INTRODUCTION

This paper is divided into two parts and aims to provide the legal profession with practical guidance on the following:

- Preparation and presentation of appeals from decisions of Arbitrators to Presidential members of the Workers Compensation Commission of NSW under s 352 of the *Workplace Injury Management and Workers Compensation Act* 1998, and

- Preparation and presentation of claims for compensation for psychological injuries.

More specifically, the paper will address both procedural and substantive matters in appeals under s 352 of the 1998 Act. It will also consider the relevant principles regarding the bringing of a claim for a psychological injury and some defences available.

In addressing these topics, authoritative case law has been identified, together with practical examples, to illustrate the necessary steps in an appeal and/or a psychological injury claim before the Commission.

PART ONE

Preparation and Presentation of s 352 Appeals in the Workers Compensation Commission of NSW

INTRODUCTION

1.1 Appeals against decisions of the Commission constituted by an Arbitrator are governed by s 352 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act), Practice Directions No 1 and No 6, and Pt 16 r 16.2 of the *Workers Compensation Commission Rules* 2011 (the Rules).

1.2 Section 352 was substantially amended by the *Workers Compensation Legislation Amendment Act* 2010. It now states:

> "**352 Appeal against decision of Commission constituted by Arbitrator**
>
> (1) A party to a dispute in connection with a claim for compensation may appeal to the Commission constituted by a Presidential member against a decision in respect of the dispute by the Commission constituted by an Arbitrator.
>
> (2) An appeal is to be made by application to the Registrar. The appeal is not to proceed unless the Registrar is satisfied that the procedural requirements of this section and any applicable Rules and regulations as to the making of an appeal have been complied with. The Registrar is not required to be satisfied as to the substance of the appeal.
>
> (3) There is no appeal under this section unless the amount of compensation at issue on the appeal is both:
>
> (a) at least $5,000 (or such other amount as may be prescribed by the regulations), and
>
> (b) at least 20% of the amount awarded in the decision appealed against.
>
> (3A) There is no appeal under this section against an interlocutory decision except with the leave of the Commission. The Commission is not to grant leave unless of the opinion that determining the appeal is necessary or desirable for the proper and effective determination of the dispute.
>
> (4) An appeal can only be made within 28 days after the making of the decision appealed against.
>
> (5) An appeal under this section is limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error. The appeal is not a review or new hearing.
>
> (5A) An appeal under this section stays the operation of the decision appealed against pending the determination of the appeal. However, an appeal does not stay or otherwise affect the operation of a decision as to weekly

payments of compensation and weekly payments of compensation remain payable despite any appeal.

(6) Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the decision appealed against may not be given on an appeal to the Commission except with the leave of the Commission. The Commission is not to grant leave unless satisfied that the evidence concerned was not available to the party, and could not reasonably have been obtained by the party, before the proceedings concerned or that failure to grant leave would cause substantial injustice in the case.

(7) On appeal, the decision may be confirmed or may be revoked and a new decision made in its place. Alternatively, the matter may be remitted back to the Arbitrator concerned, or to another Arbitrator, for determination in accordance with any decision or directions of the Commission.

(7A) Section 345 of the *Legal Profession Act* 2004 applies to and in respect of the provision of legal services in connection with an appeal to the Commission under this section in the same way as it applies to and in respect of the provision of legal services in connection with a claim or defence of a claim for damages referred to in that section.

Note: Section 345 of the *Legal Profession Act* 2004 prohibits a law practice from providing legal services in connection with a claim or defence unless a legal practitioner associate responsible for the provision of those services believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success.

(8) In this section, 'decision' includes an award, interim award, order, determination, ruling and direction."

1.3 There are a number of points to note about the new s 352:

(a) an appeal from an Arbitrator to a Presidential member is no longer a "review" and is not a new hearing. It is an appeal that is limited to the determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error. It is the establishment of error and the correction of that error that now defines the process under s 352;

(b) save for interlocutory decisions, it is no longer necessary to seek leave to appeal. For decisions that are not interlocutory, once the monetary threshold in s 352(3) is satisfied, the appeal proceeds as of right;

(c) the Commission is not to grant leave to appeal an interlocutory decision unless of the opinion that determining such an appeal is necessary or desirable for the proper and effective determination of the dispute;

(d) fresh evidence or additional evidence or evidence in substitution for the evidence received in relation to the decision appealed against may not be given on an appeal except with leave. The Commission is not to grant leave unless satisfied that the evidence concerned was not available to the party, and could not reasonably have been obtained by the party, before the proceedings concerned or that failure to grant leave would cause substantial injustice in the case;

(e) the lodging of an appeal does not operate as a stay or otherwise affect the operation of a decision as to weekly payments of compensation and those payments remain payable despite the filing of an appeal. In respect of other orders, the appeal stays the operation of the decision appealed against pending the determination of the appeal, and

(f) on appeal, the decision appealed against may be revoked and a new decision made in its place, or, in the alternative, the matter may be remitted to the Arbitrator or another Arbitrator for determination in accordance with any decision or directions of the Commission.

1.4 Save for sub-s (5A) of s 352, which applies to all Arbitrators' decisions no matter when they were delivered, the above provisions apply to decisions made on and after 1 February 2011.

1.5 Part 16 r 16.2 of the Rules provides:

"**16.2 Appeal against Arbitrator's decision**

(1) A party to a dispute in connection with a claim for compensation may appeal under section 352 of the 1998 Act against a decision of an Arbitrator by application to the Registrar within 28 days after the making of the decision appealed against or within such extended time for making the appeal as may be ordered under subrule (12).

(2) For the purposes of subrule (1), a decision is made, in respect of a dispute, when the Commission issues a certificate as to the determination of the dispute as required by section 294(1) of the 1998 Act.

(3) If the Registrar determines that he or she is not satisfied that the requirements of section 352 of the 1998 Act, or any applicable rules and regulations, as to the making of the appeal have been complied with, the Registrar is to return the application to the party who lodged it, with a statement particularising the non-compliance.

(4) An application referred to in subrule (1) must have attached to it a copy of the certificate as to the determination of the dispute referred to in subrule (2), and must include, or have attached, full details of:

(a) the arguments in support of the appeal and, if necessary, arguments in support of leave to appeal an interlocutory decision, and

(b) for the purposes of section 352(3) of the 1998 Act, the amount of compensation alleged to be at issue on the appeal, and

(c) any new evidence in respect of which leave is to be sought, by the party lodging the application, in accordance with section 352(6) of the 1998 Act, and

(d) if the party lodging the application wishes to object to the appeal being decided solely on the basis of the written application and any written notice of opposition lodged, the reasons for the objection.

(e) An objective chronology of all key events leading up to the commencement of the proceedings. The chronology should not be a chronology only of those matters of assistance to the party preparing it.

(5) The party lodging an application referred to in subrule (1) must serve a sealed copy of the application, including any attachments, on:

(a) all other parties to the proceedings, and

(b) where any of those parties is an employer (but not a self-insurer), the employer's insurer,

during the period of 14 days commencing on the day on which the Registrar registers the application.

(6) The appellant must lodge a certificate of service within 7 days of the date of service, certifying service of the sealed application on the other parties.

(7) Where a party seeks to oppose an application, that party must, within 28 days of being served with the application, lodge and serve on the other parties notice of that opposition.

(8) A notice of opposition referred to in subrule (7) must include, or have attached, full details of:

(a) the arguments in support of opposing the appeal and, if necessary, arguments in opposition to the granting of leave to appeal an interlocutory decision, and

(b) for the purposes of section 352(3) of the 1998 Act, the amount of compensation alleged to be at issue in the appeal, and

(c) any new evidence in respect of which leave is to be sought, by the party lodging the notice of opposition, in accordance with section 352(6) of the 1998 Act, and

(d) if the party lodging the notice wishes to object to the appeal being decided solely on the basis of the written application and any notice of opposition lodged, the reasons for the objection.

(9) The party opposing the application may file an alternative or supplementary chronology of events to that filed by the appellant in accordance with rule 16.2(4)(e).

(10) The party opposing the application must lodge a certificate of service within 7 days of the date of service, certifying service of the sealed notice of opposition on the other parties.

(11) For the purposes of section 352(4) of the 1998 Act, an appeal is made when the application is registered by the Registrar.

(12) The Commission constituted by a Presidential member may, if a party satisfies the Presidential member, in exceptional circumstances, that to lose the right to seek leave to appeal would work demonstrable and substantial injustice, by order extend the time for making an appeal.

(13) A party who seeks an extension of time as referred to in subrule (12) must:

(a) as soon as practicable give notice to the other parties of the intention to seek the extension, and

(b) lodge and serve with the application to appeal an application for the extension of time, including full details of the arguments to be put in favour of granting the extension."

1.6 This paper will look at the following issues:

(a) the appeal process;

(b) preliminary issues – time, extension of time to appeal, monetary thresholds, on the papers, chronologies and interlocutory matters;

(c) the nature of an appeal under s 352;

(d) fresh evidence or additional evidence on appeal, and

(e) the approach to an appeal.

NATURE OF AN APPEAL UNDER S 352

Must establish error

1.7 Under the new s 352, appeals are limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error (s 352(5)). This is much narrower than the previous provision which provided for a review. In preparing for the arbitration, it is critical to remember that, as appeals are no longer reviews, matters should be prepared thoroughly and comprehensively. All relevant evidence should be tendered at the arbitration.

1.8 As error now defines the appeal process under s 352, the following principles stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506 (cited with approval by Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ in *Zuvela v Cosmarnan Concrete Pty Ltd* [1996] HCA 30; 140 ALR 227) are relevant (I have substituted "Arbitrator" for "trial judge" where appropriate):

(a) An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if "other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that his [or her] conclusion was wrong".

(b) Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here, the "fact of the [Arbitrator's] decision must be displaced". It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.

(c) It may be shown that an Arbitrator was wrong "by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to

> that chosen by the [Arbitrator] is so preponderant in the opinion of the appellate court that the [Arbitrator's] decision is wrong."

1.9 The decision of Allsop J (as his Honour then was) in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833 (Drummond and Mansfield JJ agreeing) is also instructive in the context of the need to establish error. His Honour observed (at [28]):

> "in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge."

1.10 After observing that a degree of tolerance for any such divergence in any particular case will often be a product of the perceived advantage enjoyed by the trial judge, Allsop J concluded (at [29]):

> "The appeal court must come to the view that the trial judge was wrong in order to interfere. Even if the question is one of impression or judgment, a sufficiently clear difference of opinion may necessitate that conclusion."

1.11 What constitutes an appealable error of fact, law or discretion will be determined on a case-by-case basis. However, the Commission will be guided by the principles stated in *Fox v Percy* [2003] HCA 22; 214 CLR 118 (*Fox v Percy*) at [22]–[31]. Mistakes can occur in the "comprehension, recollection and evaluation of evidence" (*Fox v Percy* at [24]). If, after making a proper allowance for the advantages of the Arbitrator in seeing and hearing the witnesses, the Presidential member concludes "that an error has been shown" (*Fox v Percy* at [27]), he or she is obliged to correct that error.

1.12 A failure by an Arbitrator to deal with an issue that was not argued will rarely establish an error (*Brambles Industries Ltd v Bell* [2010] NSWCA 162 at [22] and [30]; *Republic of Croatia v Sneddon* [2010] HCA 14 at [88]; *Fire & Rescue NSW v Hayman* [2012] NSWWCCPD 66 at [42]–[43]).

Credit findings

1.13 Credibility based findings may be overturned if "incontrovertible facts or uncontested" evidence (*Fox v Percy* at [28]) establish that they were wrong. In rare cases, although the facts fall short of being "incontrovertible", such findings may be overturned if they are "glaringly improbable" or "contrary to compelling inferences" (*Fox v Percy* at [29] citing *Brunskill v Sovereign Marine & General Insurance Co Ltd* [1985] HCA 61; 59 ALJR 842 at 844 and *Chambers v Jobling* (1986) 7 NSWLR 1 at 10).

Discretionary findings

1.14 Challenges to an Arbitrator's exercise of discretion will be dealt with in accordance with the principles in *House v The King* [1936] HCA 40; 55 CLR 499 at 504–5. Those principles were articulated by Heydon JA (as his Honour then was) (Sheller JA and Studdert AJA agreeing) in *Micallef v ICI Australia Operations Pty Ltd* [2001] NSWCA 274 (*Micallef*). To succeed with an appeal against an Arbitrator's exercise of discretion, the appellant must demonstrate that the Arbitrator:

> "(a) made an error of legal principle,

(b) made a material error of fact,

(c) took into account some irrelevant matter,

(d) failed to take into account, or gave insufficient weight to, some relevant matter, or

(e) arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred, even though the error in question did not explicitly appear on the face of the reasoning." (*Micallef* at [45])

1.15 In an appeal against a discretionary decision, a Presidential member will not overturn the decision because he or she "might have reached a different conclusion or because intuitive feelings suggest to them a different outcome in the particular case" (*R v Taufahema* [2007] HCA 11; 234 ALR 1).

Natural justice

1.16 In respect of an error involving a departure from the rules of natural justice or procedural fairness, the appellant needs to show that the departure deprived him or her of the possibility of a successful outcome. To negate that possibility, it is necessary for the Presidential member to find that a properly conducted arbitration could not possibly have produced a different result (*Stead v State Government Insurance Commission* [1986] HCA 54; 161 CLR 141 at 147).

The conduct of the appeal

1.17 Subject to a Presidential member granting one or both parties leave to tender fresh evidence or additional evidence on appeal (discussed below from [1.56]), the appeal will be conducted on the transcript and the evidence presented at the arbitration. Whether an oral hearing will be held is discussed below at 1.55.

New points on appeal

1.18 Parties will usually be bound by the way their cases were presented at the arbitration (*Metwally v University of Wollongong (No 2)* [1985] HCA 28; 59 ALJR 481; *Suttor v Gundowda* (1950) 81 CLR 418 at 438; *Harmer v Hare* [2011] NSWCA 229 from [150]). The High Court has described the circumstances in which a party will be allowed to raise a new point on appeal as "very exceptional" (*Liftronic Pty Ltd v Unver* (2001) 179 ALR 321 at 331). There are a number of cases which establish that exceptional circumstances will not exist where the point, if taken below, might have resulted in additional or different evidence being led (*Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at 7; *Water Board v Moustakas* [1988] HCA 12; 180 CLR 491 at 498). A new point will only be permitted if two requirements are met. First, the interests of justice must require determination of the new point and, second, there is no prejudice to the party against whom the new point is taken.

Summary

1.19 Given the discretionary power to allow fresh evidence or additional evidence on appeal, and the power to not only confirm or revoke a decision but to make a new decision in place of the Arbitrator's decision, an appeal under s 352 is properly characterised as a rehearing where the Presidential member's powers are exercisable "only where the appellant can demonstrate that, having regard to all the

evidence now before the [Presidential member], the order that is the subject of the appeal is the result of some legal, factual or discretionary error" (*Allesch v Maunz* [2000] HCA 40; 203 CLR 172 per Gaudron ACJ, McHugh, Gummow and Hayne JJ at [23]; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194 at [14]).

1.20 The role of a Presidential member is to determine if the decision appealed against is affected by error and, if so, to correct that error. The error must be one that has affected the outcome (*Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409 at 419 cited in *Trazivuk v Motor Accidents Authority (NSW)* [2010] NSWCA 287 at [110]).

APPROACH TO APPEALS GENERALLY

1.21 The basic approach by an advocate to an appeal manifests itself in three broad issues, summarised by D F Jackson QC in *Appellate Advocacy* (1992) 8 ABR 245 as follows:

> "(a) what aspect of the judgment or decision below is being attacked?
>
> (b) why is it said to be wrong?
>
> (c) what is the consequence if it is wrong?"

What aspect of the decision below is being attacked?

1.22 The notice of appeal must state:

(a) whether the appeal is from the whole or part only, and, if so, which part of the Arbitrator's decision;

(b) briefly, but specifically, the grounds relied on in support of the appeal. It is not acceptable merely to allege that the Arbitrator erred in law, fact or discretion, or that the decision is against the evidence or the weight of the evidence. The grounds of appeal must identify the respects in which an error of law, fact or discretion is alleged to have occurred as well as any material findings it is said the Arbitrator should or should not have made, and any material facts it is said the Arbitrator should or should not have found (*Van Wessem v Entertainment Outlet Pty Ltd* [2011] NSWCA 214 at [14]);

(c) the argument/s in support of each ground of appeal with appropriate references to the evidence and authorities;

(d) the decision or order/s the appellant seeks, and

(e) the costs order sought in respect of the appeal and in respect of the arbitration.

1.23 In identifying what aspect of the decision is being attacked, Sackville J noted in an article in the *Australian Bar Review* in 1997:

> "…the issues on appeal are not the same as at trial. The question on a substantive appeal ultimately is whether some identifiable error has occurred which warrants the decision being set aside and different orders being made…an important part of the advocate's task, particularly the appellant's counsel, is to

identify early and precisely those rulings that are challenged and the basis for each challenge." (Sackville J *Appellate Advocacy* (1996-97) 15 ABR 99 at 100)

1.24 The appeal should not simply be "a catalogue of every conceivable error that may have been committed" by the Arbitrator (Sackville J at 102). Such an approach is unhelpful and shows a lack of thought as to the real issues.

1.25 Be selective in the grounds of appeal you pursue. There is nothing to be gained from pursuing grounds that are clearly untenable because they are contrary to established authority or because they are against the weight of the evidence.

Why is the decision said to be wrong?

1.26 Where the appellant is seeking to set aside a finding of fact, the relevant finding should be precisely identified and the ground of the challenge made clear before the evidence is explored in detail. Unless those matters are made clear, the Presidential member will be unlikely to follow the relevance of detailed references to the evidence.

What is the consequence if the decision is wrong?

1.27 Once the issues have been identified and submissions made as to why the Arbitrator was in error, it is then critical to explain what is said to flow from the alleged error. The error must be one that, but for it, the result would have been different. In *DP World Sydney Ltd (formerly known as Container Terminals Australia Pty Ltd) v Kelly* [2011] NSWWCCPD 43 (*Kelly*), it was alleged that the Arbitrator had erred in failing to draw a *Jones v Dunkel* inference because of the worker's failure to tender a report from a particular doctor. Even if that argument had been accepted, it made no difference to the result because the worker had proved his case on the basis of other evidence and the failure to tender evidence from the doctor concerned was irrelevant.

Submissions

1.28 Submissions must:

(a) be paginated and have sequentially numbered paragraphs;

(b) set out a brief but accurate background statement outlining the nature of the claim and the proceedings before the Arbitrator;

(c) be logical and concise;

(d) deal with every issue raised, and

(e) refer to the transcript and evidence and identify the page and line number, as relevant. If the appeal is filed before the transcript is available, the appellant may lodge further submissions within 28 days of the date of the letter from the Registrar enclosing a copy of the transcript.

Authorities

1.29 When referring to authorities, the correct name and citation must be provided, together with the relevant page or paragraph reference.

1.30 It is not necessary to attach copies of reported decisions, the Commission's own decisions, or of decisions that are available on AustLII.

Practice Direction No 6

1.31 The Commission's Practice Direction has been prepared to provide the profession with detailed guidance on how to proceed with appeals under s 352. I urge all practitioners to be familiar with it. Failure to comply with it will result in directions being issued, which will result in further costs being incurred (which may not be recovered) and substantial delays in the resolution of appeal.

THE APPEAL PROCESS

1.32 An appeal is made by application under Form 9 to the Registrar within 28 days after the making of the decision appealed against or within such extended time for making the appeal as may be ordered under the Rules by a Presidential member. For the purposes of the Rules, a decision is made, in respect of a dispute, when the Commission issues a certificate as to the determination of the dispute as required by s 294(1) of the 1998 Act.

1.33 For the purposes of s 352(4), which provides that an appeal must be made within 28 days after the making of the decision appealed against, an appeal is made when the application to appeal is registered by the Registrar (Pt 16 r 16.2(11)). A document is registered when it has been lodged and accepted by the Registrar (Pt 1 r 1.4(2)).

1.34 An appeal, or notice of opposition, can be lodged with the Commission by hand, facsimile, email, DX or post (Pt 8 r 8.1(4)). An appeal is lodged with the Commission provided it is received by the Commission registry via any of these methods by 4:30 pm New South Wales standard time or New South Wales summer time on any day. If the document is received after 4:30 pm on any day, or is received on a Saturday, Sunday or public holiday, it is received on the next day that is not a Saturday, Sunday or public holiday (Pt 8 r 8.1(5)).

1.35 An appeal is not to proceed unless the Registrar is satisfied that the procedural requirements of s 352 and any applicable rules as to the making of an appeal have been complied with. The Registrar is not required to be satisfied as to the substance of the appeal (s 352(2)).

1.36 Once an appeal is lodged, the Commission sets a timetable for submissions. Once that timetable has expired, usually about eight weeks after an appeal is lodged, the appeal will be allocated to a Presidential member.

1.37 On appeal, a Presidential member may confirm the Arbitrator's decision, or revoke that decision and make a new decision in its place. In the alternative, the matter may be remitted to the same Arbitrator or a different Arbitrator for determination in accordance with any decision or directions by the Commission (s 352(7)).

PRELIMINARY ISSUES

Time

1.38 Time in which to appeal runs from the day after the date of the certificate of determination, not from the date of the arbitration or the date on which the certificate is received (*Dennis v NSW Fire Brigades* [2007] NSWWCCPD 165; s 36 of the *Interpretation Act* 1987).

1.39 Where an Arbitrator delivers an extempore decision, that decision is recorded and the recording made available to the parties on request. The Registrar issues a certificate

of determination and a document headed “Statement of Reasons – Extempore Orders”. This document complies with s 294(2) of the 1998 Act, which states that a brief statement of reasons is to be attached to the certificate of determination (*Thompson v Expamet Pty Ltd t/as T & G Sheetmetal Services* [2005] NSWWCCPD 14).

Extension of time to appeal

1.40 Time to appeal can be extended, but only in the limited circumstances set out in Pt 16 r 16.2(12) of the Rules. The Commission constituted by a Presidential member may, if a party satisfies the Presidential member, in exceptional circumstances, that to lose the right to seek leave to appeal would work demonstrable and substantial injustice, extend the time for making an appeal.

1.41 Extending time to appeal requires the Commission to exercise its discretion. In exercising that discretion, it will have regard to the following matters set out in *Gallo v Dawson* (1990) 93 ALR 479 (*Gallo*) at 480:

(a) the history of the proceedings;

(b) the conduct of the parties;

(c) the nature of the litigation;

(d) the consequences for the parties of the grant or refusal of the application for the extension of time;

(e) the prospects of the applicant succeeding in the appeal, and

(f) the fact that, upon expiry of the time for appealing, the respondent has a vested right to retain the judgment unless the application for extension of time is granted.

1.42 The Court of Appeal considered the meaning of Pt 16 r 16.2(11) of the 2006 Rules (which is in the same terms as Pt 16 r 16.2(12) of the current Rules) in *Bryce v Department of Corrective Services* [2009] NSWCA 188. In that case, the appeal was filed one day out of time. Notwithstanding that the explanation for the appeal being out of time was far from satisfactory, it was held that exceptional circumstances existed that justified the extension of time because:

(a) the discretion to extend the time to appeal had to be exercised in order to do justice between the parties;

(b) the appeal was filed only one day out of time;

(c) the respondent worker pointed to no prejudice he would face if time to appeal was extended by one day;

(d) the appeal raised issues that were strongly arguable and, in those circumstances, strict compliance with the time limit would work demonstrable and substantial injustice to the appellant, as it would lose the opportunity to have the matter determined according to its substantial merits, and

(e) the appellant’s solicitor acted with reasonable promptness, once instructions to appeal were given.

1.43 On appeal, Allsop P (Beazley and Giles JJA agreeing) said that the phrase "in exceptional circumstances" was to be dealt with as a matter within jurisdiction as opposed to a precondition to the operation of jurisdiction. His Honour added (at [10]):

> "Whether or not there are exceptional circumstances and whether in those circumstances it is shown to the satisfaction of the Deputy President that demonstrable or substantial injustice would occur if leave were not granted is a composite expression in the rule to be dealt with within jurisdiction, and all of the matters identified by the Deputy President in [23] can be seen as relevant to the consideration of that composite expression."

1.44 The appellant seeking an extension of time carries the onus of satisfying the terms of Pt 16 r 16.2(12) and must make detailed submissions addressing the matters in *Gallo* and in the rule. Those submissions must address why the appeal is out of time and why, in exceptional circumstances, to lose the right of appeal would work demonstrable and substantial injustice.

Monetary thresholds

1.45 There is no appeal under s 352 unless the amount of compensation "at issue" on appeal is both:

(a) at least $5,000, and

(b) at least 20 per cent of the amount awarded in the decision appealed against (s 352 (3)).

1.46 It is not relevant that the arrears of compensation awarded may be more than $5,000. The question is how much of the compensation awarded is in dispute. In *Commercial Seating Systems Pty Ltd v Banka* [2012] NSWWCCPD 70, the appellant submitted that the threshold was satisfied because the arrears of compensation exceeded $26,000. While that was correct, the issue on appeal was whether the award between 7 February 2012 and 14 April 2012 should have been $562.40 per week instead of $703 per week. Therefore, the compensation "at issue" was significantly less than $5,000 and there was no right of appeal.

1.47 The term "compensation" is defined in s 4 of the 1998 Act to mean "compensation under the *Workers Compensation Acts*, and includes any monetary benefit under those Acts." The amount of compensation at issue on appeal is determined by reference to the amount of compensation at issue in the proceedings before the Arbitrator. Where no monetary award has been made, the amount of compensation at issue is determined by looking at the compensation claimed in the Application to Resolve a Dispute.

1.48 A dispute under Ch 3 of the 1998 Act, which deals with the preparation and implementation of injury management plans, does not involve a dispute about compensation (*Sydney Opera House Trust v Sykes* [2006] NSWWCCPD 227).

1.49 There is no right to appeal against a costs order because such an order is not an order for the payment of compensation (*Abush v Allnet Security Pty Ltd* [2007] NSWWCCPD 2). However, if an appeal is otherwise validly before a Presidential member, a party may challenge the costs order made in the matter (*Connor v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2006] NSWWCCPD 124 at [67]; *Dasreef Pty Ltd v Hawchar* [2010] NSWCA 154 at [61]).

1.50 The Commission has held that medical expenses that have not yet been incurred are not "compensation" and do not satisfy the monetary threshold in s 352(3) (*Corporate Management Services (Australia) Pty Ltd v Country Energy* [2010] NSWWCCPD 5). However, since that decision, s 60 has been amended to give the Commission jurisdiction with respect to a dispute concerning any proposed medical treatment or service and the compensation that will be payable with respect to such proposed treatment or service (s 60(5) of the *Workers Compensation Act* 1987 (the 1987 Act)). In light of this amendment, it is arguable that an order relating to the payment or non-payment of future medical expenses is an order for compensation and, provided the amount involved is at least $5,000, now satisfies s 352(3).

Interlocutory matters

1.51 There is no appeal against an interlocutory decision except with leave of the Commission (s 352(3A)). Determining what is an interlocutory decision depends on the nature of the order made. The test is: does the judgment or order, as made, finally dispose of the rights of the parties (*Licul v Corney* (1976) 50 ALJR 439 at 443–444).

1.52 The Commission has held the following orders to be interlocutory decisions:

(a) an order by an Arbitrator striking out an Application to Resolve a Dispute (*Nott v The Western Stores Ltd* [2007] NSWWCCPD 83);

(b) a finding of a deemed date of injury and that a claim had been duly made, with no final orders disposing of the issues in dispute (*Sydney Institute of Technology – NSW TAFE Commission v Fleming* [2007] NSWWCCPD 97), and

(c) a referral to an Approved Medical Specialist for assessment of a general medical dispute (*Arquero v D J & T Denning Pty Ltd t/as Capital Coast Steel* [2007] NSWWCCPD 126).

1.53 The Commission is not to grant leave to appeal an interlocutory decision unless of the opinion that determining the appeal is necessary or desirable for the proper and effective determination of the dispute (s 352(3A)). This requires a consideration of the nature of the dispute and the orders sought on appeal (*Collingridge v IAMA Agribusiness Pty Ltd* [2011] NSWWCCPD 31 at [17]). If a successful appeal will determine all issues between the parties and eliminate the need for an examination by an Approved Medical Specialist, it will be necessary for the proper and effective determination of the dispute that the Commission grant leave to appeal (*Kelly*) at [13]).

Chronologies

1.54 Under Pt 16 r 16.2(4)(e) of the Rules, the appellant must file with the appeal an objective chronology of all key events leading up to the commencement of the proceedings. It should not be a chronology of only those matters of assistance to the party preparing it. Practice Direction No 6 includes a precedent chronology that practitioners are expected to follow. An appeal will not be allocated to a Presidential member until a detailed chronology is prepared in accordance with the Practice Direction.

On the papers

1.55 A Presidential member may, if satisfied that sufficient information has been supplied, determine an appeal on the papers without the need for a conference or formal hearing (s 354(6)). The power to conduct an appeal on the papers has not been curtailed or restricted by the Court of Appeal's decision in *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11. *Hancock* turned on its own unique facts and has been distinguished in *McCarthy v Patrick Stevedores No 1 Pty Ltd* [2011] NSWCA 311 and *Ayoub v AMP Bank Ltd* [2011] NSWCA 263. Unless a Presidential member adopts an approach that was not reasonably foreseeable on the material available, the failure to give an oral hearing on appeal will not involve a failure to afford procedural fairness.

FRESH EVIDENCE OR ADDITIONAL EVIDENCE ON APPEAL

1.56 The introduction of fresh evidence on appeal is governed by s 352(6) and is only allowed with leave. The Commission is not to grant leave unless:

(a) satisfied that the evidence concerned was not available to the party, and could not reasonably have been obtained by the party, before the proceedings commenced, or

(b) the failure to grant leave would cause a substantial injustice in the case.

1.57 The power to admit further evidence is a remedial power conferred "to facilitate the avoidance of errors which cannot be otherwise remedied by the application of the conventional appellate procedures" (per McColl JA, Mason P and Giles JA agreeing, in *Siddik v WorkCover Authority (NSW)* [2008] NSWCA 116 at [66], quoting *CDJ v VAJ (No 1)* [1998] HCA 67; 197 CLR 172 at [109]).

1.58 The procedure to be followed when seeking to rely on fresh evidence on appeal is set out in Practice Direction No 6. If fresh evidence is sought to be relied upon on appeal, the party seeking to rely on that evidence must include in the Appeal Application or Notice of Opposition:

- a schedule of the fresh evidence or additional evidence;
- a copy of the fresh evidence or additional evidence;
- a brief outline of the fresh evidence or additional evidence and a detailed explanation why it was not tendered in the proceedings before the Arbitrator, and
- submissions on why the fresh evidence should be admitted or rejected, as the case may be.

1.59 The submissions must address the matters identified in *Akins v National Australia Bank* (1994) 34 NSWLR 155 (*Akins*):

(a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the arbitration;

(b) the evidence must be such that there must be a high degree of probability that there would be a different result, and

(c) the evidence must be credible.

1.60 The submissions should also address whether, in the circumstances of the case, it is just to admit the fresh evidence in any event (*Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346; 53 NSWLR 116 per Heydon JA at [15]).

1.61 If the fresh evidence sought to be tendered is evidence that was available to the party, or could reasonably have been obtained by the party, before the proceedings concerned, then, in addition to the matters identified in *Akins*, it will be necessary to establish that the failure to grant leave to admit the evidence will cause a substantial injustice in the case.

1.62 The Commission has held in several cases that arbitrations are not a trial run where parties can await the outcome and then attempt to tender on appeal evidence that could and should have been tendered at the arbitration (*Plateau Tree Services Pty Ltd v Shannon* [2011] NSWWCCPD 75; *Workers Compensation Nominal Insurer v Howard* [2011] NSWWCCPD 37; *Bricknell v TAC Pacific Pty Ltd* [2011] NSWWCCPD 53; *Hua v Freedman Electronics Pty Ltd* [2011] NSWWCCPD 60; *Transfield Services (Aust) Pty Ltd v Wicks* [2011] NSWWCCPD 63). In the absence of consent, no applications to rely on fresh evidence have succeeded under the new appeal provisions.

CONCLUSION

1.63 Appellate advocacy is a highly specialised and demanding form of advocacy that requires a detailed knowledge of substantive law and the legal principles applicable to appeals. The issues on appeal are not the same as at the arbitration, though they will be constrained by those issues and the way the parties presented their cases at first instance. A s 352 appeal is not a rehearing of the arbitration in the hope that a Presidential member will form a different view. The Arbitrator's decision must first be displaced because of some error before the matter will be re-determined.

1.64 In terms of preparation of appeals in general, compliance with Practice Direction No 6 is critical if the appeal is to proceed smoothly. The notice of appeal should properly identify the grounds of appeal and provide submissions that address each ground. The failure to comply with Practice Direction No 6 will delay the resolution of the appeal and result in additional costs being incurred, which may not be recovered.

PART TWO

PSYCHOLOGICAL INJURIES

INTRODUCTION

2.1 This part of the paper will focus on the nature of a psychological injury in the context of the *Workers Compensation Act* 1987 (the 1987 Act), the evidence required in cases where such an injury is alleged, and the defences available to those claims.

What is a psychological injury?

2.2 A psychological injury is an injury (as defined in s 4 of the 1987 Act) that is a psychological or psychiatric disorder and extends to include the physiological effect of such a disorder on the nervous system (s 11A(3)). Psychological disorders recognised in the *Diagnostic and Statistical Manual of Mental Disorders IV* (DSM-IV) will usually come within this definition.

2.3 It must be remembered, however, that DSM-IV is only a guideline for making diagnoses. It does not necessarily follow that, just because a particular condition does not meet the criteria in DSM-IV, the condition is not capable of being a psychological injury. A psychological condition that satisfies the criteria in the *International Classification of Diseases* (ICD-10), first published by the World Health Organisation in 1946 (the 10th edition being published in 1993), may also satisfy the requirement for a psychological injury.

2.4 The Court of Appeal considered DSM-IV in *State of New South Wales v Seedsman* [2000] NSWCA 119 at [114]–[122]; 217 ALR 583, where Spigelman CJ (Mason P and Meagher JA agreeing) discussed its limitations. The main points made by his Honour may be summarised as follows:

(a) DSM-IV is not a statutory formulation which a court must construe and decide whether the requirements are satisfied. It is a “diagnostic manual” for clinical use;

(b) the specific diagnostic criteria for each mental disorder are offered as guidelines for making diagnoses;

(c) DSM-IV should not be applied mechanically by untrained individuals. The exercise of clinical judgment may justify giving certain diagnoses to an individual even though the clinical presentation falls just short of meeting the full criteria for the diagnosis as long as the symptoms that are present are persistent and severe;

(d) there is no assumption that all individuals described as having the same mental disorder are alike in all important ways. The clinician using DSM-IV should therefore consider that individuals sharing a diagnosis are likely to be heterogeneous even in regard to the defining feature of the diagnosis and that boundary cases will be difficult to diagnose in anything but a probabilistic fashion;

(e) DSM-IV presents guidelines that should be subjected to clinical judgment, adherence to the diagnostic criteria is not mandatory but advisory, and

(f) the issue is not one of labelling, but of establishing a psychiatric injury of some character.

Personal injury or disease

2.5 For injuries received before 19 June 2012, the following definition applies:

> "In this Act:
>
> 'injury':
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes:
>
> (i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration,…"

2.6 The *Workers Compensation Legislation Amendment Act* 2012 has amended paragraph (b) of the above definition so that it now reads:

> "(b) Includes a
>
> 'disease injury', which means:
>
> (i) a disease that is contracted by a worker in the course of employment **but only if the employment was the main contributing factor to contracting the disease**, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease**, but only if the employment was the main contributing factor to the aggravation**, acceleration, exacerbation or deterioration of the disease,…" (emphasis added)

2.7 The new provision applies to injuries received on or after 19 June 2012 (Sch 6 Pt 19H cl 20). The definition of "personal injury" has not changed.

2.8 To qualify as a "personal injury" in a psychological injury case, there must be a physiological effect *(Yates v South Kirby Collieries* [1910] 2 KB 538). A mere emotional impulse, such an anger or disappointment, will not be enough (*Anderson Meat Packing Co Pty Ltd v Giacomantonio* (1973) 47 WCR 3 (*Giacomantonio*); (*Thazine-Aye v WorkCover Authority (NSW)* (1995) 12 NSWCCR 340; BC9505379; *Austin v Director General of Education* (1994) 10 NSWCCR 373 (*Austin*)).

2.9 In *Giacomantonio*, Jacobs P and Hope JA said at 7:

> "It is established that mental shock or trauma can be an injury within the meaning of section 6 of the Act provided that the shock affects the nervous system so that it may be said that a physiological effect and not a mere emotional impulse is produced. *Yates v South Kirby Collieries* [1910] 2 KB 538. Once there is a physiological effect and not a mere emotional impulse, then the injury can be in

the course of employment even though it is not occasioned by any external force or agency."

2.10 An emotional impulse is a normal reaction to life's events and is not compensable. If, however, that reaction "becomes excessive in degree or duration" there can be a "physiological problem" and a personal injury (*Bhatia v State Rail Authority (NSW)* (1997) 14 NSWCCR 568 (*Bhatia*) at 578).

2.11 After noting that physiological means "pertaining to the natural or normal functional processes in living organisms, as opposed to those that are pathologic" (Blakiston's Gould Medical Dictionary), Burke CCJ observed in *Bhatia*, at 578:

> "To say that a person has sustained physiological injury says no more than that in some degree, in one way or another, the person has become dysfunctional – does not function normally."

2.12 Referring to Powell JA's decision in *Austin*, Burke CCJ observed in *Bhatia* that symptoms of anxiety, mania and depression experienced by the worker were physiological effects manifesting the effects of injury. His Honour added that, if it were accepted that a worker had symptoms of that "type and degree, then it is axiomatic that he has suffered an injury" (presumably, his Honour meant "personal injury").

2.13 His Honour continued, at 579A:

> "In my lexicon, a diagnosis of anxiety state of such degree and long duration would be axiomatically a physiological effect. I would not expect that any psychiatrist, unless specifically asked, would feel it necessary to so categorise such a reaction. It would be taken for granted. 'Impulse' has to me connotations of spontaneity and transience. The Macquarie Dictionary suggests 'sudden, involuntary inclination prompting to action'. Probably a common occurrence is in the term beloved of marketing people when they speak of impulse buying. It's a spur of the moment affair. This concept fits quite well with the accepted emotional responses of people to particular stimuli – it comes, it lasts relatively briefly and it passes."

2.14 This approach is not inconsistent with the common law approach to damages in nervous shock cases or with the definition of psychological injury in s 11A. As Gummow and Kirby JJ (Gaudron J agreeing) observed in *Tame v New South Wales* (2002) 211 CLR 317 at 447 "[f]right, distress or embarrassment, without more, will not ground an action in negligence. Emotional harm of that nature may be evanescent or trivial". The "more" that is required at common law is to establish that the plaintiff suffers a recognised psychiatric illness, because that "reduces the scope for indeterminate liability or increased litigation" (Gummow and Kirby JJ at 382).

2.15 The "more" that is required in a claim under the 1987 Act is that, to constitute a "personal injury", the condition must be of such a such degree (severity) and duration that it can be said to have caused a physiological effect, as opposed to a mere emotional impulse. A recognised psychiatric disorder that, because of its physiological effects, prevents a person from functioning normally will usually qualify as a personal injury.

2.16 Even if the worker has suffered a physiological effect, and therefore established that he or she has suffered a personal injury, there will be many cases where it is difficult to determine when the injury was received. That is especially so when the injury is

said to have been caused by multiple incidents over a lengthy period, as is commonly the case in matters of this kind. It is therefore common for such cases to be run as disease cases, either under s 4(b)(i) or s 4(b)(ii).

2.17 A major depressive episode has been held to be a disease (*Rail Corporation New South Wales v Hunt* [2009] NSWWCCPD 114) and post-traumatic stress disorder has been held to be a disease of gradual process (*Department of Environment, Climate Change & Water v J* [2010] NSWWCCPD 56; *Transfield Services (Aust) Pty Ltd v Wicks (No 2)* [2012] NSWWCCPD 77). That a particular condition has been described as a disease does not necessarily prevent a finding (in the appropriate case) that the worker has suffered a personal injury: the two terms are not mutually exclusive (*Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; 187 CLR 310).

2.18 For disease injuries received on or after 19 June 2012, it will be necessary to prove that the employment was "the main contributing factor to contracting the disease", in respect of a disease alleged to have been contracted in the course of employment under s 4(b)(i), and that employment was "the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease", in respect of an aggravation, acceleration, exacerbation or deterioration under s 4(b)(ii). The Commission has not yet considered the new definition.

2.19 The critical point is that psychological injury cases should be properly pleaded and supported by evidence that addresses the issues. The Application to Resolve a Dispute should indicate if it is alleged that the worker received a personal injury or relies on the disease provisions. If the latter, it should indicate if reliance is placed on ss 4(b)(i) and 15, or ss 4(b)(ii) and 16.

2.20 While a disease can be contracted suddenly at a specific time, it will often be difficult to prove exactly when the disease was contracted. For that reason, s 4(b)(i) cases are usually run as diseases of gradual onset. To succeed with such an injury received on or after 19 June 2012, it will be necessary to prove that the employment was "the main contributing factor to contracting the disease".

2.21 Though ultimate questions of liability are a matter for the Commission, in light of the new amendments, it is strongly recommended that evidence be obtained dealing with the issues in dispute and with the terms of the new provisions.

2.22 A disease injury will be deemed to have happened at the time of the death or incapacity (ss 15(1)(a) and 16(1)(a)), or, if no death or incapacity has resulted from the injury, at the time the worker makes a claim for compensation with respect to the injury (ss 15(1)(a)(ii) and 16(1)(a)(ii)).

2.23 The reference to incapacity in ss 15 and 16 is a reference to the "incapacity for which compensation is claimed" (*GIO Workers Compensation (NSW) Ltd v GIO General Ltd* (1995) 12 NSWCCR 187 per Sheller JA at 195F–G (Priestley and Clarke JJA agreeing); *P & O Berkeley Challenge Pty Ltd v Alfonzo* [2000] NSWCA 214; 49 NSWLR 481 at [24]).

Relevance of the worker's understanding of his or her condition

2.24 It is often argued that workers cannot succeed because they made no complaint of suffering from post-traumatic stress disorder or depression at the time of the event that allegedly caused their illness.

2.25 In *Patrech v State of New South Wales* [2009] NSWCA 118, a police officer claimed damages for a psychological condition allegedly caused by stressful events that occurred between 1995 and 1998. He first sought treatment in late 2001, after a stressful court case in November 2001. Various medical histories in 2002 recorded that the plaintiff said he had been well up to the court case and that his condition had been caused by that case and his other experiences as a police officer.

2.26 The trial judge found against the plaintiff because, in his opinion, the consistent picture in the medical evidence was that it was the plaintiff's view that, prior to November 2001, he did not suffer from any symptoms that could be described as symptoms of post-traumatic stress disorder. A question arose on appeal as to whether the trial judge erred in considering that the plaintiff needed to understand or believe that his symptoms constituted a mental illness. Though it was not necessary for the Court to determine that issue, because the trial judge had erred in his analysis of the medical evidence in any event, Beazley JA (Campbell and Macfarlan JJA agreeing) observed (at [91]) that:

> "it is unlikely that could be a relevant consideration. The true question for determination in a case such as this was whether the person was suffering symptoms, which properly diagnosed, constituted an illness."

2.27 The trial judge's error was that, among other things, he had failed to analyse the medical reports having regard to the purpose for which they had been obtained ([89]). The plaintiff's statements in various non-medicolegal reports that he had been well up to the court case in 2001 did not prevent a finding that he suffered from post-traumatic stress disorder because of events in the 1990s. The plaintiff's qualified psychiatrist, Dr Klug, said he would take "with a grain of salt" a patient "expressing views about symptoms of a psychiatric disorder from the patient's personal point of view".

Preparation of a psychological injury claim

2.28 The successful outcome of a psychological injury claim commences with the Application to Resolve a Dispute and the documents attached to it. The following touches on a few of the critical areas where the Commission sees shortcomings that need to be addressed.

2.29 First, claims should be properly pleaded. It is not acceptable to say, under "describe how the injury occurred", "see statement attached". Nor is it acceptable to provide a narrative of the background facts (*Shore v Tumbarumba Shire Council* [2013] NSWWCCPD 1 (*Shore*) at [79]). What is required is a clear and succinct statement of the facts and circumstances said to have caused the injury. If there is insufficient space provided in the standard form, then it is appropriate to include an annexure setting out the alleged cause of injury.

2.30 Second, the worker's evidence will be an important part of any claim and it is critical that that evidence be properly prepared by a solicitor familiar with the legal principles involved and with the issues in dispute in the particular case. It is not acceptable to leave the preparation of the worker's evidence, or the evidence of key witnesses, to the worker, as is now common in the Commission. He or she will rarely, if ever, know what is important to prove a claim and will often include information that is not only irrelevant, but also damaging to his or her interests.

2.31 Third, claims should be accompanied by medical reports from qualified and treating doctors that address the issues in dispute. Care should be taken to ensure that all

medical witnesses have an accurate history of the events that allegedly caused the injury and that they are aware of the issues in dispute. They should be provided with a statement of the issues and requested to provide an opinion on those issues. Sending standard pro-forma letters is an unsatisfactory way to prepare a psychological injury case and will rarely elicit a relevant or helpful response from the doctor.

2.32 Fourth, a report from an "investigative psychologist", arranged by the employer or its insurer, was regarded in *Department of Ageing, Disability and Homecare v Pye* [2010] NSWWCCPD 18 at [34] as a "forensic factual enquiry", rather than a report prepared in the context of the writer's professional (medical) expertise. A similar observation was made in *NSW Police Force v Bassett* [2010] NSWWCCPD 58 at [117], where the report was given little weight, if any, in determining whether the worker had suffered a psychological injury causing incapacity.

2.33 A report from an investigative psychologist was strongly criticised in *New South Wales Police Force v Lovett* [2010] NSWWCCPD 80 at [82]–[84] because it provided discursive summaries of the author's conversations with witnesses and adopted them as true. The Arbitrator and the Acting Deputy President had difficulty understanding precisely what part of the summaries should be regarded as having come from the witnesses, and what parts were the psychologist's interpretations of what they said, or her comments on what they said. The methods adopted by an investigative psychologist were also criticised in *Ponce v Department of Education and Training* [2010] NSWWCCPD 77 (*Ponce*) at [216], where the psychologist obtained generalised responses to leading questions.

2.34 The better practice in cases of this kind is that investigations be conducted by investigators and that expert opinion be provided by psychiatrists.

2.35 Fifth, while it is not the law that workers must have corroboration of their complaints before they can succeed (*Chanaa v Zarour* [2011] NSWCA 199 at [86]), such evidence will often assist the Commission in resolving factual disputes. That is especially so when there is a major factual dispute. It is amazing how many cases are presented with no lay evidence on critical factual disputes.

2.36 Sixth, insurers, and their solicitors, must ensure that s 74 notices concisely and correctly state the issues in dispute. It is not correct to say, as appears in almost every s 74 notice, that employment is no longer a substantial contributing factor to the injury.

2.37 Last, if an insurer relies on s 11A, it must properly identify which of the eight potential grounds is alleged to ground that defence. It is not acceptable to say that reliance is placed on s 11A, or to list all eight of the grounds (*McCarthy v Department of Corrective Services* [2010] NSWWCCPD 27 at [13]).

Defences

2.38 I will only deal with two commonly applied, but frequently misunderstood defences. First, the argument that a worker cannot succeed because he or she has overreacted to innocuous events or that the worker was over sensitive and therefore susceptible to anxiety or depression in any event (perception). Second, s 11A.

Perception

2.39 The basis for the argument that a worker cannot succeed if the psychological condition has resulted from a misperception of innocuous events is the decision of McGrath CJ in *Townsend v Commissioner of Police* (1992) 25 NSWCCR 9 (*Townsend*).

2.40 In that case, the worker developed an anxiety state after being transferred to a different area. He based his case on five main points. First, that the circumstances under which he was transferred caused rumours among other police that he had been transferred because he must have done something wrong and was corrupt. Second, his anxiety state was aggravated by the refusal of the Police Department to do anything to dissipate the rumours. Third, that the rumours gained credence because he was originally told his transfer was part of the implementation of the anti-corruption policy (something that was later denied, falsely in the applicant's opinion). Fourth, that the peremptory notification to him of the transfer by telephone was understood to be the means of transfer when an officer was guilty of, or suspected of, wrongdoing. Last, the fact that no confirmation of the transfer ever appeared in the normal police notices, when taken together with the above matters, made the rumours so credible that he had reasonable grounds for coming to the belief that what he was told by senior officers (that he was not under suspicion for corrupt conduct) was not the truth.

2.41 McGrath CJ observed (at [17]) that the major difficulty in the worker's case was that the alleged stressors were in "fact perceptions that the applicant himself formed of the events around him, and inferences that he drew from these events".

2.42 The Chief Judge did not accept any part of the worker's case. His Honour found that the transfer was not because of a suspicion that the worker was corrupt, but was to fill a vacancy created by the transfer of other officers under the anti-corruption policy. He did not accept that the notification of the transfer was peremptory, or had denied the worker the chance to object to it, as the worker had alleged, describing the worker's claims on this point as "so extraordinary as to be completely unbelievable" (at [49]).

2.43 With regard to the rumours, his Honour said (at [217]) that there was:

> "no rational basis for the appellant … to accept the groundless rumours … in the face of repeated reassurances which he conceded that he received from his personal friends [that the rumours were untrue]. His unshakable beliefs were irrational and stem[med] from his own unreal perceptions of the external world. It was not the external world of his employment which was responsible for the irrational beliefs, which were at the heart of the anxiety state."

2.44 At [232], his Honour said that he did not disagree with the medical evidence that different people can react differently to the same events, but added:

> "However, in the present case, the major problem is to ascertain whether or not the events to which the applicant is said to have reacted are real events or only events that existed in the perception of the applicant himself."

2.45 His Honour did not give a clear answer to this question, but said (at [235]) that the worker's anxiety state resulted from his "erroneous perception of external events and not from his reaction to real events which were potentially damaging". What was meant by the reference to "external events" is discussed below.

2.46 In *Yeo v Western Sydney Area Health Service* [1999] NSWCC 1; 17 NSWCCR 573 at [53], Neilson CCJ said that *Townsend* was authority for the proposition that a misperception by a worker of otherwise innocuous matter, which misperception leads the worker to develop a psychiatric condition, does not constitute an injury arising out of or in the course of employment. That interpretation was consistent with McGrath CJ's repeated references to Mr Townsend's beliefs having stemmed from his own "unreal perceptions of the external world".

2.47 Though the Court of Appeal has expressly held that that interpretation of *Townsend* is incorrect (*State Transit Authority (NSW) v Chemler* [2007] NSWCA 249; 5 DDCR 286 (*Chemler*)), the Commission still regularly receives submissions to the effect that an injury caused by a misperception of innocuous events is not compensable. Such submissions are erroneous.

2.48 In *Chemler*, Spigelman CJ (Basten JA and Bryson AJA agreeing) held (at [40]) that employers take their employees as they find them. With respect to psychological injuries, there is an "eggshell psyche" principle, which, like the "eggshell skull" principle (at common law), is a "rule of compensation not of liability".

2.49 This was a reference to the fact that claims for damages for pure psychiatric illness are distinct from claims based upon physical injury and that no duty of care is owed to a plaintiff unless a person of normal fortitude would suffer psychiatric injury, subject to an exception in the case of a defendant with knowledge of a particular susceptibility of the plaintiff.

2.50 The "eggshell psyche" rule, however, applies after a determination is made that a person of normal fortitude would suffer some injury. His Honour explained that, as the element of foreseeability required by the law of negligence is not the basis of the "eggshell skull" principle, that principle could be applied by way of analogy to claims for compensation under the 1987 Act.

2.51 After noting (at [68]) that a psychological state can be based on a delusion, and that the question remains one of causation, Basten JA added (at [69]) that "the proper focus" is the consequence of the conduct on the claimant and not the motivation, intention or other mental state of the co-worker or supervisor. His Honour added:

> "If conduct which actually occurred in the workplace was perceived as creating an offensive or hostile working environment, and a cognizable injury followed, it was open to the Commission to conclude that causation was established."

2.52 Spigelman CJ added (at [54]) that, as McGrath CJ indicated, 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". Exactly what was meant by "external events" is unclear. It may refer to events that are external to (and not part of) the worker's employment, or to events that are external in that they were imagined and not real.

2.53 Though it is far from clear, I favour the view that, having regard to McGrath CJ's comments at [217] (see 2.24 above), the reference to "external events" was a reference to the worker reacting to "unreal perceptions of the [imagined] external world". This follows from the next sentence at [217], where his Honour said that it was not the "external world of his employment which was responsible for the irrational beliefs", which were at the heart of the anxiety state. In other words, the worker reacted to events that were imagined and, on his Honour's factual findings, had not happened.

2.54 This understanding of "external events" is supported by the fact that a worker can recover compensation for a psychological injury caused by an event that is external to his or her employment. This point is well demonstrated in *Fire and Rescue New South Wales (formerly NSW Fire Brigades) v Guymer* [2011] NSWWCCPD 38 (*Guymer*).

2.55 In *Guymer*, the worker developed a psychological injury as a result of two Sydney radio broadcasts (in which the worker did not participate) that identified him "as having committed credit card fraud" and as being "implicated in an alleged assault matter" and had been involved in a suggested cover-up. Though the broadcasts were clearly events that were external to his employment, in the circumstances of that case, the resulting injury was held to have arisen out of the worker's employment.

2.56 The Deputy President based his conclusion (that the injury arose out of the worker's employment) on the following matters (at [88]):

> "(a) the genesis of the broadcast made 21 July 2009 was the leaking of the Ministerial brief. That was the [employer's] highly confidential document and, it may be inferred, plainly concerned suggested misconduct of Mr Guymer in the performance of his employment duties;
>
> (b) the responsible Minister attended the radio station studio on that occasion to participate in an interview which, as demonstrated in transcripts, concerned Mr Guymer in his capacity as an officer of the [employer]. Whilst he was not identified at that time, it is clear that the false suggestion of credit card fraud and a cover up, matters not corrected by the Minister, related to the earlier investigation of Mr Guymer. There is abundant evidence that colleagues and family identified Mr Guymer as being the officer allegedly guilty of 'credit card fraud';
>
> (c) the broadcast was concerned, in part, with the firefighter's complaint made in February 2009 noted at [30] and [38] above. That complaint, detail of which was broadcast, related in part directly to Mr Guymer's employment and the manner of performance of his duties. The unchallenged evidence of Mr Guymer is that he was not informed by the [employer] of the complaint at the time it was made. It seems from the evidence, and I infer, that Mr Guymer did not hear the introductory portion of the broadcast. As stated by Mr Guymer he was informed of that complaint by Mr Wright in May 2010 when interviewed. That only part of that broadcast was heard by Mr Guymer is, in my opinion, of no significance in determining whether his injury was causally related to his employment, and
>
> (d) in the broadcast made on 23 July 2009 Mr Guymer was named as being one of the officers involved in the suggested 'cover up'. The evidence of Mr Guymer is that Mr Hadley on that occasion stated that no one from the NSW Fire Brigade was prepared to speak on the matter."

2.57 An appeal to the Court of Appeal was discontinued.

2.58 The relevant principles regarding "perception" are summarised at [52] in *Attorney General's Department v K* [2010] NSWWCCPD 76; 8 DDCR 120:

> (a) employers take their employees as they find them. There is an "eggshell psyche" principle which is the equivalent of the "eggshell skull" principle (Spigelman CJ in *Chemler* at [40]);

(b) a perception of real events, which are not external [or imagined] 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 (*Leigh Sheridan v Q-Comp* [2009] QIC 12; 191 QGIG 13);

(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" (*Wiegand v Comcare Australia* [2002] FCA 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.

2.59 The above approach is consistent with the Victorian Court of Appeal decision in *St Mary's School v Askwith* [2011] VSCA 90 at [12], [20], [23], [36] and [41], where it was observed that there need only be a real event in the workplace and that it is irrelevant if the worker's response was irrational or excessive because of his or her eggshell skull.

2.60 Given the above authorities, which the Commission has consistently applied, *Townsend* is of limited, if any, relevance to psychological injury cases. It is not correct to say that a worker cannot recover compensation if his or her reaction to, or perception of, events that happened at work (or arose out of the employment) was not objectively rational or was excessive. Nor is it relevant to say that "no offence was intended" by the particular conduct or comment. Motive is irrelevant. The proper approach is to ask if the worker's employment was a substantial contributing factor to the development of a recognised psychological condition. It does not matter that the worker may have been oversensitive, or that a different person may not have reacted to the particular conduct or comment. Employers take their employees as they find them.

Section 11A

2.61 Section 11A(1) provides:

"**11A No compensation for psychological injury caused by reasonable actions of employer**

(1) 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.

(3) A ‘psychological injury’ is an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.

(4) This section does not affect any entitlement to compensation under this Act for an injury of a physical nature even if the injury is a physical symptom or effect of a psychological injury, so long as the injury is not merely a physiological effect on the nervous system.

(6) This section does not extend the definition of "injury" in section 4. In particular, this section does not affect the requirement in section 4 that a disease is not an injury unless it is contracted by the worker in the course of employment.

This section does not affect section 9A (No compensation payable unless employment substantial contributing factor to injury).

(7) In the case of a claim for weekly payments of compensation in respect of incapacity for work resulting from psychological injury, the medical certificate required to accompany the claim must (in addition to complying with the requirements of section 65 of the 1998 Act) use, for the purpose of describing the worker’s condition, accepted medical terminology and not only terminology such as ‘stress’ or ‘stress condition’.

(8) If a claim is deficient because subsection (7) has not been complied with and the insurer or self-insurer concerned notifies the worker in writing of the deficiency (including details of what is required to comply with that subsection) as soon as practicable after receiving the deficient claim then (unless the insurer or self-insurer waives that requirement):

(a) the claim is not considered to have been duly made for the purposes of section 93 of the 1998 Act until subsection (7) is complied with, and

(b) proceedings before the Commission cannot be commenced in respect of the claim until subsection (7) is complied with.”

2.62 The first point to note about s 11A is that the onus of proof of establishing that a defence has been made out under the section is on the employer (*Pirie v Franklins Ltd* [2001] NSWCC 167; 22 NSWCCR 346 (*Pirie*).

2.63 To succeed with a defence under s 11A, an employer must establish, first, that the whole or predominant cause of the worker’s psychological injury was the employer’s action taken or proposed to be taken with respect to one or more of the specific grounds identified in the section and, second, that the particular action or proposed action was reasonable (*Manly Pacific International Hotel v Doyle* [1999] NSWCA 465; 19 NSWCCR 181 (*Doyle*) at [4]).

2.64 The section only applies to the specific matters listed and it is does not apply to any reasonable conduct by the employer or to a “legitimate business decision” (*Gray v Busways Gosford EMP Pty Ltd* [2009] NSWWCCPD 124 at [143]).

Whole or predominant cause

2.65 The Commission has held that “predominantly caused” means “mainly or principally caused” (*Ponnan v George Weston Foods Ltd* [2007] NSWWCCPD 92 at [24]). This is a question of fact that requires a “commonsense evaluation of the causal chain”

and is “determined on the basis of the evidence, including, where applicable, expert opinions” (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 per Kirby P (as his Honour then was) at 463 (Sheller and Powell JJA agreeing).

2.66 If possible, it is usually prudent to deal with the causation issue first. If the employer is unable to establish that the injury was wholly or predominantly caused by action taken with respect to one or more of the matters listed in s 11A, then reasonableness does not arise.

2.67 In *Shore* and *Jetstar Airways Pty Ltd v Canterbury* [2011] NSWWCCPD 54 (*Canterbury*) at [158], it was held that, in determining whether the whole or predominant cause of an injury was the action relied on under s 11A, it is necessary to consider all potential work-related causes of the injury, even if they have not been properly pleaded in the particular proceedings. That is because a condition can have more than one cause (*ACQ Pty Ltd v Cook* [2009] HCA 28; 237 CLR 656 at [25] and 27]).

2.68 To avoid a potential absurdity from a literal application of ss 9A and 11A, it is necessary to understand s 11A to mean that the employer is not liable where, “*to the extent that employment contributed to the injury*, that contribution was wholly or predominantly caused by reasonable action taken with respect to” one or more of the matters in the section (*Department of Education and Training v Sinclair* [2005] NSWCA 465 (*Sinclair*); 4 DDCR 206 at [58] (emphasis included in original)).

2.69 *Sinclair* provides a good illustration of why it is important to determine first the whole or predominant cause of the injury and why it is critical to call evidence on that issue.

2.70 The Arbitrator found that the worker suffered an injury in the course of his employment and that employment was a substantial contributing factor to that injury. Dealing with the s 11A defence, he found there were four relevant aspects of the employer’s conduct that the worker said were unreasonable:

(a) the delay in investigating the claim (about 18 months from the allegations first being raised to the date on which breach of discipline charges were laid);

(b) the failure to give the worker particulars of the allegations at the outset (the worker was first informed of an allegation of improper conduct in February 2001 but full particulars were not provided until November 2001);

(c) the No Contact Direction (the worker had been directed not to contact any students), and

(d) the transfer (to office duties during the course of the investigation).

2.71 The Arbitrator found that the delay was reasonable but, as the conduct in the remaining three matters was unreasonable, “the injury was not caused by reasonable conduct with respect to discipline or transfer”. It seems to have been accepted, though not stated, that the Arbitrator meant to say that the injury had not been wholly or predominantly caused by reasonable action with respect to discipline or transfer.

2.72 On appeal, Sheahan J upheld the finding that the injury arose out of the worker’s employment and that employment was a substantial contributing factor to the injury. On the issue of reasonableness, his Honour found that two of the four steps involved

were reasonable, namely, the delay and the transfer, and he upheld the Arbitrator's decision. However, he made no specific finding on whether the injury was wholly or predominantly caused by reasonable action with respect to discipline.

2.73 The employer submitted in the Court of Appeal that there was no basis in the medical evidence for concluding that the failure to give particulars was a cause of the injury and that Sheahan J had either failed to apply the statutory formula or failed to set out his reasons.

2.74 Spigelman CJ (Hodgson and Bryson JJA agreeing) held that, in view of the submissions made to him, it was necessary for Sheahan J to form his own judgment as to whether or not the whole or predominant cause of the employer's contribution to the worker's injury was reasonable action by it with respect to discipline. The statutory test could not be satisfied by merely identifying two respects in which the employer's conduct was unreasonable. It remained necessary to determine whether, notwithstanding those blemishes in the decision-making process, "reasonable action" with respect to discipline was the whole or predominant cause of the injury.

2.75 As there was evidence that the injury had been caused by the investigation itself and the delay, both of which were found to be reasonable, and as the worker argued that the injury had been caused by the whole process, the matter was remitted to the Commission for re-determination. Spigelman CJ added, at [96]–[97]:

> "Such actions [as those listed in s 11A] usually involve a series of steps which cumulatively can have psychological effects. More often than not it will not be possible to isolate the effect of a single step. In such a context the 'whole or predominant cause' is the entirety of the conduct with respect to, relevantly, discipline.
>
> His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole cause of conduct of the characterisation 'reasonable action with respect to discipline'. In my opinion, a course of conduct may still be 'reasonable action', even if particular steps are not. If the 'whole or predominant cause' was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, 'reasonable action'. For this alternative reason the appeal should be allowed."

Reasonable action

2.76 On the question of reasonableness, the often-quoted statements by Geraghty CCJ in *Irwin v Director-General of School Education* (unreported WCCNSW, Geraghty CCJ, 18 June 1998, No 14068 of 1997) (*Irwin*) and Truss CCJ *in Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998) (*Ivanisevic*) remain the best guide.

2.77 In *Irwin*, Geraghty CCJ said:

> "The question of reasonableness is one of fact, weighing all the relevant factors. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of 'reasonableness' is objective, and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness."

2.78 In *Ivanisevic*, Truss CCJ said:

> "In my view when considering the concept of reasonable action the Court is required to have regard not only to the end result but to the manner in which it was effected."

2.79 These passages were quoted with approval by Foster AJA (Sheller and Santow JJA agreeing) in *Commissioner of Police v Minahan* [2003] NSWCA 239; 1 DDCR 57 (*Minahan*) at [42].

2.80 Consistent with these authorities, in determining whether particular conduct was reasonable, it is necessary to:

(a) weigh the rights of the employees against the objective of the employer (*Irwin*);

(b) consider whether the conduct was, in all the circumstances, fair (*Irwin*; *Shore* at [75]). This requires that employers give workers notice of any proposed action or complaints that will affect their rights. If an employee is being given official warnings that could impact on the existence of his or her job, simple fairness requires that the employee be made aware of the precise status of the warnings, and any threat to his employment (*Quealey v Cement Australia Pty Ltd* [2012] NSWWCC 81). The failure to give a worker proper particulars of complaints against him or her may mean that the action taken was not reasonable (*Shore* at [75]; *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v Broad* [2008] NSWWCCPD 139; 7 DDCR 193 (*Broad*) at [68]–[69]). An investigation that proceeded without providing procedural fairness to the worker (failing to put a specific allegation to the worker so he could respond to it) was not reasonable (*Canterbury* at [158]);

(c) make an objective assessment of the employer's action. As Basten JA said in *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138 at [50], "if, in the view of the Commission, the action taken by the employer in transferring an employee is not reasonable in all the circumstances, the employer cannot rely upon s 11A because it held a genuine belief, based on reasonable grounds, that its action was reasonable". It is not enough that the employer complied with its own protocols, those protocols must, in the view of the Commission, be objectively reasonable (*Broad* at [45]). On the other hand, failure to comply with a company policy or enterprise agreement that sets out procedures to be followed may mean that the conduct was not reasonable (*Baldwin v Greater Building Society Ltd* [2011] NSWWCCPD 18 (*Baldwin*) at [100]). Discipline based on breaches of a confusing and contradictory company behaviour policy was held to be not reasonable, the obligation being on the employer to communicate its policies and procedures in clear and unambiguous terms (*Canterbury* at [152]–[153]);

(d) look at the entire process involved. A course of conduct may still be "reasonable action" even if particular steps in it are not (*Sinclair* at [69] and [97]);

(e) consider the circumstances surrounding the action, both before and after the action, and the consequences of the action (*Buxton v Bi-Lo Pty Ltd* (1998) 16 NSWCCR 234 at 249; *Melder v Ausbowl Pty Ltd* (1997) 15 NSWCCR 454 at 458). For example, in considering if a transfer was reasonable, it is necessary to consider if the manner in which the decision to transfer was

communicated to the worker was reasonable (*Doyle* per Fitzgerald JA at [6] (Mason P agreeing)). Similarly, it will be necessary to consider if the manner in which the transfer was effected was reasonable (*Minahan*; *Ivanisevic*). It is not simply a question of whether the action was justified from the employer's perspective;

(f) weigh the consequences of the employer's conduct against the reasons given for it (*Ritchie v Department of Community Services* (1998) 16 NSWCCR 727 at [44]), and

(g) consider the full history of management's dealings with the particular worker (*CS Energy Ltd v Q-Comp* [2008] QIC 57).

2.81 Cases where these principles have been applied are set out below when dealing with discipline, transfer and retrenchment.

With respect to

2.82 The words "with respect to" make it necessary to consider the process involved and the steps taken, or proposed to be taken, in determining whether the action considered comes within any of the eight matters listed in s 11A. As Spigelman CJ observed (at [35]) in *Sinclair*, the formulation in s 11A extends to the entire process involved in the matter under consideration.

2.83 There must be a process in place before the action can be action "with respect to" that process. In the absence of any disciplinary process or proceedings being undertaken, a chance discovery by a worker of a document critical of her was not action "with respect to discipline" (AC v AD [2009] NSWWCCPD 110 at [58]–[59]).

Discipline

2.84 In *Kushwaha v Queanbeyan City Council* [2002] NSWCC 25; 23 NSWCCR 339 (*Kushwaha*) it was held (at [152]) that "the primary meaning of 'discipline' is learning or instruction imparted to the learner and the maintenance of that learning by training, by exercise or repetition" and that the narrow meaning of punishment, chastisement is secondary to the primary meaning. It was added that the word "must be given its full meaning, unless the context otherwise requires" and "such a context does not appear to me to be called for in the interpretation of s 11A(1)".

2.85 I have some reservations about whether "discipline" in s 11A includes "learning or instruction". If discipline includes learning or instruction, then attending a legal seminar could be considered "discipline" and any psychological injury caused by attending would not be compensable. It is difficult to see that such an activity is discipline (*Uptin v NSW Department of Education & Training* [2011] NSWWCC 179).

2.86 Recent decisions in the Commission have tended towards a narrower view of "discipline", but have not expressly disapproved of *Kushwaha* (*McCarthy v Department of Corrective Services* [2010] NSWWCCPD 27 (*McCarthy*) at [155]). Neilson DCJ has subsequently said, "perhaps I approached the matter too broadly in *Kushwaha*" (*Kristine Soutar v The Commissioner of Police* [2006] NSWDC 95 at [138]). I am inclined to agree.

2.87 Exchanges about workload and general (work) circumstances in emails do not amount to discipline; nor is it discipline to merely ask someone to do his or her job

(*McCarthy* at [163]; *Bottle v Wieland Consumables Pty Ltd* (1999) 19 NSWCCR 135 (*Bottle*) at [33]). Consistent with these authorities, counsel for the employer rightly conceded in *Ponce* that the mere correction of a worker's work style (the manner of entering documents) was not discipline.

2.88 Counselling and support meetings were held not to be discipline, or action with respect to discipline, in *South Eastern Sydney and Illawarra Area Health Service v Nikolis* [2009] NSWWCCPD 74 at [125].

2.89 The suspension of a worker pending an investigation to determine what, if any, disciplinary action should be taken against the worker because of a power failure at a hotel was held to be "action with respect to discipline" (*Chisholm v Thakral Finance Pty Ltd t/as Novotel Brighton Beach* [2011] NSWWCCPD 39 at [84]).

2.90 *Broad* is an instructive case on the assessment of whether an employer's conduct was reasonable in the context of action taken with respect to discipline. That case concerned action with respect to discipline. The worker was a teacher accused of misconduct of a sexual nature. On 25 September 2006, the Assistant Principal entered the worker's classroom and told him to see the Diocesan Assistant Director of Schools (Mr Collins) in the Principal's office. On attending the office, Mr Collins gave the worker a letter signed by the Diocesan Director of Schools.

2.91 The letter said: information had been provided alleging "reportable conduct"; the allegation was of a serious nature; the worker was to be placed on Director's approved leave for the duration of the investigation; a member of the Diocesan Child Protection and Professional Conduct Unit (DCPPCU) would make enquiries, would meet with the worker and full details of the alleged behaviour would be given at the meeting; an opportunity to respond to the allegations would be given; a support person could be present at the interview, and confidentiality was essential.

2.92 The worker asked Mr Collins what the issues were and was told "I can't tell you"; "they are just allegations". Mr Collins said he told the worker that the allegation "was of a sexual nature"; that the worker "would need to leave the school" and "it was best if he did not resume his classes". The worker found being told to leave the school "humiliating and traumatic". He got his things and Mr Collins put his arm around him and walked him to his car as students watched from a window.

2.93 The worker saw his general practitioner on 26 September 2006 and was prescribed anti-depressants. He felt "intense despair" and "totally destroyed". He was not aware of the specific allegations until 28 September 2006. The DCPPCU's preliminary finding on 20 December 2006 was that two of the allegations were not sustained because of insufficient evidence and the balance were misconceived. By 20 May 2008, the Bishop of Maitland-Newcastle had informed the worker by letter that the appropriate finding for all allegations was "false".

2.94 The Arbitrator held that the whole or predominant cause of the worker's psychological condition was action taken with respect to discipline but the actions were not reasonable. The employer's appeal against the reasonableness finding was dismissed. The Acting Deputy President said:

(a) in analysing the reasonableness of the employer's actions, it was appropriate to consider whether things could have been handled differently, and better;

(b) the relatively public fashion in which the employer dealt with the worker on 25 September 2006 had the real potential to create gossip, and to be humiliating

for him. It was the worker's perception that he was being dragged off "like a criminal" and that he left the school as if he "was being taken away by the Police". That was unreasonable. The reasonable course would have been to employ greater discretion, and to have greater respect for the worker's privacy in what were difficult circumstances. The letter could have been given to the worker at the end of the school day, without the need to remove him from class, when his departure would seem normal;

(c) the lack of particulars provided on 25 September 2006 was also unreasonable, he having been told (on the employer's version) only that the allegation against him was of a sexual nature but not rape, which gave no real particulars. The *Ombudsman Guidelines* required that the worker was to be informed "with as much detail as possible" of the allegations. The provision of such detail would not have prejudiced the investigation that had been substantially completed by 25 September 2006, and

(d) the provision of particulars on 28 September 2006 did not cure the problem. By then, the worker was already off work and had been diagnosed with reactive depression. That is, he had already suffered a psychological injury.

Performance appraisal

2.95 Dealing with performance appraisal, Geraghty CCJ said in *Irwin*:

> "It is placed in the context of processes like 'transfer', 'demotion', 'promotion', 'retrenchment' or 'dismissal' of workers. It must be seen in this context. Furthermore, performance appraisal in any work situation is a process, an established process involving various steps. Perhaps it would involve the completion of questionnaires and forms. It requires discussion between various parties about performance, written appraisal, sometimes even self-appraisal, and 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, discreet [sic] process, with a recognised procedure through which the parties move in order to establish an employee's efficiency and performance."

2.96 This statement has been approved and applied by the former Compensation Court in *Bottle* at 147 and *Dunn v Department of Education & Training* (2000) 19 NSWCCR 475 (*Dunn*), and by the Commission in *Ponce* and *AMP Bank Ltd v Ayoub* [2010] NSWWCCPD 37 at [130] (upheld in the Court of Appeal where this issue was not considered: *Ayoub v AMP Bank Ltd* [2011] NSWCA 263).

2.97 In *Ponce*, it was observed (at [230]) that merely "addressing" performance did not amount to performance appraisal within the terms of s 11A. This was consistent with *Dunn*, where Geraghty CCJ said (at [69]) that an "improvement program, or an enhancement program, or some type of in-service training" was not performance appraisal. Performance appraisal requires a discrete process in which the worker's performance is assessed or evaluated in a recognised procedure or process.

2.98 Informally "addressing performance" is not performance appraisal. Giving a worker two letters, speaking to her about her mistakes, and holding a meeting that was described as an "informal coaching session" was not performance appraisal (*Baldwin* [97]). Merely telling the worker how to carry out her work was not performance appraisal, but was just a lawful instruction (*Bottle* at [33]; see also *McCarthy* at [163]).

Transfer

2.99 In *Doyle*, Davies JA (Mason P and Fitzgerald JA agreeing) held (at [31]) that "transfer" includes a move from one position to another regardless of whether there is any change in location (in that case the worker was moved from being the chef di parti to being a sauciere at the same location). A move from one building to another will be a "transfer" within s 11A (*ISS Property Services Pty Ltd v Milovanovic* [2009] NSWWCCPD 27 (*Milovanovic*) at [86]).

2.100 Fitzgerald JA (Mason P agreeing) said, however, that Davies AJA stated the position too broadly when he said that the consequences of actions taken or proposed to be taken with respect to transfer did not include the worker's response to employment conditions encountered after the transfer. Fitzgerald JA said (Mason P agreeing), at [8]:

> "It was an action taken by the appellant with respect to the transfer of Mr Doyle, namely, the transfer of him from one position to another, which caused him to work in 'the circumstances ... which ... were the predominant cause of his breakdown'. That being so, the appellant's material action, the transfer of Mr Doyle, cannot be automatically excluded as the whole or predominant cause of Mr Doyle's psychological injury. Whether or not the appellant's transfer of Mr Doyle was the whole or predominant cause of his psychological injury within the meaning of subs 11A(1) is a question of fact and degree, which involves consideration of all the factors which produced Mr Doyle's condition."

2.101 Though the trial judge erred in failing to undertake that task, it did not affect the outcome because, in any event, the trial judge found that the transfer was unreasonable.

2.102 Section 11A applies to transfers initiated by the worker as well as by the employer (*McCarthy* at [158]–[159]).

2.103 *Shore* is the most recent case where the Commission considered the concept of reasonableness in the context of a transfer. In that case, the worker had been the subject of complaints by a co-worker with whom he had worked as a part of a team for about five years. The co-worker had a car accident when she passed out. She believed that she passed out because of stress she felt at having to work with Mr Shore. She complained that Mr Shore often came to work stressed, crying, and expressing self-harm issues. At a meeting with her managers on 6 June 2010, which Mr Shore did not attend, the co-worker said she could no longer work with him. To remove any issues affecting the co-worker's health, the Council decided, at a meeting on 7 June 2010, again in the absence of Mr Shore, to transfer him to another area. The Council told Mr Shore of the decision to transfer him at a meeting on 8 July 2010.

2.104 The Arbitrator said that, presented with the co-worker's statement, the Council had "little alternative but to transfer" Mr Shore. He referred to evidence from one of the Council's witnesses that it wanted a "conciliatory approach" to the "matter of moving"

Mr Shore and wanted his comments. The Arbitrator said that the Council had "sensitively" taken into account Mr Shore's pre-existing psychological state, which related to a reaction he had had to the re-opening of a grave in the course of his employment, and had given reasons for the transfer. He added that, if a co-worker had the kind of reaction expressed by the co-worker, the Council's approach was "appropriate" and a separation of the two workers was appropriate.

2.105 In overturning the Arbitrator's decision, it was noted that it may well have been "appropriate" for the Council to take action to address the co-worker's concerns and, even, to separate the workers. However, the issue raised by s 11A was not whether particular action was "appropriate" but whether, assessing the actions objectively, the action taken was reasonable.

2.106 An objective assessment of the evidence led to the conclusion that the Council's actions with respect to the transfer were not reasonable. There were three main areas where the Council's conduct was unfair to Mr Shore:

(a) it did not tell Mr Shore (prior to the meeting of 8 July 2010) of the co-worker's complaints (which were first raised on 6 June 2010) against him. That was unfair because it denied him the opportunity to respond to those complaints and to address them, which might have avoided a transfer;

(b) it did not give Mr Shore notice of the meeting until the morning of 8 July 2010 and that deprived him of the opportunity to properly prepare for it, and

(c) it refused to tell Mr Shore of the purpose of the meeting, denying him the opportunity to prepare a response to the complaints.

2.107 In the context of a worker who had been with the Council for over 30 years and who had a history of depressive symptoms caused by his work duties, the action with respect to the transfer was not reasonable.

Retrenchment or dismissal

2.108 The term "dismissal" in s 11A should be given its ordinary meaning. A worker is dismissed when an employer terminates his or her employment without the worker's consent (*Smith v Director General of School Education* [1993] NSWIRComm 134). The section extends not only to the dismissal, but also to reasonable action taken, or proposed to be taken, with respect to the dismissal.

2.109 Retrenchment is relevantly the termination of a worker's services normally for reasons of economy (*Rail Corporation New South Wales v Crilly* [2010] NSWWCCPD 84 (*Crilly*) at [131]). In *Crilly*, a letter relating to the worker's absence without a medical certificate, his failure to resume his duties and the comment that he was not able to be contacted by telephone, and which concluded by saying that a failure to respond "may result in it being considered that you have abandoned your employment with RailCorp", was held not to be action with respect to retrenchment or dismissal (or the provision of employment benefits).

2.110 *Pirie* is a good example of how the process adopted by the employer in the retrenchment of a worker was not reasonable. In that case, the worker was the national insurance manager for Franklins from July 1987, until he was retrenched on 1 March 1999. Through his hard work, he "salvaged the insurance position of Franklins". He worked between 10 and 12 hours per day and also took work home. In 1998, Franklins decided to outsource its insurance business. Without giving the

worker any prior notice, he was retrenched, and the insurance operations outsourced.

2.111 In concluding that the employer's actions with respect to the retrenchment of the worker were not reasonable, the judge took into account:

(a) the fact that the worker was a senior employee meant that "justice, equity and fairness" (at [58]) required that the employer at least consult him as to its proposal. The worker was entitled to be heard;

(b) the suddenness of the "axe that fell upon the applicant" (at [59]). He was told of his retrenchment and the decision to outsource the insurance operations on 1 March 1999, with the immediate effect that he and his staff would become redundant within a month;

(c) the short period of notice (one month) to the worker of the decision to dismiss him, which might have been usual for a factory worker, but was "quite unreasonable" (at [60]) for a senior executive (noting that warehouse workers received six weeks' notice);

(d) the lack of provision of counselling services (at [63]) (noting again that counselling and financial advice, as well as help in finding alternative employment, had been made available to retrenched warehouse staff as a normal part of the retrenchment process), and

(e) the lack of assistance to help the worker find alternative employment.

2.112 *Temelkov v Kemblawarra Portuguese Sports & Social Club Ltd* [2008] NSWWCCPD 96 is another case where it was held that the employer's actions with respect to the dismissal of a longstanding employee were not reasonable.

2.113 In that case, the worker had worked for a sports club for 13 years. At the end of his shift, in the early hours of 4 March 2007, the Club's supervisor handed him a letter saying that, because of the Club's financial circumstances, his employment would be terminated and he would be re-employed on a much lower wage. The worker was upset and agitated. He saw his general practitioner on 6 March 2007 and was certified unfit.

2.114 The Arbitrator upheld the employer's argument that the worker's undisputed psychological injury was caused by reasonable action with respect to retrenchment and the provision of employment benefits. That decision was overturned on appeal because (at [125]):

"(a) the Club took action to dismiss a long-term employee of good standing without giving him any prior notice that his position was under review. Had the Club given some notice of its concerns, it would have given Mr Temelkov time to consider his position, seek advice, or propose an alternative;

(b) the [dismissal] letter of 3 March 2007 was expressed in blunt and uncompromising language. It said, for example, "your position as Doorman...will be terminated with five weeks' notice". That kind of language was, given the history between Mr Taylor and Mr Temelkov, unreasonable and inappropriate;

(c) the supervisor gave the letter to Mr Temelkov after he completed his Saturday night shift. At the very least, one would have thought that an employee

with Mr Temelkov's history and dedication would have been given the courtesy of a face to face meeting with management so that he could discuss other options;

(d) the letter was not simply a reduction in wages; it was a termination of employment with an offer of re-employment at a much lower wage. It gave Mr Temelkov no alternatives, no offer of assistance (such as counselling) and no opportunity to be heard or to negotiate. I reject the Club's submission that it acted reasonably in all the circumstances in its 'negotiations' with Mr Temelkov. So far as the March 2007 letter was concerned, there were no negotiations, merely a final decision terminating his employment without warning;

(e) the fact that Mr Temelkov reacted as he did to the December 2005 letter [which caused the worker anxiety when the Club reduced his hours] put the Club on notice that he was sensitive to, and concerned about, his conditions of employment. The Club knew, or ought to have known, that Mr Temelkov would be concerned about the contents of the letter of 3 March 2007. In these circumstances, some sensitivity and foresight should have been exercised in handling the matter, and

(f) further, …I am not satisfied that the stated reason for termination of Mr Temelkov's employment and the offer of re-employment at a substantially lower wage, namely, that the Club was no longer in a financial position to pay $1,114 per week, was a genuinely held view as at 3 March 2007. Whilst it is not for me to determine if the Club's decision to terminate Mr Temelkov was justified, if the stated reason for the action taken is not accepted, that is relevant to the reasonableness of the process with respect to the dismissal/employment conditions."

Provision of employment benefits to workers

2.115 Provision of employment benefits to workers encompasses a reduction of the worker's "extra" paid time performing a special clean-up job with particular tenants of the building in which she cleaned (*Milovanovic* at [82]).

CONCLUSION

2.116 Claims for psychological injuries require careful and thorough preparation. The pleadings must clearly and concisely identify the claim and the issues in dispute. The evidence must address the issues in dispute and be presented in a way that will assist the Arbitrator to understand the case and the parties' arguments. Adopting this approach will ensure that claims are handled expeditiously and that a fair outcome will be achieved, thus substantially reducing the risk of an appeal.