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Recent developments regarding employer directed health assessment and medical examinations

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It is incumbent upon employers under both the common law and statute to reasonably minimise the risk of injury to employees in the performance of work. Current iterations of work health and safety laws extend this general duty and explicitly require a person conducting a business or undertaking to ensure, as far as reasonably practicable, that '*the health of workers and the conditions at the workplace are* ***monitored*** *for the purpose of* ***preventing*** *illness or injury of workers arising from the conduct of the business or undertaking*'.[1] This newsletter briefly reviews the law regarding the medical assessment of workers, and considers two recent decisions – one in the context of an individual and the other an attempt to implement a broad mandatory health assessment program.

Starting point – the general authority of an employer to obtain a medical evaluation

An employer is entitled to issue directions, and an employee must comply with such directions, provided that they are both lawful and reasonable.[2] A failure to do so may amount to serious misconduct. The obligation to issue and comply with directions has long extended to the production of medical documentation and attendance at examinations to assess fitness for work:

> *'essential for compliance with … [WHS obligations] that an employer be able, where necessary, to require an employee to furnish particulars and/or medical evidence affirming the employee's continuing fitness to undertake duties. Likewise, an employer should, where there is a genuine indication of a need for it, also be able to require an employee, on reasonable terms, to attend a medical examination to confirm his or her fitness. This is likely to be particularly pertinent in dangerous work environments.'* [3]

Experienced human resource practitioners will know that there is a fine line to be traversed between balancing the employment and safety obligations of the business in this context with issues of discrimination and privacy. In general, an employer sponsored medical examination should not ask about the existence of medical conditions per se, but rather should be limited to the ability of the employee to perform the duties of the position, any functional limitations or accommodations required to do so, and the level of risk associated with such performance. As such, the practitioner performing the medical assessment or functional capacity evaluation

should have a clear understanding of the employment duties and the forces potentially involved so as to enable the assessment to specifically address the capacity to safely perform those duties. For this reason, medical certificates couched in broad or generic terms performed by a doctor with little information as to the nature of the job are often of little material value.

Common circumstances providing a '*genuine indication of a need*' for medical evaluation include complaints of injury or illness, observations of functional difficulty in performing tasks, a return to work after significant injury or illness, and a change to the job risks or requirements such as increased manual handling requirements. Furthermore, pre-employment medicals have become a standard part of any role involving an elevated level of risk. Legislation in some industries, such as mining, mandate pre-employment and periodic medical evaluations.[4]

Recent example – employee dismissed for refusing to attend medical evaluation

The recent decision of the Full Bench of the Fair Work Commission (**FWC**) in *Grant v BHP Coal Pty Ltd*[5] provides a useful illustration of the application of these principles. Darrin Grant (**Grant**) was a boilermaker working at BHP's Peak Down mine and was an area delegate of the Construction, Forestry, Mining and Energy Union. He sustained an injury to his shoulder while at work in 2011 and experienced re-aggravations. In July 2012, Grant took sick leave and ultimately underwent shoulder surgery in September 2012. In early 2013, after having being off work for eight months, Grant supplied BHP with medical certificates from his treating medical practitioner and the orthopaedic surgeon who had performed the surgery, both of which in very simple terms provided a clearance to return to normal work. Given the prolonged absence and the fact that Grant had undergone surgery, BHP required him to undergo a functional assessment test with an occupational physician who had specific knowledge of the relevant duties and mining operations. It refused him access to the site until after the assessment has been completed. Grant equivocated and ultimately failed to attend the appointment, asserting that the direction was unlawful and unreasonable given the presented medical certificates cleared him for work and the asserted failure of BHP to clearly define the legal basis for the direction. Grant had been explicitly advised that a failure to comply with the direction to attend the examination may result in disciplinary measures being taken against him. A further appointment was arranged however Grant again failed to attend. BHP initiated an investigation but Grant refused to provide any explanation for his conduct and demanded any questions be put in writing. As a result, his employment was terminated.

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Grant pursued an unfair dismissal claim in the FWC. At first instance and on appeal his dismissal was upheld, finding:

> *'Given the nature of [Grant's] medical history and the fact that [Grant] had had shoulder surgery and rehabilitation, [BHP] had reasonable cause to satisfy itself that [Grant] could perform his duties and would not expose anyone to an unnecessary level of risk.*
>
> *… the aggregate of [Grant's] conduct in relation to the failure to follow the lawful and reasonable directions – specifically the failure to attend medical assessments – and his unreasonable refusal to participate in the disciplinary investigation formed a valid reason for dismissal.'*

Much of the argument on appeal focused on whether the direction to attend a medical examination was inconsistent with the specific testing regime required to be established under the *Coal Mining Safety and Health Act 1999* (Qld). The FWC at first instance and the Fair Work Commission Full Bench (**FWCFB**) on appeal confirmed that the general obligation under the Act to '*take any other reasonable and necessary course of action to ensure anyone is not exposed to an unacceptable level of risk*' justified a direction of this nature, and was not inconsistent with the mandatory health assessment requirements in the Act and regulations.

Broader workplace assessment – pro-active physical risk review program struck down

Contrast can be drawn with another recent decision in *TWU v Cement Australia Pty Ltd*[6] in which Commissioner Spencer of the FWC struck down a direction by an

employer to its distribution workforce (primarily cement truck drivers) to attend and participate in a physical risk review program. The program had been intended to assess workers' risks in performing their work duties having regard to their level of fitness and lifestyle. Depending on the results of assessments, workers may be recommended for various programs to pro-actively improve their health, including quit smoking programs, weight loss, lifestyle coaching, focused strengthening programs, etc. The physical risk review program was an attempt to address the prevalence of musculoskeletal injuries identified by Cement Australia during two workplace studies.

In concluding that the direction to participate in the program was not lawful or reasonable, Commissioner Spencer drew a stark distinction between an assessment of an individual's ability to perform the requirements of their job because of specific circumstances, and a direction to a sector of the workforce based on a general trend. Further, it was clear that the Commissioner was unconvinced by the evidence as to the use to which the assessments would be put in practice or that privacy issues had been adequately addressed:

> *'On the information provided, and in circumstances where the direction to participate in the program was provided to a segment of the workforce at large, based on general injury information, rather than on the basis of specific factual concerns associated with an individual employee regarding their prospects of injury, or being able to perform the inherent requirements of their job, it is not considered that the direction for the Risk Review Program was lawful or reasonable in the circumstances. Nor would it, on completion of the program address or rectify [Cement Australia's] concerns regarding the general injury level. The Program has been considered alongside the legislative health screening that currently exists.*
>
> *… There has been an insufficient particularisation of the data to* ***establish a genuine need*** *to direct an entire segment of the workforce to undertake this assessment. Further, the outcome of the Risk Review Program* ***will not provide medical information directed to the inherent requirements of the job*** *or provide a link to reduce the musculoskeletal injury rate. In addition, given that there remain questions regarding the process and contradictory information and questions regarding the discharge of the process, the direction has not been made on reasonable terms. [Cement Australia]* ***could not conclusively provide that the privacy of employees' medical information would be secured.****'* (emphasis added)

Discussion

While directions for medical assessments to address the functional capacity of an individual employee have long been enforced, broader workplace assessments struggle to gain acceptance outside of limited industries. The very absence of individual circumstances necessitating the assessment, whether in the nature of historical injury or something else, undermines the ability of employers to satisfy the threshold of '*genuine indication of a need*'.

From a societal perspective, broader injury trend analysis and risk assessment, and the implementation of pro-active measures to address risk factors such as strengthening and lifestyle programs, are the very measures that employers ought to be encouraged to pursue. It is counter-productive to limit employer intervention to individual circumstances, such as post injury rehabilitation, when broader prevention strategies may negate those individual issues from ever arising. Far better to assess and pro-actively address issues of posture, task rotation and muscle strengthening, than deal with degenerative neck and back issues in future years. Far better to assess and assist an employee with lifestyle choices and weight loss strategies, than to have to frustrate the employee in future years for being unable to perform the employment duties at an acceptable level of risk. This is particularly so in circumstances where an employer's statutory obligations are all consuming and extend to '*ensuring*' safety, '*minimising*' risk, '*monitoring*' health and working conditions and doing all that is *'reasonably practicable*'.[7]

While voluntary wellness policies are not new, too often employees do not avail themselves of the benefits until after problems are entrenched. Enforcing mandatory participation in health assessments and post assessment programs requires careful planning to:

- Establish, evidence and articulate the need;
- Design the program with clear trigger points and actions, with defined tie back to the underlying need;
- Source the appropriate health practitioner to lead the assessments, and ensure consistency in its application;

- Separate the program from employment based decisions (save for any failure to participate) – if it is there to improve health outcomes and minimise risk, remove fault from the equation;
- Have clear measures in place for ensuring privacy – what does the employer actually need to know for the program to succeed and who needs to know it; how is information securely stored to minimise the risk of broader access; and
- Communicate the program and the rationale, and provide avenues for addressing concerns.

Certain higher risk industries, such as mining, are more advanced in this process than others. Given statutory obligations to perform periodic health checks, occupation exposure testing, drug and alcohol testing etc, workers are often more accustomed to employer intervention programs. However, notwithstanding this most recent setback, with careful planning and documentation, the judicial recognition and acceptance of broader workplace assessments and injury prevention strategies mandated by employers will follow.

[1] Section 19(3)(g) of *Work Health and Safety Act 2011* (Qld), *Work Health and Safety Act 2011* (NSW), *Work Health and Safety Act 2012* (SA) etc. In Victoria, s 22(1)(a) of the *Occupational Health and Safety Act 2004* (Vic) has a similar obligation.
[2] *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday* (1938) 60 CLR 601.
[3] *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 113 IR 461 at 476. Upheld on appeal by the High Court in *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539.
[4] See for example the requirements under regulation 46 of the *Coal Mining Safety and Health Regulation 2001* (Qld) and regulation 87 of the *Mining and Quarrying Safety and Health Regulation 2001* (Qld).
[5] [2014] FWCFB 3027 – delivered 18 June, 2014.
[6] [2015] FWC 158 – delivered 20 April, 2015.
[7] It remains an interesting conundrum as to how employers are to do all that is reasonably practicable to minimise a risk and monitor the health of workers in circumstances where they are prohibited from applying or enforcing the identified control measures.

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Update on Mining Safety Legislation

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The *Work Health and Safety (Mines) Act* 2013 (NSW) and *Work Health and Safety (Mines) Regulation 2014* (NSW) commenced operation on 1 February 2015, and apply to all mines in New South Wales. The legislation was drafted based on the national model WHS Regulations for mining and the additional tri-State mining provisions agreed by NSW, Queensland and Western Australia. The new legislation replaced the *Coal Mine Health and Safety Act 2002* (NSW), *Coal Mine Health and Safety Regulation 2006* (NSW), *Mine Health and Safety Act 2004* (NSW) and *Mine Health and Safety Regulation 2007* (NSW).

Queensland continues to review the preferred path forward following the issue of a regulatory impact statement and consultation process in 2013. At this time it retains the two regimes under *Coal Mining Safety and Health Act 2002* (NSW) and the *Mining and Quarrying Safety and Health Act 1999* (NSW) and respective regulations.

Western Australia released a decision regulatory impact statement in February 2015 recommending pursuit of a new single Act covering safety in the mining, petroleum and geothermal industries. At present safety obligations can be found across six Acts, although for the mining industry the main legislation remains the *Mines Safety and Inspection Act 1994* (WA).