

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Whitsunday Housing Company Ltd v Workers' Compensation Regulator* [2018] QIRC 016

PARTIES: **Whitsunday Housing Company Ltd**  
(Applicant)

v

**Workers' Compensation Regulator**  
(Respondent)

WC/2016/203

PROCEEDING: Application for an Order that the Worker submit to a personal examination by a registered medical specialist

DELIVERED ON: 23 February 2018

HEARING DATES: 15 February 2018

HEARD AT: Brisbane

MEMBER: Industrial Commissioner Black

ORDER: **1. The application is refused; and**  
**2. Costs are reserved.**

CATCHWORDS: WORKERS' COMPENSATION - APPEAL AGAINST DECISION – INDEPENDENT MEDICAL EXAMINATION - Application for order for medical examination - whether the factors in s 556 are satisfied - whether an acceptable reason for the order has been established.

CASES: *Workers' Compensation and Rehabilitation Act 2003* s 556.

APPEARANCES: Mr M Smith, Counsel, instructed by McKays Solicitors on behalf of the Whitsunday Housing Company Ltd;  
Ms D Callaghan, Counsel, directly instructed, for the Workers' Compensation Regulator.

## Decision

### Introduction

- [1] Ms Penny Coles lodged an application for workers' compensation with WorkCover on 16 January 2015 in respect to an injury described as "depression and anxiety" which she said was caused by "bullying, intimidation and unfair treatment at work". At the time, Ms Coles was employed by the Whitsunday Housing Company Ltd in the capacity of "Property Manager".
- [2] WorkCover referred Ms Coles to Dr Chung for an independent psychiatric assessment on 14 December 2015. Ms Coles' application for compensation was subsequently rejected by WorkCover on 10 March 2016. However, on review, the Workers Compensation Regulator (the regulator) set aside WorkCover's decision and determined that the claim was one for acceptance.
- [3] The Whitsunday Housing Company Ltd lodged an appeal against the regulator's decision on 26 October 2017. Further, on 18 December 2017 the appellant sought, by application, an order that Ms Coles attend an independent psychiatric examination. The terms of the order sought were subsequently altered in an amended application filed on 13 February 2018.
- [4] The application, which is opposed by the regulator, was heard by the Commission on 15 February 2018.

### Legislation

- [5] Under s 556 of the *Workers' Compensation and Rehabilitation Act 2003* (the WCR Act), the Commission may exercise a discretion to order a claimant or worker to submit to a personal medical examination. The application is made pursuant to this section of the WCR Act which provides:

#### **556 Additional medical evidence**

- "(1) This section applies if -
  - (a) The condition of a claimant or worker who has, or is, said to have, sustained an injury is relevant to the appeal; or
  - (b) The cause, nature or extent of the injury or incapacity arising from the injury is relevant to the appeal.
- (2) The appeal body may, at any time before or after the start of the hearing, order the claimant or worker to submit to a personal medical examination by 1 or more specified registered persons."
- (3) The appeal body may also, as the appeal body considers appropriate, make an order about—

- (a) the way, time and place of the examination; and
  - (b) costs of the application for the order and of the examination.
- (4) An opinion formed on the examination must be given to the respondent and the respondent must make the opinion available to the appellant.
- (5) Subsection (6) applies if the claimant or worker—
- (a) fails, without reasonable excuse, to attend for the examination at the time and place ordered by the appeal body; or
  - (b) having attended, refuses to be examined by a registered person; or
  - (c) obstructs, or attempts to obstruct, the examination.
- (6) Any entitlement the claimant or worker may have to compensation is suspended until the claimant or worker undergoes the examination.

[6] The application is filed in circumstances where Ms Coles has refused a request by the applicant to voluntarily agree to undertake an independent medical examination. In correspondence to Ms Coles dated 1 August 2017, the applicant said that the purpose for such an examination was to provide advice in relation to a number of matters including Ms Coles' current psychological status, the relationship between the injury and the employment, the relationship between the injury and management action, and the relationship between the injury and Ms Coles' expectation or perception of management action taken against her.

[7] The discretion to be exercised by the Commission under s 556 of the WCR Act turns on whether Ms Coles' "condition" is relevant to the appeal, or whether the cause of her injury or the extent of her injury is relevant to the appeal. While the applicant may oppose a finding that an injury has been sustained, the psychological nature of any claimed injury should not be in dispute.

[8] It was the applicant's submission that both the "condition" of Ms Coles and the cause, nature or extent of Ms Coles' injury are relevant to the appeal. The respondent however contested the application on the basis that sufficient grounds to warrant an assessment had not been made out.

### **Condition of Worker**

[9] Ms Coles' "condition" has been assessed over time by her general practitioner, her treating psychologist, and by Dr Chung in completing an independent psychiatric assessment.

[10] The applicant submitted that the appellant employer was entitled to ask that Ms Coles submit to an independent medical examination in circumstances where no recent psychiatric assessment had been conducted, and where the employer was entitled to have Ms Coles' injury reviewed by an independent clinician prior to the prosecution of its appeal.

[11] In circumstances where Ms Coles' claimed psychological injury was sustained around October 2014, the respondent argued that Ms Coles' current condition was not relevant

to the appeal. It was questionable whether a psychiatric assessment conducted in February or March 2018 would be able to meaningfully contribute to a consideration of Ms Coles' condition in late 2014.

- [12] While it is possible that a new psychiatric assessment may contribute to a more complete understanding of Ms Coles' psychiatric condition, it is unlikely that such an assessment would be relevant, in any significant way, to the decision making process in the substantive proceedings, in circumstances where:
- (i) The determination to be made is whether Ms Coles sustained a psychological injury in October 2014, and matters relating to causation;
  - (ii) All the available contemporaneous medical evidence supports a finding that a psychological injury was sustained around October 2014, and that the injury was related to employment;
  - (iii) Ms Coles reported workplace stress or depressive symptoms to her general practitioner on 23 October 2014, and on three further occasions between that date and 29 December 2014;
  - (iv) On 29 December 2014, Ms Coles was referred to a psychologist for treatment for reactive depression;
  - (iv) Ms Coles' treating psychologist confirmed a diagnosis of reactive depression related to events at work in reports dated 11 February 2015 and 30 June 2015;
  - (v) Ms Coles was subject to an independent psychiatric assessment at the request of WorkCover on 14 December 2015.

### **Cause of Injury**

- [13] The applicant submitted that the "cause" of the injury was relevant to the appeal. In addressing the application of the second limb of s 556(1) of the Act, the applicant relied on two grounds.
- [14] The first ground was that any opinion about causation arising from any of the assessments of Ms Coles' injury completed by medical practitioners had been derived solely from a history provided by Ms Coles. In particular, the applicant differentiated a new psychiatric assessment from the earlier assessment completed by Dr Chung on the basis that Dr Chung relied solely on Ms Coles' version of events in terms of developing a factual appreciation for what went on in the workplace.
- [15] It followed that the applicant considered that Dr Chung's report was based on a history that was incomplete, inaccurate, or false. The factual differences considered to exist were detailed in the affidavit of Mr Boyle (Exhibit 1). It is clear from a reading of the affidavit that the applicant is disaffected by a process in which its version of events were excluded from the assessment, and that this is something that it believes will be corrected in a new assessment. If a further psychiatric assessment were allowed, the examiner would be able to base conclusions on a complete history, and different opinions might emerge about the injury and about the causes of the injury.
- [16] The applicant's views about Dr Chung's assessment may be misconceived. While Dr Chung expressed an opinion that employment was the major significant contributing factor to the development of the injury, factual findings about causation are matters for

the Commission in the substantive proceedings. Further, Dr Chung's opinion was given in a context where he also pointed out in his report that he could neither confirm nor dispute any of the allegations made by Ms Coles during the assessment. He also concluded that it was Ms Coles' perception of the situation at work that had caused the development of her psychological injury and that the "injury is mostly associated with her perceptions of the Board member's behaviour towards her and her colleagues". It is problematic for the applicant to suggest that it would achieve a significantly different conclusion in a new assessment, particularly given the extensive conflict in the history provided by Ms Coles and the version of events presented by Mr Boyle.

- [17] It is also relevant that both Dr Chung's assessment and any new assessment would have been preceded by contemporaneous accounts about causation given by Ms Coles to both her general practitioner and her treating psychologist. This evidence will be tested against a report prepared over three years after the claimed injury. While a new report may have regard to a complete history, the history can be expected to be heavily disputed.
- [18] The second ground relied on the records of Ms Coles' attendances on her general practitioner since 2004. It was the applicant's submission that the records disclosed that Ms Coles' depression could be attributed to factors other than her employment. The records, which were included in an affidavit of Stacie Young (Exhibit 4), included entries of interest arising from attendances on 11 July 2005, 24 January 2006, 4 May 2006 and 11 September 2008. According to the applicant, these entries disclosed a history of depression or anxiety which preceded events in the workplace in or around October 2014.
- [19] The record dated 11 July 2005 disclosed that Valium had been prescribed. The record dated 24 January 2006 included an entry to the effect that Ms Coles had been feeling depressed for about four to five months. It is unlikely that reliance on these entries alone would sustain a position that Ms Coles' condition in October 2014 could be said to be attributable to a predisposition to depression or depressive symptoms.
- [20] Firstly, in terms of Ms Coles' medical history, the reporting of depressive symptoms could only be considered a very isolated event and an event that occurred eight years before the onset of depression at the end of 2014. Secondly, the respondent said that related entries in the records explained the prescription of Valium and explained why Ms Coles was feeling depressed around January 2006. These explanations substantially diminished the prospect that Ms Coles may have had a history of depression and that the discussion about causation would be enlightened by the entries in question.
- [21] The respondent submitted that "cause" was relevant if there was a dispute about whether the employment was the major significant contributing factor to the injury. On what has been disclosed thus far about the appellant's case in the substantive appeal, the respondent noted that no significant argument had been advanced which might justify a conclusion that the injury was caused by anything other than the employment. It was further submitted that there was, at best, only a remote prospect that a further psychiatric examination would disclose anything new in terms of factors said to have contributed to the injury.

## **Decision**

[22] The decision on the application turns on a consideration of all the relevant facts and circumstances and involves an exercise of discretion by the Commission under s 556(1) of the WCR Act.

[23] I am not satisfied, having regard to the reasons advanced by the applicant, that the Commission should positively exercise its discretion and issue the Order sought by the applicant.

[24] The application is dismissed.