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WORKERS COMPENSATION AND INDUSTRIAL RELATIONS
SOME REFLECTIONS ON STRESS CLAIMS UNDER THE
WESTERN AUSTRALIAN WORKERS COMPENSATION AND
REHABILITATION ACT 1981

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ABSTRACT

This paper examines the changes made to the Western Australian *Workers Compensation and Rehabilitation Act 1981* in November 1993 in relation to stress related claims for compensation. These changes generally preclude a claim for compensation where the stress related condition relates to an industrial relations issue. The Western Australian provisions have some parallel in Victoria and South Australia so some discussion of those states provisions is included. In addition the writer draws together the threads of the relationship between workers compensation law and industrial law as it relates to unlawful dismissal. Finally some comments are made about the procedure for claims in Western Australia and the difficulties confronting stress claim litigants.

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Introduction

The purpose of this paper is to outline the history of change in the laws relating to the payment of compensation for workers who make claims for work related stress in Western Australia. It will consider the effects of the changes on claims procedure and the interrelationship between compensation claims for stress and industrial relations related issues. The paper will also consider the implications for Western Australia of various Australian stress cases before providing some conclusion on future stress related workers compensation claims.

1 The history of the changes to the legislation

When the Western Australian government made changes to the *Workers Compensation and Rehabilitation Act 1981* (the Act) in November 1993 it did so having the advantage (or disadvantage) of considering the changes which had been made to the Victorian *Accident Compensation Act 1985* in 1992.

When the Liberal Government was elected in Victoria it made significant changes to the industrial laws and workers compensation laws in that State. Among the changes it made to the workers compensation laws were provisions to the Accident Compensation Act 1985 which reduced the possibility of workers making claims for stress related illness. These changes were achieved in two ways.

First, the worker had to show that the employment was a significant contributing factor to any disease, the subject of a claim (see section 5(1B)). Prior to the changes to the Victorian Act (which became effective 1st December 1992) it was not necessary to show that the employment was a significant contributing factor.

Second, specific limitations were placed on stress claims. No stress claim could be brought where the stress arose wholly or predominantly from reasonable action taken by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker, or where a decision by the employer was made on reasonable grounds not to award or to provide promotion, reclassification or transfer of or leave of absence or benefit from connection with employment to the worker (see section 82(2A)).

Under Victorian legislation, stress was not defined but by reason of Section 82 (2A) stress is by implication referred to as an illness or disorder of the mind caused by stress.

When changes were made to the West Australian Act a similar two-pronged approach was taken. First, section 5 of the Act was amended so as to require the worker to show that the employment was a "significant contributing factor" to the disease or disorder. Prior to the amendments (which were effective from 24 December 1993) it was only necessary for the worker to show that the employment contributed to a "recognisable degree". What amounts to a recognisable degree was discussed in the Mathai case,¹ which is dealt with below.

These amendments made to section 5 requiring a worker to show the employment was a significant contributing factor to the disease or disorder affect all claims for compensation, not simply stress claims. The effect of these amendments is to require the worker to produce more comprehensive evidence of the effect of the employment upon their condition.

Second, and in some ways similar to the Victorian approach, section 5, which provides for the definition of disability under the Act, was amended to quarantine stress claims so as to limit the opportunity of workers to make claims for stress (see also section 5 (4).)

1(a) Some differences between the Western Australian legislation and the Victorian legislation

Neither the West Australian or Victorian legislation defines stress. Stress under the Victorian Act by implication in section 82(2A) relates to a disorder of the mind. It follows that in Victoria there is no reason why a stress claim could not be brought on an unrestricted basis in relation to stresses relating to illnesses or disorders of the body as opposed to the mind. The Victorian legislation seeks to distinguish between illnesses of the mind and body. Those workers seeking to make stress claims will therefore, in the first instance, be attempting to show that their condition is not an illness or disorder of the mind. As discussed below the significance of the mind/body distinction is that courts and tribunals have been

¹ *State of Western Australia v Mathai*, Supreme Court of WA. unreported 4th December 1987 SCL6960.

more willing to recognise claims with a physical element. The Victorian provisions may make claims for stress easier if the physical element is more easily recognisable.

In Victoria, the definition of disease includes physical or mental ailment, disorder, defect or morbid condition whether of sudden or gradual development. It should be noted that the word "illness" does not appear in this definition of disease (see section 5) although it appears in section 82(2A).

In Western Australia, section 5 of the Act defines disability. In general terms the definition of disability includes personal injury by accident, (that is, specific trauma related conditions), gradual onset conditions and various industrial diseases.

The Western Australian amendments to section 5 (relating to the definition of disability) effective from 24 December 1993 provide that disability does not include a disease caused by stress if the stress wholly or predominantly arises from a matter referred to in Sub-section (4). Sub-section (4) of Section 5 provides that if the stress arises as a consequence of the worker's dismissal, retrenchment, demotion, discipline, transfer or redeployment, or the worker not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment or the worker's expectation of those matters referred to above, then no stress claim can be brought unless the action taken by the employer in respect of those matters is unreasonable and harsh. These matters are conveniently referred to in this paper as the "industrial relations issues".

There are clearly similarities between the West Australian and Victorian legislation. These include the requirement that the employment be a significant contributing factor to the stress disability and that prohibitions will be placed on claims that arise out of "industrial relations issues". Unlike the Victoria legislation the West Australian legislation however does not confine the restriction on stress claims to those relating to "an illness or disorder of the mind."

The West Australian legislation limits claims caused by stress to any "disease". A "disease" includes any physical or mental ailment, disorder, defect or morbid condition whether of sudden or gradual development (see section 5 definition). There is no limitation on whether the "disease" is one of a physical or mental nature.

This difference between whether the "disease" is a physical or mental may merely be one of academic interest given that it is likely that the limitations on stress claims referred to above will have little effect on physical injuries caused by stress. For example, it is unlikely to be argued that a person's repetitive strain injuries was related to the kinds of industrial relations issues referred to in section 5(4).

1(b) Defining Stress

As indicated, neither the Victorian or West Australian legislation provides a definition for stress. In his book "Health and Safety at Work", Dr John Matthews devotes a chapter to hazardous work organisation and stress. There is no specific reference to a definition of stress, however Dr Matthews notes that;

stress derives from the way work is organised, and it can only be prevented if workers seek to have work re-organised, collectively²

Further, Dr Matthews notes:

stress is normally experienced subjectively as fatigue, anxiety, and depression. It is sometimes exhibited as behaviour changes when people become hostile and aggressive. These are all signs or symptoms of stress, and indicate that there is something radically wrong with the job³

McGrath has been credited with defining stress as:

a (perceived) substantial imbalance between demand and response capability, under conditions where failure to meet demand has important (perceived) consequences.⁴

² J Matthews(1993) Health and Safety at Work, Pluto Press Australia p303.

³ Ibid, p304.

⁴ Referred to in J.C. de Carteret,(1994) Occupational Stress Claims - Effects on Workers Compensation, AAOHN Journal, October Vol 42 No. 10 p494.

Ultimately in the workers compensation arena it will be up to the courts to decide the meaning of the term stress, its origins and the quantum required for the purposes of the Act. Advocates who act for workers trying to avoid the limitations imposed on stress claims under section 5(4) of the Act, will attempt to show that the disability is not caused by stress but by some other means. In this respect are a number of cases which suggest that workers compensation legislation should be interpreted so as to favour the worker, where the meaning is unclear or ambiguous.⁵ There are also decisions which suggest that where legislation reduces the rights of beneficiaries, it should be construed narrowly.⁶ Section 5(4) should therefore be interpreted in narrow manner, given that its clear intention is to reduce workers claims.

Mendelson in a series of articles published in 1990 quoted Cox, who defined work related stress in the following terms:

Occupational stress exists in the person's recognition of their inability to cope with demands relating to work and in their subsequent experience of discomfort⁷

Mendelson also noted that rating instruments which measure life events such as the "Social Re-adjustment Rating Scale" and various other questionnaires are now being used to measure work related stressful events. Such scales included indicators relating to incidents such as dismissal, retirement, technological change at work, change in work responsibilities, trouble with supervisors and change in work hours and conditions.⁸ It follows that it is possible to measure the effects of industrial relations issues, on workers.

5 See Fullagar J, in *Thompson v Armstrong and Royes Pty Ltd* (1950) 81 CLR 58.

6 See *Baker v Australian Insulations* (1985) 3 NSWLR 280 in particular Kirby, P.

7 G Mendelson 1990, Occupational Stress Part 1, An Overview, Journal of Occupational Health and Safety - Australia/New Zealand 6(3) p176.

8 Ibid, P176.

(c) **Types of Stress Claims**

An American study conducted in 1980 by Staten and Umbeck noted:

Work stress occurs in a variety of forms and spawns a variety of physical symptoms. Regardless of the manifestation of stress, the problem of distinguishing its origin - work related versus non-work related is formidable. For certain types of disorders, most notably physiological and emotional reactions, it is difficult to accurately document and measure the existence of the problem. A determination more fundamental than causality. These disorders are not always accompanied by physical symptoms, in assessing this type of pain, a physical to some extent, must rely on the employee's own statement that he or she has a problem.⁹

Staten and Umbeck (and many writers before and since¹⁰) suggested three categories of stress claims:

(1)Mental - physical - cases where there is a non-physical stimulus inducing a physical response. For example workers witnessing frightening events and suffering a heart attack, stress provoked ulcers, arteriosclerosis, or stroke. Under the Act these events are likely to be compensable as "personal injury by accident" situations, because there is a specific identifiable traumatic event which causes a physiological change for the worse.¹¹

(2)Physical - mental - cases where there are mental disorders that follow from a physical injury. Such cases can be compensable where there is sufficient connection between the physical episode (which must be compensable) and the mental sequel. These cases have been dealt with in a number of jurisdictions. The physical-mental type injury has been recognised by the High Court in *Federal Broome Co Pty Ltd v Semlitch*.¹² In that case the worker who had a previous history of suffering from a Schizophrenic condition had injured herself at work straining her right side. She recovered in time from the physical injury but continued to suffer from a delusion that she had abdominal pain and this

⁹ M. Staten and J. Umbeck, *Compensating Stress Induced Disability: Incentive Problems In Worrall (Ed) Safety and the Workforce - Incentives and Disincentives on Workers Compensation* ILR Press, 1983.

¹⁰ see footnote 15 and Mendelsons' articles referred to above

¹¹ See *Kavanagh v Commonwealth* (1960) 103 CLR 547. Also Guthrie R. *Workers Compensation Western Australia* Butterworths 1995 p20..

¹² (1964) 110 CLR 626

abdominal pain in turn incapacitated her for work. The employer argued that the worker is not entitled to compensation because the delusion of pain that she was suffering from was not work related. The High Court rejected the employer's argument and held that the symptoms then suffered by the work were connected with the original physical injury. The key to *Semlich's* case was the ability of the court to draw a connection between the physical injuries and the subsequent mental disorder. Other examples of physical-mental claims include conversion hysteria, post accident depression and suicide related to chronic pain syndrome.¹³

(3)Mental - mental - cases occur where some non-physical event (such as dismissal, transfer, discipline) triggers a psychological reaction so as to incapacitate a worker. The process may be gradual (eg the dismissal type situation) or more sudden where say the worker witnesses an explosion and remains physically uninjured but suffers some neurotic symptoms. The explosion example would be compensable under the Act, as a personal injury by accident but there may be some difficulties with the "mental - mental dismissal type" case. In these cases the worker has no "physical" injury but is nevertheless incapacitated. The main impediment to establishing a claim in these cases is showing the link between the event and the incapacity and disability. The additional complicating factor is other pre-existing stress factors may impinge upon the worker's health. The event which occurs may aggravate a pre-existing neurotic condition, or anxiety or depression etc. It is necessary to show that the event made a significant contribution to the disability. Other factors may impinge, but under Western Australian law whilst the disability may be multifactorial in origin,¹⁴ so long as one of the factors is work related, and it is a significant factor, there is a prospect of compensation being paid. The difficulty arises where the legislation precludes a claim because the event which caused the stress has been identified as a disqualifying factor such as an "industrial relations issue".

Mendelson, noted that mental-mental claims might involve the risk that workers who could not cope generally with a complicated society might be tempted to make work the villain. Mendelson noted that some American research had established a recognition of mental-mental claims in American

¹³ In relation to suicide note however that there is limited scope for such claims following the decision in *Marriot v Malthby Main Colliery* (1920) 13 BWCC 353 where the House of Lords noted that it was necessary to show that the injury had caused insanity which lead to the suicide.

¹⁴ See Section 5(4) of the Act.

courts with some American writers suggesting that such claims could only be made available where the worker can establish that the work situation was substantially most stressful than every day work and that there should be unequivocal medical evidence that the abnormal work situation was the primary source of stress.¹⁵ Lippel in a survey of Canadian and North American decisions, noted the lack of coherent tests for stress claims of the mental-mental type. She noted the difficulties for decision makers in this area by commenting:

The mental-mental claim, although often equally understandable, is much more difficult to measure objectively. This leaves the decision-maker in a double bind as to how to recognise a manifestly legitimate claim without "opening the floodgates" to thousands of other unmeasurable cases that may be less legitimate.¹⁶

The view apparently adopted by Mendelson and noted by Lippel may however be at odds with the general principles of Australian workers' compensation, that the employer "takes the worker as he/she finds the worker". If an employer engages a worker with a pre-existing mental disorder which is aggravated by apparently ordinary work circumstances, the employer is liable to make payments for compensation.¹⁷ The American approach referred to by Mendelson and Lippel appears to be a rejection of the subjective element of compensation claims. It suggests a move to some kind of objective measure of stress and the allocation of certain occupations as being stressful. Some jurisdictions in Canada and North America, for example, have ventured a test that would make claims by workers in recognised stressful jobs as more difficult, because they would have difficulty in showing an unusual level of stress had contributed to their disability. This ignores the individual workplace pressures and individual occupational pressures. The West Australian legislation does not require a worker to show that the workplace was stressful or more than ordinarily stressful but simply to show that the employment was a significant contributing factor to the stress related condition.¹⁸

¹⁵ G. Mendelson (1990), Occupational Stress Part 1: An Overview, Journal of Occupational Health and Safety, Australia & New Zealand, 6(3), p179.

¹⁶ Lippel K (1989) Workers Compensation and Psychological Stress Claims in North American Law: A Microcosmic Model of Systemic Discrimination. International Journal of Law and Psychiatry. Vol 12 41-70 at page 42.

¹⁷ See Evatt J. in *Hetherington v Amalgamated Collieries of WA Ltd* (1939) 62 CLR 317.

¹⁸ This distinction becomes increasingly hard to draw. See now especially the position in South Australia following further changes to the legislation in that State requiring that stress be the dominant cause of the incapacity. The word "dominant" clearly requires a greater element of stress to be work-related. As the quantum of work stress increases before a claim is compensable the Australian position begins to look more like the American position. Workers in so called "less stressful" occupations may find it harder to proceed with claims,

2 History and Impetus for Change

There are two main reasons for the legislative changes to stress claims. First, the number of decisions of the Workers Compensation Board and Supreme Court of Western Australia in the mid-1980s, caused concern in relation to the possibility of future stress claims. Second, there is a perception that there is a rise in the number of stress claims.

(a) Decisions causing concern

The Workers Compensation Board (which was abolished in March 1994) had to deal with a number of claims in relation to stress, when the Act was proclaimed in 1982. Perhaps the most significant change which the Act brought into effect, was the provision for claims for gradual onset conditions. It should be remembered that prior to 1982, the worker could only claim compensation where the condition arose through a personal injury by accident, that is a specific trauma.¹⁹ Prior to 1982, gradual onset conditions including some such as stress and repetitive strain injuries, were generally precluded. Since 1982 however, the definition of "disability" includes gradual onset conditions and the definition of "disease" makes this absolutely clear (see definition of disease in section 5)

In the *Mathai* case a public servant in Western Australia claimed compensation as a consequence of stress in the mid 1980's. The claimant in this case was a woman who was shown to have suffered considerable stress in her domestic life and as a consequence her work performance suffered. The employer took disciplinary action against the worker and a number of reports were placed on her file. In due course the woman was given access to the adverse reports on her file and as a consequence, suffered increased symptoms of stress related conditions. As a consequence of the work incident she claimed compensation and at a hearing before the Workers Compensation Board it was found that the employment had contributed to a recognisable degree to her anxiety. An appeal to the Supreme Court of Western Australia by the employer was unsuccessful.²⁰ This case caused considerable alarm amongst employers. The reasons for their alarm were obvious. In the first place, the workers anxiety was contributed to not simply by her employment but by other domestic factors. The law at the time did

¹⁹ See for example *Roberts v Dorothea Slate Quarries Co Ltd* [1948] 2 ALL ER 201

²⁰ *State of Western Australia v Mathai*, Supreme Court of WA. unreported 4th December 1987 SCL6960.

not require her employment to be the dominant contributor to her anxiety condition. In the second place, the factor which seems to have set off her anxiety did not relate to her work activity but rather to industrial relations issues such as the transfer of her work station .

From about the time that *Mathai's* case was decided, changes to the Act were mooted in relation to stress claims. When the Liberal Government in Western Australia was elected, it took the opportunity to put in place provisions to restrict stress claims.

(b) The rise in stress claims

The second impetus for change was a perceived rise in stress claims. As to this matter, there are unlikely to be any reliable statistics gathered prior to 1982 in relation to stress claims, because there were simply not the mechanisms for statistical data to be obtained. It would be inappropriate to compare the statistics for stress claims prior to 1982 with those after 1982, as few of the stress claims made under the pre-1982 legislation would have been successful. When stress claims were first dealt with by the Workers Compensation Board, there were no limitations placed upon the right of the worker to claim. In addition the proof threshold was simply that the worker had to show that the employment was a "recognisable" contributing factor to the condition, whereas the current legislation requires a "significant contribution".

A recently published Comcare study showed that stress claims were comparatively more costly because of the extended average length of incapacity (7.7 weeks compared to an average of 2.4 weeks for all other conditions). Stress claims under the Comcare system average nearly \$30,000 each. The Comcare study was able to identify the factors likely to precipitate a workers' compensation claim. Reported most frequently were workload issues (25%), trauma (10%), conflict with supervisors (9%) and forced relocation and deployment (9%).²¹ Western Australian statistics indicate that stress claims make up a very small proportion of overall claims but show very high duration of incapacity and consequently are overall more expensive than other kinds of claims. The Western Australian statistical information does not however provide a

²¹ Dr J Toohey (1994), Work Stress, *Worksafe News*, October, p15 and p18. Similar costs have been experienced in United States. See J.C. de Carteret (1994) Occupation Stress Claims Effects on Workers Compensation. *AAOHN Journal* October Vol 42 No. 10 p 494.

breakdown as to the precipitating factors for work stress.²² Some American research indicates that the practice of (and presumably participation in) industrial relations is inherently stressful.²³

Recent statistical evidence points to a rise in stress claims and confirms the cost of stress claims is in excess of all other types of claims. Persons who have experienced stress at work invariably stay off work longer than other types of claims for injury or disease once a claim is established.²⁴

3 The effects of the changes on claims procedures

By reason of section 5(4) of the Act, a worker with a stress claim who alleges that a decision of an employer in relation to an "industrial relations issue" is unreasonable and harsh, will have to establish that the unfairness of the decision before a stress claim can be brought. The WorkCover Directorate of Conciliation and Review now has jurisdiction to determine that issue (see sections 84A-ZN). In particular a Conciliation or Review Officer will have to make that finding. It is likely that the Review Officers will be the key decision makers, because they will be hearing matters that the parties have been unable to resolve. This is a novel point because whilst there is some overlap between workers compensation and industrial laws, the overlap has never been so direct. As a result of section 5(4) it seems that the Conciliation and Review Officers of the Directorate will now be required to consider what were previously purely "industrial relations issues" such as whether the worker was unfairly dismissed or dealt with in a manner that was harsh and unreasonable or indeed any of the other matters that are addressed in section 5(4).

The irony of this extra requirement, is that those workers who have stress related conditions, are invariably those workers who are least able to suffer the rigours of litigation.²⁵ It is likely that a person claiming for a stress related condition will have to litigate the claim in two jurisdictions, that is, the industrial arena and the

²² White C.B.(Ed) State of the Work Environment, Occupational Injuries and Diseases Western Australia 1993/94 No 20 March 1995, p16 and 17 Department of Occupational Health and Safety

²³ See Kelloway, Barling and Shah(1993) Industrial Relations Stress and Job Satisfaction Concurrent Effects and Mediation *Journal of Organisational Behaviour* Vol. 14 P447-57.

²⁴ White C.B.(Ed) State of the Work Environment, Occupational; Injuries and Diseases Western Australia 1993/4 No 20 march 1995

²⁵ The writer is currently acting for a worker who has medical advice to the affect that she should not attend conciliation as this will be detrimental to her treatment and stressful to her. An application has been made for counsel to appear at conciliation without the need for the worker to attend.

workers compensation jurisdiction. In addition, in relation to the workers compensation jurisdiction, there is potential for conflicting decisions to be made. In the workers compensation arena, Conciliation and Review Officers would not necessarily be bound by a decision of the Industrial Relations Commission. It is possible for the Conciliation and Review Officers to find that a dismissal was unreasonable and harsh, notwithstanding that the WA Industrial Relations Commission or the Australian Industrial Relations Court had found to the contrary. The converse situation applies. The potential for inconsistency in decision making is a further frustrating factor for workers with stress claims²⁶.

In addition to the potential for conflicting decisions, it is likely that workers claiming for stress related conditions will have to approach the compensation jurisdiction with greater energy than other claimants. To avoid the effects of limitations on stress claims, set out in section 5(4), it will be necessary for the worker to show that the stress related condition did not arise because of the "industrial relations issues".

In a study conducted in America in relation to workers' compensation claims for stress related conditions, Eliashof and Streltzer noted that whilst for many claimants of compensation, litigation processes may not be significant, for approximately 20% of the cases studied by them compensation issues seemed to play a major role. The litigation process aggravated the development and maintenance of symptoms for many in this category. Typically they demonstrated a greater interest in compensation than in the treatment of their symptoms.²⁷

If we accept what Dr Matthews suggests, that is that, stress generally arises through poor organisation of the workplace, it may be that it becomes apparent through fatigue, anxiety and depression and poor work performance. In these circumstances poor work performance may lead, to discipline, dismissal, transfer or lack of promotion. The stress-related condition probably arises in most cases before the disciplinary action takes place. The distinction is a subtle one but something which will have to be proved to the satisfaction of the workers compensation jurisdiction. Clearly, greater emphasis will be placed at hearing

²⁶ There seems good grounds for predicting a revival of "Compensation Neurosis" as a feature of stress claim litigation. See for example. Weighill V.E.(1983) "Compensation Neurosis" a review of the literature. Journal of Psycholinguistic Research 27: p97-104 and Levy A (1992) Compensation Neurosis rides again. Brain injury Vol 6 No. 5 p 401-410.

²⁷ B. Eliashof and J. Streltzer,(1992) The Role of Stress in Workers' Compensation Stress Claims, American Journal of Medicine, Volume 34, No 3, March , p297 - 303.

upon exactly what was happening in the workplace, so as to show that the condition was brought on as a consequence of stress through work activity and not through "industrial relations issues". Some of these issues may take some legal expertise to enable the best case for the worker to be presented²⁸.

Legal representation of workers is however limited under that Act. At conciliation the worker is generally not entitled to be represented although current trends noted in a 1995 WorkCover report indicate increased union participation on behalf of workers.²⁹ There is no automatic entitlement to be represented at the review stage. Review occurs when the parties have been unable to reach agreement or where one party is not happy with an order or direction of the Conciliation Officer. The 1995 WorkCover report indicates that about 75% of cases are resolved by conciliation and the balance proceed to a Review Officer³⁰. A large number of litigants with stress claims can therefore expect that they will have to go to conciliation without the aid of a lawyer. It does not necessarily follow that this is a bad thing, however the WorkCover report notes that nearly 50% of workers thought that they were at a disadvantage by not having a legal representative.³¹ One can surmise, that stress claim litigants are more likely to fall into the group that feels the need for legal assistance, given that the operation of section 5(4) appears to raise a number of questions of law.

28 A decision of the South Australian Workers Compensation Appeal Tribunal in *Cartwright v TransAdelaide* (unreported WCAT/SA A133/1995 29th September 1995) where the Deputy President distinguished between stress that arose from disciplinary action and stress arising from co-worker harassment following the disciplinary action. In that case the worker was successful in showing the condition was compensable.

29 Report of Dispute Resolution Committee WorkCover 16 June 1995 at pp 14,22 and 24

30 Ibid p 9

31 Ibid p 23

4 The relationship between the limits on workers compensation claims and developments in industrial laws

As indicated above, a person who wishes to claim compensation for a disease caused by stress will be confronted with a number of hurdles. The first hurdle relates to the higher standard of proof required as a consequence of the amendments to section 5 of the Act effective from 24th December 1993. The second relates to showing that the stress claim is not related to what has been called "industrial relations issues". At this point it is necessary to draw together some threads to attempt to draw some attention to the different directions that workers compensation laws and industrial laws are taking

Until recently, one of the requirements of establishing that an industrial dispute existed in the Federal arena is that the dispute must relate to an industrial matter. Early decisions of the High Court cases³² suggested that there was a distinction between industrial matters on the one hand and matters of managerial prerogative on the other. It was suggested that there were some matters in which a worker could not be involved. It was often said that the decision to introduce changes in technology and changes in staffing levels were decisions for management only and that workers and unions had no right to be considered in consultations in relation to those matters.

A more enlightened High Court finally rejected the notion of managerial prerogative.³³ The High Court in *Cram's* case said,

many management decisions seen as directly affecting the relationship of employer and employee and constituting an 'industrial matter'³⁴

Cram's case and an earlier decision by the High Court which related to the introduction of technology³⁵ had the effect of requiring the employer to consult with workers and unions in relation to a wide range of matters. In particular where there was to be a change in technology or staffing, a union was entitled to be consulted if such provisions were contained in a federal award.

³² There may be many cases, but see a series of cases culminating in *Melbourne and Metropolitan Tramways Board v Horan* (1967) 117 CLR 78.

³³ See *Re Cram: Ex parte NSW Colliery Proprietor's Association Ltd* (1987) 163 CLR 117.

³⁴ *Ibid*, p135.

³⁵ *Federated Clerks Union of Australia v Victorian Employer's Federation* (1984) 154 CLR 472.

Interestingly, the High Court had earlier decided that whilst an individual worker could not be involved in a Federal industrial dispute (because such a dispute required some collective/interstate quality) a matter relating to safety and welfare of workers could be the subject of a Federal industrial dispute, even if the dispute was notified by an individual worker.³⁶

In the Federal industrial sphere the High Court has therefore recognised the importance of safety and work safety procedures and the need for consultation in relation to matters which will change workforce technology and staffing levels. Managerial prerogative has been narrowed considerably by the imposition upon the employer of the need to consult with the workers on these issues.

(a) Managerial prerogative and workers compensation for stress claims

In industrial spheres it is sometimes said that the employer has a right to hire and fire without restriction. High Court decisions of the 1980's however, have placed limitations on the employer's right to do this. Following *Cram's* case there is at least a need to consult with the workforce before technological changes and redundancies occur.

Significant amendments made to the *Industrial Relations Act 1988* (Cth) now make it mandatory for an employer to put in place a proper system for termination of an employee's employment.

A recent decision by a Australia Industrial Relations Court Judge³⁷ indicated that the remedies for a worker who was unfairly dismissed in Western Australia may be inadequate as compared to the remedies provided under Commonwealth legislation. Whilst the decision of the Australia Industrial Relations Court in relation to an industrial matter appears to have no relationship to workers compensation issues, it is the case that there is some connection.

³⁶ See *R v Staples: Ex parte Australian Telecommunications Commission* (1980) 143 CLR 614.

³⁷ *Wylie v Carbide International Pty Ltd* 1994 AILR 336 and a series of cases since. Note however that the WA Government has recently moved to amend its industrial laws so as to attempt to make them "adequate". A recent decision of *Willcocks v Makfren Holdings Pty Ltd v/as Circuit Technology* (unreported AIRCt 22 August 1995) suggests however that the legislation does not go far enough. The Federal legislation has likewise been amended to reduce the likelihood of Federal/State conflict.

In West Australia the Act now prevents a worker from making a claim for a stress related condition where it is shown that condition arises through what has been called "industrial relations issues", that is the dismissal or alteration of the worker's employment conditions as set out in section 5(4) of the Act. If however, the employer takes action against a worker in a manner which is unreasonable and harsh, a claim for a stress related condition can be brought. It follows that in many cases the threshold question for a worker will be whether or not the action taken against them by the employer was unreasonable and harsh.

The words "unreasonable and harsh" have been chosen because they have an established industrial meaning. It is often said that action which is unreasonable and harsh is unfair. This form of words was considered in detail in Australia by the Australian Conciliation and Arbitration Commission in the Termination, Change and Redundancy Case³⁸. In that case the Australian Conciliation and Arbitration Commission considered whether certain words, namely "that an employer shall not dismiss an employee in a manner or for a reason which is harsh, unjust or unreasonable" should be inserted into an award. As a consequence of the Commission's decision and later decisions by the Industrial Relations Commission, those words have been frequently inserted into awards governing conditions of Federal workers. The words have been exhaustively defined and since the amendments to the *Industrial Relations Act 1988* (Cth) the manner in which the worker can be dismissed has been extensively provided for. In broad terms the Commonwealth legislation requires that a worker cannot be dismissed on certain discriminatory grounds and that in the event that worker is dismissed for other reasons, the employer must make it clear to the worker the grounds of dismissal and give the worker an opportunity to answer allegations. This notion of procedural fairness proposes strict obligations upon an employer which, if not followed, may give the right to damages or reinstatement.

In 1993 the Western Australian Liberal Government made changes to the *Industrial Relations Act 1979* (WA) to put in place procedures for claiming unfair dismissal. These procedures did not provide for the kind of procedural fairness contemplated by the Commonwealth legislation and further, by reason of a series of Western Australian Industrial Appeals Court decisions, it appears that the right to compensation in Western Australia is extremely limited.³⁹

³⁸ (1984) 8 IR 34 and (1984) 9 IR 115

³⁹ See for example *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of WA* (1987) 68 WAIG 11 (Pepler's case)

All this means that a worker in Western Australia who does not have a remedy for unfair dismissal may turn to the Commonwealth legislation for redress.

To link these apparently disparate topics - in the context of workers' compensation claims and in particular stress claims, this means that a worker who has a stress related condition which arises by reason of some industrial action or decision taken by an employer which was unfair, may have to consider taking action in the Australian Industrial Relations Court to establish a case in the workers compensation sphere. At the time of writing the West Australian Government has recently amended the *Industrial Relations Act 1979 (WA)* so as to provide remedies for unfair dismissal more consistent with the Federal Legislation. In any event, the question of whether or not an employer's behaviour was unreasonable and harsh is a matter which will require the workers' compensation dispute resolution body to enquire into the behaviour of the employer at the time of the onset of the stress condition. Such an enquiry is novel to workers' compensation jurisdictions.

The effect of the amendments to section 5 of the Act in relation to managerial prerogative is interesting. On the one hand there is a clear intention to try to protect employers from stress claims that relate to industrial relations issues. On the other hand because the legislation make it a pre-requisite for any industrial relations related stress claim to show unfair behaviour or procedure by the employer the Act arguably makes the employers conduct subject to even greater scrutiny than pre-amendment claims. Management behaviour may therefore be under an unexpected spotlight.

Management behaviour and stress claims

As indicated, the behaviour of employers in dealing with dismissal, transfer and promotion, is therefore of some importance. Dr Frank Salter,⁴⁰ a consultant in inter-personal communication noted:

Managers should be alert to pressures and traumas experienced by employees outside the organisation since these are likely to put them at risk of accident and illness. Women's great involvement with and empathy for the welfare of family and friends makes them especially

⁴⁰ F. Salter (1991), *Assessing Stress in the Workplace: An interdisciplinary Review and Practical Guide*, Journal of Occupational Health and Safety, Australia & New Zealand, 7(4) p315.

vulnerable to external stresses. In small companies the boss should take an interest in the personal lives of employees, especially in relation to main potential stresses, involving the welfare of family members, the mortgage, conflict and divorce. In larger organisations, first-line managers and welfare personnel should fill this role, assisting decision makers to predict and ameliorate stress that arises outside the organisation.

Salter⁴¹ and Mendelson⁴² identified a range of occupations which are said to exhibit high rates of stress related illness. These include air traffic controllers, prison officers, police, teachers, nurses, ambulance officers, journalists, counter staff, and firemen. Salter noted that one behavioural mechanism had been identified as giving rise to stress in the workplace, - high work demand combined with lack of control over the job seems to produce stress.

Loss of control is associated with formalism and specialisation, both of which constrain the worker's decision making and reduce the meaningfulness of the job. Job stress is more likely in work places which deny independence and autonomy, where tasks are highly structured, do not provide challenging tasks, where clear goals are not set, where participation in decision making is denied, where red tape is a major part of daily activity, and where workers feel snowed under with a backlog of uncompleted tasks.⁴³

These kinds of matters will be important issues for consideration in workers compensation disputes. Not only will there be an examination of whether industrial relations matters have been handled "fairly", but also whether the employment practices are reasonable.

41 Salter, Ibid, p314.

42 G. Mendelson (1990) , Occupational Stress Part 2: Occupations at Risk, Journal of Occupational Health and Safety, Australia & New Zealand, 6(3), p181 - 188. See also the work of R. Soillane (1984) Stress at Work : A Review of Australian Research International Journal of Health Series Volume 14 Number 4 p589 for a historical context.

43 Salter, Ibid, p314,(referring to Moos R H (1986)., Work Environment Scale Manual. Second Edition Palo Alto: Consulting Psychologist's Press)

Dr Matthews notes⁴⁴ that there are a number of matters which give rise to work stress. He lists these as follows:

- Work load
- Continuous work
- Incentive based pay systems
- Monitoring and surveillance
- Shift work

Some other writers have noted that an increase in shift work may upset body clock rhythms producing desynchrony between behaviour and body functions. In the longer term health problems may eventuate for shift workers and some care needs to be taken in restructuring work hours for extended shifts.⁴⁵ The practice of an employer in dismissing an employee or an employers decision to simply the allocate work will be of some consequence. In this regard, the so-called "reforms" in the workplace are of some significance. Whilst the main selling point of enterprise bargaining and workplace bargaining, seems to have been an increase in the autonomy of the worker, it also follows that "breaking the shackles" of the award system has been, in Victoria and Western Australia in particular, a opportunity for management to re-assert itself and revive a flagging management prerogative.

(c) **Workers Compensation and the *Workplace Agreements Act 1993***

From a workers compensation perspective it is possible to conjecture that one of the consequences of the introduction of the *Workplace Agreements Act 1993* may be an increase in workplace stress. The *Workplace Agreements Act 1993* allows for the registration of agreements between individual workers and their employer. The workplace agreement put in place may for example, reduce the number of breaks taken between work activity and increase, shift work and/or workload, as a trade-off for increased pay. It is not possible at this stage to say what the overall effect of the *Workplace Agreements Act 1993* has on stress. If we take into account the research carried out by Wallace⁴⁶ there is potential for increased work stress as a consequence of changes to work practices.

⁴⁴ Matthews J (1993) Health and Safety at Work Second Edition Pluto Press pp 299-301

⁴⁵ M. Wallace (1994), Extended Shifts: Designing Rosters for the Best Outcome, Safety Institute of Western Australia Journal, Volume 2 No 2 , p12 - 15. Note also. Singer G (1983). Stress and Compensation, Human Resource Management, Australia, November p 53.

⁴⁶ see footnote 38

Because "stress" is a word which has a vague meaning in the public arena, its meaning may be different from that in the scientific literature. It may be that there are appropriate responses to some stress, and some inappropriate responses. A lot may depend upon the individual. The stress which results in compensation claims seems to be those inappropriate responses to long term stress.

In the context of *Workplace Agreement Act 1993* it may be more difficult to argue a stress claim where an individual has agreed to certain terms and conditions of employment. It is implicit that the individual can "cope" with the stresses that may come with the job. Stress however seems to arise where there has been a failure to balance work demands with the workers capacity to cope. There may be a host of reasons why certain terms and conditions have been agreed to. Fear of unemployment, financial security/insecurity will be primary reasons, rather than the ability to cope. So it may be reasonable for a manager to monitor work stress where there has been a change in conditions. Arguably new "stress provisions" under the Act seems to alleviate the need to monitor at least some of these aspects. In other words stress at work is being treated differently from other work safety hazards.

Often the inability of workers to cope with work related stress is referred by some writers as "distress". Brewer has recently conducted some studies into distress in the New South Wales mining industry following an industrial dispute. She notes that:

Work distress is best understood as the response by the employee to an event or phenomenon at work. People experience a particular situation as distressful, depending on their degree of familiarity with the incident or phenomenon.⁴⁷

Brewer focussed on a number of industrial relations issues, including inter union matters, employer-employee conflict over union activities, managerial control, hours of work and dismissals due to lack of trade and closures. Brewer's study showed that work schedules were important to mineworkers. Changes to work schedules could cause some distress. Likewise failure by management to acknowledge constraints on worker productivity, and changes in technology caused distress. She suggested that claims of work distress are more likely to

⁴⁷ A Brewer (1994), Employee Distress and the Introduction of Flexible Working Arrangements in the New Wales Coal Mining Industry, *International Journal of Employment Studies*, Volume 2, No. 1 April p110 - 131.

occur when the opportunities for employee involvement and control are low. Any attempts not to comply with managerial strategy might be viewed adversely. The options for workers may be resistance to managerial strategies or exit from the workforce.

Although there are obvious dangers in extrapolating this study too far, it may be reasonable to suggest that work stress or distress may manifest itself before industrial relations problems occur. If the new Western Australian industrial laws (eg *Workplace Agreements Act 1993*, amendments to the *Industrial Relations Act 1979 (WA)*) result in reduced flexibility or control for workers, or increased managerial control, there may be an increase in work stress.

The *Workers Compensation and Rehabilitation Act 1981* however attempts to shield employers from the impact of these possibilities by making more difficult any stress claims. As previously noted a critical element in any stress claim will be to establish when the stress occurred. Taken together, the changes made in 1993 to the *Workers Compensation and Rehabilitation Act 1981* and the advent of the *Workplace Agreements Act 1993* , show a trend away from the direction taken by the High Court in the narrowing of managerial prerogative.

- **Some Australian stress cases**

Despite the fact that the legislation in relation to "stress" claims is relatively new in Western Australia, there have been a number of cases in other Australian jurisdictions that may assist in understanding the direction that the Western Australian decisions may take. So far there is not the same level of diversity that has plagued the North American and Canadian jurisdictions.

Victoria and Western Australia have similar provisions in relation to "stress" claims which they seem to have borrowed from South Australia. The essence of these provisions is the need to show the level of work contribution to the stress condition. In most state the contribution must be "significant" although it seems that in an effort to further reduce the costs of stress claim a new standard of "dominant" contribution seems fashionable. The higher the level of work contribution required the closer that one comes to the American criteria that requires the stress to be unusual in nature or that the occupation be inherently stressful. Lippel⁴⁸ has highlighted the bizarre situation in Canada and North

48 See footnote 15

America where in 60 North American jurisdictions there were almost as many tests for stress claims as there were tribunals. The position in Canada seems little better. The focus in these jurisdictions has moved away from the traditional Australian workers compensation theory⁴⁹, that considers the affects of a working environment on the worker, towards somehow quantifying the amount of stress. Attempting to quantify stress has lead to a multitude of incoherence.⁵⁰

In some Australian states, stress cases have been successful where it has been established that there is an "association" between a particular work event and the worker's condition. In *Mansini v Director General of Education*,⁵¹ Burke J. noted that a school teacher who had been teaching for a period of 14 years was entitled to compensation where he suffered a stress related condition as a consequence of lax discipline at the school which culminated in a suspected arson attack upon the school by students. For such a case to succeed in Western Australia it would be necessary to show that the student behaviour was a significant contributing factor in precipitating the teachers condition. It is interesting to note that teaching is often regarded as stressful occupation. It would not be necessary to show that the occupation was stressful but rather that the events that lead to the stress related condition were work/occupation linked.

In a New South Wales decision the Court of Appeal in *Davies v Mobil Oil Aust. Ltd*⁵² found that the worker who suffered an emotional state and who could no longer cope as a consequence of an altercation between himself and his supervisor was found to be entitled to compensation. The court made no comment as to whether the emotional state was a disease or a personal injury. In Western Australia the distinction would not be material because both "disease" and "personal injury by accident" are compensable. The New South Wales Court of Appeal seems to have been preoccupied with the question of whether or not the altercation was in the course of the employment. Following the decision of *Tarry v Warringar Shire Council*⁵³ the New South Wales Court of Appeal found that the injury had arisen in the course of the employment notwithstanding that the altercation which had precipitated the emotional state had occurred because the worker had chosen not to follow the supervisor's direction but to accede to a union directive. On the facts it was significant that there had been at the time of

49 *Kavanagh v Commonwealth* (1960) 103 CLR 547

50 Per Lippel See footnote 15 at pages 64-70

51 Unreported, Compensation Court NSW, No 303/89, 30th January 1990.

52 Unreported, SC of NSW, 3rd February 1988.

53 [1974] WCR 1.

the altercation some talk of violence but no actual violence took place. This case would probably be similarly decided in Western Australia. *Davies* case highlights the need for decision makers to consider in the first instance whether the stressor is work related. If it is, then the question which will have to be considered in Western Australia is, whether the stressor is one of the matters that is dealt with under section 5(4) of the Act and if so, consideration has to be given as to whether the claim is precluded by those provisions. A further consideration is then whether the issues of unreasonable and harsh management behaviour have any relevance.

The requirement in Western Australia that the work component be "significant" rather than "recognisable" will probably make it harder for claims for stress related conditions. In *Pandos v Commonwealth of Australia*,⁵⁴ the Commonwealth Administrative Appeals Tribunal held that a worker was entitled to weekly payments for total incapacity where the level of stress which a worker had previously been exposed to was found by the Tribunal to be a "material" contribution to the psychiatric injury diagnosed. The Tribunal held that the worker suffered from a disease, namely Reactive Depression. The worker claimed that the whole of his employment was stressful due to industrial disputation. The employer had argued that the worker's dismissal as a consequence of an allegation of misconduct had been reasonable and that the stress arose from disciplinary action it was not compensable. The Tribunal considered the evidence in relation to the disciplinary action and found that the employer had not acted reasonably. This case has some bearing upon Western Australian legislation as a similar requirement of reasonable conduct by the employer pertains under Section 5 (4) of the Act. There is also the issue of whether there is any difference between a "material" contribution and a "significant".

The Commonwealth Administrative Appeals Tribunal again found that disciplinary action taken by an employer was unreasonable in *Dimitriou v Australian Postal Corporation*.⁵⁵ In that case the worker was found to be incapacitated as a consequence of disciplinary action taken at his worksite. The claim could not have been maintained if it was found that the disciplinary action was reasonable. On the evidence the Tribunal found that what is reasonable disciplinary action would depend upon the nature of the employee's duties, the

⁵⁴ Unreported, AAT, No. V89/586, 25th January 1991.

⁵⁵ Unreported, MT, No V91/383, 14th January 1993.

worker's conduct and the laws governing the worker's duties. This dictum may be of some significance in Western Australian decisions where section 5(4) is being invoked so as to preclude a claim. It is also likely that the Review Officers in Western Australia will be borrowing heavily from the plethora of Industrial Court and Tribunal decisions relating to unfair dismissal.

In a South Australian decision *Fernandez v State of South Australia*,⁵⁶ the Supreme Court of South Australia upheld a decision not to allow compensation to a worker who had been subject to disciplinary action as a consequence of the discovery by the employer of four pre-employment convictions for larceny. The court found that the convictions for larceny struck at the heart of the contract of employment and amounted to serious misconduct. The disciplinary action taken in respect of those charges was therefore reasonable. Compensation was not payable. A similar result is likely in Western Australia although the employer could probably also rely upon the fraud provisions in section 188 of the Act which preclude compensation where the worker makes false statements.

The Federal Court in *Mills v Australian Postal Corporation*⁵⁷ found that a Commonwealth employee was entitled to compensation where he had suffered an acute stress reaction and was unfit for work after his home was searched by the Federal Police who damaged some of his property and seized some of his papers. The Federal Police were investigating a complaint by his employer as to the misuse of cleaning chemicals at his place of work. The Federal Court found that the police raid on the employee's home occurred in the course of the employee's employment and that the stress reaction was directly related to the search. The Federal Court decision is consistent with previous authorities in so far as it shows a broad interpretation of "in the course of the employment". There was a clear connection between the search initiated by the employer and the stress reaction. The fact that the stress reaction did not take place at the place of employment was not relevant. A factual situation such as this might present some difficulties in the Western Australian jurisdiction. A distinction would have to be made between the effect of the search and whether or not the stress arose as a consequence of the search or through the disciplinary procedures put in place by the employer. One suspects that it would be possible under the Western Australian legislation to find that the worker had suffered a compensable condition if it could be shown that the search and the disciplinary action were

56 Unreported, SC (SA), No SCGRG 93/1558, 28th July 1994.

57 (1994) 19 AAR 330.

distinct stressors affecting the worker. If the "search stress" was significant (and one suspects that it was) then even if there was some "discipline stress" the worker would be entitled to compensation for the stress arising from the search.

In *McPherson v State Print*⁵⁸ a Review Officer of the Western Australian Conciliation and Review Directorate found that a worker who had not been informed of the employer's final intentions to privatise a State Government instrumentality and who suffered a stress related condition was entitled to compensation. The worker had not been advised when changes would take place. Despite frequent attempts to obtain information, the worker was not aware of his circumstances until the final day of his work when he was advised that his employment was to be terminated. He became incapacitated as a consequence of these events and sought compensation from the employer. At the Review hearing the employer defended the matter on the grounds that the worker had a stress related condition which arose out of his dismissal or the expectation of his dismissal. The Review Officer found that the worker's stress related condition had commenced prior to the dismissal and that because the worker had not been informed as to the circumstances of his employment he had no expectations in relation to dismissal or transfer. Therefore the employer's defence failed because it was unable to invoke the preclusions in section 5(4) of the Act. In any event, the Review Officer made a finding that the employer's behaviour had been harsh and unreasonable in failing to advise the worker in relation to the privatisation project. The decision of the Review Officer was strongly criticised by the West Australian Minister for Labour Relations, who suggested that if the Review Officer's interpretation of the legislation was correct then the legislation should be changed⁵⁹. On appeal to the Compensation Magistrate found that the Review Officer had wrongly found that the worker had no expectations. The Compensation Magistrate found that the only conclusion which was open was that workers' stress arose from his expectation of being dismissed or redeployed. The Compensation Magistrate did not appear to deal comprehensively with the further submission by the worker that in any event the employers conduct was harsh and unreasonable. This matter on appeal to the Supreme Court of Western Australia⁶⁰. One hopes that the Supreme Court will take the opportunity to clarify all the issues raised and not confine itself to the matters that the Compensation Magistrate dealt with. Some guidance in this appeal may

58 Unreported WA No 3171/94-RE 6 April 1995.

59 W Pryer (1995), Kierath Threat to Amend Comp Law, West Australian, Wednesday, April 19, .

60 Unreported CM 49/95 13th June 1995.

be gained from the recent South Australian Supreme Court decision in *SA Mental Health Services Inc v Margush*⁶¹. In that case the South Australian Supreme Court dealt with the onus of proof in cases under section 30(2a) of the *Workers Rehabilitation and Compensation Act 1986* (SA). This section is in similar terms to the Western Australian section 5(4) although its structure may require the courts to think carefully about its portability. In *Murgush* the court held that the worker bears the onus of showing that the work contributed to the stress related condition and that further, if an industrial relations issue was present, the worker bore the onus of showing that the employer had acted unreasonably.

6 Conclusions

Changes to workers compensation and industrial laws in Western Australia came swiftly in 1993. There is a common theme running throughout. There is a tendency for an increase in management control. The changes to the Act reflect a return in some respects to the notion that certain activities of employers should not be the subject of consultation or question by workers. The restrictions for stress claims implicitly protect the employer from action where the employer has made changes to a worker's position. The desired effect of the provisions may to some extent be limited as a consequence of the effects of the Commonwealth industrial laws which put in place procedures for dismissal of employees. An unexpected consequence of the amendments to the provisions relating to stress claims may be that these matters are thrown into the spotlight. The Western Australian case of *McPherson* suggests that regardless of the apparent protection offered by section 5(4) of the Act employers may not escape scrutiny of their industrial relations practices. Somewhat surprisingly this scrutiny may come from a jurisdiction not usually concerned with such matters. The unfortunate result is that a stress claim litigant may be involved in more litigation than any other workers compensation claimant.

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⁶¹ Unreported SA/SC S5246 8 September 1995

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