

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3268/20
Applicant: Vince D'Agostino
Respondent: Harris Farm Markets Pty Limited
Date of Determination: 3 September 2020
Citation: [2020] NSWCC 299

The Commission determines:

1. The applicant sustained a psychological injury in the course of his employment with the respondent with a deemed date of injury of 31 May 2019.
2. The respondent has failed to establish a defence pursuant to section 11A of the *Workers Compensation Act 1987*.
3. The applicant has had no current work capacity since 13 January 2020.

The Commission orders:

1. The respondent is to pay the applicant the amount of \$1,961.48 per week from 13 January 2020 to date and continuing pursuant to section 37 (1)(a) of the *Workers Compensation Act 1987*.
2. The respondent is to pay the applicant's reasonable medical expenses for treatment for his psychological injury pursuant to section 60 of the *Workers Compensation Act 1987*.

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

John Isaksen
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 JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Vince D'Agostino, claims that he sustained a psychological injury in the course of his employment with the respondent, Harris Farms Markets Pty Limited.
2. The applicant claims that during the second half of 2018 and up until 31 May 2019, while employed as a store manager for the respondent, he sustained a psychological injury due to an excessive workload caused by a lack of staff and also by a lack of tolerance and support by the respondent for a lower back condition which the applicant suffered from.
3. The applicant ceased work on 31 May 2019 and claims that he has had no current work capacity since then.
4. The respondent, through its insurer icare workers insurance, initially made payments to the applicant but issued a section 78 notice dated 30 December 2019 denying liability on the grounds that the psychological injury sustained by the applicant was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to performance appraisal and discipline.
5. The applicant claims weekly payments of compensation and the payment of reasonable expenses for treatment for his psychological injury.

ISSUES FOR DETERMINATION

6. The parties agree that the following issue remains in dispute:
 - (a) whether any psychological injury sustained by the applicant was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to performance appraisal and discipline (section 11A of the *Workers Compensation Act* (the 1987 Act)).

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conference and hearing on 27 August 2020. 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.
8. Mr Phillip Perry appeared for the applicant, instructed by Mr Dous. Mr Doak appeared for the respondent, instructed by Mr Elder. Ms Issa from icare was also in attendance.
9. The hearing was conducted by telephone in accordance with the protocols set out by the Commission due to the coronavirus pandemic.
10. It was agreed that if the applicant was successful then the award for weekly payments of compensation would commence from 13 January 2020.
11. It was agreed that pre-injury average weekly earnings (PIAWE) is \$2,451.85, and that for the purposes of section 37 (1) of the 1987 Act, 80% of PIAWE is \$1,961.48.
12. The submissions of the parties at the arbitration were recorded and I do not propose to reiterate each of them in these reasons. I will, however, refer to the general thrust of those submissions in the course of this decision.

EVIDENCE

Documentary evidence

13. 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, and
 - (c) Application to Admit Late Documents filed by the applicant on 14 August 2020.

Oral evidence

14. There was no application to cross examine the applicant or adduce oral evidence.

FINDINGS AND REASONS

The applicant's case

The applicant's evidence

15. The applicant has provided a statement dated 31 January 2020.
16. The applicant states that he commenced working for the respondent as a shop assistant at its Pennant Hills store in 1988. He states that he was promoted to manager at the Pennant Hills store in 1998 and worked as a store manager at other stores of the respondent until October 2008. The applicant states that he worked for three years with Trims Fresh and then returned to work for the respondent as a store manager at various stores until May 2016.
17. The applicant states that he was the store manager at the Leichhardt store when he resigned his employment in May 2016 to work for Wes Fresh. He states that he recommenced work with the respondent in May 2017 as the store manager at the Leichhardt store.
18. The applicant states that when he recommenced work at the Leichhardt store, he found that store would be quite busy and understaffed, such that he was required to perform both managerial tasks and manual tasks on the floor. He states that he did not mind doing the manual work because he liked to get his "hands dirty" and that presentation on the floor of the store was his strong suit.
19. The applicant states that a meeting was held on 17 July 2018 regarding his performance. He states that in that meeting he explained the difficulties that he was having managing the Leichhardt store in regard to staffing issues and difficulties that he was having due to pain in his back. He states that following this meeting a decision was made by the respondent to transfer him to work as the store manager at the Boronia Park store.
20. The letter from the respondent to the applicant dated 19 July 2018 regarding the transfer includes the following:

"As discussed at our meeting, your performance as Store Manager at Harris Farm Markets Leichhardt has been unsatisfactory. Specifically, that during the past year you have failed to achieve KPI's relating to meeting sales, wages and margin budgets. The Leichhardt store is undergoing expansion and refurbishment, which will make it a more challenging store to run. Therefore, a decision has been made to move you to Boronia Park store which should prove less of a challenge.... You are a highly experienced manager and I have confidence that you can perform

when you set your mind to it. However, should your performance not improve we will need to review your position in Harris Farm Markets and consider whether you continue as a Store Manager. The outcome may include termination on the ground of underperformance or demotion to a role suiting your abilities. We obviously would prefer this did not happen and are here to support you.”

21. The applicant states that the transfer to the Boronia Park store occurred in August 2018 and that he was placed on a performance improvement plan. The applicant states: “Whilst I admit I wasn’t working to my usual speed due to my back problems, I do believe the real issue with the store was the lack of staff.”
22. The applicant states that while working at the Boronia Park store, the area manager, Peter Musumeci, would visit the store on a daily basis and that the applicant would complain about the trouble he was having. The applicant states that the store was so understaffed that he would have to send the boys who usually work on the floor to the registers and he would stay back on the floor to fill up and tidy stock. The applicant states in regard to the Boronia Park store:

“... I noticed this store too was grossly understaffed and I needed to take it upon myself to get a lot of the manual tasks on the floor completed. I felt this was nobody’s responsibility but my own as I was the manager and I couldn’t ignore the work that needed to be performed on the floor. If displays are not neatly kept and stopped not properly refilled, this negatively affects sales and our budgets. For me as a manager, these matters were important and should be prioritised to ensure the success of the store.”
23. The applicant does not provide any direct evidence of what occurred in two meetings held between himself and Mr Musumeci and a representative from the HR department on 10 May 2019 and 31 May 2019, nor the circumstances which caused him to cease work after the meeting on 31 May 2019. He states that he has been certified unfit for work since 31 May 2019 and that his mental health has significantly declined since he received notice of his workers compensation claim being declined.

The applicant’s medical evidence

24. The clinical notes from the applicant’s general practitioner, Dr Ah-Yeung, are in evidence.
25. The first entry in those clinical notes of any problems which the applicant was having with his lower back is on 1 August 2018 where there is a note of “lumbar strain 3 months ago.”
26. There are then some 24 entries between 13 August 2018 and 15 May 2019 for attendances for lower back pain. The words “stress” or “stressed” appear in eight of those entries, although those references are more frequent in the first few months of the applicant attending Dr Ah-Yeung.
27. Dr Ah-Yeung records on 28 September 2018 as part of an attendance for the applicant’s lower back condition: “stressed from management of work tried to change hours attending.”
28. There is an entry on 15 May 2019, being five days after the first meeting between the applicant and management, of: “stressed by management tactics or pressure.”
29. On 1 June 2019, the day after the meeting on 31 May 2019, Dr Ah-Yeung records that the reason for the visit is for “Stress” and there is a note: “suspended at work for ‘bad performance’.” The notes record the applicant as being stressed and very depressed, and there is a reference to counselling and the applicant to call Lifeline if necessary.

30. On 7 June 2019, Dr Ah-Yeung records the applicant having sleep impairments, reduced short term memory and palpitations.
31. Dr Rastogi, consultant psychiatrist, initially sees the applicant on 11 June 2019, which is within two weeks of him ceasing work. In her report back to Dr Ah-Yeung following that consultation, Dr Rastogi takes a history of the applicant sustaining a back injury in 2017 but did not seek help at that time. She records that when the applicant “was pulled by HR for underperformance”, he explained about his back pain and sought treatment for it.
32. Dr Rastogi records that the applicant went onto suitable light duties and reduced hours of work and gradually increased his work hours, but that James Ellis from the respondent told the applicant that if the applicant did not resume 40 hours then he would be placed outside of the respondent. She records that the applicant considered Mr Ellis to be very impersonal and dismissive of the applicant’s back injury.
33. Dr Rastogi also records that the applicant was left alone at his job and he felt extremely isolated and dismissed. She records that in the last few weeks the applicant “feels picked on and harassed by work”, and that the last straw was being pulled into the office and “ambushed” for not finishing tasks when he was not given proper directions. She records that the applicant was told his performance was poor with not meeting KPIs and he felt persecuted and blamed. She records that allegations were made against the applicant and he has been suspended since then. Dr Rastogi diagnoses an acute adjustment disorder with anxiety complicated by back pain.
34. Dr Rastogi has provided a further report dated 7 February 2020. By then the applicant had attended Dr Rastogi on six occasions. The diagnosis made by Dr Rastogi in that report is now Major Depressive disorder single episode with psychotic features. Dr Rastogi writes:

“His depression is associated with ongoing discrimination, ostracization and alienation by work and lack of tolerance by work due to his back injury. He has shown motivation and drive to work despite constant transfers and working with limited physical limitations but felt deceived, invalidated and punished for his injury. He is in acute crisis and not coping and remains at risk to himself.

The depression is directly related to work related stressors and has been exacerbated by unresolved grievances, lack of validation, financial strain and loss of his career. He holds a poor prognosis.”
35. Dr Rastogi opines that the applicant is unfit to work in any capacity and that in the foreseeable future the applicant’s ability to work is limited due to ongoing depression, impaired confidence and poor complex ability to do things.
36. The applicant also attended Ms Fariha Khan, psychologist, for treatment. Ms Khan has provided a report dated 3 September 2019, although the history she recites is exactly the same as that contained in the report of Dr Rastogi dated 11 June 2019.
37. However, the clinical notes from Ms Khan are also in evidence. Her first entry for treatment of the applicant on 19 June 2019 includes:

“The patient reports that he has no psychiatric history he injured his back in the beginning of year, was transferred to other store and had participated in rehabilitation program grad return to work, he had pressure to pick up pre injury hours and he has had stress due to his back pain, after that his manager started picking on him and accusing him doing something wrong which he has not committed, he felt depressed.”

38. The applicant attended Dr Hong, consultant psychiatrist, at the request of his solicitors, and Dr Hong has provided a report dated 24 February 2020.
39. Dr Hong records a history of the applicant managing an understaffed Leichhardt store. He records that the Boronia Park store was also understaffed but that the applicant was being pushed to increase his hours of work at the Boronia Park store while coping with his lower back condition. He records that management had threatened that the applicant's employment would be terminated if he could not work 40 hours per week.
40. Dr Hong records that the applicant "advised the main issue that led to his psychiatric disorder, would be the bullying, false allegation and the chronic staff shortage." He records that the applicant advised that the performance problem only occurred after his back injury.
41. The "false allegation" was one of two reasons for the meeting on 31 May 2019 but Dr Hong records that the applicant refutes the claim that he had spoken inappropriately to a work colleague on the phone.
42. Dr Hong diagnoses the applicant with major depressive disorder with psychotic features. Dr Hong was of the opinion when he examined the applicant on 24 February 2020, that the applicant had no capacity for work at that time.
43. Dr Hong concludes:

"Mr D'Agostino advised his symptoms first occurred as a result of stress at work from having inadequate staff. His psychological symptoms increased following a back injury, and further increased after a meeting, with numerous conduct allegations which he says are untrue and also allegation of his performance problem which he felt was inappropriate, due to no consideration for his physical injuries."

Dr Hong then writes:

"Assuming that Mr D'Agostino's accounts are reasonably accurate (and I note the general practitioner's records noted anxiety and depressive symptoms before the disciplinary action), then I consider the administrative action was not the predominant cause of his psychological injury.

To put it another way, the predominant cause is the alleged chronic staff shortage, follow by alleged bullying and harassment, which led to his psychological injury."

The respondent's case

The evidence of Peter Musumeci

44. There is the transcript of a record of interview between Geoff Farrell and Peter Musumeci dated 2 August 2019.
45. Mr Musumeci states that he is an area manager for the respondent. He states that he specifically sought out the applicant to offer him a job as a store manager back with the respondent.
46. Mr Musumeci states that following the applicant's return to work for the respondent, the applicant was not managing the Leichhardt store well because the store was not meeting key performance indicators.

47. Mr Musumeci states that the same performance issues occurred when the applicant was transferred to the Boronia Park store. He states that every time he walked into the Boronia Park store, the applicant would be working in the first aisle on fruit. He states that this was the applicant's strength and that the applicant is "a creative sort of store manager where he can do a good display of fruit" but that the applicant should have been managing the store. Mr Musumeci states in regard to the applicant's role as a store manager: "You need to be responsible from front door to back door, receiving goods to selling goods, developing staff and hitting those KPIs."
48. Mr Musumeci states that the applicant had ample training on computer work and that the applicant would confirm to Mr Musumeci that he understood how to work on the computer, but as soon as Mr Musumeci left then the applicant would refer that work to Ms Hassan, the operations co-ordinator at the Boronia Park store.
49. Mr Musumeci states that two to three times each week he would say to the applicant: "...why isn't this done, why hasn't this improved, why is your margin poor again, this is what it looks like, you need to really concentrate on getting this right."
50. Mr Musumeci acknowledges that he was aware that the applicant had a lower back condition but that the applicant was told not to do physical work and just manage the store.
51. Mr Musumeci states that the first meeting with the applicant in May 2019 was to formalise performance issues. He states that the meeting was based on how management could help the applicant but that the applicant took the meeting as an attack on him. Mr Musumeci states that the involvement of HR at that meeting was not to discipline the applicant but to help with his performance.
52. Mr Musumeci states that the second meeting with the applicant in May 2019 was in regard to the inappropriate language the applicant used in a telephone conversation with an employee, Alvin Palon, in regard to another employee, Nasim Hassan, and that there was also a "whole performance discussion as well."
53. Mr Musumeci states that the applicant denied the use of inappropriate language but that Mr Musumeci did not believe the applicant. Mr Musumeci states that at the meeting the applicant was also questioned about him leaving perishable stock in the cool room that should have been out on display and failing to leave any directions with other staff when the applicant was not going to be at work the following day.
54. Mr Musumeci states that at this second meeting the applicant was advised that he would be stood down while the comments made about Ms Hassan were investigated and the applicant responded by saying that he would sue the respondent and "take us for everything we've got."
55. Mr Musumeci states:

"I like Vince. I think Vince has potential to be a good operator. I'm patient enough and the company is patient enough to try with guys like Vince to take them forward and improve performance because we have many programs, PIPs, performance improvement plans and things that we can do or put him in with the manager of a bigger business to understand how other managers operate one-on-one.... There were many options we had to improve his performance, to make him realise that he needed to improve. But we never got that opportunity with Vince."

The evidence of Nichol Trueman

56. Nichol Trueman has provided a statement dated 1 August 2019.
57. Ms Trueman states that she has held the position of HR Manager with the respondent since 2013.
58. Ms Trueman states that the applicant experienced work performance issues for an extended period of time when he returned to work as a store manager at the Leichhardt store. She states:
- “When we spoke to the claimant about his work performance issues on 19 July 2018, the claimant made allegations that he had a back injury as a result of the nature and conditions of his employment with the insured.”
59. Ms Trueman states that on 1 September 2018, the applicant secured a Certificate of Capacity which stated that the applicant was for three days of work per week for 5 hours per day. She states that an external injury support provider, James Ellis, was at that point managing the applicant’s return to work.
60. Ms Trueman states that she and Mr Musumeci met with the applicant on 5 October 2018 and the applicant was told to avoid physical work inside the store due to his back injury. She states that this was confirmed in an email to the applicant, which included:
- “Based on the advice we have received to date, as discussed with Peter, we would like you to focus on non-physical work. I appreciate you are finding this frustrating but you must follow your specialists advice and not undertake physical work that will aggravate the injury. You can add value to the business by drawing on your skills and experience to manage, coach and train the team.”
61. Ms Trueman in her statement refers to the meeting on 10 May 2015, although it is apparent that she was not present at that meeting.
62. Ms Trueman did attend the meeting on 31 May 2019. She states that she spoke to Mr Palon and Ms Hassan, and then to the applicant. She states that the applicant advised that he did not wish to have a support person. Ms Trueman states that the most significant issue discussed with the applicant was the phone call, but that performance issues were also discussed.
63. Ms Trueman states that the applicant advised that he would never speak about the staff in the manner that it was alleged. She states that it was highlighted to the applicant that mechanisms had been put in place to permit the applicant to just manage the store with his injury but the pattern of work performance issues with him was not improving.
64. Ms Trueman states that given the concerns about the significance of the allegation made by Mr Palon, the applicant was informed that he was to be stood down with full pay while an investigation was undertaken. She states that the applicant said he felt he was being “punished and punished” and that he was going on stress leave and going to see a lawyer.
65. A letter was then sent by Ms Trueman to the applicant which included the following:
- “Please note that your suspension does not mean that we have already decided that you have done or not done an action or behaviour that is misconduct or serious misconduct. We will not keep you suspended for longer than is necessary for us to carry out the investigation and decide on action to be taken, if appropriate. We can lift the suspension at any time.”

66. Ms Trueman states that the respondent had sufficient information by 8 July 2019 to determine that the applicant behaved inappropriately when speaking with Mr Palon and Ms Hassan. She states that she wrote to the applicant on that date to advise of the outcome of the investigation and that the respondent was now considering disciplinary action, up to and including termination of employment, “due to continued failure to perform your duties to the standard required of a Store Manager at HFM.”

The evidence of Alvin Palon

67. Alvin Palon has provided a statement dated 30 July 2019.
68. Mr Palon states that he is employed with the respondent at its Boronia Park store as a Store 2IC.
69. Mr Palon states that when he came back to work at the Boronia Park store in September 2018, the applicant was on restricted hours of about four hours per day for three days per week, but that by Christmas the applicant was working 45 hours per week.
70. Mr Palon states that he was very confused by the applicant’s behaviour because the applicant was the store manager but he would at times spend his entire day packing fruit. He states that the applicant “would spend abnormal amounts of time perfectly aligning items on display.” Mr Palon states that he would ask the applicant about work that needed to be performed elsewhere in the store and the applicant would provide no solution and advise Mr Palon to ‘deal with it.’ He states that the fruit display work which the applicant did do was very light. Mr Palon states that he can only recall one occasion when the applicant worked back past 4.00 pm.
71. Mr Palon states that one day he rang the applicant to see if the applicant had any solutions to some safety issues and changing data strips. He states that the applicant was off work that day but that he was going to be off work the next day and he wanted to get started on these issues. Mr Palon states that when he spoke to the applicant about the data strips, the applicant replied: “Tell Nasim it is her fucking job. Tell her to fix the fucking problem. She decided to have Thursday off, tell her to come and fix the fucking problem.”
72. Mr Palon states that he telephoned Ms Hassan after the call he had with the applicant and told her what the applicant had said. He states that Ms Hassan was very upset and understands that she contacted Mr Musumeci.

The evidence of Nasim Hassan

73. Nasim Hassan has provided a statement dated 30 July 2019.
74. Ms Hassan states that she has been employed as an Operations Consultant with the respondent at its Boronia Park store since 2012.
75. Ms Hassan states that the applicant came to the Boronia Park to work as the store manager in October 2018. She states that the applicant started working restricted hours because he was on workers compensation, but by January 2019 he was working 45 hours per week.
76. Ms Hassan states the applicant shied away from performing many of his management duties. She states that the applicant would busy himself in the berry section and first aisle of fruit and vegetables, and stack items onto the displays. She states that the weights the applicant was lifting were very light. She states that the applicant would often spend the entire day performing such work, wanting to make the items perfectly aligned on display. She states that she found the applicant’s behaviour strange and inconsistent.

77. Ms Hassan states that Mr Musumeci would come to the store almost every day. She states that she would consistently hear Mr Musumeci tell the applicant not to perform the work that he was doing and to focus on management tasks.
78. Ms Hassan states that the applicant “had enormous problems as a manager.” She states that running fruit and vegetables was the applicant’s strong suit, but he had issues with tasks such as rostering, budgeting, stock control, managing leave or routine employee issues. She states that because of this she was often performing those duties for the applicant. Ms Hassan states that the applicant never checked things like budgets and rosters and that he told Ms Hassan that he trusted her.
79. Ms Hassan states that the applicant was always out the door at 4.00 pm.
80. Ms Hassan states that Mr Palon rang her one day to tell her that he had spoken to the applicant regarding data stripping and the applicant told Mr Palon that it was Ms Hassan’s “fucking” job and that Mr Palon was to “fucking call her.” She states that she was so upset about this that she rang Mr Musumeci about this and said that she wanted to resign.

The records of meetings on 10 May 2019 and 31 May 2019

81. The records of the meetings conducted with the applicant on 10 May 2019 and 31 May 2019 are in evidence. Neither the applicant nor Mr Musumeci dispute the contents of those records.
82. In the record of the meeting on 10 May 2019, Mr Musumeci is stated to have said that the business is going well but there is a high term of wastage in the fridges. The applicant responds that there are issues with fridges because “we keep training people and we haven’t found the right person.” The applicant responds that four people have been tried in that job and all of them left because they are not capable.
83. The record of that meeting also includes a reference to the applicant hiring junior staff at appropriate times.
84. The record of that meeting includes a note that the applicant agrees not to try and complete everything at once and to look at rostering, training and hiring new people.
85. The record of the meeting on 31 May 2019 includes the applicant’s denial that he used inappropriate language about Ms Hassan in a telephone call he had with Mr Palon.
86. The record of the meeting also includes the applicant’s response that he was not performing due to his back problem. The response from Ms Trueman is that she is aware of the applicant’s back problem and “we are doing all we can to support him”, but the store is not performing as it should under the applicant’s management.

The respondent’s medical evidence

87. The applicant attended Dr Chow, consultant psychiatrist, at the request of the respondent on 29 October 2019, and Dr Chow has provided a report dated 8 November 2019.
88. Dr Chow records that the applicant’s problems started in 2018 when the applicant had a back injury. He records that the applicant was pulled up by the return to work co-ordinator and told that if he could not get back to 40 hours of work per week then the applicant would need to look for work outside of the respondent.
89. Dr Chow records that the applicant pushed himself to get back to 40 hours of work per week but was pulled up for poor performance. He records that the applicant stated his performance was not the best because of his back injury and he could not focus 100%.

90. Dr Chow records that the applicant said that as operation manager he just had to look over things to make sure they were okay. He records that there were further allegations that the applicant was talking bad about someone to someone else and all of a sudden he was in a meeting and suspended from work.
91. Dr Chow provides an extensive list of documents that he has reviewed, including statements from Ms Trueman, Ms Hassan and Mr Palon, and the investigation report which is attached to the Reply.
92. Dr Chow diagnoses the applicant having a major depressive disorder. Dr Chow regarded the applicant as being totally unfit to work in October 2019, and that the estimated recovery time for the applicant was uncertain.
93. Dr Chow is asked to describe all the events that caused the applicant's psychological injury and responds:

“He claimed to be bullied and targeted by work, especially after he had a back injury but according to work there had been some concerns about his performance before his back injury in 2018. He then continued having treatment for his back injury but they had ongoing performance concerns. Eventually there were allegations of bullying against him and due to poor performance, he was suspended in May 2019.”

94. Dr Chow is then asked whether the performance management process undertaken by the respondent was the whole or predominant cause of the applicant's diagnosable condition, and if only some of the work related incidents were the whole or predominant cause, then to confirm which are those incidents and to provide his rationale. Dr Chow responds:

“According to the workplace statement, there were ongoing concerns about his performance even prior to his back injury in 2018.

With the allegations against him and ongoing poor performance, he was suspended in May 2019.

I therefore consider the performance management process and the suspension from work appear to be the predominant causes of Mr D'Agostino's diagnosable condition.”

Determination

The section 11A defence

95. All of the doctors who have treated the applicant, or examined the applicant in respect of this claim, have concluded that the applicant's psychological injury has been sustained in the course of his employment. The respondent contends, however, that the applicant's psychological injury has been wholly or predominantly caused by reasonable action taken with respect to performance appraisal or discipline, and pursuant to section 11A (1) of the 1987 Act, no compensation is payable to the applicant.
96. Section 11A (1) of the 1987 Act provides:

“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 transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.”

97. There are differing opinions from the medical experts as to the cause or causes of the applicant's psychological injury.
98. The applicant's treating psychiatrist, Dr Rastogi, opines that the applicant's depression "is associated with ongoing discrimination, ostracization and alienation by work and lack of tolerance by work due to his back injury."
99. Dr Hong opines that the predominant cause of injury "is the alleged chronic staff shortage, follow by alleged bullying and harassment."
100. Dr Chow considers "the performance management process and the suspension from work appear to be the predominant causes of Mr D'Agostino's diagnosable condition."
101. I consider that particular regard should be had to the information and opinion provided by the applicant's treating psychiatrist, Dr Rastogi. Dr Rastogi has treated the applicant on at least six occasions and is well placed to provide an opinion on the cause or causes of the applicant's psychological injury.
102. However, I do have concerns regarding the opinions expressed by Dr Rastogi. Firstly, at the applicant's initial consultation, Dr Rastogi records details which relate almost entirely to the effect that the applicant's back injury and his attempts to return to work has had upon his psychological condition. Dr Rastogi does not record problems that the applicant was having with a lack of staff, other than recording that the applicant "was left alone at his job." Dr Rastogi records that the applicant was told that his performance was poor with not meeting KPIs, but does not record the circumstances whereby these allegations by the respondent were being made, other than to accept the applicant's explanation that it was due to his back pain. Dr Rastogi does not record any specific details of the reason for the applicant's suspension from his employment other than to write "there were allegations put against him by second in charge."
103. Although Dr Rastogi provides a more comprehensive report to the applicant's solicitors, dated 7 February 2019, the history of injury which she recites is the same as in her initial report to Dr Ah-Yeung. That report indicates that Dr Rastogi is provided with the report of Dr Chow dated 8 November 2019, but no reference is made by Dr Rastogi to statements from other employees of the respondent. Dr Rastogi states that she disagrees with Dr Chow's opinion as to the cause of injury because "being his treating psychiatrist he has been consistent with his history and unresolved grievances."
104. It is therefore understandable that Dr Rastogi opines that the cause of the applicant's psychological injury is due to difficulties at work because of his lower back injury, as that is the history provided to her by the applicant. However, it is an opinion that is made without an understanding of other factors which have influenced, or potentially influenced, the applicant's psychological condition.
105. Secondly, the conclusion made by Dr Rastogi that the applicant's psychological condition "is associated with ongoing discrimination, ostracization and alienation by work and lack of tolerance by work due to his back injury", amounts to hyperbole which is not matched by the available evidence.
106. The applicant's own evidence does not describe that he was deliberately excluded, isolated, or estranged by management or other staff. The applicant does not dispute the evidence of Mr Musumeci and Ms Trueman that the applicant was told to avoid physical work due to his back injury. He does not challenge the evidence of Ms Trueman at the meeting on 31 May 2019 that "we are doing all we can to support" him.

107. In my view, the conclusion reached by Dr Rastogi of the applicant being subjected to ongoing discrimination, ostracization and alienation is made by her without a full understanding of the applicant's circumstances in his workplace.
108. Nonetheless, the available evidence does support a finding that the applicant experienced ongoing stress between August 2018 and 31 May 2019 due to concerns that he had about his lower back condition and being able to continue to work for the respondent, and that it is reasonable to conclude that this was a factor in the development of the applicant's psychological injury.
109. The clinical notes from Dr Ah-Yeung include multiple references to stress associated with the applicant's lower back injury. As I have already observed, most of those references are in the first few months of the applicant seeking treatment from Dr Ah-Yeung.
110. Mr Doak for the respondent submits that there are no references in those clinical notes of the applicant being picked on or harassed because he cannot perform his work, and that psychological symptoms only appear in the notes after the first meeting on 10 May 2019 when Dr Ah-Yeung records on 15 May 2019: "stressed by management tactics or pressure."
111. However, I agree with the response from Mr Perry for the applicant that it is not necessary for the clinical notes to spell out the reasons for the stress which is being recorded in those notes. Although there are less references to "stress" as the applicant's lower back condition is recorded as improving in the latter part of 2018, the notes still reveal a consistent pattern of concern which the applicant had regarding his lower back condition.
112. Deputy President Roche in *Attorney General's Department v K* [2010] NSWCCPD 76 (*Attorney General's Department v K*) reviewed a number of authorities which considered psychological injuries sustained arising out of or in the course of employment and said at [52]:

"The following conclusions can be drawn from the above authorities:

- (a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in *Chemler* at [40]);
- (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);
- (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
- (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Sheridan*);
- (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' Von Doussa J in *Wiegand* at [31]), and
- (f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered."

113. DP Roche then went on to state 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 the 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’.”

114. I accept from a review of the clinical notes of Dr Ah-Yeung that the applicant was experiencing stress when coping with his back injury, in increasing his hours of work, and then maintaining his work hours due to his lower back condition. The applicant was still seeing Dr Ah-Yeung for review and being prescribed medication in the first five months of 2019. I consider those entries in the clinical notes of “stress” and “stressed”, along with the applicant’s own evidence, support a finding that the applicant did perceive his workplace as being a hostile environment to the extent that he remained stressed and concerned about his ability to maintain his employment, even if I do not accept that the applicant was being harassed, ostracized or picked on because of his lower back injury.
115. I find it difficult to assess the impact of the threat recorded by Drs Rastogi, Hong and Chow that the applicant’s job was at risk unless he was able to return to a 40 hour week, when that does not appear in the applicant’s own statement or elsewhere in the evidence. However, at the very least it adds to the perception which the applicant had that he was under pressure to maintain his employment while he coped with his lower back condition.
116. I therefore consider that the stress associated with the applicant’s lower back condition was a factor in the psychological injury which the applicant developed.
117. Dr Hong has only seen the applicant on one occasion. However, he has had the benefit of reviewing the other medical reports that are in evidence, and statements from other witnesses. He has recorded the applicant’s own reasons for the onset of his psychological injury, being “the bullying, false allegation and the chronic staff shortage.” Having given consideration to that, Dr Hong’s own opinion is that the predominant cause of injury “is the alleged chronic staff shortage, follow by alleged bullying and harassment”.
118. There is evidence to support the contention that lack of staff at the Boronia Park store was a source of stress for the applicant. There is his own evidence that he found the Boronia Park store to be understaffed. The applicant states that he needed to take on display work because the store was understaffed but that he considered display was one of the respondent’s biggest priorities.
119. In my view, the decision made by the applicant to concentrate on working on displays is another example of the applicant’s perception of a difficult working environment. In response to Ms Hassan’s evidence that he spent too much time on displays, the applicant states:
- “I felt it was my responsibility as the store manager to ensure that there were no issues with the displays and this is why I took it upon myself to look after these matters when they needed to be done” and “had I neglected these displays, this would mean other KPIs would not have been met.”
120. The lack of staff is also referred to in the record of the meeting on 10 May 2019 where it is written that the applicant had difficulties getting the right person to work in the fridges, getting junior staff at appropriate times, and the applicant to look at rostering, training and hiring new people.

121. The text messages included in the ARD, although capturing only a short period of the applicant's employment, also confirm difficulties which the applicant was having with adequate staff. On 26 May 2019 Ms Hassan sends a text to the applicant regarding the difficulties she is having getting staff and the applicant responds: "Well the other days we just have to use the ones we got." On 28 May 2019 the applicant sends a text to Mr Palon: "Great sales with no staff."
122. Although the evidence from Mr Musumeci is in the form of a record of interview with several leading questions provided to him by the interviewer, I could not locate any evidence from Mr Musumeci on the issue of lack of staff.
123. I am unable to conclude from the evidence that the difficulties which the applicant had with staff was a predominant cause of the applicant's psychological injury, which is the opinion of Dr Hong, but the evidence certainly supports that particular problem encountered by the applicant as being another factor in the causes of that injury.
124. Dr Chow also has had the benefit of reviewing much of the material that is before the Commission. He describes the bullying and targeting of the applicant at work, as well as ongoing performance concerns, as being the cause of the applicant's psychological injury. When asked about the whole or predominant cause of that injury, Dr Chow opines that "the performance management process and the suspension from work appear to be the predominant causes."
125. The difficulty which I have with the opinion of Dr Chow is that Dr Chow does not explain why the performance management process and the applicant's suspension from work are the predominant causes of the applicant's psychological injury. This is in spite of him being specifically asked to "provide your rationale."
126. In *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42 (*Hevi Lift*) McColl JA (Mason P and Beazley JA agreeing) said at [84]: "It has been long been the case that a court cannot be expected to, and should not, act upon an expert opinion the basis for which is not explained by the witness expressing it." Dr Chow provides no explanation as to why he chooses the performance management process and the applicant's suspension from work as being the predominant causes of the applicant's psychological injury over other factors that also have affected the applicant.
127. It is certainly arguable from a review of the evidence that, although the applicant was experiencing some stress prior to the meeting on 31 May 2019, it was what occurred at that meeting which actually caused the applicant to sustain a psychological injury. The notes made by Dr Ah-Yeung the following day indicate a substantial shift in the applicant's psychological well-being. It is recorded that the applicant is "very depressed", an anti-depressant drug is prescribed, and it would seem Dr Ah-Yeung is concerned enough to advise the applicant about Lifeline. Within a few days, Dr Ah-Yeung has provided the applicant with a referral to a psychiatrist.
128. However, Dr Chow does not address the reasons for his conclusion that the predominant cause of the applicant's psychological injury is due to performance appraisal or discipline. In *Ponnan v George Weston Foods Ltd* [2007] NSWCCPD 92 (*Ponnan*), Handley ADP applied at [24] the dictionary meaning of "predominantly caused", being "mainly or principally caused." The onus rests on the respondent to prove this as part of the defence provided by section 11A (see *Department of Education & Training v Sinclair* [2004] NSWCCPD 90 at [23]).
129. In *Canterbury Bankstown Council v Gazi* [2019] NSWCCPD 14 (*Gazi*), President Phillips said at [146]:

“The first limb of s 11A(1) of the 1987 Act requires the employer to prove that the relevant psychological injury was ‘wholly or predominantly’ caused by the employer’s action with respect to, in this case, transfer. This requires consideration of the nature of the psychological injury and the extent that employment contributed to the injury. The causal test in s 11A(1) is whether the injury was ‘wholly or predominantly caused’ by the relevant action, in the present case with respect to transfer. In determining that question the phrase ‘predominantly caused’ means ‘mainly or principally caused’.”

130. I am not satisfied that Dr Chow has properly explained the extent that the applicant’s employment contributed to the applicant’s injury. I am not satisfied that Dr Chow has provided an explanation as to why the performance management process and the suspension from work were the whole or predominant cause of the applicant’s psychological injury, especially when there were other factors, and which were acknowledged by Dr Chow, that may have been a cause for this injury.

131. In *Hamad v Q Catering Limited* [2017] NSWCCPD 6 (*Hamad*), DP Snell said at [88]:

“The extent to which aspects of the appellant’s history contributed to causing the psychological injury was not, in the circumstances, something which could be decided in the absence of medical evidence. There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s 11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the appellant’s statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s 11A(1), were the whole or predominant cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with respect to discipline, could not be resolved on the basis of the Arbitrator’s common knowledge and experience.”

132. In my view, this dispute is similar to what DP Snell observed in *Hamad*, namely that there were a number of causative factors for the applicant’s psychological injury, which require the assistance of medical evidence. I do not accept that there was a single instance of major psychological trauma, with no competing factors. For the reasons I have given, the respondent has failed to meet the onus of establishing that either performance appraisal or discipline was the whole or predominant cause of that injury.

133. I should add that I do not consider that the applicant was subject to any actual performance appraisal that would allow the respondent to rely upon section 11A. Although I do consider that the applicant was the subject of discipline and that the discipline was reasonable.

134. Although the applicant states that he was on a performance improvement plan at the Boronia Park store, the available evidence does not in my view meet the criteria set for performance appraisal by Geraghty CCJ in *Irwin v Director General of School Education NSWCC* no.14068/97 (18 June 1998, unreported) (*Irwin*), and which has consistently been followed in the Commission. In *Irwin*, Geraghty CCJ said:

“Furthermore, performance appraisal is a process, an established process involving various steps. Perhaps it will involve the completion of questionnaires and forms. It requires discussion between various parties about performance, written appraisal, sometimes even self-appraisal, maybe even a score. It is a process in which parties are engaged and knowingly engaged.

Performance appraisal is not a vague, continuing, informal process which begins on the first day of employment although, in a sense, we can say that we are continually under scrutiny and being appraised in somewhat the same way as students in a classroom are being scrutinised on a day-to-day basis. But 'performance appraisal' is somewhat like an examination, not a continuing assessment. Performance appraisal is more like a limited discrete process, with a recognised procedure to which the parties move in order to establish an employee's efficiency and performance."

135. Mr Musumeci states that he would attend the Boronia Park store two to three times per week and say to the applicant: "why isn't this done, why hasn't this improved, why is your margin poor again, this is what it looks like, you need to really concentrate on getting this right." In my view that action on the part of Mr Musumeci does not amount to a discrete process with a recognised procedure in which the applicant was knowingly engaged. Nor did the two meetings in May 2019 set out a recognised procedure for the appraisal of the applicant's performance.
136. However, I do consider that both the suspension from work and the issues of performance that were discussed at the meetings in May 2019 amounted to reasonable action by way of discipline.
137. Although the applicant refutes that he made inappropriate remarks about Ms Hassan to Mr Palon, the respondent had to balance the interests of all employees involved and suspension with pay while an investigation was reasonable and is a standard industrial practice in the circumstances.
138. It was also reasonable for management to raise with the applicant the problems that had arisen at the Boronia Park store at the meetings on 10 May and 31 May 2019. The applicant was the store manager and was being paid a salary commensurate with the responsibility of a store manager, and answers were needed for particular problems which had arisen at that store and needed attention.
139. I agree with the submission made by Mr Doak that the applicant's suspension from work meets the narrow definition of discipline, being punishment or chastisement, which is referred to by Neilson CCJ in *Kushwaha v Queanbeyan City Council* [2002] NSWCC 25; 23 NSWCCR 339 (*Kushwaha*). The issues raised by management at the meetings in May 2019 meet the wider definition of discipline from that same decision of *Kushwaha* of "learning or instruction imparted to the learner."
140. However, as I have already outlined, the evidence discloses several causes of the applicant's psychological injury, being stress from the difficulties he was having in dealing with his lower back injury and coping with his employment due to that injury, problems with staff shortages, and the disciplinary action arising from the meetings on 10 May and 31 May 2019. I am not satisfied from a review of the lay and medical evidence that the respondent has met the onus required under section 11A to establish that reasonable action taken with respect to performance appraisal or discipline is the whole or predominant cause of the applicant's psychological injury.

The claim for weekly payments and medical expenses

141. The most recent evidence in regard to the applicant's work capacity goes back to February 2020. That is the opinion of Dr Hong that the applicant had no capacity for work at that time. Dr Hong did opine that the applicant might improve with further treatment but that the applicant's future work capacity was unclear.
142. Dr Chow opined in November 2019 that the applicant was totally unfit for work. When Dr Rastogi last saw the applicant in December 2019, she also considered the applicant to be unfit for work in any capacity.

143. Although Dr Rastogi initially diagnosed the applicant having an acute adjustment disorder with anxiety, all three doctors referred to in this decision have ultimately made a diagnosis of the applicant having a major depressive disorder.
144. It may be that the applicant has had some improvement in his psychological condition over the past six months whereby he may be capable of at least some menial part time work, but there is no medical evidence to confirm this. The medical evidence otherwise indicates that the applicant has had no current work capacity from the time his weekly payments ceased on 12 January 2020.
145. There will therefore be an award of weekly payments made to the applicant at the rate of \$1,961.48 from 13 January 2020 to date and continuing, pursuant to section 37 (1)(a) of the 1987 Act.
146. There will also an order that the respondent is to pay the applicant's reasonable medical expenses for psychological treatment as a result of the psychological injury that he has sustained in the course of his employment with the respondent.

