

This month, www.mkarisk.com.au presents a more detailed case study of a highly successful project on occupational stress prevention which was briefly referred to in earlier newsletters. The project achieved a 70% reduction in the incidence of occupational stress claims for the twelve months after it was conducted. The case study provides information on key aspects of occupational functioning that were targeted in a combination of training and counselling.



In the May newsletter, we will be covering the case of Koehler versus Cerebos (Australia) Ltd which deals with the issue of employers being able to foresee the possibility of psychiatric injury. We will also be referring to the case of Inspector Gregory Maddaford v Graham Gerard Coleman & Anor [2004] NSW which provides very clear guidelines around expectations of preventing workplace bullying.

MKA: Making Knowledge Accessible

Events of Note

Fatigue was topical again in April 2005. Large retailers gave evidence at the NSW Staysafe Parliamentary Committee. Coles was praised for its Code of Conduct that required contractor proof of systems dealing with vehicle safety, fatigue management, drugs and alcohol and harassment. (SMH 2005).¹

The Victorian parliament passed the "Owner Drivers and Forestry Contractors Bill" which attempts to formalise verbal working contracts to reduce accidents caused by fatigue. Discussions about a similar proposal are also occurring in NSW.

Can Employers Be Expected to Always Foresee Psychiatric Injury?

Last month the High Court handed down its decision in "Koehler v Cerebos (Aust) Ltd." This case has a number of ramifications for the management of occupational stress in the workplace and for chronic pain injuries.

A respected and very competent sales representative moved to a contracted position in a part time merchandising role. Whilst stipulating working hours, the broad nature of her work, and her hourly rate, the contract did not list the number of shops to be covered nor the detail of her duties. On starting the new work, these latter were revealed when she told the employer she could not do this in

the allocated time; but she agreed to try.

Over the next five months, the appellant repeatedly told these latter reservations to the employer as well as suggesting reallocation of territory, recruitment of additional staff and other changes, but without avail. She had a physical health assessment but was regarded as well with no physical signs of distress or injury or personality change; but only later was a psychiatric assessment to diagnose complex fibromyalgia with major depression attributed to her work.

The High Court, which dismissed the Appeal, felt that such remedies as she sought might have been tried to avoid and industrial dispute; but also that warning signs of illness including psychiatric, which must be consistent with a diagnosed condition, were required before the employer had a duty to foresee and hence ameliorate the psychiatric illness. Not only were there no such signs but to the contrary there was testimony that she was unchanged, regarded as competent and healthy by her peers, and never mentioned that she regarded herself as adversely affected.

¹ Noonan, G. (2005) MP slams big retailer over drivers, Sydney Morning Herald, April 19, 2005

Court Case Studies

Establishment of a psychiatric injury, and its employer foreseeability requires behavioural, relational and interpersonal indicators that an individual is not coping. A psychiatric injury must be subject to the same evidentiary requirements as a physical injury. In other words, assertion of a mental injury, needs to be accompanied by observable behavioural evidence. Conversely this means that there is still room for employers to be found negligent for psychiatric injury if an employee suggests at any time that the employer's conduct is in danger of causing an employee psychological/psychiatric injury. I think this is the real lesson to be learned here and I think that is worth mentioning.

Another key issue raised by this case is whether an employer can be prosecuted under the occupational health and safety act for failure to provide both a psychologically and physically safe environment, when the prosecution concerns a physical injury which has psychological sequelae. This most recent ruling implies that this is not the case, (although this is a matter for the legal profession to conclusively determine). In other words, this ruling may be very applicable to chronic pain cases, (the majority of which suffer from major depression). By way of explanation, chronic pain cases represent a substantial proportion of long tailed claims for physical injury.

Can employers be expected to foresee the possibility of workplace bullying?

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The case of Inspector Gregory Maddaford v Graham Gerard Coleman & Anor [2004] NSWIR Comm 317, is an interesting illustration of how the courts expect employers to prevent bullying. The Company was charged with failing to ensure the health, safety and welfare at work of its employees, in particular that of a young apprentice, Mr Doyle. It was asserted that the company:

- (1) failed to adequately supervise its employees to ensure they took reasonable care for the health and safety of people at the premises;
- (2) failed to adequately train its employees to ensure they took reasonable care for the health and safety of people at the premises;
- (3) failed to prevent an act of premeditated violence by employees to Dwayne Doyle at the premises; and
- (4) failed to implement adequate policies or procedures governing violence in the workplace.

The courts were particularly critical of a perceived culture which

condoned workplace bullying, as there was evidence of pranks having occurred before. The court also concluded that because the employer had knowledge of previous pranks having occurred, that it was therefore foreseeable that a young employee could be bullied. The court also noted that the employer had only implemented an anti-bullying policy and other preventative policies after Workcover had visited the workplace. The employer was castigated for failing to adopt a proactive view on workplace safety.

Future Topics

- **Creating positive, performing, professional workplace cultures**
- **Inspired Performance Management**
- **A Drug Free Workplace**
- **Adventurous workplaces without risk**
- **Positive Mental Health at Work**
- **Goodbye Chronic Pain**
- **Mediation that Works**
- **Safety Culture Plus**
- **Real Team Building**



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