[2014] AATA 331

|  |  |
| --- | --- |
| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2013/0430 |
| Re | Jim Awad |
|  | APPLICANT |
| And | TNT Australia Pty Ltd |
|  | RESPONDENT |

# Decision

|  |  |
| --- | --- |
| Tribunal | **Senior Member J Toohey****Dr Bill Isles, Member** |
| Date | **28 May 2014** |
| Place | **Sydney** |

The Tribunal sets aside the decision under review and substitutes for it the decision that the respondent is liable under s 14 of the *Safety Rehabilitation and Compensation Act* *1988* to compensate Mr Awad for the injury he suffered as a result of the incident on 10 August 2012.

........................................

**Senior Member J Toohey**

***CATCHWORDS*** *– COMPENSATION – psychological condition – diagnosis – whether state of affairs actually occurred – whether employment contributed to a significant degree – decision under review set aside*

**Legislation**

Safety Rehabilitation and Compensation Act 1988 ss 4, 5A(1), 5B(1), 5B(3), 14, 16, 19

Administrative Appeals Tribunal Act 1975 s 37

**Cases**

Comcare v Mooi (1996) 69 FCR 439

Wiegand v Comcare (2002) 72 ALD 795

# REASONS FOR DECISION

**Senior Member J Toohey**

**Dr Bill Isles, Member**

**BACKGROUND**

1. Mr Jim Awad has been employed by the respondent since 1995. On 28 August 2012, he claimed compensation under the *Safety Rehabilitation and Compensation Act* *1988* (the Act) for “depression, anxiety state” which he said resulted from an incident at work on 10 August 2012.
2. It is common ground that an incident occurred on 10 August 2012 involving Mr Awad and his branch manager, Mr Scott Sullivan. It is also common ground that there had been some tension between the two men leading up to the incident, but the respondent disputes Mr Awad’s version of events and denies that his employment contributed to a significant degree to his condition.
3. We have to determine whether the respondent is liable under s 14 of the Act to compensate Mr Awad for his condition.
4. Separately from the determination that it was not liable under s 14 to compensate Mr Awad, the respondent determined it was not liable to compensate him under ss 16 or 19 for medical expenses or incapacity. That determination is not the subject of these proceedings.

**SUMMARY OF DECISION**

1. There is no question that Mr Awad’s presentation, and features of his illness, are highly unusual. His treating psychiatrist, and three consulting psychiatrists who saw him for assessment, agree on that point. They agree that his condition is complex and that he shows features of abnormal illness behaviour. That said, none thought he was fabricating his illness and all agreed that the incident on 10 August 2012, CCTV footage of which is in evidence, could produce a psychiatric response in a person.
2. It is not for us to determine whether Mr Sullivan acted unreasonably or unfairly during the incident on 10 August 2012 or to arbitrate as to who was in the right or wrong. For the reasons set out below, we are satisfied that Mr Awad suffered an injury as a result of that incident for which the respondent is liable to compensate him. We are satisfied that the incident created a perception on Mr Awad’s part such that it contributed to a significant degree to a psychiatric reaction and led to him being incapacitated for employment. We are not required in these proceedings to determine how long that incapacity lasted.

**RELEVANT LEGISLATION**

1. The respondent will be liable to compensate Mr Awad if he suffered an injury that resulted in death, incapacity for work, or impairment: s 14.
2. By s 5A(1), *injury*means:
	1. a disease suffered by an employee; or
	2. an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or
	3. an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment.
3. By s 5B(1), *disease* means:

(a) an ailment suffered by an employee; or

(b) an aggravation of such an ailment;

(c) that was contributed to, to a significant degree, by the employee's employment by the Commonwealth or a licensee.

1. *Ailment* means any physical or mental [ailment](http://www.austlii.edu.au/au/legis/cth/consol_act/sraca1988368/s4.html#ailment), disorder, defect or morbid condition whether of sudden onset or gradual development: s 4. It is not in dispute, if the Tribunal finds Mr Awad suffers from a psychological condition, that it is an *ailment.*
2. *Significant degree*means a degree that is substantially more than material: s 5B(3).

**THE EVIDENCE**

1. Mr Awad has provided a written statement of evidence dated 3 October 2013. He did not give oral evidence. In a written report dated 15 February 2014, his treating psychiatrist, Dr David Grace, stated that Mr Awad was unable to endure giving oral evidence because of his psychological condition. Dr Grace confirmed his opinion in oral evidence. We accept his advice. It makes our task more difficult but we are satisfied we have sufficient evidence before us and that the weight of the evidence favours Mr Awad.
2. Mr Awad’s wife, Marguerite Awad, gave written and oral evidence. Dr Grace provided written reports and gave oral evidence. Psychiatrists, Dr John Champion, Dr Graham George and Dr Michael Robertson, provided written reports and gave oral evidence concurrently.
3. Also before the Tribunal were documents (T-documents) provided by the respondent under s 37 of the *Administrative Appeals Tribunal Act* *1975* and CCTV footage of the incident on 10 August 2012 which was made available to the doctors who gave evidence before the Tribunal and to Mr Sullivan. Written statements of Mr Sullivan and others who witnessed the incident are in the T-documents, and Mr Sullivan gave oral evidence.

**Mr Awad’s written statement**

1. As Mr Awad did not give oral evidence, relevant parts of his written statement are reproduced here in full; other parts are summarised as follows:
2. …..

*8. Some days prior to 10 August 2012, I was approached by various PM shift workers who felt the monthly meetings were not being held with them and when they were, were often scheduled during their tea break. As a TWU delegate, I resolved to raise the issue with Scott Sullivan, Branch Manager.*

*9. On about 9 August 2012, I spoke with [a supervisor named Michael]… as I understood a meeting was scheduled to take place for the PM shift on the following day and I wished to discuss any issues he may have so I could discuss these with the TWU members ahead of the meeting. Michael advised me he had several concerns, including employees arriving late for work or walking off the dock, as well as people not smoking in the designated smoking areas.*

*10. On 10 August 2012, I had a conversation with a fellow TWU delegate, John Cocoris. I do not recall our exact conversation as we discussed various things regarding including the upcoming meeting. I also advised John that a supervisor had warned me “someone was smoking on the dock” or words to that effect. John questioned me about who that supervisor was and I declined to tell him as I did not wish to betray confidences.*

*11. At about 5:00PM on 10 August 2012, a Wellbeing Barbeque was [held in the dock] … to award employees for their work and celebrate years of service.*

*12. I saw that Scott was working near the barbeque and I went over him to discuss the concerns the PM shift workers were having. Scott was not interested in discussing the issue as he was too busy with the barbeque and brushed me off.*

*13. A short time later, I was entering the lunch room to take my break but was called back by Scott who was speaking with John. Both Scott and John appeared to be quite agitated and Scott asked John to repeat what he had just said. John then said, words to the effect of, “You told me Scott was watching me through the cameras trying to catch me smoking on the dock”. I was shocked and said to John words to the effect of, “no, that’s a lie, I said someone from management told me they have seen people smoke on the dock”. John then turned to me and called me a “fucking liar” or words to that effect. I became highly embarrassed by being sworn at. John and Scott kept talking and when I tried to explain myself, Scott turned to me and told me to “fuck off” and he “did not want to talk to me”, or words to that effect. I do not recall what else was said during this time although Scott was very aggressive to me and kept pointing his fingers at me when he was yelling at me. I believe I may have asked Scott to move this away from staff but Scott kept berating me. I was extremely upset and embarrassed by Scott’s behaviour particularly as he was my manager and had raised his voice and swore at me in front of many of my colleagues. I felt as if I had become frozen or numb and I also felt a tightness in my throat which caused me to be unable to get any words out to defend myself.*

*14. I returned to the lunchroom and sat down. I believe I became quite teary in the lunchroom and I was still suffering from shock of what had just occurred. I felt overwhelmed and unable to talk. I was not thinking straight and couldn’t focus. I do not recall much after the incident. I believe I may have returned back to some of my duties but I do not recall completing any work.*

*15. Over the next few days I still felt like I was in a daze. I could not stop thinking about the incident with Scott. I was still embarrassed after being belittled in front of my colleagues and although I did not wish to discuss it with others, I decided I needed to clear the air with Scott.*

*16. On Monday, 13 August 2012, I approached Peter Roderick, a fellow driver and TWU delegate. I explained to Peter that I had a blow up with Scott on Friday and I wanted to fix the issue. Together we approached Scott in his office. Scott was still very terse with me and at one stage he said that I had gone “gaga on Friday”, or words to that effect. I do not recall the majority of the conversation although it was only short before Scott told me he had had “enough of” me, or words to that effect.*

*17. Although I continued to work for the next few days or so, I felt completely lost. I was having difficulty concentrating both at home and at work and I kept fixating on being embarrassed in front of my colleagues. I was finding it difficult to sleep at night and just generally did not feel like myself.*

1. Mr Awad writes that, on 16 August 2012, he attended his usual medical practice and saw Dr Seham Gerges who prescribed Endep. The following day, when he could not stop thinking about events, he saw his usual doctor, Dr Mohsen Gerges at the same practice, who prescribed Zoloft.
2. Despite the medication, Mr Awad states, he continued to feel “extremely depressed and stressed” and had difficulty sleeping. Dr Gerges referred him to Dr David Grace, psychiatrist, for treatment. Dr Grace saw him on 31 August 2012 and certified him unfit for work until 28 October 2012 due to “anxiety and depression”. Dr Grace has continued to certify him unfit for work. Dr Grace’s evidence is considered below.
3. Mr Awad writes that, before the incident, he was “quite a social person” and always enjoyed having people over to the house. Now he does not want to talk to anyone and wants to be left alone. He is no longer intimate with his wife. The family no longer goes on annual holidays. He barely speaks to his children and has no motivation to do anything. He bathes himself but his wife shaves him and supervises his dressing, and has to prompt him to eat. He will only leave the house in the company of his wife. He no longer drives because he cannot concentrate.
4. Mr Awad states he has difficulty completing day-to-day tasks. He has difficulty sleeping, and often has nightmares and flashbacks to the incident. He finds himself ruminating on events and will drink two to three stubbies of beer a day and smoke a Lebanese water pipe to keep calm. He can no longer speak to people as he becomes flustered and starts stuttering. He has developed an involuntary tic and shakes his head from side to side when suffering anxiety. He says he wants to get better and obtain treatment but cannot afford it.

**Mr Sullivan’s evidence**

1. Mr Awad’s description of the incident on 10 August 2012 and Mr Sullivan’s description are broadly similar. Mr Sullivan agrees that Mr Cocoris told him Mr Awad had said he had been watching employees to see whether any were smoking and he called Mr Awad over and asked Mr Cocoris to repeat his allegation. A summary of his written and oral evidence follows.

*Mr Sullivan’s written statement*

1. On 6 September 2012, Mr Sullivan gave a written statement to an investigator who, it appears, was appointed to investigate the incident following a complaint about it by Mr Awad. Mr Sullivan told the investigator he was “shocked” when Mr Cocoris told him it was alleged he had been spying on employees and asked who had told him “such lies”. He said when confronted with the accusation, Mr Awad shook his head and “appeared to stutter the words ‘Na na na’”.
2. After assuring Mr Cocoris he had never watched anyone on the cameras, Mr Sullivan stated he told Mr Awad: “You need to act with honesty and integrity. This is not the first time that you have done this” to which Mr Awad said “I haven’t done this sir”; as he was frustrated with Mr Awad, Mr Sullivan told him: “Fuck off I don’t want to talk to you”.
3. Mr Sullivan stated that, a short time later, Mr Awad walked past him and said “I didn’t do it sir, you just don’t want to listen”. Mr Sullivan stated he told Mr Awad he should speak to his union member and he needed to act “with honesty and integrity” and not “make things up to create angst”.
4. Mr Sullivan stated he returned to his office about 6.40pm and composed an email to his manager, James Motulalo, detailing the incident; while he was on the telephone to another manager, Mr Awad came to his door and asked to speak to him; he replied “No, I have wasted enough time on you and your lies and I want to go home and spend time with my family” at which Mr Awad turned and walked back out the door.
5. A copy of Mr Sullivan’s email to Mr Motulalo is in evidence. He describes the allegation relayed by Mr Cocoris and how he called Mr Awad over. He says Mr Awad “turned to water and could not back track quick enough” and he told Mr Cocoris and “anyone nearby” that the allegation was untrue and that “this was the second occasion that Jim was trying to put a wedge between the employees and the management team without any fact or substance”. He said he advised Mr Awad he had no faith in his integrity and he expected him to act in an honest manner when dealing with employees or management.
6. As we have said, it is not for us to determine whether or not Mr Sullivan acted unfairly, or to determine who was in the right. The email is relevant only insofar as it makes clear there was some tension between Mr Sullivan and Mr Awad prior to 10 August 2012, and that Mr Sullivan made some of the remarks alleged by Mr Awad.
7. Continuing his statement to the investigator, Mr Sullivan stated that, early on the following Monday, Mr Awad came to his door with a union delegate who asked to speak to him about the incident. When he told the delegate he should speak to Mr Cocoris, Mr Awad said “You don’t seem to understand or want to listen” to which Mr Sullivan said “All I expect is for you to act with honesty and integrity. This is not the first time that I have had concerns with you saying stuff without any fact or substance”. He then repeated the need for Mr Awad to act with honesty and integrity.

*Mr Sullivan’s oral evidence*

1. Giving oral evidence, Mr Sullivan denied allegations by Mr Awad that he was “trying to drive” the union out of the depot and trying to drive a wedge between Mr Awad and union members, and he denied he had made various disparaging comments to Mr Awad during meetings. He denied ever saying Mr Awad was lacking in integrity but agreed he had had occasion to question whether he was telling the truth and had formed the view in the past that he “lacked integrity”. As his email to Mr Motulalo shows, he did in fact tell Mr Awad during the incident that he “had no faith in his integrity”
2. Although he denied raising his voice to Mr Awad during the incident, Mr Sullivan conceded under cross-examination that he did, although he denied doing so “in an aggressive manner”. He agreed that he told Mr Awad to “fuck off”.
3. Mr Sullivan maintained he gave Mr Awad a chance to respond and let him speak, but then agreed he did not give him a chance to actually respond to the accusation he was putting to him. He agreed Mr Awad appeared “lost for words” during the incident and “had a blank look on his face”. He conceded that he treated anything Mr Awad might say during the incident “with a level of dismiss”, and on the basis that what Mr Awad might say was irrelevant because he would not believe him. He agreed he had had “enough of him” and “a gutful” of what he saw as Mr Awad’s history of telling lies. He agreed he turned away from Mr Awad “in disgust” although, he said, not in anger. He did not recall calling Mr Awad “a fucking liar” but he agreed that, in his mind, he was a liar “at that time”. He agreed he did not give Mr Awad a chance to speak on the Monday morning.

**Other evidence about the incident**

*The investigator’s report, 21 September 2012*

1. According to the investigator’s report, his inquiries “have failed to support Mr Awad’s allegation of being verbally intimidated or belittled by Mr Sullivan”. Mr Awad was overseas at the time of the investigation and was not interviewed. The report includes a number of gratuitous adverse comments about him. The investigator concluded it was “clearly evident that Mr Awad was embarrassed” by Mr Cocoris repeating his apparently unfounded allegation in front of other union members and that, in the circumstances, “Mr Sullivan’s actions in challenging Mr Awad after being confronted by Mr Cocoris [were] justified”.
2. The report appears to have been prepared at the request of a Senior Occupational Health and Safety Adviser in response to a complaint by Mr Awad on 24 August 2012. It is not clear, and it does not matter here, what its outcome was. For present purposes it assists us only in so far as it has attached to it several statements taken from witnesses to the incident.

*Written statement of Elaine Metcalfe*

1. On 30 August 2012, Elaine Metcalfe, a sales manager for the respondent, provided a statement for the purposes of the internal investigation. She stated she was present when she saw an employee, whom she later learned was Mr Awad, speaking with Mr Sullivan. She was about a metre from them and “could hear that they were involved in a serious discussion”.
2. Ms Metcalfe stated she did not hear everything they said but she recalled Mr Sullivan saying words to the effect of “You’re a liar come back here and tell the truth” as Mr Awad walked away. She saw Mr Awad turn and say words to the effect “No that’s not true” to which Mr Sullivan said “No you’re a fucking liar, come back here and tell one of your members why you would say that” at which Mr Awad turned again and went to the nearby lunch room.

*Other written statements*

1. Mr John Jones, who was present in the depot at the time of the incident, gave a brief statement for the purposes of the investigation. It is relevant only in as much as he says he could see Mr Awad and Mr Sullivan and could hear they were arguing; their voices were “raised towards each other” but he could not hear what was said.
2. Mr Brian Castle, was also present and gave a statement. He said he heard Mr Sullivan say to Mr Awad words to the effect “Why are you lying, there’s no need to lie. This is union vilification against me” before Mr Awad turned and walked away.
3. These statements lend weight to our conclusion that what occurred between Mr Awad and Mr Sullivan was more than “just a conversation” as the respondent suggests.
4. Mr Andrew Wyatt, who was not present during the incident, provided a statement about a conversation with Mr Awad and another employee two days before the incident. The inference from his statement is that Mr Awad made up the allegation that Mr Sullivan had been observing staff in order to cause trouble. Mr Awad denies this allegation and in the absence of an opportunity to test Mr Wyatt’s statement, it does not assist us other than to confirm there was tension between Mr Sullivan and Mr Awad.

 *Statement of Apisalomi Degei, 17 May 2013*

1. A written statement dated 17 May 2013 from Mr Apisalomi Degei is in evidence. He states he has been employed by the respondent for approximately 15 years and has known Mr Awad for most of that time. He says he witnessed the incident and that Mr Awad looked “humiliated and distressed” and “[t]here were tears in his eyes and he seemed overwhelmed”. Mr Degei was not available to give oral evidence. Without the opportunity to test his statement, we give it no weight.

**CCTV evidence**

1. A DVD of closed circuit television footage of the incident on 10 August 2012 is before the Tribunal. It shows a conversation between Mr Awad and Mr Sullivan lasting approximately two minutes, at the end of which Mr Awad leaves the room. After about seven minutes, he is seen re-entering the room at which time Mr Sullivan is seen speaking to Mr Cocoris. Mr Sullivan calls Mr Awad over, and he and Mr Cocoris are seen speaking for approximately 12 seconds. Mr Sullivan and Mr Awad are then seen speaking for approximately 51 seconds after which Mr Sullivan is seen leaving the room.
2. Six to eight others besides Mr Sullivan, Mr Awad and Mr Cocoris are seen in the immediate area and several others can be seen through a window in an adjoining room. Mr Sullivan appears to do most of the talking throughout. He repeatedly extends his arm in Mr Awad’s direction and several times points his finger directly at him, apparently emphasising his point. At times, Mr Sullivan and Mr Awad appear to be about a metre apart, at others about three metres apart. In the first part of their exchange, before he leaves the room, Mr Awad stands with his hands clasped in front of him and he appears surprisingly passive in the face of at what appears to be directed at him. He appears more animated during their conversation when he returns to the room when Mr Sullivan is seen gesturing emphatically as soon as their conversation commences.
3. There is no sound with the footage but the overall tenor of the exchanges between Mr Sullivan and Mr Awad is unmistakeable. It is clear that a confrontation of sorts is occurring. Mr Sullivan agreed that it could be properly characterised, at various stages, as “a dressing-down”.

**Ms Awad’s evidence**

1. Marguerite Awad married Mr Awad in 1995. They have three children. She gave written and oral evidence. She impressed us as a truthful witness.
2. Ms Awad says that, before 10 August 2012, Mr Awad had always been a happy person and a wonderful father; he was outgoing and caring; he was always involved with the children and made time to play with them; he was very handy around the house and had renovated their home; he would mow the lawns and was the breadwinner for the family.
3. Ms Awad says Mr Awad arrived home at about 8pm on Friday, 10 August 2012. He looked “very stressed” and his speech was “erratic and all over the place”. He eventually told her that he had been in a verbal altercation with Mr Sullivan who had sworn at him in front of other workers. Ms Awad says she was worried about him but she hoped he would improve over the weekend. That night, he could not sleep and kept repeating what had happened to him and was “in a highly anxious state”. She told him he should speak with Mr Sullivan on Monday to sort out the problem.
4. On 13 August 2012, Mr Awad arrived home and said he had spoken to Mr Sullivan but “it hadn’t gone well” and Mr Sullivan had insulted him again. He had difficulty sleeping that night and was “fixated on what had occurred”. When he did not improve over the next few days and was unable to go to work, she took him to their general practitioner.
5. Ms Awad says that, over time, Mr Awad became more distant, he did not want to talk to her and would tell her to leave him alone, he lacked focus and concentration and became more “reclusive” around the house. He keeps to himself and does not like to leave the house; there is little conversation between them and he has developed a tic where his head shakes. She has to wake him and tell him to shower, he washes himself but she helps him to dress; she tries not to leave him alone as she is scared he may harm himself; she has to remind him to eat meals that she prepares for him. When he leaves the house he becomes anxious and his speech becomes affected; he may start stuttering and sometimes his speech becomes slurred.

**Medical evidence**

1. There is no evidence that Mr Awad suffered from any psychiatric condition prior to the incident on 10 August 2012. Dr Mohsen Gerges reported on 30 October 2012 that he had known Mr Awad since June 2009 and he had never had any prior psychiatric illness. When he saw him on 17 August 2012, he looked “very upset” so he prescribed Zoloft. Without suggesting any criticism of Dr Gerges, the psychiatrists who gave oral evidence thought this early prescription of medication may have influenced the progression of Mr Awad’s condition.
2. Dr Gerges reported that, while in his surgery, Mr Awad started to feel dizzy and felt unsafe to drive. He gave him a Workcover medical certificate and referred him immediately to Dr Grace. Whatever the nature and cause of Mr Awad’s condition at that point, it is evident that Dr Gerges was sufficiently concerned by Mr Awad’s presentation to refer him immediately to a psychiatrist.
3. A CT brain scan on 21 June 2013 and an MRI brain scan on 16 September 2013 showed no abnormality.

***Dr Grace’s evidence***

1. Dr Grace saw Mr Awad on nine occasions between August 2012 and February 2014, accompanied by his wife each time. He has provided two written reports and gave oral evidence.
2. Dr Grace says Mr Awad appeared “highly anxious and depressed” at their first consultation, and he diagnosed him as developing an Adjustment Disorder with Depressed and Anxious mood. Mr Awad’s presentation has progressively deteriorated; he had difficulty speaking and he appeared to become overwhelmed more easily when asked to process complex information.
3. Dr Grace says Mr Awad’s condition is “unusual in its presentation” and has been difficult to diagnose. While his depression is fairly typical, its associated anxiety is extreme and its expression odd. It has not improved with a change in his medication. Dr Grace says he now has a “non-psychotic chronic major depressive disorder associated with a paralysing level of anxiety”, and his prognosis is poor unless he receives effective treatment soon.
4. Despite his unusual presentation, Dr Grace believes Mr Awad’s condition is “entirely genuine” and says his personality and personal circumstances are the key to understanding his presentation. He describes Mr Awad as:

*… a moral, socially shy and unassertive man who lacks self-confidence and prefers to remain in the background. He needs to be accepted by those people he considers important and interacts with as a result of which he suppresses rather than expresses any anger that he feels towards them. Over time a significant accumulation of suppressed and therefore contained anger can express itself as depression and/or panic anxiety.*

1. Dr Grace believes the incident with Mr Sullivan was a “frightening verbal attack” and a “major public humiliation” for Mr Awad. It caused him to be overwhelmed by anxiety “due to the severity and protracted nature of what he saw as an unjust attack”.
2. In cross-examination, Dr Grace agreed it is not in the nature of the therapeutic relationship to interrogate a patient’s version of events. He said he had considered the possibility that Mr Awad was malingering but he had not interrogated his version of events. He agreed that, if the version of events described by Mr Awad was not accurate, his opinion about whether work made him ill would change. As set out below at [85], while Mr Awad and Mr Sullivan interpret their exchange differently, we do not think the version Mr Awad gave to Dr Grace is so different from what happened that it undermines either Mr Awad’s credibility or Dr Grace’s opinion.
3. Dr Grace notes that, because his claim for compensation has not been accepted, Mr Awad has paid for his consultations himself. As he is not privately insured, he cannot afford admission to a private psychiatric hospital or to participate in an outpatient program run from a private psychiatric hospital. Dr Grace says he has discussed the possibility of hospitalisation in the public psychiatry system with Mr and Ms Awad on a number of occasions but both were worried it would be “a frightening experience for him” and did not wish to pursue that option. He believes electro-convulsive therapy would be the treatment of choice in the initial stage of in-patient treatment.

***Dr George’s reports***

1. Dr George first saw Mr Awad on 12 September 2012. He diagnosed him as suffering an acute stress disorder which might develop into an adjustment disorder with anxious and depressed mood if his symptoms extended beyond four weeks. He thought he appeared to suffer a panic attack when he believed he was being embarrassed in front of colleagues.
2. Dr George saw Mr Awad on two further occasions and has provided five reports. When he saw him in May 2013, he thought Mr Awad showed “significant ‘sick role’ behaviour” and he was not able to draw a coherent history from him. He noted that Mr Awad was smoking a Lebanese water pipe for two to three hours in the morning and again in the afternoon, and would drink two to three bottles of beer each day.
3. In June 2013, Dr George reported that Mr Awad’s medication did not appear to be having much effect and he was unable to give a clear account of himself. He appeared incoherent and had difficulty with speech, and he appeared to have cognitive dysfunction. Dr George thought he should be extensively investigated in a hospital and recommended an MRI brain scan which, as noted above, showed no abnormality.
4. In September 2013, Dr George thought Mr Awad had chronic major depression. He agreed with a report of Dr Robertson who assessed Mr Awad as seriously depressed and in need of in-patient care and, possibly, electro-convulsive therapy. He thought it appeared that the altercation at work had precipitated his condition.

***Dr Robertson’s reports***

1. Dr Robertson saw Mr Awad for assessment in August 2013. He reported he was “at a loss” to explain Mr Awad’s profound disability over such a protracted period, and the possibility of an underlying organic process should be excluded. He thought Mr Awad’s presentation “if legitimate” was of a chronic major depressive disorder.
2. Dr Robertson thought it possible, given the humiliation Mr Awad appeared to have experienced “at the hands of his superior”, and the loss of face associated with it, that he had sustained “sufficient narcissistic injury that would explain his current level of incapacity” although he thought it “quite extraordinary” how unwell he presented. On the balance of probability, he thought it likely that Mr Awad had sustained “a psychological injury as a result of vilification on the part of his colleague”.

***Dr Champion’s reports***

1. In November 2013, Dr Champion prepared a report concerning Mr Awad based on a review of file documents including reports from Drs George and Robertson. Given the “minimal nature of the stressor, the abnormal course (becoming more severe rather than resolving progressively) and the context of workers compensation claim”, he recommended Mr Awad undergo neuropsychological evaluation so as to have a basis for a more accurate diagnosis.
2. On 6 December 2013, Dr John McMahon, clinical psychologist, saw Mr Awad for neuropsychological assessment. He attempted to administer a *Test of Memory Malingering* which he describes as “a simple standardised test”. Mr Awad was unable to comply. He began to hyperventilate and had mild shaking and head tremors, and he complained of nausea. He had a pronounced stutter and was unable to tolerate responding to questions verbally. He was still unable to do the test after a break and he ingested Valium, which precluded the further administration of standardised tests.
3. Dr McMahon reported that Mr Awad’s presentation was “extreme”. He said he has been able to elicit meaningful and valid responses to the test from persons aged from 8 to 90 years old, including persons suffering from dementia and schizophrenia. The fact that Mr Awad was not able to complete the test was unusual and “may represent a regression in the face of the stressor of examination, an unconsciously motivated behavioural reaction such as in Ganser Syndrome or Factitious Disorder”. It was also possible that it indicated “motivational factors to appear more unwell than he actually was in a conscious way” but, in the absence of testing, he could not provide conclusive evidence of such motivation.
4. In January 2014, having received Dr McMahon’s report, Dr Champion reported that Mr Awad’s apparently deliberate avoidance of participation in “an extremely simple psychological test” was most likely due to motivational factors rather than any genuine psychiatric disability. On that basis, he thought it improbable that Mr Awad had any current disorder which would qualify him for a valid psychiatric diagnosis.

***Concurrent oral evidence of Drs George, Robertson and Champion***

1. Drs George, Robertson and Champion gave oral evidence concurrently after conferring and preparing brief written responses to questions concerning diagnosis, causation and treatment of Mr Awad’s condition. They viewed the CCTV footage in the course of their oral evidence.
2. The doctors were in agreement that Mr Awad’s presentation is highly unusual. Dr Champion described it as “a most extraordinary pattern” in a person with a stable psychological history confronted with the incident in question to develop an illness that escalated over time despite “maximum treatment”; it was “exactly the reverse” of what would be expected. He thought an event such as the incident could produce an adjustment disorder but in the “vast majority” of cases, it would resolve over a matter of days or weeks at the most.
3. Dr Robertson and Dr George were of the view that Mr Awad suffers from “persisting depressive disorder” after the workplace incident triggered some sort of acute distress, although neither thought it could explain Mr Awad’s extended “disability and psychiatric distress”. Dr Robertson thought it precipitated “a more complex psychopathological process … mediated by culture, secondary gain, and psychosocial reinforcement”. Dr George thought the loss of face in front of colleagues, precipitated an acute stress disorder which over time developed into a persisting depressive disorder.
4. Perhaps reflecting Mr Awad’s unusual presentation, the doctors’ evidence was not always easy to follow and appeared contradictory in parts. For instance, Dr George gave evidence that he thought it “more than likely” that Mr Awad probably had “an overwhelming” panic attack at the time. He later said there was not sufficient evidence to say that he did have a panic attack. Dr Champion thought he “possibly” had a panic attack. All agreed that returning to speak to Mr Sullivan after leaving the room was at odds with a panic attack, as was waiting for a week before seeing his doctor. As we understand their evidence, all agree that situations such as that seen on the DVD can cause a stress reaction and an adjustment disorder. All agree Mr Awad is presently incapacitated for employment.
5. As we understand their evidence, none of the doctors suggest that Mr Awad is concocting his symptoms; rather, that a pattern of entrenched “abnormal illness behaviour” has developed which, in Dr Champion’s view, will resolve once the present litigation is finalised. All think his condition likely to be complicated by factors including his medication, personality and psycho-social factors.

**CONSIDERATION**

1. We have to decide whether Mr Awad suffered an injury in the nature of an ailment to which his employment contributed to a significant degree. We are not required in these proceedings to determine the extent of any incapacity he has suffered.
2. An ailment may be found to exist, notwithstanding it cannot be identified with the label of a recognised medical condition, if it is a condition “outside the boundaries of normal mental functioning and behaviour”: *Comcare v Mooi* (1996) 69 FCR 439 at 444.
3. The doctors have offered varying diagnoses of Mr Awad’s condition, from Dr Grace’s initial diagnosis of Adjustment Disorder with Depressed and Anxious mood to Dr George’s and Dr Robertson’s diagnosis of persistent depressive disorder, and Dr Robertson's of chronic major depressive disorder. All agree that there are features of abnormal illness behaviour in his presentation, although only Dr Champion confined his diagnosis to this condition (without saying abnormal illness behaviour is a diagnosable condition).
4. The doctors agree that Mr Awad’s present condition is highly unusual and his response apparently out of all proportion to the incident observed on the DVD. The progression of his condition defies their experience of responses to stressful events and they cannot adequately explain it. They agree that a diagnosis could only be made with any confidence if Mr Awad were to be hospitalised, taken off all his medications, and looking at “all his biological functions” one at a time.
5. Despite their differences, the doctors were all of the view that what was observed on the DVD had the potential to lead to a psychiatric response in the nature of an adjustment disorder.
6. In *Wiegand* *v Comcare* (2002) 72 ALD 795, von Doussa J said that, in determining whether an incident or state of affairs contributed to an ailment to the required degree:

*… there is no requirement at law that the interpretation placed on the incident or state of affairs by the employee, or the employee’s perception of it, is one which passes some qualitative test based on an objective measure of reasonableness. If the incident or state of affairs actually occurred, and created a perception in the mind of the employee (whether reasonable or unreasonable in the thinking of others) and the perception contributed in a material degree to an aggravation of the employee’s ailment, the requirements of the definition of disease are fulfilled.*

1. The respondent contends that the state of affairs claimed by Mr Awad did not exist, in particular, that the version of events he gave to Dr Grace, and on which Dr Grace’s opinion was formed, did not exist. Further, that the DVD does not support his version. The respondent submits we should prefer Mr Sullivan’s version of events and that, absent the state of affairs claimed by Mr Awad, his claim must fail.
2. It is not for us to determine whether Mr Sullivan’s conduct during the incident was unreasonable or unfair. Whether it was as confronting or belligerent as Mr Awad says, or as benign as Mr Sullivan suggests, is not to the point. As we have observed, it is unmistakeable from the DVD that a heated confrontation occurred in which Mr Awad apparently put up little resistance. We do not accept the respondent’s submission that all Mr Sullivan was doing was “talking with his hands” or that it was “just a case of a conversation”. Neither Ms Metcalfe nor Mr Johns appears to have thought it was so.
3. There is no dispute that there had been some tension between Mr Sullivan and Mr Awad for some time. It is not for us to determine whether either was at fault. However, by his own evidence, Mr Sullivan had had cause to question Mr Awad’s honesty and integrity previously and had thought he was at times telling lies. He was frustrated with Mr Awad. He repeated that he should act “with honesty and integrity” and claimed it was not the first time he had “done this”. He was frustrated with Mr Awad and, by his own evidence, was giving him a “dressing-down”. The doctors went further: Dr Robertson described the body language as “fairly menacing” and indicated there was “a very assertive point being made”; “it looked, colloquially, like a spray”. Dr George thought Mr Sullivan was “remonstrating” with Mr Awad although, given Mr Sullivan believed Mr Awad was not being truthful, he thought that understandable.
4. Against this background, and having observed the incident on DVD, albeit without sound, we are satisfied that an incident occurred in which Mr Awad was publicly taken to task by his manager and his honesty and integrity put in question. We are satisfied that he perceived this as a public humiliation and that it triggered a psychiatric reaction.
5. Dr Grace understood from Mr Awad that, for some 18 months, Mr Sullivan had been trying to create a split between him and union members, and was “on a mission” to drive the union out of the workplace; that he set about victimising Mr Awad, putting him down in public and in private, and branding him as incompetent and lacking integrity. Mr Awad told Dr Grace that, on 10 August 2012, Mr Sullivan “began screaming at him in front of at least 20 or 30 workers”.
6. There was evidently tension between Mr Sullivan and Mr Awad leading up to the incident. The DVD does not support Mr Awad’s account that Mr Sullivan “screamed” at him in from of 20 to 30 others but it does show, at times, up to 12 or 13 others in the general area and several more in the next room. We cannot know how many could hear the conversation but Mr Awad’s account is not so at odds with what we saw that it seriously undermines his version of events, or Dr Grace’s diagnosis and opinion that the incident contributed significantly to his condition.
7. As we understand their evidence, all of the doctors agreed that what they saw on the DVD was the sort of incident that could cause a person to feel under attack and lead to a response by way of some kind of stress reaction. Whether he had a panic attack at the time is not clear but it seems probably not. We are satisfied that there was more than a temporal connection between Mr Awad’s condition and his employment and that he had a reaction of a psychiatric nature as a result of the incident.

**CONCLUSION**

1. We are satisfied that Mr Awad’s employment contributed to a significant degree to him being incapacitated for employment. How long that incapacity continued is not a matter we are required to determine.
2. We set aside the decision under review and substitute for it the decision that the respondent is liable under s 14 of the Act to compensate Mr Awad for the injury he suffered as a result of the incident on 10 August 2012.

|  |
| --- |
| I certify that the preceding 88 (eighty-eight) paragraphs are a true copy of the reasons for the decision herein of Senior Member J F Toohey and Dr B Isles, Member.  |

..........................................

Associate

Dated 28 May 2014

|  |  |
| --- | --- |
| Date(s) of hearing | **4 – 5 March 2014** |
| Representatives for the Applicant | **Mr Matthew Gollan, Counsel****Mr Abraham Ghaleb, Slater & Gordon** |
| Representatives for the Respondent | **Mr Peter Woulfe, Counsel****Mr Shaun Jackson, Moray & Agnew Solicitors** |