



Workplace Injury Commission

DETERMINATION AND REASONS FOR DETERMINATION

CITATION: [2024] VWIC 2

ARBITRATION REFERENCE NUMBER [Number]

PARTIES

WORKER [Worker's name] (the Worker)

WORKSAFE AGENT/SELF-INSURER [Self-insurer's name] (the Self-insurer)

EMPLOYER [Employer's name] (The Employer)

ARBITRATION OFFICER Katie Valentine

DATE(S) OF HEARING(S) 24 January 2024, 13 March 2024

DATE OF DETERMINATION 28 March 2024

DETERMINATION

1. I determine that the Self-insurer's decisions dated 21 August 2023 and 18 October 2023 under review are revoked. This means that the determination is in favour of the Worker.
2. I determine that the Worker is entitled to compensation from 13 July 2023. I direct the Self-insurer calculate and pay the amount of compensation to which the Worker is entitled, in accordance with the Act.
3. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

4. As this determination is in favour of the Worker, I award the Worker's costs as fixed under section 301W of the Act to be paid by the Self-insurer.
5. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a Request for Costs Decision form to WIC within 30 days of this determination

REASONS FOR DETERMINATION

DISPUTE REFERRED TO ARBITRATION

1. This arbitration is about whether the Worker has an entitlement to compensation for a psychological injury that he claimed occurred on 13 July 2023 due to 'stress, anxiety' arising from 'threatened and bullying from management' whilst working away from home as a truck driver.
2. The Worker alleges the condition arose as a result of his interactions with his operations manager over a dispute about pay (the pay dispute).
3. On 24 July 2023, the Worker lodged a claim for compensation (weekly payments and medical and like expenses) (the claim).
4. On 21 August 2023, the Self-insurer rejected the claim on the grounds that:
 - the Worker did not sustain an injury within the meaning of the Act,
 - the Worker has not sustained an injury arising out of or in the course of his employment,
 - the Worker's employment is not a significant contributing factor to the claimed injury,
 - the claimed injury has not materially contributed to an incapacity for work,
 - the claimed incapacity for work is not materially contributed to by an injury which entitles the Worker to compensation, and
 - the claimed injury was caused by a mental injury of a type which does not create an entitlement to compensation under the Act.
5. At that time, the Self-insurer did not yet have any circumstance investigation report, Independent Medical Examination (IME) report or treating health practitioner reports. Having obtained that information, it issued a further decision dated 18 October 2023, also rejecting the Worker's claim, on the grounds that:
 - The Worker has not sustained an injury arising out of or in the course of employment,
 - The alleged injury was caused by a mental injury of a type which does not create an entitlement to compensation under the Act,
 - The injury was sustained as a result of management action taken on reasonable grounds and in a reasonable manner by the Worker's manager on 12 July 2023 in relation to payment for a stand down whilst the Worker was interstate on 12 July 2023, and
 - The injury was sustained as a result of an expectation by the Worker that management action would be taken or a decision made to take management action to terminate the Worker's employment.

6. The Worker lodged an application for conciliation. The parties did not reach agreement to resolve the dispute and on 21 December 2023 a Conciliation Officer issued a 'Genuine Dispute' outcome certificate.
7. On 22 December 2023, the Worker lodged a referral for arbitration.
8. On 24 January 2024, an initial arbitration hearing was held by video conference (the initial hearing), attended by the Worker, a worker assistant and a representative from the Self-insurer. On 13 March 2024, a further hearing (the further hearing) was held by video conference attended by the Worker, a worker assistant and a representative from the Self-Insurer. The operations manager attended as a witness and gave affirmed oral evidence. The Worker gave sworn evidence.
9. In making this determination, I have considered all the material provided by the parties. It is included in the Arbitration Book (pages 1-317), and Schedule B of the Arbitration Book (pages 318-1255), and the evidence and submissions presented at the arbitration hearing. A copy of this material was provided to the Worker and the Self-insurer before the hearing. At the close of the further hearing the parties were given the opportunity to provide any final written submissions by 15 March 2024. The Worker provided a further submission and an email correcting an error in that submission that was exchanged with the Self-insurer. The Self-insurer did not provide any further submissions. The relevant evidence is discussed below.

ISSUES

10. The relevant legislation is the *Workplace Injury Rehabilitation and Compensation Act 2013* (the Act).
11. At the initial hearing, the Self-insurer confirmed it relied on the grounds for refusing the claim as those in its decision dated 18 October 2023.
12. Noting the grounds relied upon by the Self-insurer to reject the claim, I consider the following are the relevant issues to be determined:
 - a. Did the Worker suffer an injury?
 - b. What was the date of injury?
 - c. Did the injury arise out of or in the course of employment?
 - d. If the injury arose out of or in the course of employment, was the injury caused wholly or predominantly by any one or more of the following:
 - i. Management action taken on reasonable grounds and in a reasonable manner by or on behalf of the Worker's employer;
 - ii. A decision of the Employer, on reasonable grounds, to take, or not to take, any management action;
 - iii. Any expectation by the Worker that any management action would, or would not, be taken or any decision made to take, or not to take, any management action?
 - e. If the injury was caused wholly or predominantly by any of the grounds in d. above, does this disentitle the Worker to compensation?

Preliminary Matters

13. The Self-insurer requested permission for a legal representative to represent them at a hearing. This request was denied because I considered there would be a power imbalance between the parties which made it inappropriate to approve the request.
14. The Worker sought permission for excerpts of certain audio recordings of conversations between him and a former senior operations manager to form part of the evidence. This request was denied because they do not cover the events that led to the Worker's claimed injury.
15. At the subsequent hearing, the Self-insurer stated it wished to make final submissions in writing. I provided parties the opportunity to make oral submissions at the hearing to enable me to ask any questions. The parties made oral submissions and were also given the opportunity to provide any further written submissions by 15 March 2024. I consider the parties were given a reasonable opportunity to present their cases.

CONSIDERATION OF ISSUES

Burden and standard of proof

16. The Worker must establish, on the balance of probabilities, that he has an injury arising out of or in the course of employment pursuant to section 39(1) of the Act; *Pulling v. Shire of Yarra Ranges* [2018] VSC 248 at [78].

Did the Worker suffer an injury?

17. The parties agree that the Worker has a mental injury but do not agree on the diagnosis.
18. On 20 July 2023, the Worker's first consultation relating to the claimed injury was with Dr [S] from [GP Clinic 1] who issued a medical certificate dated 21 July 2023 that stated 'He is suffering from Stress and Anxiety'.
19. The Worker consulted Dr [A] from [GP Clinic 1] on 27 July 2023, who provided a medical questionnaire dated 4 August 2023 which diagnosed the Worker with 'depression and emotional stress due to maltreatment in the workplace.' He issued a WorkSafe Certificate of Capacity diagnosing 'Emotional stress due to workplace bullying and threats'.
20. Dr [A]'s further letter dated 6 October 2023 stated 'Diagnosis is emotional stress resulting from workplace bullying and threats.'
21. Psychologist, [Ms ES] (the psychologist) saw the Worker on five occasions before writing her report dated 11 October 2023 that noted the 'battery of psychological tests', which she undertook including a 'Depression, Anxiety, Stress Scale', a 'Patient Health Questionnaire - Depression' and a 'Posttraumatic Stress Disorder Checklist'. She diagnosed an 'Adjustment disorder with Mixed Anxiety and Depressed Mood with features of trauma symptomatology'.
22. In his report dated 16 October 2023, Dr [H] from [GP Clinic 2] diagnosed 'major depressive disorder'.

23. The Self-insurer relies on the opinion of Associate Professor [K] (the IME) who provides in his report of 11 September 2023 a diagnosis of 'major depressive disorder' and states the Worker had a longstanding mental health condition.
24. Stress of itself is not a diagnosable mental injury. I note that both the IME and Dr [H] agree that the Worker's diagnosis is major depressive disorder. Dr [A] provided a diagnosis on 4 August 2023 of depression. The psychologist also noted features of depressed mood and whilst her primary diagnosis was different, considered that there could be a differential diagnosis of Major Depressive Episode or emerging Major Depressive Disorder and Anxiety with trauma symptoms. She notes 'clinically significant symptoms of depression, anxiety, and stress, as well as features of trauma symptomatology.'
25. I note that the psychologist's primary diagnosis is different but that she acknowledges that the Worker could in fact be suffering from Major Depressive Disorder. I am therefore satisfied and find, that due to the consistency of views by the IME and treating health practitioners, the Worker's diagnosis is Major Depressive Disorder (depression).

What was the date of injury?

26. Some of the agreed facts leading to the alleged injury are set out below:
 - a. The Worker has been working as a truck driver for the Employer since 2017. Since 2020, at the Employer's request, he occasionally worked interstate for two or three weeks at a time.
 - b. On 27 June 2023, the Worker went interstate to work. He worked regularly until 12 July 2023.
 - c. On 12 July 2023 no truck was available for him to drive and the Worker was therefore 'stood down' (the stand down). He believed he would be paid 12 hours whenever he was stood down whilst away from home. He submitted a time sheet requesting payment for 12 hours. The Employer's payroll employee informed the Worker that he would be paid for seven hours.
 - d. The Worker spoke to the operations manager, [YZ] by phone who confirmed that seven hours pay was the policy for a stand down, but agreed to pay him for 10 hours.
 - e. There was an exchange of emails between the Worker and the operations manager about the pay dispute.
 - f. The Worker worked on 13, 16 and 17 July 2023 and then ceased work.
27. The Worker submits that he was working his regular hours until the pay dispute, then after working on 17 July 2023 could not go on working.
28. Some of the Worker's submissions concern a longstanding history of bullying and harassment by the Employer; however, the Worker agrees that this claim concerns the injury on 13 July 2023. This was the date of injury on the claim form.
29. The date of injury is not disputed by the Self-insurer.
30. As 13 July 2023 is the date of the pay dispute, the date of the claimed injury, and the date of injury is agreed between the parties, I find that the date of injury was 13 July 2023.

Did the injury arise out of or in the course of employment?

31. The parties dispute whether the injury arose out of or in the course of employment. The detailed interactions between the Worker and the operations manager during the pay dispute are relevant to determining this question and are as follows:

- a. It is not in dispute that the Worker and the operations manager disagreed about whether the Worker was entitled to 12 hours stand down pay. The parties do not agree about how many times the Worker tried to call the operations manager on 12 July 2023, or the content of the telephone conversation between the Worker and the operations manager on that day. However, the parties have produced in evidence an email trail that shows that on the evening of 12 July 2023, the Worker emailed the operations manager and copied in the operations manager's superior, [UV] and a former superior, [WX], complaining that the operations manager had failed to get back to him and was requesting payment for 12 hours '...just as it has always been'.
- b. On 13 July 2023 at 8.33am, the operations manager emailed the Worker stating relevantly (unedited):

If you want to throw me under a bus, make sure you have and relay the whole and correct story.

You tried to call me, and I was in a meeting, when the meeting finished I called you back to discuss. I wasn't here in March 2020 when [WX] agreed to pay you 12 hours to be stood down or for the 12 hours for each day of travel (I will need [WX] to clarify).

...

I have been told that you are completing a shift this morning so unsure what you are really intitled to, I think sometimes the big picture is pretty fair and that a standard 7 hour stand down payment was more than fair for yesterday.

I you have further issues happy to discuss, now [UV] and [WX] have been dragged into this they might have a different perspective.

- c. On 13 July 2023 at 8.55am, the Worker emailed the operations manager stating relevantly (unedited):

I don't think I have thrown anyone under the bus ...

I have tried to call you and even if I've called you now I would struggle to get hold of you.

as the text message screen shot shows I have tried and if you have extended a little bit of professional courtesy instead of treating us like criminals. try and hear us out first. I respected you enough not to go above you, however if you're not willing to listen or understand the stress we have to go through to sort anything out.

I'm not sure what you mean throw you under the bus when you clearly state you don't know what's going on mate. everytime a new manager sits where you are I go through this.

to answer your questions. NO 7 HOURS ISNT FAIR.

I WAS STOOD DOWN. THEN HOURS LATER WAS TOLD WOULD YOU LIKE TO DO AN AM SHIFT. SINCE I LEGALLY CAN I ACCEPTED IT TO HELP ME WITH MY FLIGHT DAY.

STILL WILL MISS OUT ON A FULL DAYS PAY.

HOW IS THAT FAR. AM PM IT DONT MATTER.

I shouldn't have to discuss any deals with anyone everytime I need to disappear. I don't mean to disrespect you but you lost me the day you said to me I can walk out tomorrow and I'll replace you. how can work with someone who thinks that of his staff.

look at the end of the day I am the one missing out [emoji]. I am happy to come in and do my roster and not do any more because I give so much just like everyone else. go above and beyond and get spat on.

so bottom line here is: I got stood down. what is the go no? will I getting my 12 hours?

- d. On 13 July 2023 at 9.17am, the operations manager emailed the Worker (the 'Personal now' email) stating relevantly (unedited):

I take offence that you accuse me of something I would never say to anyone.

*** said to me I can walk out tomorrow and I'll replace you. how can work with someone who thinks like that of his staff.*

I treat my drivers with the utmost respect and would never say that NEVER, I would like you to retract that statement.

[YZ] - Personal now.

On 13 July 2023 at 9.25am, the Worker emailed the operations manager still requesting 12 hours pay and stating (unedited):

You said those word to me when I came to see you after speaking to [L] in the office. I've never lied about anything. I will not be going back and forth on that matter.

infant I've never walked in that office and lied even if my job depended on it.

clearly I'm nothing but a headache to you mate. solved that by taking myself of this equation of helping out with anything. I'll come in do the minimum of what I'm supposed to do. however I'll still need that 12 hours for the stand down. not 10 hours. after that you will not hear a beep from me.

I've spoken to [WX] last night and he confirmed it. so there's no confusion about it.'

- e. On 13 July 2023 at 9.33am, the Worker emailed the operations manager stating relevantly (unedited):

I know I probably put a target on my back and my days would be numbered and it is what it is if it come down to that. until then I'll do my job.

32. The Worker worked on 13 July 2023 and flew back to Melbourne on 14 July 2023. The Worker worked on 16 and 17 July 2023, and ceased work from 17 July 2023.

33. On 20 July 2023, the Worker consulted Dr [S] from [GP Clinic 1], whose notes state (unedited):

*He says he has been approached by his boss at work and threatened
Works as truck driver
Feels very stressed and not coping to go to work
Will talk with Union and will explore his options
Psychologist referral.*

34. Dr [S] prescribed Diazepam issued a medical certificate certifying the Worker unfit for work from 20 to 27 July 2023 due to stress and anxiety.

35. On 27 July 2023, the Worker consulted Dr [A] from [GP Clinic 1] who noted (unedited):

*his manager bullied him and threatened him via email
[Worker] was not given his full pay
he is meant to go get paid even if there is no work according to the contracted
his previous manager approved the contract
he should be paid 7hrs if he is in Melbourne and 12hrs if he is away
the manager threatened to sack him and is very angry that his superiors were contacted
[Worker] has complained to the upper hierarchy and is now waiting for response.*

36. Dr [A] issued a WorkSafe Certificate of Capacity from 27 July to 24 August 2023 diagnosing 'emotional stress due to workplace bullying and threats'.

37. The Worker attended further consultations with Dr [A] on 31 July 2023 and 15 August 2023 for the same condition and with Dr [H] at [GP Clinic 2] on 29 August 2023 and on a regular basis thereafter for the same condition.

38. At the Worker's request, the Employer invited the Worker to a meeting but ultimately cancelled it until the Worker provided medical clearance that he was fit to attend.

39. On 24 July 2023, the Worker informed the Self-insurer that he would lodge a complaint with HR and the FairWork Commission due to their decision that he was not fit to attend a meeting and on that date he lodged a claim for compensation.

Worker's submissions

40. The Worker submits that he suffered a mental injury as a result of his interactions with the operations manager over the pay dispute. He submits he had no pre-existing history of a mental health condition.

41. In the Worker's sworn statement of 31 January 2024 he sets out his response to the operations manager's 'Personal now' email:

As soon as I read that, my mental health was not the same. I felt threatened and scared hearing your manager who you already knew calls you names now tells you its PERSONAL shook me. I was already feeling isolated, unheard and overwhelmed with lack of support and follow through from management. I did not expect that response from a manager. I felt really low and depressed knowing I now have an obvious target on my back from the very person who was calling me a MONKEY. Emotional outbursts of uncontrollable anger, fear, helplessness and nonstop cries was all I felt. I couldn't concentrate or do anything. This was happening. ...

42. The Worker's treating health practitioner reports state relevantly as follows:

a. Dr [A]'s medical questionnaire dated 4 August 2023 states:

The Worker advised that his emotional stress and anxiety started after his manager refused to pay him as agreed and instead threatened to sack him. He claims his life was threatened.

b. Dr [A] also provided a report dated 6 October 2023 which stated:

*Diagnosis is emotional stress resulting from workplace bullying and threats.
He reported an ongoing culture of intimidation at workplace since 2017. It became unbearable for him in July 2023 when his manager refused to pay him the verbal agreed contract.
His attempts to communicate his displeasure to his boss were unfruitful prompting him*

escalate the issue to other superiors. His manager then threatened to sack him and to deal with him.

As a result of this [the Worker] became afraid for his future at the company and of his personal safety.

He also reported that another work colleague threatened him with a knife.

The toxic work environment left him stressed, anxious and angry. He also mentioned suicidal ideations, anhedonia, loss of motivation, anxiety and depression.

His condition is not an aggravation of a pre-existing condition. He denies any similar symptoms in the past.

...

His condition appears to be a direct result of hostile work environment at his place of employment.

- c. The psychologist noted there was no reported mental health history; however, she documents a number of workplace issues concerning alleged bullying and harassment from 2017 to 2020, resulting in the Worker experiencing 'early signs of decline' and 'emotional distress', but that things began to improve in 2020. She notes at length the 'complex constellation of clinically significant symptoms of depression, anxiety and stress, as well as features of trauma symptomatology...[that] have significantly impacted his occupational and social functioning.' Her opinion is that the Worker's condition has 'arisen in the course of his employment over a period of time due to ongoing stressors of a similar nature; however they peaked due to the incident on 13 July 2023.'
- d. In his report dated 16 October 2023 General Practitioner, Dr [H] from [GP Clinic 2] stated (unedited):

... [The Worker] alleged bullying, harassment and racism at his workplace for the last six years. However, I note that he had continued working and did not seek any psychological or psychiatric treatment until a recent industrial dispute about his pay following which he stopped work. [The Worker] also reported relationship difficulties with his wife, which he alleged happened because he was stressed at work and was isolating himself.

Self-insurer's submissions

43. The Self-insurer submits that:

- a. The Worker had a longstanding mental health condition. It relies on the opinion of the IME who states in his report of 11 September 2023:

I do not consider that the incident on 12 July 2023, regarding the payment dispute, is a cause for his major depressive disorder. He probably has had major depressive disorder for a long period of time, which had been undiagnosed and untreated, the cause of which is not confirmed. He alleged bullying and harassment and racism by his previous managers.

- b. The Worker did not sustain an injury on 13 July 2023 but was 'aggrieved that he was not given 12 hours pay as demanded'.
- c. The clinical notes are relevant in light of the Worker's marital and personal problems. It submits the IME did not receive a full history that included the Worker's past mental health and financial issues.

- d. Other factors 'appear to be causing the worker to have a pre-injury mental condition' such as marital difficulties, bullying by other employees over many years at work that is not the subject of this claim and an allegation that his operations manager called him a 'f***ing monkey' sometime between May and 12 July 2023.
 - e. On 10 June 2022, the Worker attended Dr [P] at [GP Clinic 2] for stress relating to a dispute with a bank about a loan (the bank dispute), and was provided with a Mental Health Care Plan to see a psychologist.
44. The Self-insurer submits that the medical evidence from all treating health practitioners was not based upon his full history that includes the dispute and therefore their opinions relating to causation cannot be relied upon. The Self-insurer does not believe the Worker has provided full and frank disclosure of all medical information in relation to his pre-existing condition.

Considerations

45. Where it can be shown on the balance of probabilities that the act or omission of the employer was a cause of the injury, the Worker will have established a sufficient connection to their employment to characterise the injury as "arising out of" their employment. The question of causation is a matter of common sense. It is not necessary for the Worker to establish that the act or omission of the Employer was the sole or dominant cause of the injury; *Zlateska v Consolidated Cleaning Services Pty Ltd & Anor* [2006] VSCA 141, [8]-[11].
46. The Worker gave oral evidence that he did not consider he had a pre-existing condition and has claimed he sustained a primary injury as a result of the pay dispute.
47. The IME diagnosed a pre-existing Major Depressive Disorder. He opined the Worker probably had depression for a long period of time, undiagnosed and untreated, the cause of which was not confirmed. He did not consider the pay dispute was a cause for the Worker's condition although did not say why.
48. The Self-insurer submits that the Worker had a pre-existing psychiatric condition that did not arise by reason of the pay dispute, '[r]ather, it is due to non-work-related factors in [the Worker's] personal life before 12 July 2023.' This is not stated in the IME's report as a reason for his depression, and is therefore conjecture, which I do not accept.
49. The Self-insurer also submits the Worker's health records are incomplete. I am not satisfied this is the case because:
- a. The Worker produced a signed authority authorising [GP Clinic 2] to release his entire health records.
 - b. Those records disclosed that in June 2022 that he was suffering from stress due to the bank dispute.
 - c. The records of [GP clinic 1] state they cover the period from 20 October 1986 to 22 August 2023.
50. I am satisfied that the health records for [GP Clinics 1 and 2] are complete and there is no evidence that the Worker sought any other treatment for his mental health.
51. The Self-insurer also submits that both the IME and the treating health practitioners did not have the Worker's full mental health history when forming their opinions. Whilst the Worker

did not inform [GP Clinic 1] or the psychologist of any prior mental health condition, the Worker gave clear oral evidence that he did not consider he had a mental health condition until the pay dispute. He gave evidence that his marital difficulties were ongoing and he did not characterise them as a mental health condition, nor did he view the bank dispute as a mental health condition as it resolved after a couple of weeks in June 2022. [GP Clinic 2] was aware of the bank dispute. There is no evidence that the Worker had treatment or time off work until the pay dispute.

52. I am satisfied that the Worker did not have a pre-existing condition, and the pay dispute caused the Worker's diagnosed depression. This is because:
- a. The treating health practitioners saw the Worker over a period of time, which enabled them to determine the cause of the injury. In particular, the psychologist saw the Worker on five occasions and noted at length the other factors in his life causing stress, but did not consider he had a pre-existing mental injury.
 - b. Dr [A] stated the Worker's 'anxiety started after his manager refused to pay him as agreed and instead threatened to sack him.'
 - c. Dr [H] noted the Worker had not had any time off work nor sought psychological treatment until he ceased work as a result of the pay dispute.
 - d. The psychologist stated that the Worker's 'psychological symptoms have arisen in the course of his employment over a period of time due to ongoing stressors of a similar nature; however, they peaked due to the incident on 13 July 2023.'
 - e. I consider the treating health practitioners' opinions show that the Worker had stressors in his life that did not reach a threshold for a diagnosis of a mental health condition until after the pay dispute. The IME did not explain why he considered the pay dispute was not the cause of the Worker's injury.
 - f. Within days of the pay dispute the Worker ceased work and sought medical treatment.
 - g. The Worker was employed by the Employer since 2017. Despite alleging ongoing bullying and harassment, it was the pay dispute that caused the Worker to cease work. In his witness statement, [ST], a former senior operations manager until March 2022 stated that even though the Worker had experienced verbal abuse from an employee at another employer's site, the Worker did not take any periods of time off work due to stress and in general worked overtime.
 - h. Whilst the Worker had marital problems, when asked in oral evidence what impact they were having on him at the time he ceased work, the Worker denied this was an issue, as it had always been there.
 - i. In relation to the bank dispute, the Worker did not use the mental health care plan to see a psychologist, and the GP did not prescribe any medication. Nor did he seek further treatment. I am therefore satisfied this was not a mental health condition and his stress was of limited duration.
 - j. Despite the other stressors in his life, including his marital difficulties, the Worker did not at any other time cease work, nor did he seek treatment except for one GP appointment during the bank dispute. I accept the Worker's oral evidence that his stress lasted for a

brief period and resolved. I am satisfied it did not constitute an ongoing mental health condition.

k. I am satisfied that the Worker would have sought treatment had he considered this necessary as he did so during the short duration bank dispute and when the pay dispute occurred.

l. The clinical notes do not show other causes of his condition than the pay dispute. I am satisfied there are no other contemporaneous events that caused this condition.

53. For these reasons, I therefore find on the balance of probabilities, the Worker's depression arose out of or in the course of his employment.

Was the injury caused wholly or predominantly by any one or more of the factors set out in subsection 40(1)?

54. The Self-insurer submits that if I determine that the Worker's injury arose out of or in the course of employment, he is not entitled to compensation under subsection 40(1) of the Act as the injury arose wholly or predominantly by any one or more of the following:

a. Management action taken on reasonable grounds and in a reasonable manner by or on behalf of the Employer;

b. A decision of the Employer, on reasonable grounds, to take, or not to take, any management action; or

c. Any expectation by the Worker that any management action would, or would not, be taken or any decision made to take, or not to take, any management action.

What was the management action?

55. Subsection 40(7) of the Act defines management action relevantly as follows:

In this section—

management action, in relation to a worker, includes, but is not limited to, any one or more of the following—

...

(k) provision to the worker of a benefit connected with the worker's employment;

...

(n) communication in connection with an action mentioned in any of the above paragraphs;

56. The Self-insurer submits the management action is that taken by the operations manager to decline to approve payment of 12 hours for the stand down; and communication in connection with this management action.

57. The Worker submits that the Employer's decision to pay stand down pay of 10 hours is an example of management action under paragraph 40(7)(k), and the discussions in relation to the stand down pay constitute management action as defined by paragraph 40(7)(n).

58. On the claim form, the Worker wrote 'threatened and bullying from management' as the mechanism of injury, I asked the parties for submissions about whether the operations manager's conduct could be construed as bullying and harassment rather than management action. Both submitted that they considered the operations manager's conduct was management action.

59. The Self-insurer also submits that the operations manager's conduct does not constitute bullying or harassment as set out in WorkSafe Victoria's Guide for Employers - Workplace Bullying, emphasising that the Worker does not allege 'repeated, unreasonable behaviour' (the Self-insurer emphasising the word 'repeated').

60. I am satisfied that conflict between the Worker and operations manager about his pay whilst stood down concerns a 'provision to the worker of a benefit connected with the worker's employment' under paragraph 40(1)(k) and the emails, texts and telephone call related to that was also communication, and part of the management action under paragraph 40(1)(n). I therefore find the actions by the operations manager on 12 and 13 July 2023 to be management action.

What was the whole or predominant cause of the injury?

Self-insurer submissions

61. The Self-insurer submits that the Worker has no entitlement to compensation because his injury was wholly or predominantly caused by one or more the following:

- a. Management action taken on reasonable grounds and in a reasonable manner by or on behalf of the Employer. It submits that the Worker's injury arose because he was aggrieved by the operation manager's decision not to authorise 12 hours' pay when stood down. The operations manager's responses to the Worker's claims 'were intended to point out that the Worker was being unnecessarily personal against him and aggressive in his communications about the 12 hour pay issue' and were based on reasonable grounds and done in a reasonable manner.
- b. A decision of the Employer, on reasonable grounds to take or not to take any management action; namely, the operations manager's decision 'after speaking with the worker on 12 July and making enquiries that he was only strictly entitled to 7 hours pay, to nonetheless approve 10 hours for the stand down in his discretion due to the worker being stood down while interstate.'
- c. Any expectation by the Worker that any management action would or would not, be taken or any decision made to take, or not to take, any management action. The Self-insurer submits that the Worker 'stated that he expected he would have his employment terminated over his actions to ensure he was paid 12 hours of pay for being stood down...'

Worker submissions

62. The Worker submits that his injury was caused wholly or predominantly by management action, namely 'the management action taken on behalf of [the Employer] to pay 7, then 10 hours stand down pay, as well as the discussions in relation to the payment of stand down pay.' He submits he passed two 'fitness for work' tests in 2020 and 2021, his clinical history shows no diagnosis of prior psychological treatment, he worked full hours and duties until ceasing work on 17 July 2023, and was certified unfit due to stress as soon as he saw his GP on 20 July 2023.

Considerations

63. Under subsection 40(1) the onus falls on the Self-insurer to show, on the balance of probabilities, that the Worker has no entitlement to compensation as a result of a mental injury caused wholly or predominantly by any one or more of the management actions set out above.
64. The evaluation of whether management action is the predominant cause of the injury is not carried out in any technical or formal way but by applying common sense to the facts of the particular case. In *Pulling v Yarra Ranges Shire Council* [2018] VSC 248, the Court said:
- a. Management action can be the predominant cause where other causes contribute to the injury, but that cause is still the predominant cause; and
 - b. To be the predominant cause, that cause must, in its power and influence, exceed the other causes.
65. The Self-insurer contends if the injury arose out of employment, it was due to the operations manager's decision not to pay him 12 hours stand down pay; that is, it relies on paragraph 40(1)(b). Alternatively, it contends that the injury was due to the operations manager's actions that were carried out on reasonable grounds and in a reasonable manner, relying on paragraph 40(1)(a). The Self-insurer's submissions also rely on the defence of paragraph 40(1)(c), that the Worker had an 'expectation' of management action.
66. The Self-insurer submits that the evidence is inconsistent; on the one hand the Worker states that he had a good relationship with the operations manager, and on the other hand claims he expected to have his employment terminated.
67. I have considered all of the grounds under subsection 40(1) concerning the 'whole or predominant cause' of the injury and on balance I find that the Worker's injury was predominantly caused by an expectation that he would be subjected to an abuse of power and ultimately have his employment terminated. I find this is the case on the following basis:
- a. The 'Personal now' email from the operations manager was the catalyst for the Worker's mental health to significantly decline. The reason the Worker gave for this is because he now had 'an obvious target on my back...' The 'Personal now' email led to the Worker to experience 'emotional outbursts of uncontrollable anger, fear, helplessness and nonstop cries' and an inability to concentrate, or work.
 - b. In oral evidence, when asked what he thought would happen he said, 'the threat of abusing power'. He stated in oral evidence that he thought he would be 'micro-managed to find any excuse to sack me.' I find this evidence credible. The expectation that his employment would be terminated has been repeated to doctors and in submissions, emails and statements made since the time of the injury.
 - c. I do not consider the whole or predominant cause of the Worker's injury was due to the management action under paragraph 40(1)(a) i.e., the decision to pay him seven and then 10 hours, or specific communication about the number of hours he would be paid. I note in particular the Self-insurer's submission that the Worker robustly engaged with the operations manager about his entitlements and the operations manager's emails on 13 July 2023 should be read in the context of the entire email chain. I agree that the

Worker was able to communicate his concerns to the operations manager, and to escalate them to his superiors. I consider it was the 'Personal now' email that caused him to cease work due to his injury. In oral evidence he stated that he previously managed stresses at work:

I used to and I could previously but I've never been threatened like this before like point blank.

d. I do not consider the whole or predominant cause of the injury is the decision to pay the Worker 10 hours not 12 hours stand down pay under paragraph 40(1)(b). Whilst this was the event that led to the communications between the Worker and the operations manager, and ultimately the 'Personal now' email, I am not satisfied that a dispute over the pay itself for one shift caused the Worker's mental health decline.

68. Accordingly, I find under paragraph 40(1)(c), the Worker's injury was wholly or predominantly caused by the Worker's expectation that management action would be taken in the form of disciplinary action and ultimately employment termination.

69. The defence under paragraph 40(1)(c) can only be overcome by the Worker if:

- a. I find that the Worker had a subjective expectation of disciplinary action and/or termination,
- b. I find the Worker did not expect the management action would be reasonable action nor reasonable in the manner of its taking, and
- c. There were circumstances known to the Employer and the Worker that founded an expectation of that action; *Department of Education v Unsworth* [2010] VSCA 77.

Did the Worker subjectively expect disciplinary action and/or termination?

70. The Self-insurer submits that the Worker is disentitled to compensation because 'any alleged mental injury arose out of the Worker's expectation that he would be disciplined or counselled over his emails to [the operations manager]'. It also states 'the worker has stated that he expected he would have his employment terminated over his actions to ensure he was paid 12 hours of pay.'

71. These submissions are consistent with the Worker's subjective expectation of disciplinary action and/or termination.

72. The Worker's expectations were expressed in an email to the Self-insurer on 17 July 2023 stating (unedited):

...I am taking stress leave due to anxiety, lack of concentration and insomnia.

It is absolutely terrifying when a manager "[operations manager]" make threats and make things personal given the threat made against me I feel unsafe being behind the wheels of a dangerous vehicle...

... I need this time to get my head right and seek professional advice on how to proceed. as I am not comfortable walking into a potential confrontation with my management.

73. On 18 July 2023 the Worker emailed the Self-insurer as follows (unedited):

I hope this isn't being perceived in a negative way or discounted, as I genuinely feel cornered. I have done nothing to make things personal with anyone. All I wanted was for all parties to act in

good faith and honour the long standing agreement which has been in place for several years. but been given the run around, because of that yes I will go to upper management who have agreed to this.

I am experiencing anxiety at the moment and feel that I will now be targeted. That is not fair!

74. In oral evidence, the Worker stated that the 'Personal now' email was the event that caused a significant change in his mental health. He states that he couldn't stop thinking about it, it affected his ability to work, he was constantly pulling over the truck to look at the email again, and this caused him to cease work and get treatment.

75. This is consistent with the history he recounted to the IME, Dr [H] and the psychologist.

76. I am satisfied that the emails of 17 and 18 July 2023 that are contemporaneous with the management action, together with the Worker's oral evidence show that the Worker had a subjective expectation that he would be 'targeted' which meant being disciplined and that his employment would be terminated.

Was the Worker's expectation that the management action would be taken on reasonable grounds and in a reasonable manner?

77. In *Unsworth* at [57], the Court of Appeal held that a worker would be disentitled from compensation:

... if it established that the worker's expectation, in the circumstances, was of reasonable action taken in a reasonable manner. But if the worker's expectation was that action would be taken which, having regard to the known circumstances, would be unreasonable, or was an expectation that action taken would be unreasonable in the manner of its taking, then paragraph (c) would not apply.

78. The Court of Appeal explained further at [58]:

...did the worker have an expectation of reasonable action reasonable in the manner of its taking? That sub-question will require consideration whether there were any circumstances, known to the employer and the worker, which – reasonableness aside - could found an expectation of action; and then consideration whether, given those circumstances, the expectation was of reasonable action reasonable in the manner of its taking.

79. The Worker gave oral evidence that he did not consider the management action would be taken in a reasonable manner, he considered there was 'the threat of abusing power' and that he thought he would be 'micro-managed to find any excuse to sack me.' I have found this evidence credible and persuasive, as it is borne out by his contemporaneous emails. The dispute between the Worker and Employer was about pay entitlements, and not any misconduct or events that would legitimately give rise to disciplinary action and/or termination of employment. I therefore find the Worker did not expect the management action would be reasonable action. I accept the Worker held the belief that the management action would involve an abuse of power and I also find that the Worker did not expect the management action would be taken in a reasonable manner.

Were there circumstances known to the Employer and the Worker that founded that expectation?

80. Following *Unsworth*, the Worker's beliefs that he would be subjected to management action such as to discipline him and/or terminate his employment must also have been known to the Employer.

81. It is not necessary that the Employer intended to take the action. I consider there were circumstances known to the Employer that founded the Worker's expectation as follows:

- a. On 13 July 2023 at 8.33am, the operations manager emailed the Worker stating 'if you want to throw me under a bus make sure you have and relay the whole and correct story.'
- b. The Worker followed up the phone call on 12 July 2023, in which the Worker alleges the operations manager said '...[you] can walk out tomorrow and I'll replace you' with an email on 13 July 2023 at 8.55am that repeated this allegation (cited above) and agitated the Worker.
- c. The operations manager's email on 13 July 2023 at 9.17am in which he said he took offence to that accusation and signed his email replying to it with 'Personal now'.
- d. On 13 July 2023 at 9.33am the Worker emailed the operations manager stating:

... I know I probably put a target on my back and my days would be numbered...

82. In his email of 13 July 2023 at 9.17am, his witness statement and in oral evidence the operations manager denied stating '[you] can walk out tomorrow and I'll replace you.'

83. The Self-insurer states that the Worker's credit is in issue as the operations manager did not threaten to sack the Worker as claimed. It states that:

[The operations manager] ... considered the worker was out of line in contacting senior managers within the business and making allegations that [the operations manager] had not been responsive to the worker and did not value the worker and other drivers. [The operations manager's] emails responding to the worker's claims were intended to point out to the worker that he was being unnecessarily personal against him and aggressive in his communications about the 12 hour pay issue. In the all the circumstances [The operations manager's] management action in relation to the 12 hours pay issue (and his communications in relation to same) were based on reasonable grounds and were conducted in a reasonable manner.'

84. Regardless of whether the 'you can walk out tomorrow and I'll replace you' statement was made, I consider there were circumstances known to both the Worker and the Employer that led the Worker to consider the statement 'personal now' as a threat, given the preceding email exchanges that were increasingly agitated on both sides.

85. The onus is on the Self-insurer/Employer to establish that the Worker's expectation of dismissal was of "reasonable action reasonable in the manner of its taking"; *Unsworth* at [58].

86. I am satisfied that the Worker had an expectation that the management action would not be reasonable action reasonable in the manner of its taking. I accept in the overall circumstances, the Worker reasonably perceived the 'Personal now' email as a threat, and that therefore his expectation was that his employment would be terminated. Given that

there is no evidence that there would be a basis for the Worker to be subjected to disciplinary action or termination of his employment, there is a basis for his belief that the management action would not be on reasonable grounds or in a reasonable manner.

87. I therefore find that there were circumstances known to the Employer and Worker that founded the expectation of disciplinary action and termination.

Conclusions

88. In light of the above I find that paragraph 40(1)(c) does not apply and the Self-insurer's defence must fail.

89. It is not necessary for me to make any further findings about the issues raised in the alternative.

90. The Worker provided a medical certificate from 20 July 2023 to 27 July 2023 and a WorkSafe Certificate of Capacity from 27 July 2023. The Worker's date of injury is 13 July 2023 and he ceased work on 17 July 2023. I find that the Self-insurer must assess the Worker's entitlement to compensation from his date of injury on 13 July 2023 in accordance with the Act.

DETERMINATION

91. I determine that the Self-insurer's decisions dated 21 August 2023 and 18 October 2023 under review are revoked. This means that the determination is in favour of the Worker.

92. I determine that the Worker is entitled to compensation from 13 July 2023. I direct the Self-insurer calculate and pay the amount of compensation to which the Worker is entitled, in accordance with the Act.

93. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

94. As this determination is in favour of the Worker, I award the Worker's costs as fixed under section 301W of the Act to be paid by the Self-insurer.

95. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a Request for Costs Decision form to WIC within 30 days of this determination.

[Signature]

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Katie Valentine
Arbitration Officer