



High price of psychological injury

Minimising the risk of compensation claims

Key Points

- Workers compensation claims for psychological injury are increasing.
- One recent case= \$500,000 damages.
- Employers required by law to provide safe workplaces, free from prolonged work-related stress.
- Failure to have safe system of work is enough for employer to be prosecuted.

Workers compensation claims for workplace-related psychological injury have jumped in recent years and there is no sign they are on the decline. Moreover, the cost of these claims is high when compared with other types of injury, with one employee in a recent case awarded almost \$500,000 in damages from his employer.

In 2002–2003, while stress claims made to the workers compensation insurer for the Commonwealth Government, Comcare, accounted for only 6% of total workers compensation claims, they accounted for nearly 21% of total claims payouts. And according to other Comcare figures, psychological injuries cost four times as much and take longer to resolve than other workers compensation claims.

What is psychological injury?

Depression, anxiety and neuroses are among the most common psychological workplace injuries. They may result from prolonged or excessive exposure to demanding, stressful stimuli, such as work-related factors and/or critical incidents. And most psychological injuries develop over a long period of time.

When initially faced with stressful stimuli, the body releases hormones that increase the heart rate, blood pressure, breathing and muscle tension. These create a state of mental and physical arousal in anticipation of a response to the stimuli.

If stimuli are prolonged and excessive, the body attempts to adapt. If the adaptation is over an extended period it can create exhaustion and provide little opportunity for the body to recover from its stressed state. Over a prolonged period, stress can make an individual susceptible to psychological injury. Physical ailments can also occur, such as headaches, back and neck strain, nausea and constipation.

Not all employees respond to stressful stimuli in the same way. Responses vary depending on an individual's expectations and their capacity to deal with demanding work-related factors. As a result, managers must avoid relying on their own personal coping mechanisms as a guide to how much stress employees can handle.

At the same time, not all stressful stimuli are negative. A certain level of stimulus may motivate an employee to creatively and successfully complete tasks.

However, while individual employee expectations and capacity to cope may determine the extent of a response, it is work-related factors that trigger the response. A combination of high job demand and low job control is one of the most common work-related factors put forward to explain the work-stress response. In particular, low job control is seen as a major source of stress.

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Employer liability

Under Australian occupational health and safety (OHS) statutory law and common law, employers must provide safe workplaces. This includes taking practical steps to identify, assess and control reasonably foreseeable psychological risks.

Under OHS statutory law, a psychological injury does not have to occur for an employer to be in breach of OHS law. Failure to have a safe system of work is enough to be charged and prosecuted.

Under common law, an employee with a psychological injury may be able to sue an employer for negligence and be awarded damages.

The *State of NSW v Coffey* [2002] NSWCA 361, 7 November 2002 (*Meagher, Heydon and Ipp JJA*), is an example of how an employer's common law duty may play out in Court. The Court of Appeal found employers have a responsibility to ensure the psychological health and safety of their workers. A NSW Housing Commission caretaker received threats and abuse from tenants and had witnessed murders and suicides, which he reported to his employer. He also asked his employer to erect a security screen at his office counter, but the employer refused.

The caretaker resigned from his job after eight years of service with depression and post-traumatic stress disorder. The Court of Appeal held the risk of psychological injury was reasonably foreseeable, but the employer had failed to act. The employer could have considered rotating the employee into other positions, monitoring the employee's coping ability and ensuring he received ongoing counselling.

Although the employer offered a counselling service, it was up to the employee to seek it out. According to the court, this was not sufficient to "absolve" the employer from its duty of care to provide a safe system of work. The employee was awarded \$459,478 in damages.

Workers compensation laws

Under Australian workers compensation laws, psychological injury can be compensated if work contributes to the injury or aggravates an existing injury. The workplace does not have to be the dominant or the only cause, but it must be a substantial cause of the injury.

Depending on the injury, compensation may include benefits such as weekly payments, medical treatment, rehabilitation and lump sum payments for permanent impairment (as opposed to common law damages).

Employees who are awarded common law damages will have their access to workers compensation benefits ceased or restricted.

Injuries resulting from reasonable managerial direction, such as retrenchment or addressing an employee's wilful misconduct are not covered by workers compensation. However, if retrenchment and other managerial directions are handled in an unreasonable manner then there could be grounds for a stress claim.

In *Jaksic v WorkCover/Allianz Australia Workers Compensation (SA) Ltd (Konica Australia Pty Ltd)* [2004] SAWCT 17A, the SA Workers Compensation Tribunal found the workplace contributed to an employee's anxiety and set aside WorkCover SA's denial of the employee's claim.

WorkCover had argued it was a disciplinary interview that caused the employee's anxiety; therefore the stress claim could be denied. However, the judge found other action, not just the disciplinary action, contributed to the employee's injury.

The employee's supervisor arrived at work one morning to find the warehouse gate had been left open by the employee and decided to teach the employee a lesson in securing the warehouse. The supervisor hid equipment from the employee then asked the employee to find it. The employee could not. The supervisor then revealed the equipment, indicating the workplace was not secure. The employee became anxious and left work. The employee had a history of not adhering to workplace policies and was in the process of being counselled over this. The employee also had a history of anxiety. The judge subsequently found that hiding the equipment had been unreasonable and the employer should have foreseen it would cause the employee to become anxious.

Disability discrimination laws

Employers must also understand their obligations under disability discrimination laws. An employer cannot use a psychological injury as the reason for dismissing an employee if the employee still can carry out the basic job requirements.

In *Power v Aboriginal Hostels Limited* [2003] FCA 1475 the Federal Court set aside an earlier Federal Magistrate's Court ruling, which found an employer's decision to terminate an employee suffering from clinical depression was reasonable. According to the Federal Court, the Federal Magistrate failed to consider if the employee was unable to perform his on-call duties.

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Privacy laws

Employers should also have regard for privacy laws. Federal laws impose certain obligations on the collection, use and storage of certain information. Health information is considered sensitive under federal privacy laws. Employers must ask permission before collecting such information and do not have an unfettered right to use such information.

Preventing psychological injury

To ensure all workers are reasonably protected from psychological risks, employers should address stressful work-related stimuli, not just employees' stress responses.

Specific stressful stimuli may include, but not be limited to:

- controlling management style;
- poor consultation;
- blaming culture;
- unclear job description;
- inadequate training;
- poor recruitment techniques;
- unexplained constant change;
- intense, fast-paced work;
- repetitive and boring work;
- unsupportive work environment;
- interpersonal conflict;
- critical incidents;
- poor ergonomics;
- lack of flexibility, poor salaries and poor working conditions.

Employers should also be aware of the substantial indirect costs of psychological injury. They can have a negative impact on a workforce's productivity, morale, turnover, motivation, absenteeism and relationships. Managers should take the lead and demonstrate the importance of preventing workplace psychological injuries at both the organisational and the individual level.

Useful steps to take

Step 1 – Identify the psychological hazards

This involves stressful stimuli which includes, but is not limited to, consulting workers and supervisors through surveys and discussions; reviewing accident and incident reports and workers compensation claims; appraising workflows and work systems; and assessing absenteeism and grievances.

Step 2 – Assess the risk

This includes assessing the possible consequences of exposure to stressful stimuli, the likelihood of exposure and the extent of the exposure, and then a prioritisation of the risks. For example, if heavy workloads are identified as stressful stimuli, the employer should consider the consequences, the possibility of exposure, and the employees exposed. Once the extent of the risk is determined it can be prioritised.

Step 3 – Control the risks

It is counterproductive to focus controls solely on individual workers, as it sends the message that employees are the problem. Stress can escalate if employees are blamed for situations outside their control. Counselling employees, for example, won't fix work overload problems. Work overload is a function of

systems out of step with reasonable workflow.

Appropriate organisational controls may include revising key performance indicators to better reflect what employees are able to do; and altering workflows and systems to better reflect available resources and employees to complete tasks.

That said, the organisational approach should not be at the expense of individual risk control measures, which can complement organisational controls. Individual controls, such as counselling, relaxation, problem-solving, stress management, time management and employee assistance programs may be required.

While some employers may doubt the existence of psychological injury or that, at the very least, a worker would be able to prove its cause, both the courts and workers compensation tribunals in Australia have accepted it can occur and that employers may be responsible for it.

As prevention is always better than cure and can save potentially hundreds of thousands of dollars in compensation payouts, professional advice should be sought.

For specific advice in relation to your business, contact Delta OHS Systems:

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