion which I accept for reasons discussed above) and Dr Miller has provided opinion Mr Coskun was merely experiencing emotional upset in the context of his demotion, I do not accept the psychological injury sustained by Mr Coskun was either "wholly" or "predominantly" caused by actions taken by or on behalf of the respondent with respect to demotion, performance appraisal and/or discipline.

³⁵ [2017] NSWCCPD 6

³⁶ [2008] NSWCCPD 130

³⁷ [2013] NSWCA 225; 12 DDCR 95

104. The respondent made quite lengthy submissions relevant to defence raised under s 11A(1) of the 1987 Act and if for the sake of argument, one was to accept Mr Coskun's psychological injury was wholly or predominately caused by action taken by or on behalf of the respondent with respect to demotion, performance appraisal and/or discipline, the respondent has the onus relevant to the reasonableness of its actions.
105. While it may be certain steps taken by the respondent relevant to Mr Coskun's demotion, performance appraisal and/or discipline may be regarded as "reasonable" (by way of example, the many informal chats held with him prior to him placed on Performance Plan, the opportunity for him to improve prior to demotion despite him being placed on Performance Plan, and the clarity of the Performance Plan as to the work performance deficiencies and the expectations), it is evident Mr Coskun suffered significant psychological injury after the homicide incident, with caution provided by both his treating psychiatrist at the time in a report dated 23 May 2016 (a copy of which was apparently sent to the respondent insurer) and an independent medical examiner retained by the respondent insurer in a report dated 28 July 2016 that Mr Coskun appeared to have adopted an avoidance strategy due to a fear of exposure to triggers. When Mr Coskun's avoidance strategy apparently manifested in the reported taking of excess sick leave and complaint he was "not pulling his weight", the respondent concluded Mr Coskun's poor work performance required addressing through demotion, performance appraisal and/or discipline, which in my view is not reasonable action when it is evident the respondent knew or ought to have known of Mr Coskun's continuing psychological fragility.
106. For the reasons discussed above I am not satisfied the respondent has discharged the onus of proof required and the respondent cannot rely on defence raised under s 11A(1) of the 1987 Act.

Capacity

107. As I accept Mr Coskun has sustained psychological injury arising out of or in the course of his employment with the respondent, with a deemed date of 8 February 2020, and I accept Mr Coskun's employment with the respondent was a substantial contributing factor to such injury as prescribed by s 9A of the 1987 Act, it follows he may have an entitlement to weekly benefits payable under the 1987 Act.
108. While in his statement Mr Coskun does not address his capacity for work, he talked of constant flashbacks and nightmares and said he remained under the care of Dr Mayne and Ms Nazenin. Dr Mayne provided opinion in his report dated 27 October 2020 that Mr Coskun was totally incapacitated for work with "any future return to operational police duties to be unlikely". Dr Ozme, under whose care Mr Coskun initially came, certified him totally incapacitated for work since 8 February 2020 and Dr Ghannoum, under whose care Mr Coskun subsequently came, has continued to certify him totally incapacitated for work. Although Dr Miller considered at the time of assessment on 2 July 2020 that Mr Coskun was fit to return to his operational duties with the respondent or to work on a full time basis with the employer, her opinion was grounded in opinion Mr Coskun suffered no psychological injury, being opinion with which I have not agreed, and naturally I prefer the opinions provided by Mr Coskun's treaters as regards his total capacity for work since 8 February 2020 ongoing.

Quantification of entitlement to weekly benefits

109. Mr Coskun's current weekly wage rate and probable earnings but for injury is agreed to be \$1,869.61.

110. I am satisfied that since 8 February 2020 Mr Coskun has been totally incapacitated for work, and accordingly Mr Coskun's entitlement to weekly benefits from 8 February 2020 is as follows:

- (a) \$1,869.61 from 8 February 2020 to 8 August 2020 under s 36 of the 1987 Act;
- (b) \$523.10 from 9 August 2020 to 30 September 2020 under s 37 of the 1987 Act; and
- (c) \$527.04 from 1 October 2020 ongoing under s 40 of the 1987 Act. Mr Coskun's entitlement to weekly benefits is subjected to adjustment.

Treatment

111. As I accept Mr Coskun has sustained psychological injury arising out of or in the course of his employment with the respondent, with a deemed date of injury of 8 February 2020, it follows he has an entitlement to compensation for the cost of medical or related treatment payable under section 60 for that injury.

Costs

112. As I accept Mr Coskun has sustained psychological injury arising out of or in the course of his employment with the respondent and I accept his employment with the respondent was a substantial contributing factor to injury, it follows that Mr Coskun has entitlement to his costs.

113. It was submitted this matter involved a degree of complexity, with which I agree. I am satisfied in circumstances where there was a contested hearing, with injury and incapacity in issue, and defence raised under section 11A of the 1987 Act in the alternative, an uplift for complexity is appropriate. I recommend an uplift of 20 per cent relevant to the parties' costs.

SUMMARY

114. Mr Coskun sustained a psychological injury arising out of or in the course of his employment with deemed date of injury of 8 February 2020. Mr Coskun's employment with the respondent was a substantial contributing factor to his psychological injury.

115. Mr Coskun's employment with the respondent was not wholly or predominantly caused by reasonable action taken by the respondent with respect to performance appraisal, discipline and/or demotion.

116. Mr Coskun's current weekly wage rate and probable earnings but for injury are agreed at \$1,869.61. Mr Coskun has had a total incapacity for work since 8 February 2020 due to his psychological injury. Mr Coskun has an entitlement to weekly benefits payable under the 1987 Act as follows:

- (a) \$1,869.61 from 8 February 2020 to 8 August 2020 under s 36 of the 1987 Act;
- (b) \$523.10 from 9 August 2020 to 30 September 2020 under s 37 of the 1987 Act; and
- (c) \$527.04 from 1 October 2020 ongoing under s 40 of the 1987 Act. Mr Coskun's entitlement weekly benefits payable under s 40 of the 1987 Act is to be subjected to adjustment.

117. Mr Coskun has an entitlement to medical or related treatment payable under s 60 of the 1987 Act resulting from the psychological injury he sustained with deemed date of injury of 8 February 2020.
118. Mr Coskun has an entitlement to his costs. I accept this matter involved a degree of complexity and recommend an uplift of 20 per cent relevant to the parties' costs.