

# QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Wesley v Workers' Compensation Regulator* [2019] QIRC 126

PARTIES: **Wesley, Gordon**  
(Appellant)

v

**Workers' Compensation Regulator**  
(Respondent)

CASE NO: WC/2018/65

PROCEEDING: Appeal against a decision of the Workers' Compensation Regulator

DELIVERED ON: 11 September 2019

HEARING DATES: 25 February 2019  
12 April 2019  
8 May 2019

HEARD AT: Brisbane

MEMBER: Knight IC

ORDERS:

- 1. The appeal is dismissed.**
- 2. The decision of the Respondent dated 13 March 2018 is affirmed.**
- 3. The Appellant is to pay the Respondent's costs of and incidental to this appeal.**

CATCHWORDS: WORKERS' COMPENSATION – APPEAL AGAINST DECISION – Whether the Appellant's psychological injury is secondary to an accepted physical injury – questions around multi-factorial causation – whether physical workplace injury and associated pain and stress triggered increase in drug use and onset of psychiatric symptoms – nature of psychological injury - was employment the major significant contributing factor to the psychological disorder.

LEGISLATION: *Workers' Compensation and Rehabilitation Act 2003*

CASES: *Pacific Coal Pty Ltd v Gaudy* [1996] QCA 525

*Blackwood v Mana* [2014] ICQ 027  
 APPEARANCES: Dr G Cross, Counsel, instructed by Everingham  
 Lawyers, for the Appellant.  
 Ms L Willson, Counsel, directly instructed by the  
 Workers' Compensation Regulator, the Respondent.

### **Decision**

[1] Mr Wesley Gordon ("the Appellant") appeals a decision of the Workers' Compensation Regulator ("the Respondent") dated 13 March 2018, which confirmed a decision of Workcover Queensland (Workcover) to reject the Appellant's claim for compensation under s 32 of the *Workers Compensation and Rehabilitation Act 2003* ("the Act"), in respect of a psychological injury claimed to have developed as a secondary injury. The appeal is made under s 550 of the Act.

### **Witnesses**

[2] For the Appellant:

- Mr Gordon Wesley, Appellant;
- Dr Christopher Harvey, General Practitioner;
- Dr Lawrence Khoo, General Practitioner;
- Dr Karen Chau, Psychiatrist.

[3] For the Respondent:

- Dr Ken Arthur, Psychiatrist.

### **Background & Appeal Details**

[4] Mr Wesley is 40 years of age. During the proceedings the Commission was told he was abused by his step-father as a child and that he eventually left home to live with friends. He was educated to Grade 8, later completing Year 10 while in prison.

[5] At the time of the proceedings he told the Commission he was separated from his partner, with whom he has four children, and was residing in Far North Queensland with his mother.

[6] It is not in contention the Appellant has a history of convictions associated with driving under the influence. He told the Commission he was imprisoned for various periods after being charged with drink driving on sixteen occasions, serving a total of two and a half years in jail.

[7] In addition to his drink driving offences and experiencing periods of excessive consumption of alcohol during his life, the Appellant told the Commission he has a long-standing history of amphetamine and ice use, which commenced around the age of fourteen.

[8] In this matter, there is some disagreement about the extent of the Appellant's consumption of the drug ice at or around the time he sustained his physical injury, in

circumstances where the Appellant is now claiming a secondary psychological injury.

- [9] At the time the Appellant injured his arm in March 2016, he was working as a casual labourer or house stumper for Wayne Marshall, House Restumping Services. On 16 May 2016 Mr Wesley made an application for compensation for a physical injury to his left forearm. The claim was accepted.
- [10] More than a year later, by Notice of Claim for damages, dated 14 July 2017, the Appellant advised as to the particulars of injuries sustained as a result of the injury to his forearm, including a psychological injury. He maintains that prior to injuring his arm in March 2016, he had no history of a psychological/psychiatric illness.
- [11] The Appellant’s position is that following the incident, he experienced pain and difficulties with his left arm, significantly increased his drug use, experienced anxiety and depression and suffered a relationship breakdown. The Appellant argues the injury to his arm on 15 March 2016 had a profound, detrimental effect on his psychiatric/psychological state, which was not in existence prior to the incident occurring.
- [12] The Respondent maintains the Appellant has not suffered a secondary injury as a result of his accepted physical injury, maintaining that any injury he is suffering, did not arise out of or in the course of his employment, and that his employment was not the major significant factor to the injury.
- [13] Further, that the Appellant’s mental health has been adversely affected by his drug use and abuse and that any psychological or psychiatric condition that the Appellant is suffering from, is purely related to his longstanding drug abuse and is not a result of his physical injury.
- [14] Although the Appellant acknowledged during the proceedings he had experienced occasions in his life where he consumed significant levels of ice, he argues that in the period immediately before the injury to his arm, his usage was only “a couple of times a week or twice a fortnight or something”.
- [15] The Regulator rejects this position, noting the Appellant is attempting to minimise his drug usage in the period immediately before he injured his arm, with the goal of demonstrating to the Commission that his drug consumption, *after* the physical injury, is directly related to his psychological condition, which he says arose as a result of the physical injury.

### **Legislation**

- [16] The relevant parts of the legislation for the time period material to the Appellant’s claim for workers' compensation, are set out below:

#### **32 Meaning of *injury***

- (1) An *injury* is personal injury arising out of, or in the course of, employment if—
- (a) for an injury other than a psychiatric or psychological disorder—the employment is a significant contributing factor to the injury; or

- (b) for a psychiatric or psychological disorder—the employment is **the** major significant contributing factor to the injury (**my emphasis**).

...

### **Issues To Be Determined**

- [17] The appeal to the Commission is conducted by way of a hearing *de novo*. To succeed in this Appeal, the Appellant bears the onus of proof, on the balance of probabilities to prove that he did sustain an injury within the meaning of the Act. The questions to be answered in the determination of the appeal include:
- (i) whether the Appellant's psychological or psychiatric injury arose out of, or in the course of, his employment; and
  - (ii) whether his employment is the major significant contributing factor to the injury.
- [18] Whether, and to what extent, the Appellant's employment contributed to the development of a psychological injury involves an examination of the associated pain, stress, drug habits and other adverse events that occurred in the wake of the physical injury on 15 March 2016, along with medical evidence relevant to the injury and its onset.
- [19] For employment to be the major significant contributing factor, the employment must be important or of consequence, and there should be a nexus between the employment and the (psychological) injury. Moreover, in a case where expert medical evidence is led, the facts upon which it has been based must be supported by admissible evidence before it can be of value.

### **Evidence**

#### *Secondary Injury – Depression*

- [20] The Appellant maintains he increased his drug usage after injuring his forearm at work in March 2016. Prior to the accident he denies any psychological injuries, but says he became depressed after the accident. Under cross-examination, the Appellant appeared to attribute part of the reason for his increased drug use, to the breakdown in his relationship with his partner of over twenty years.
- [21] In an appointment with psychiatrist, Dr Ken Arthur on 1 September 2017, in response to a question about his mental state in the past six to twelve months, the Appellant was reported as saying:

I'm not fucking alright...I'm up the shit ...losing my house...heaps of shit is wrong...<sup>1</sup>

- [22] When asked if he felt depressed, he was reported as stating: 'all the time (when he is not using ice)'. According to Dr Arthur he admitted to using ice over the past twelve months, with the longest he had gone without drugs being 4 days.<sup>2</sup>

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<sup>1</sup> Exhibit 7.

<sup>2</sup> Ibid.

*The Appellant's Drug Use - Pre March 2016*

- [23] The Appellant told the Commission he commenced taking illicit drugs when he was fourteen years old. He said he took speed when he was younger and would steal and sell various items to fund his habit, but that he eventually moved predominantly to consuming ice which he paid for, as he got older, by working.
- [24] The Appellant explained that 10 points of ice was generally equal to one gram of ice. He said that he took or consumed ice intravenously, and that it could cost anywhere between \$100 to \$400.
- [25] Psychiatrist, Dr Chau, in a report dated 8 September 2017, noted the Appellant had told her at an appointment he attended on 28 August 2017, that he had used speed, ecstasy and acid since he was 14 years old. Between the ages of 18 and 20 he used speed on a daily basis. In his assessment with Dr Chau, the Appellant denied having any alcohol-related problems but disclosed he had been charged for driving under the influence sixteen times. Dr Chau also reported the Appellant told her he started using ice *after* his work injury, "to relax you, take your mind off shit".<sup>3</sup>
- [26] In an appointment with Dr Ken Arthur a few days later, the Appellant was reported as stating that he drank alcohol on a daily basis, typically consuming 12 to 16 beers every night and a carton and a half over the weekend.<sup>4</sup>
- [27] Dr Arthur's report, which was dated 1 September 2017, noted that when specifically asked about his drug use, the Appellant initially reported:
- yeah, nah...I just drank beers ...I was on the piss before the accident...<sup>5</sup>
- [28] In the same report, Dr Arthur noted the Appellant:
- ...minimized his use of crystal methamphetamine (ice) stating: 'I don't smoke really ...just tried it...' On further questioning he admitted he had smoked ice on the Sunday (the accident was on a Tuesday). He claimed that he was extremely hung over on Monday and did not consume any alcohol or ice that evening. On direct questioning, he clarified he was using ice on average once a month prior to his injury. He denied any other illicit drug use.<sup>6</sup>
- [29] The Appellant confirmed he had an alcohol addiction in his teens but denied consuming alcohol and drugs as a result of any prior psychological issues.
- [30] Under cross-examination, the Appellant confirmed he also told Dr Arthur he moved to Canberra for two years around the year 2000 and consumed a significant amount of drugs during this period.
- [31] In relation to his consumption of ice immediately prior to his forearm injury in March 2016, the Appellant told the Commission that he "wasn't really using ice at ... work", and that he would "Maybe on...the weekends, I might have some." He also described that he "worked hard and supported his family and just drank beers."<sup>7</sup>

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<sup>3</sup> Exhibit 6.

<sup>4</sup> Exhibit 7.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> T1-10, 45 – 46.

[32] On weekends, he said he would take "just a little bit of rock. A gram. Or a point, yeah."<sup>8</sup> During the week the Appellant explained he would drink six to eight to twelve beers a night. He indicated that he did not take time off work as a result of his alcohol or drug use.

[33] While giving his evidence, the Appellant's representative read out to him a progress note prepared by the Redcliffe Hospital on 15 March 2016, (the day he injured his arm), which reported as follows:

IV use daily. Last used yesterday. No other drugs regular. Smokes 15 a day. Alcohol, two to three cans per day.<sup>9</sup>

And a further notation the next day:

Drinks six pack beer after work. Last alcohol use on Sunday. Denies any withdrawal or seizure from alcohol misuse. Uses speed and ice, more ice than speed. IV daily. Uses ED five days then crashes. Uses one gram in two days. Uses clean needles and syringes. Last use ice was Monday. Denies any paranoia aggression, hallucinations when crashing. Denies cannabis, benzo and cocaine.<sup>10</sup>

[34] When questioned as to whether there was any content in the progress note prepared by hospital staff he disagreed with, the Appellant confirmed it was the history (in terms of his drug use) he had provided to the hospital. The Appellant didn't disagree with the information being read out to him by Counsel.

[35] He later told the Commission, "before the accident I was using probably one point every two weeks".<sup>11</sup> Under cross-examination, he again agreed he "might have" reported using ice intravenously to the person taking notes at the hospital but was unable to recall if he also reported consuming a gram of ice every two days.<sup>12</sup>

[36] The Appellant agreed that consuming a gram of ice every two days was a lot, acknowledging the amount was potentially on par with what he was consuming when he moved to Caloundra some months after the workplace accident where he was heavily abusing drugs.

[37] In response to questions as to how he would characterize the Appellant's drug use given the description contained in the hospital progress notes referred to earlier – that is, "IV daily. Uses ED five days then crashes", Dr Arthur referred to the concept of 'chaining', whereby:

they'll use it every day for a period of time in order to maintain some sort of a state of being intoxicated, and that can go on – I have had people report to me that they've used ice or IV amphetamines for weeks at a time with very little sleep and within increasing...levels of disorganisation. And I would consider that would be...more serious use...often associated with significant sleep deprivation, which then compounds, the psychotropic or psychoactive effects of the drug and may increase the risk of having hallucinations or paranoia and mood

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<sup>8</sup> T1-11, 44.

<sup>9</sup> Exhibit 1.

<sup>10</sup> Exhibit 2.

<sup>11</sup> T1-22, 32.

<sup>12</sup> T1-27, 19-40.

swings. So I'd consider that people who use it every day for a number of days and then crash, as they say...I would consider that to be more serious and damaging.<sup>13</sup>

- [38] Although the Appellant accepted he had more time after the accident to take drugs, he did not agree the reason he felt depressed was because he was 'coming down' off ice. He considered the workplace accident had played a large part in his drug addiction.

*The Appellant's Drug Use - Post March 2016*

- [39] The Appellant told the Commission he "upped the ante a lot" in respect of his drug taking about two to three months after the workplace accident. He explained this involved consuming anywhere between five and seven points of ice a day.<sup>14</sup> In response to a query regarding the consequences of consuming this amount of ice, he said, "...times I've almost been kicked out of the unit with the kids. Not paying rent. There's no food, just things like that".<sup>15</sup>
- [40] He explained that he would coordinate the purchase of ice, "Through – oh, the rent money...Centrelink benefits or other tactics. I was pretty violent".<sup>16</sup>
- [41] In response to a question as to how the drug use affected him, in respect of whether it gave him a high or a low, the Appellant explained, "Yeah, I – just having it, it was just a high. But coming down off it, it just come depression".<sup>17</sup>
- [42] According to a report prepared by Dr Chau on 8 September 2017, the Appellant reported he only started to take ice after the workplace injury, noting that he used it daily and that his consumption increased significantly following his separation from his partner. He reported using a maximum of five to eight points a day, but told Dr Chau, "I'm cutting it back".<sup>18</sup>
- [43] When asked by his representative about why he increased his level of drug use by two points a week to five points a day, the following exchange occurred:

DR CROSS: Why did you increase your level of drugs by two points a week to five points a day?

APPELLANT: Just – yeah, just not working, just have anything – just builds up. You just don't care no more.

DR CROSS: Is this because you were depressed-

APPELLANT: Oh, yeah, fully, Yes.<sup>19</sup>

- [44] In Dr Arthur's report, he noted the Appellant told him he had moved to Caloundra with a couple of mates after his relationship with his partner deteriorated. Dr Arthur reported Mr Wesley as staying:

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<sup>13</sup> T1-72, 25-45.

<sup>14</sup> T1-22, 35.

<sup>15</sup> Ibid, 39-41.

<sup>16</sup> Ibid 47.

<sup>17</sup> T1-23, 3-4.

<sup>18</sup> Exhibit 6.

<sup>19</sup> T1-24, 6-10.

...in Caloundra until Christmas time; although he claimed to have kept up with physiotherapy he admitted: "got on the drugs real bad...smoking a gram of ice a day...I was just getting off me head ...pokies...piss..." He was in receipt of Workcover payments and was living with a wealthy female friend who supported him financially.

... He continues to use approximately one point of ice a day which he claims: 'takes the edge off and shit.' Although this is only a fraction of what he was using in Caloundra, he admitted that if he does not have it, he feels: 'a bit emotional and shit.' He has also cut back on his alcohol use although will binge if he can afford it.<sup>20</sup>

- [45] Under cross-examination, the Appellant clarified that the wealthy female referred to in Dr Arthur's report did not support the Appellant financially, but instead supported his drug habit. He confirmed the reason he was able to consume so much ice in the months he lived in Caloundra was because she paid for it.

#### *Relationship Breakdown*

- [46] Although the Appellant was not living with his partner at the time of the workplace accident in March 2016, his evidence was that his relationship with his partner was still reasonable. He said she would drive him to work daily. The Appellant explained the reason he did not live with his partner and kids during this period was that he could not deal with his partner's parents who often lived at the house.
- [47] The Appellant told the Commission his relationship with his partner deteriorated after his workplace accident, eventually leading to a formal separation in July 2016. His evidence was that his partner did not want to work, which resulted in some significant tension in the relationship.
- [48] In an appointment with Dr Chau, a Psychiatrist, the Appellant was reported as saying his 21-year de-facto relationship was "good...fine" pre-injury and they had never separated previously.<sup>21</sup> After the injury he reported to Dr Chau there was significant strain in the relationship as he did not perceive her to be supportive and understanding, despite his financial concerns. Although they had been separated for over one year, he indicated the relationship was still strained.
- [49] The Appellant told Dr Chau his partner had developed a drug and alcohol problem since his injury and had formally agreed to allow him to have full custody of his children. Initially after the work injury, his mother was reported as caring for his children for a couple of months, as he had developed an ice habit. It's not entirely clear on the materials before the Commission as to when the Appellant accepted full custody for his children or how long this arrangement was maintained.
- [50] In an appointment with Dr Arthur, the Appellant reported he had been in an off-and-on relationship with his partner since their teenage years. He reported they had multiple break ups, the longest being in 2000 when the Appellant moved to Canberra for two years and heavily abused drugs. After leaving his partner in 2016 he spent the rest of the year with his ex-partner's best friend.

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<sup>20</sup> Exhibit 7.

<sup>21</sup> Exhibit 6.



[51] Dr Arthur noted, "Although he claimed he has been caring for his children since March of this year [2017], he described a somewhat complex situation where his ex-partner will come and take them down to the Gold Coast on a whim and still receives full parenting payments for the children."<sup>22</sup>

[52] The Appellant's partner was not called to give evidence during the proceedings.

### **Medical evidence – nexus between physical injury and psychological injury**

#### *Nature of Injury*

[53] The medical evidence in respect of the Appellant's psychological or psychiatric condition(s) consisted of medical reports and accompanying oral evidence. In addition to two psychiatrists, Dr Chau and Dr Arthur, two other General Practitioners were called to give evidence in relation to their treatment of the Appellant:

- Dr Harvey; and
- Dr Khoo.

[54] Dr Harvey confirmed there was no history of depression contained in the Appellant's medical notes. The dates of the Appellant's appointments within the medical records provided to the Commission by Dr Harvey ranged from 23 June 2009 until 18 July 2016.<sup>23</sup>

[55] Dr Khoo confirmed it was not until the Appellant attended an appointment at the Welsby Parade Medical Centre on 29 May 2017, that any reference to depression can be located within the relevant medical records. An entry for 29 May 2017, notes:

**Surgery Consultation recorded by Dr Archana Bhandarker on 20/05/2017**

**Reason for visit:**

Drug abuse

Depression/Anxiety

Uses rock

Wants to stop it

Suicidal attempt – tried to hang himself

Usually have ½ grams daily – stopped – had nothing in the last 3 days<sup>24</sup>

[56] On the same day, Dr Archana Bhandarker sought assistance for the Appellant from ATODS via Caboolture Community Health. In a letter dated 29 May 2017, Dr Bhandarker wrote:

...

It would be appreciated if Gordon can be seen to help with his drug addiction and he is willing to come off his addiction. He has stopped taking his ICE for the last 3 days and suffering from withdrawal symptoms [restless, anxious]

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<sup>22</sup> Exhibit 7.

<sup>23</sup> Exhibit 3.

<sup>24</sup> Exhibit 4.

....

Uses ICE-ROCK as intravenous drug for the last 5 years.  
Alcohol intake – usually none, drinking 16 drinks last 3 days when he hasn't taken any ICE  
Smoking – 2 cigarettes per day

He feels depressed and anxious as well for which I will be monitoring him<sup>25</sup>

- [57] Separately, the Appellant provided the Commission with an injury diagram, which he completed himself and signed on 4 May 2017, where he noted:

PSYCHOLOGICAL SYMPTOMS:

Left form (sic) ARM has very little bend and twist no movement in wrist whilst hand is in fist striking (sic) pain up middle of form (sic) arm contouios (sic) pain around lump in form (sic) arm...

ADDITIONAL

Since Injury very bad depression lost partner kids everything. Im (sic) homeless lack of sleep scared to touch a power tools now have bad drug habbit (sic) thinking of suicide on a couple of accusation don't (sic) in the dumps all ways mentally and fisally(sic) emotional in the head.<sup>26</sup>

- [58] A file note in respect of a conversation between a Dr McGrath and Ms Susan Lewis of Everingham Lawyers on 22 February 2019, confirmed Dr McGrath had examined the Appellant at the request of Workcover Queensland for the purpose of assessing permanent impairment for his physical injury.<sup>27</sup>
- [59] Dr McGrath was recorded as reviewing her notes and confirmed she had written down 'dd ice' and the word 'depression'. She confirmed she had no record of whether the Appellant had problems with depression and explained that the reference to depression related to the Appellant's medical history prior to the date of her examination, not prior to the date of injury.<sup>28</sup> It is not entirely clear from the file note when Dr McGrath's examination of the Appellant took place.

*Dr Karen Chau - Psychiatrist*

- [60] Dr Chau, a psychiatrist, called by the Appellant, prepared four separate reports to assist the Commission during the Appeal proceedings.
- [61] In a report dated 8 September 2017, Dr Chau diagnosed the Appellant as having an Adjustment Disorder with Mixed Anxiety and Depressed Mood. In a further report prepared by Dr Chau, dated 22 March 2018, she noted:

I believe that Mr Gordon Wesley sustained Adjustment Disorder with Mixed Anxiety and Depressed Mood and Generalised Anxiety Disorder after a work injury on 15 March 2016. Thus, I opine that work is the major significant contributing factor to the development of these psychiatric conditions.

- [62] Under cross-examination Dr Chau confirmed she arrived at her conclusion having regard to what the Appellant was like *before* the workplace incident and what he

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<sup>25</sup> Ibid.

<sup>26</sup> Exhibit 5.

<sup>27</sup> Exhibit 8.

<sup>28</sup> Ibid.

was like *after* the incident, relying on a temporal connection between his physical injury and his reporting of an increase in drug consumption after the event.

[63] Dr Chau opined that the Appellant's past prejudicial childhood, history of heavy polysubstance abuse and personality predisposition, resulted in him being very vulnerable to developing psychiatric conditions in response to a workplace injury. She maintained his increase in drug use to 'self-medicate' pain and psychological trauma as a result of his work injury, was consistent with his coping style.

[64] In arriving at her conclusions, Dr Chau relied on information provided to her by the Appellant in respect of his drug taking both prior to and after the March 2017 workplace injury, along with the history he gave about his relationship with his partner and the stability of his employment, prior to and after the workplace incident.

[65] In response to questions during cross-examination as to her understanding of the nature and extent of the Appellant's drug dependency prior to the workplace incident, particularly in light of the progress notes from the Redcliffe Hospital, which appeared to suggest a greater level of ice consumption on the part of the Appellant prior to his workplace accident than he had reported, Dr Chau attempted to differentiate between drug dependency and dysfunctional use, noting that:

the fact that he was still presenting to work and reportedly functioned really well at work, the fact that he was, you know, maintaining his relationship – his long-term relationship. I think, the fact that someone uses drugs regularly – we have to differentiate it from whether or not it's an abuse type of pattern.<sup>29</sup>

[66] Under cross-examination as to whether someone (such as the Appellant) consuming ice for five days and then crashing was dysfunctional, Dr Chau acknowledged the such a level of consumption was heavy but was unwilling to confirm the extent or level of his dependency, in circumstances where she wasn't clear as to the functional impact or impairment for the Appellant at the time of the crash.

*Dr Ken Arthur*

[67] In a report dated 1 September 2017, Dr Ken Arthur, a psychiatrist, provided the following provisional diagnosis in respect of the Appellant:

- Polysubstance Misuse Disorder, predominantly alcohol and methamphetamine (the history suggests a pattern of dependence on amphetamines with tolerance and withdrawal symptoms);
- Mood and Psychotic Symptoms secondary to substance abuse (predominantly amphetamines);
- Antisocial Personality Disorder;
- Chronic Pain and Dysfunction secondary to the workplace injury.<sup>30</sup>

[68] In the same report, Dr Arthur noted:

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<sup>29</sup> T1-59, 29-33.

<sup>30</sup> Exhibit 7.

Based on the provided history, it is impossible to disentangle Mr Wesley's reported psychiatric symptoms to his past and present substance abuse.

All the symptoms reported to me are most likely explained by his daily ice habit punctuated with occasional binge alcohol use. Whilst it might be argued that Mr Wesley's escalation of substance abuse following his injury is a consequence of financial and interpersonal stressors directly related to his injury (pain/financial difficulties) he does have a significant history or premorbid abuse and relationship instability.<sup>31</sup>

[69] Dr Arthur was not prepared to diagnose the Appellant with depression. He explained that the use of drugs affects mood and thinking, noting that drug takers such as the Appellant are often in a state of flux in terms of their mood, which, depending on their state of intoxication could cycle between being very dysphoric, "down in the dumps" and reporting symptoms of depression and suicidal thoughts, to a scenario where mood symptoms would lift considerably, after receiving support.

[70] In relation to the Appellant, Dr Arthur explained it was difficult to determine whether he had a genuine mood disorder or if he was, instead, experiencing a constantly fluctuating mood due to his substance abuse.

[71] During cross-examination Dr Arthur confirmed he wasn't convinced he could diagnose the Appellant with a depressive episode noting:

He certainly reported symptoms of depression but didn't display any features of depression. So people can report feeling depressed. That doesn't necessarily equate to a diagnosis of depression. People can talk about suicidality. That doesn't denote a diagnosis of depression. People can be suicidal without being depressed. He was still using...amphetamines. He was still on ice which would've had an effect on his mood at the time. So whilst, yes, I'm not going to disagree with you that those reports are all consistent with someone who's depressed, I think you actually need to take it in context. And you need to look at the longitudinal picture, not just that cross-sectional reporting before you can make a clear diagnosis.<sup>32</sup>

[72] Dr Arthur submitted the Appellant also fulfilled the criteria for an anti-social personality disorder, which he explained "automatically raises questions as to the quality of the history given. And so I think any uncorroborated history...you just have to consider that very carefully."<sup>33</sup> Later, under cross-examination he re-enforced the need to obtain both collateral and corroborative history in circumstances where the Appellant had not been consistent in his reporting of various aspects of his life.

[73] In his evidence to the Commission, Dr Arthur was of the opinion the Appellant's use of ice had increased in circumstances where, not working and separated from his partner, he moved to the Sunshine Coast where a female friend was able to provide him with a regular supply of drugs. In circumstances where the friend was funding the drugs, Dr Arthur was of the view the Appellant had taken advantage of the supply and increased his use accordingly.

[74] Under cross-examination, Dr Arthur referred to the many months where the Appellant had been using ice in a daily basis, noting "...there were other reasons for him losing his relationship and causing his social problems that weren't just the injury."<sup>34</sup>

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<sup>31</sup> Ibid.

<sup>32</sup> T1-78, 1-10.

<sup>33</sup> T1-73, 28-30.

<sup>34</sup> T1-77, 44-46.

- [75] Dr Arthur accepted that distress, discomfort and other problems can trigger people who are vulnerable to engage in maladaptive coping strategies such as using drugs. He also acknowledged that chronic pain would be a significant stressor.
- [76] During cross-examination, in response to the assertion that the Appellant wasn't suffering any significant psychological problems prior to his workplace accident, Dr Arthur noted:

I think he has a substance abuse problem. And I think that he's only got a history of very heavy substance abuse ... I think his relationship was unstable and it was – you know, there was longevity to it...there's many unstable relationships that may last, you know, 30 or 40 years. So you know, his work history is ...on the surface, that's good...But it doesn't exclude the fact that he had a substance use problem and that had...caused him social problems in the past...in the past when he had a separation that he turned to heavy substance abuse. So when he's not in the relationship, he's got a history of doing so.. there's no evidence he's had a psychotic or a mood disorder, But there's certainly evidence of substance abuse and substance misuse.<sup>35</sup>

- [77] Under cross-examination, Dr Arthur expressed the view that after the accident, the Appellant's already unstable life unraveled. He considered the Appellant's drug use impaired his capacity to deal with certain stressors, Further, that the Appellant had engaged in some poor choices and some poor coping strategies which, in turn, caused him more problems.
- [78] He also considered that Dr Chau underplayed the choices made by the Appellant – that is, although he accepted the Appellant was a vulnerable individual, he considered that he did have a choice as to how best to cope with the various stressors in his life in the period after the accident, but that his choices led to a worsening of his psychosocial situation, which in turn amplified his distress.
- [79] Dr Arthur clarified that the Appellant's relationship, his family and his prior employment had all operated as *protective factors* in his life which assisted him to limit his substance abuse and remain in employment, to the extent that he was not idle.
- [80] Dr Arthur noted the Appellant identified boredom as an issue, commenting that people who are bored are more likely to engage in behavior such as substance abuse to pass the time. He considered the protective factors mentioned above had assisted him in maintaining the 'stably unstable lifestyle' that he had prior to the injury but that his life started to unravel once he stopped working and formally separated from his partner.

### **Submissions**

- [81] In reliance on the matter of *Pacific Coal Pty Ltd v Gaudy*<sup>36</sup>, the Respondent submits the Appellant has failed to discharge the onus that he has in fact suffered an "injury", namely depression. Further, that the evidence of Dr Arthur should be preferred and in those circumstances the Commission should not make a finding that the Appellant has sustained an injury.

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<sup>35</sup> T1-85, 3-20.

<sup>36</sup> *Pacific Coal Pty Ltd v Gaudy* [1996] QCA 525.

[82] In the event the Commission determines the Appellant has in fact suffered an injury, namely depression, the Respondent submits the injury did not arise out of or in the course of the Appellant's employment – that is, the injury in fact arose out of the Appellant's independent choices to not work and to take large amounts of the drug, ice.

[83] In support of its position, the Respondent points to the opportunities that arose when the Appellant's female friend from Caloundra funded his drug opportunities. Other opportunities arose in circumstances where he had more time on his hands due to not working (notwithstanding he was provided with an opportunity to engage in other employment in the months following his injury). The Regulator maintains the Appellant's drug use led to negative impacts on the Appellant's health and his life. Moreover, those set of circumstances is not a result of any work-related injury or employment related factor.

[84] Conversely, the Appellant maintains the claim is one for acceptance in circumstances where:

- the Appellant had a biological vulnerability;
- prior to the accident the Appellant used alcohol and drugs which may have increased his pre-existing vulnerability;
- the Appellant has no history of a psychiatric / psychological illness prior to the event in question;
- significant anxiety, depression and relationship breakdown are identified post the event;
- an increase in substance abuse is identified;
- the increase in drug misuse and the psychiatric symptomology occurred post the event;
- there is evidence of chronic pain syndrome post the event;
- the triggering event for the increased use of drugs and the psychiatric symptoms would appear to be the workplace accident.

[85] The Appellant maintains that a proper consideration of the evidence indicates the workplace accident on 15 March 2016 had a profound detrimental effect on the Appellant's psychological / psychiatric state which was not in existence before 15 March 2016.

### **Consideration and Conclusions**

[86] In *Blackwood v Mana*,<sup>37</sup> President Martin highlighted the importance of the accuracy and quality of the medical evidence relied on to support any claim, noting: "it is an un-contestable requirement that, for an expert opinion to be of any value, the facts on which it is based must be proved by admissible evidence."<sup>38</sup>

[87] One of the challenges associated with the medical evidence in this appeal are the inconsistencies in the histories provided by the Appellant to both Dr Chau and Dr Arthur about his circumstances, both before and after his physical injury. Moreover,

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<sup>37</sup> *Blackwood v Mana* [2014] ICQ 027.

<sup>38</sup> *Ibid* [13].

there were several inconsistencies and a certain level of ambiguity in some of the evidence the Applicant provided to the Commission. Unhelpfully, the Appellant also did not call any other witnesses to support or corroborate his account of what was occurring in his life both before and after he injured his arm in March 2016.

- [88] For example, the Appellant provided varying accounts to both Dr Arthur and Dr Chau of the extent, nature and timing of his consumption of ice both before and after he injured his arm. Likewise, during the proceedings when presented with a progress note from the Redcliffe Hospital containing a notation relating to the extent of his drug use around the time of his physical injury, the Appellant initially agreed with the account read out to him by his representative, but retreated in cross-examination from the idea that he had been consuming ice to the extent represented in the note.
- [89] Although the Appellant's reports to both doctors along with his evidence to the Commission, in respect of the reasons for his formal separation from his partner in the months after his physical injury, were generally consistent, the full extent and nature of his relationship with his partner and children prior to and after the injury was at times, unclear.
- [90] Likewise, although Dr Chau and to an extent, Dr Arthur, were of the understanding the Appellant's attendance at work was stable and consistent, there was limited evidence before the Commission to corroborate the full nature and extent of his employment prior to his physical injury.
- [91] Having regard to the inconsistencies identified above, in combination with Dr Arthur's views about the Appellant fulfilling the criteria for an anti-social disorder (which I accept) and the challenges this raises in respect of the quality of history provided by the Appellant, I agree with the Respondent that this is a case where the evidence provided by the Appellant about the nature and reasons for his drug use, should be treated with some caution.
- [92] As such, I consider the Redcliffe Hospital notes, in respect of the Appellant's drug use are a more reliable and accurate reflection of his consumption of ice in the period immediately before he injured his arm. That is, the Appellant was consuming ice intravenously and on a regular basis, immediately before he injured his arm in March 2016.
- [93] At a minimum, I am satisfied his pattern of use was more likely than not to have been daily, for approximately five days at any one time. In circumstances where the Appellant explained to the Commission that one point is generally equal to a tenth of a gram, it's more likely than not that the Appellant was consuming at least a gram of ice over a two-week period, immediately before his accident.
- [94] In arriving at her conclusions, Dr Chau relied on the information provided to her by the Appellant in respect of, among other things, his pre-injury drug consumption, the nature of his relationship with his partner and the stability and consistency of his employment.
- [95] In determining the Appellant's employment was the major significant contributing factor to his depression, she took into consideration his reports of drug use both before and after his accident.

- [96] Although it is obvious from Dr Chau's evidence that she eventually came to understand that the Appellant's initial account of his drug use may not have been entirely accurate, it is clear she considered there was a significant difference in his consumption both before and after his accident. Moreover, this was a major consideration in her determination about his employment being the major significant contributing factor to his depression. Other considerations extended to the nature of the Appellant's relationship, his employment stability and reports about his mood at the time of her examination.
- [97] The difficulty I have with accepting Dr Chau's diagnosis and opinion, is that it is clear the history provided to her by the Appellant was at times inconsistent and inaccurate.
- [98] Moreover, when presented during the proceedings with, among other things, a variation of the reported history and/or other entirely plausible reasons which may have also contributed to the Appellant's decision to increase his ice consumption after his injury, Dr Chau was unwilling to make many concessions, to the extent that she was not prepared to acknowledge that the Appellant's drug use, based on the record retained by the Redcliffe Hospital, may have fallen into the category of drug abuse.
- [99] In this matter, I prefer the evidence of Dr Arthur, who took a more measured and cautious approach when considering the information provided to him by the Appellant.
- [100] Dr Arthur was prepared to acknowledge Dr Chau's views about the Appellant's vulnerability, but at the same time he convincingly explained to the Commission that the Appellant had chosen to engage in poor choices and coping strategies following his physical injury, including an increase in his drug consumption, which in turn, created more distress for him, in circumstances where there was already a significant degree of instability in his life.
- [101] Dr Arthur was not convinced the Appellant suffered from depression, in a diagnostic sense. He was prepared to acknowledge the Appellant had reported feeling depressed on occasions, but explained it was very difficult to diagnose depression in circumstances where the Appellant may have been experiencing a constantly fluctuating mood due to his substance abuse.
- [102] In many respects, Dr Arthur's observations about the connection between the Appellant's fluctuation in mood and the consumption of ice, align with the events associated with the first time there is any reference in the Appellant's medical records to him reporting that he was feeling depressed.
- [103] That is, on 29 May 2017, the practice notes of the Welsby Parade Medical Centre indicate the Appellant complained of feeling depressed and anxious in circumstances where he had stopped taking ice three days prior.<sup>39</sup> There is no record, in the same notes, of the Appellant or the GP connecting his complaint of feeling depressed with the pain in his arm or any other employment related issues.

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<sup>39</sup> Exhibit 4.



- [104] Taken further, notwithstanding the submission by the appellant in respect of evidence in support of a chronic pain syndrome after the physical injury, there are minimal (if any) contemporaneous materials before the Commission, aside from the injury diagram completed by the appellant himself, where there is any suggested link between the low mood complained of by the appellant, his increase in substance abuse and his physical injury.
- [105] Instead, the evidence supports the conclusion that the Appellant's decision to increase his drug usage, which I acknowledge appears to have resulted in a fluctuation in mood at times, particularly during a periods where he would attempt to wind back his consumption, was a direct result of his own personal choices and other opportunities surrounding him during the relevant period, rather than employment related.
- [106] Dr Arthur explained that although the Appellant reported symptoms of depression, he didn't display any features of depression. In circumstances where the Appellant was still consuming ice, he opined the drug would have been having a big impact on his mood. He considered it was important, when diagnosing the Appellant to consider the longitudinal picture, before making a clear diagnosis.<sup>40</sup>
- [107] On his own evidence the Appellant explained, in response to a question as to how the drug use affected him, "Yeah, I – just having it, it was just a high. But coming down off it, it just come depression".<sup>41</sup>
- [108] Having regard to the evidence of both Dr Chau and Dr Arthur in respect of whether the Appellant has suffered an injury, that is depression, I prefer the evidence of Dr Arthur. That is, I am not persuaded, having considered all the materials before the Commission, that the Appellant's injury could accurately be diagnosed as depression. As such, I am unable to make a finding the Appellant has sustained an injury within the definition of the Act.

### **Orders**

[109] The Commission makes the following orders:

- 1. The appeal is dismissed.**
- 2. The decision of the Respondent dated 13 March 2018 is affirmed.**
- 3. The Appellant is to pay the Respondent's costs of and incidental to this appeal.**

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<sup>40</sup> T1-78, 1-10.

<sup>41</sup> T1-23, 3-4.