Fitness for Work

Contributor

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Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **1** Date: **3/9/2012** Time: **18:24:36**
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bwservice::0::

[The next page is 140,021]

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **2** Date: **3/9/2012** Time: **18:24:36**
bwpageid:: 140002::
bwservice::0::

Fitness for Work

CONTENTS

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **3** Date: **3/9/2012** Time: **18:24:36**
bwpageid:: 140021::
bwservice::0::

[The next page is 140,051]

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **4** Date: **3/9/2012** Time: **18:24:36**
bwpageid:: 140022::
bwservice::0::

[140,100] Introduction

A workforce able to competently fulfil its responsibilities is one of the prerequisites for safe, healthy and productive work, along with safe systems of work and suitable equipment. This is particularly true in the mining industry.

Fitness for work issues that can affect the safety performance of people at work can include medication (including the improper use of drugs), alcohol, fatigue, illness, stress (relating to home, work, relationships, money, health) and diet (nutrition).

Whilst the regulatory regime in Australia goes some way to ensuring fitness for work standards are implemented and upheld in the mining sector, early intervention in the area of fitness for work provides personnel with the skills and motivation to manage such issues that may otherwise be of harm to themselves or others.

[140,200] What is "fitness for work"?

[140,200.1] *Definition*

According to the commentary, the term "fitness for work" means that a person is in a physical and psychological state which enables them to perform their work tasks competently and in a manner which does not threaten their safety, health or wellbeing, or that of others.

[140,200.2] *Why is "fitness for work" important?*

A worker who is fit for work is in a physical and mental state that will allow them to fulfil their work responsibilities competently and in a manner which does not compromise safety.[1] On the other hand, a worker whose work performance is impaired by fatigue, by drugs or alcohol, by stress, illness, injury or other factors may be more likely to put themselves or others at risk.[2]

Many aspects of work activities can have a significant influence on competence and fitness for work. For example, workers may not be able to fulfil their work responsibilities competently if they have not received adequate training or if the equipment they are expected to use is not fit for the purpose. Similarly, the design of the job may be such that workers will be too tired by the end of the shift to be fit to meet the physical challenges they are confronted with.[3] This means that workplaces should take a holistic approach to fitness for work, examining how to manage all of the influences on fitness for work, rather than focusing entirely on individual factors.

[1] CCH Commentary, Occupational Health and Safety, Australian Managing Occupational Health and Safety, WHS Risk Management, Managing Social Risks, [¶35-500] Fatigue and fitness for work, last reviewed 05 December 2011; Tony Parker and Charles Worringham, *Fitness for Work in Mining: Not a 'one size fits all' approach*, Injury Prevention and Control (Australia) Ltd.

[2] CCH Commentary, Occupational Health and Safety, Australian Managing Occupational Health and Safety, WHS Risk Management, Managing Social Risks, [¶35-500] Fatigue and fitness for work, last reviewed 05 December 2011.

[3] Tony Parker and Charles Worringham, *Fitness for Work in Mining: Not a 'one size fits all' approach*, Injury Prevention and Control (Australia) Ltd.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **5** Date: **3/9/2012** Time: **18:24:36**
bwpageid:: 140051::
bwservice::0::

Key case

Workers exposed to heatstroke risk: *Angus Lawrence*

An example of where work design may expose workers to risk is found in the Inquest into the death of *Angus Lawrence* [2005] NTMC 069 (31 October 2005). The inquest was held following the death of a member of the Australian Army, Angus Lawrence.

Mr Lawrence died as a result of acute heatstroke which he suffered during outdoor training activities conducted in extremely hot and humid weather at the Army's Mt Bundey Training Area in the Northern Territory.

Evidence given during the Inquest noted that days before Mr Lawrence's death, a soldier undertaking a different course collapsed from heatstroke and was admitted to intensive care. The soldier survived, but suffered from some residual brain damage. Other heat-related illnesses had also been reported prior to Mr Lawrence's death.

The Coroner found that the Army had failed to appreciate the level of danger at which performing the field training placed the soldiers in, given the conditions that prevailed. Coroner Cavanagh stated:

> I acknowledge that soldiers must train in all climatic conditions and be placed under pressure to assess their performance, but I cannot understand why they should be put in life threatening situations during training, particularly when the evidence of experienced soldiers at the Inquest suggested that the defensive scenario practised . . . was "archaic" not in keeping with current operations being conducted by defence personnel.

Corrective actions

In response to the incident, the Department of Defence took a number of steps including:

- A work/risk table with stratified risk levels was produced such that where high and extreme risk categories were identified there was a requirement to have a resuscitation team available to support the activity.
- Commanders are required to undertake a thorough and comprehensive risk assessment before conducting activities to ensure they have adequate control measures and mitigation strategies in place in the event that casualties occur.
- Protocols were developed to specify clear return to work criteria.

[140,200.3] ***What are the risks?***

A range of work-related risks arise from poor fitness for work, whatever the source, including increased risk of accidents/incidents, musculoskeletal problems and poor work performance.[4] These are examined in more detail below.

(1) **Increased risk of accidents/incidents**

(a) Fatigue causes impairment of cognitive and physical functions, leading to increased potential for incidents due to human error. Sleep deficit, for example, can cause significant lapses in concentration, including episodes of involuntary "napping" (micro-sleeps).[5]

(b) Concentration lapses are also a common result of alcohol and drug consumption. Even where concentration does not lapse, impairments

[4] *CCH Commentary*, Occupational Health and Safety, Australian Managing Occupational Health and Safety, WHS Risk Management, Managing Social Risks, [¶35-500] Fatigue and fitness for work, last reviewed 05 December 2011.

[5] Ibid.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **6** Date: **3/9/2012** Time: **18:24:36**
bwpageid:: 140052::
bwservice::0::

caused by drug or alcohol consumption can result in slower response times due to reduced physiological arousal.[6] It can also result in reduced cognitive function and capacity to make sound decisions, as well as loss of situational awareness. This means that, at the same time that errors are more likely, there is reduced margin for errors.

(c) Workers who are not fit for work because of fatigue or drug and alcohol consumption may not be able to pay sufficient attention to secondary tasks.[7] For example, they may operate a forklift truck correctly, but drive too quickly. They may be unable to recognise the existence of a problem or may only recognise it too late to do anything about it. These factors increase the risk of incidents/accidents occurring on the mine site whether to the detriment of the impaired employee, or those around him/her.

(d) Fatigue, as well as alcohol and drug consumption, can significantly impair hand-eye coordination so that even if affected workers are able to identify the need to respond, they may not be able to respond correctly.[8]

(e) All of these problems are more likely where work is repetitive, tedious or requires sustained vigilance, as in equipment operation. Very low levels of physical activity can increase workers' sleepiness, while at the other end of the spectrum jobs that are very demanding from a manual handling perspective can also increase the risk by increasing workers' fatigue.[9]

(2) **Increased presence of injuries**

(a) Lack of physical fitness for work can also increase the risk of injuries or musculoskeletal disorders such as back injuries, strains/sprains, and injuries to neck, shoulders, knees, and the like.[10] Problems of this type often constitute a high proportion of work injuries, and a major cost to the organisation, particularly in physically demanding workplaces, such as mines.

(b) These injuries are the most commonly occurring. This is supported by workers' compensation statistics which have shown that sprains and strains are the most common type of claim made by workers. In 2009–10, sprains and strains accounted for 43% of all serious workers' compensation claims. This can be compared to other injury types which are much lower as depicted in the graph below.

[6] Ibid.

[7] Tony Parker and Charles Worringham, *Fitness for Work in Mining: Not a 'one size fits all' approach*, Injury Prevention and Control (Australia) Ltd.

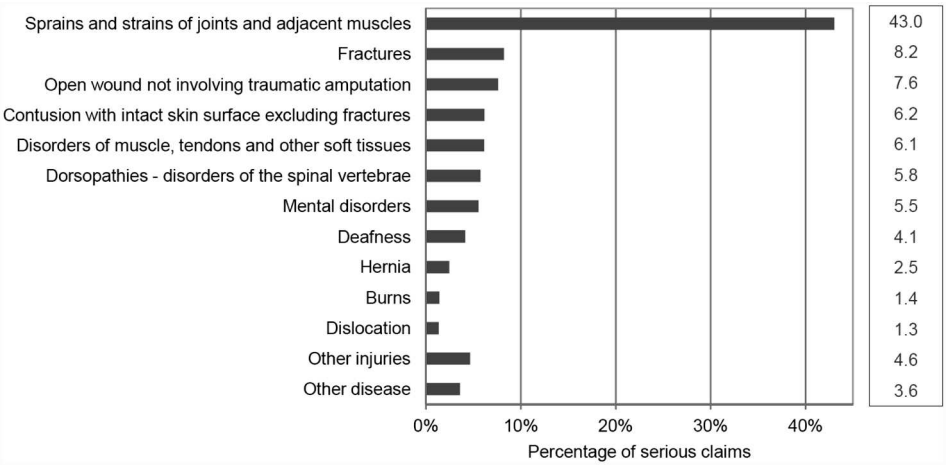
[8] CCH Commentary, Occupational Health and Safety, Australian Managing Occupational Health and Safety, WHS Risk Management, Managing Social Risks, [¶35-500] Fatigue and fitness for work, last reviewed 05 December 2011.

[9] Tony Parker and Charles Worringham, *Fitness for Work in Mining: Not a 'one size fits all' approach*, Injury Prevention and Control (Australia) Ltd.

[10] Ibid.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: 7 Date: 3/9/2012 Time: 18:24:37
bwpageid:: 140053::
bwservice::0::

Serious claims: percentage by nature of injury or disease[11]



(3) **Poor work performance**

(a) Poorer work performance can also result from lack of fitness for work. Poor work performance results in decreased productivity and increases the costs of an organisation.[12]

(b) While not strictly speaking a health and safety issue, work performance and quality issues can also feature amongst the benefits for organisations when fitness for work is addressed and improved.

[The next page is 140,075]

[11] Safe Work Australia, Key Work Health and Safety Statistics, 2012.

[12] CCH Commentary, Occupational Health and Safety, Australian Managing Occupational Health and Safety, WHS Risk Management, Managing Social Risks, [¶35-500] Fatigue and fitness for work, last reviewed 05 December 2011.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **8** Date: **3/9/2012** Time: **18:24:37**
bwpageid:: 140054::
bwservice::0::

[140,300] The statutory regime

In New South Wales, Queensland and Western Australia the statutory regime provides for specific obligations relating to fitness for work. These provisions generally oblige an operator of a mine to develop and implement a fitness for work program which includes measures to eliminate or control risks relating to fitness for work, namely, the consumption of drugs and alcohol, fatigue and medical assessments.

Below is a table summarising specific statutory provisions in relation to fitness for work in New South Wales, Queensland and Western Australia.

State	Act / Regulation	Section	Obligation
NSW	Mine Health and Safety Regulation 2007	82	*Fitness for work program*: The operator of a mine must prepare and implement a fitness for work program. It must be developed in consultation with those employed at the mine, and must include measures to eliminate or control risks arising from the consumption of drugs or alcohol at the mine, and measures to eliminate or control the risks arising from fatigue.
		83	*Drugs and alcohol*: Drugs and alcohol can only be taken into a mine with the authority of the operator of the mine and in accordance with the drugs and alcohol policy of the mine operator.
		86	*Health surveillance*: The operator of a mine must make provision for the regular surveillance of the health of worker's at the mine. The surveillance must include medial examinations for each worker who is exposed to occupational health risks at the mine. Medical assessments may be undertaken prior to a proposed worker commencing work.
		87, 88, 89	*Records of health surveillance*: Records must be kept of any health surveillance for five (5) years or until the person concerned leaves employment at the mine. The records in relation to a person must be made available to that person on request or when that person leaves employment at the mine, and must be made available to any government official on request.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **9** Date: **3/9/2012** Time: **18:24:37**
bwpageid:: 140075::
bwservice::0::

State	Act / Regulation	Section	Obligation
	Coal Mine Health and Safety Regulation 2007	148	*Fitness for work program*: The operator of a coal operation must prepare and implement a fitness for work program. It must be developed in consultation with those employed at the coal operation, and must include measures to eliminate or control risks arising from the consumption of drugs or alcohol at the coal operation, and measures to eliminate or control the risks arising from fatigue.
QLD	Coal Mining Safety and Health Regulation 2001	39	*Consumption of alcohol*: Alcohol can only be consumed at a coal mine in an accommodation building or a recreation area designated for that purpose by the site senior executive.
		40	*Under the influence of alcohol*: A person must not carry out a work activity at a coal mine, enter a part of the mine where on-site activities are carried on, if the person is under the influence of alcohol.
		41	*Safety and health management system for alcohol*: A coal mine's safety and health management system must provide for controlling risks associated with the excessive consumption of alcohol. The system must provide for the following: an education programme, an employee assistance programme, and a number of assessments to determine a person's fitness for work, such as voluntary self-testing.
		42	*Safety and health management system for fatigue, impairment and drugs*: A coal mine's safety and health management system must provide for controlling risks associated with fatigue, physical or psychological impairment, and the improper use of drugs. The safety and health management system requires specific inclusions for each condition. Notably, the provision of an education programme and an employee assistance programme is common in relation to both personal fatigue and the consumption of drugs.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **10** Date: **3/9/2012** Time: **18:24:37**
bwpageid:: 140076::
bwservice::0::

State	Act / Regulation	Section	Obligation
		43	Provides for the correct way to deal with records and information about a person's fitness for work.
		46	*Health assessment*: The employer must ensure a health assessment is carried out for each person employed as a coal mine worker for a task other than a low risk task. An assessment must be carried out before the person is employed as a coal mine worker; if the nominated medical adviser considers the assessment is necessary if given a notice in s 49, otherwise, periodically, as decided by the nominated medical adviser, but at least once every 5 years.
		47	*Employer's responsibility for health assessment*: The employer must arrange for the health assessment or medical examination required by s 46, and ask the nominated medical adviser (a doctor, appointed in writing) to give the health report to the employer and a copy and explanation of the report to the person to whom it relates.
		48	*Reviewing health assessment report*: If an adverse health assessment report is given about a coal mine worker, prior to taking action to terminate the worker's employment or demote the worker, the employer must give the worker a reasonable opportunity to undergo a further health assessment from another nominated medical adviser or relevant medical specialist chosen by the worker. A copy of the further medical report must be given to the nominated medical adviser who carried out the original adverse health assessment, and the employer must ask the nominated medical adviser to review the original health assessment having regard to the further health assessment report.
		48A	*Conflicting health assessment reports*: This will apply if a health assessment report and a further health assessment report about a coal mine worker contains conflicting information and the information is given to the Chief Executive within 28 days of being given the report. If this s applies, the chief executive must appoint a relevant medical specialist to prepare a final report.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **11** Date: **3/9/2012** Time: **18:24:37**
bwpageid:: 140077::
bwservice::0::

State	Act / Regulation	Section	Obligation
		49	*Monitoring for workers' exposure to hazards*: A coal mine's safety and health management system must provide for periodic monitoring of the level of risk from hazards at the mine that are likely to create an unacceptable level of risk. The system must also provide for notice of any appreciable increase in the level of risk to a coal mine worker at the mine to be given to the worker's employer.
		50	*Records about health assessment*: A nominated medical adviser must keep records for each health assessment carried out.
		51	*Ownership of health assessment records*: A record kept by the nominated medical adviser is a record of the department.
		52	*Confidentiality of medical record*: A person must not disclose to anyone the contents of a coal mine worker's medical record obtained by the person under this division, unless they have the worker's written consent.
	Mining and Quarrying Safety and Health Regulation 2001	84	*Alcohol and drugs*: A person must not carry out work activity at a mine, or enter an operating part of the mine, if the person is under the influence of alcohol, or impaired by a drug. Alcohol can only be consumed at a mine in an accommodation building or a recreation area designated, in writing, for that purpose by the site senior executive.
		85	*Fitness of workers*: The site senior executive must ensure a worker at the mine does not carry out work at the mine unless the worker's fitness level has been decided as adequate for the work.
		86	*Self-assessment of fitness level*: Each worker must periodically conduct a self-assessment of their condition to decide if they are in a fit condition to carry out duties at the mine without creating an unacceptable level of risk.
		87	*Assessing workers to decide fitness level*: The site senior executive must ensure each worker is assessed to decide if the worker's fitness level is adequate to enable the worker to carry out work at the mine, and a record of the assessment is kept. The assessment must be carried out in an appropriate way, including by a medical examiner, and must be carried out, amongst other things, before the worker first commences work at the mine.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **12** Date: **3/9/2012** Time: **18:24:37**
bwpageid:: 140078::
bwservice::0::

State	Act / Regulation	Section	Obligation
		88	*Fitness of visitors*: The site senior executive must ensure a visitor does not enter an operating area at the mine unless the visitor's fitness level is adequate to visit the area. The fitness level is assessment in an appropriate way, including, for example, by a questionnaire.
		89	*Work hours and rest breaks*: A mine's safety and health management system must provide for controlling risks arising out of personal fatigue caused by excessive work hours or insufficient rest periods.
		90	*Amenities for workers' fitness and health*: The site senior executive must ensure the mine has appropriate amenities for use by workers to maintain their fitness and health. Amenities must include, for example, food storage and consumption facilities, toilet facilities and supplies of cool drinking water.
WA	Mines Safety and Inspection Regulations 1995	3.25	*Initial health assessment*: A health assessment must be carried out under the supervision of a medical practitioner or an approved person on each new employee at the mine within three months of becoming a new employee.
		3.26	*Periodic health assessment*: A health assessment must be carried out under the supervision of a medical practitioner or an approved person on each employee at the mine who has not received a health assessment in the last five years.
		3.27	*Additional health assessment*: Additional health assessments must be carried out in respect of an employee who engages in specified occupational exposure work at the mine.
		3.28	*Biological monitoring*: The employer must ensure that biological monitoring is carried out in respect of employees who engage in specified occupational exposure work at the mine, where there is a recognised biological monitoring procedure and a reasonable likelihood that accepted values might be exceeded.
		3.30	*Employer responsible for arranging health surveillance*: An employer at a mine is responsible for arranging and paying the expenses of any health assessment or biological monitoring required under the Regulations.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **13** Date: **3/9/2012** Time: **18:24:37**
bwpageid:: 140079::
bwservice::0::

State	Act / Regulation	Section	Obligation
		3.31	*Medical practitioner to provide results of health assessment*: The medical practitioner or approved person under whose supervision a health assessment is carried out must notify the employee of the results of the assessment and notify the employer of the outcome of the assessment, and advise on the need for remedial action (if any).
		3.32	*Department to keep records*: The State mining engineer must ensure that a system is established for keeping health surveillance records.
		3.34	*Mines occupational physician*: A person is to be appointed or engaged to be the mines occupational physician, who is to supervise the keeping of health surveillance records at the department, provide medical and technical advice to the State mine engineer and the Mining Industry Advisory Committee, and give technical and medical advice and support in respect of monitoring programs.
		3.35	*Health surveillance records to be confidential records*: The medical practitioner must ensure that health surveillance records that the medical practitioner has are retained as confidential records.
		3.36, 3.37	*Employee may request a copy of record*: If an employee applies in writing to the State mining engineer for a copy of any health surveillance record, or enquires as to whether an employee has previously been given a health assessment, relating to the employee that is kept by the department, the State mining engineer is to cause a copy of that record or information to be provided to the employee.
		3.39	*Notice of occupational disease*: If an employer at a mine receives advice that an employee has an occupational disease, the employer must, as soon as is practicable, notify the mine's occupational physician that the employee has the disease.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **14** Date: **3/9/2012** Time: **18:24:37**
bwpageid:: 140080::
bwservice::0::

State	Act / Regulation	Section	Obligation
		3.40	*Remedial action*: If any health assessment or biological monitoring indicates the need for remedial action to be taken to protect the health of an employee at a mine, the employer must ensure that the action is taken as soon as is practicable.
		4.7	*Intoxicating liquor or drugs*: A person must not be in or on any mine while the person is adversely affected by intoxicating liquor or drugs. If adversely affected, the employee reporting for duty may be directed to immediately leave the mine. A person must not, without the knowledge and permission of the manager of the mine, have any intoxicating liquor or deleterious drugs in his/her possession in or on the mine, or consume any intoxicating liquor or deleterious drug while in or on the mine.

While the remaining States and Territories in Australia do not have the detailed specific obligations relating to fitness for work which are contained in the legislation in New South Wales, Queensland and Western Australia, operators of mines in those jurisdictions will still have a general statutory obligation to ensure the health and safety of workers at a mine. This includes ensuring workers are fit for work so they do not expose themselves or others to risk of harm.

This general obligation encompasses the provision and maintenance of a work environment without risks to health or safety, safe plant and structures, and safe systems of work. It also includes the safe use, handling, storage and transport of plant, structures and substances, the provision of and access to adequate facilities for the health and welfare of workers, the provision of information, training, instruction or supervision, and the monitoring of the health of workers and the conditions at the workplace.

In light of this, employers who conduct mining operations in those jurisdictions which do not contain detailed specific regulation in relation to fitness for work matters should put in place appropriate measures to protect workers and others from risks of harm arising from those factors impacting a person's fitness, including fatigue, alcohol and drugs and medical fitness.

[140,300.1] *Common law obligations*

Health and safety obligations in the workplace are not restricted to those which exist under legislation but are also evident at common law in which an employer owes its employees a duty of care. This duty arises both in tort and in contract.

In tort, the employer has a non-delegable duty to take reasonable care for the safety of its employees.[13] The nature of the duty is to ensure that reasonable care is taken to avoid exposing employees to unnecessary risk of injury or damage to their health which is evident from the joint judgment of Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ in *Czatyrko v Edith Cowan University*[14] in which it was held:

> An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid

[13] *Edwards v North Goonyella Coal Mines Pty Ltd* [2005] QSC 242; BC200506422 at [34].

[14] (2005) 214 ALR 349; (2005) 79 ALJR 839; [2005] HCA 14; BC200501748.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **15** Date: **3/9/2012** Time: **18:24:37**
bwpageid:: 140081::
bwservice::0::

> exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work.[15]

An employer has similar contractual obligations arising from an implied term to take reasonable care not to expose employees to unnecessary risks to their health and safety. Further, an employer may have a duty not to be in breach of any statutory requirements which relate to the health and safety of its workers.[16]

Clearly, an employer's obligation both in tort and contract will require employers to take reasonable steps to protect employees from the risk of harm which might result from issues relating to fitness for work.

[The next page is 140,101]

[15] *Czatyrko v Edith Cowan University* (2005) 214 ALR 349; (2005) 79 ALJR 839; [2005] HCA 14; BC200501748 at [12].

[16] *Edwards v North Goonyella Coal Mines Pty Ltd* [2005] QSC 242; BC200506422 at [35].

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **16** Date: **3/9/2012** Time: **18:24:38**
bwpageid:: 140082::
bwservice::0::

[140,400] Fatigue

[140,400.1] ***What is fatigue?***

Fatigue refers to a degree of mental or physical exhaustion that can undermine a person's capacity to function competently.[17]

While physical or mental effort inevitably result in tiredness, fatigue and its effects increase the potential for mistakes and unsafe actions, as well as lowering performance and productivity.

The most common effects associated with fatigue are:[18]

- poor concentration and a desire to sleep;
- impaired recollection of timing and events;
- irritability;
- poor judgment of risks;
- reduced capacity for communicating with others;
- reduced visual perception and hand-eye coordination;
- reduced vigilance; and
- slower reaction times.

As well as causing a decrease in performance and productivity at work, these effects simultaneously increase the potential for incidents and injuries to occur. People working in a fatigued state may place themselves and others at risk, most particularly:

- when operating machinery (including driving vehicles);
- when performing critical tasks that require a high level of concentration; and
- where the consequence of error is serious.

Problems such as micro-sleeps, a decline in work performance and an increase in errors and misjudgements can severely compromise health and safety at work.[19]

Fatigue in the mining context

Inquest into the death of Malcolm MacKenzie, Graham Peter Brown and Robert Wilson

The findings of the Inquest into the death of Malcolm MacKenzie, Graham Peter Brown and Robert Wilson (the Inquest), conducted by Coroner Annette Henessy, explain, as far as possible, how the two motor vehicle incidents occurred in which Senior Constable Malcolm MacKenzie, Mr Graham Brown and Mr Robert Wilson died. The inquest also raised a number of issues with regards to fatigue and fitness for work, making a number of relevant recommendations worthy of consideration.

[17] CCH Commentary, Occupational Health and Safety, Australian Managing Occupational Health and Safety, WHS Risk Management, Managing Social Risks, [¶35-500] Fatigue and fitness for work, last reviewed 05 December 2011.

[18] Tony Parker and Charles Worringham, *Fitness for Work in Mining: Not a 'one size fits all' Approach*, Injury Prevention and Control (Australia) Ltd.

[19] CCH Commentary, Occupational Health and Safety, Australian Managing Occupational Health and Safety, WHS Risk Management, Managing Social Risks, [¶35-500] Fatigue and fitness for work, last reviewed 05 December 2011.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **17** Date: **3/9/2012** Time: **18:24:38**
bwpageid:: 140101::
bwservice::0::

The first motor vehicle accident (the Yeppoon Road accident) involved Senior Constable MacKenzie and Mr Brown. Both men died in a two vehicle collision on Yeppoon-Rockhampton Road, Mulara, on the evening of 24 October 2005. Mr Brown worked at Blackwater Mine and was travelling to his home at Yeppoon when the accident occurred. He had worked a roster of four day shifts and had completed a day's work before driving a little over two hours home. It was thought possible that he was fatigued during the drive home as a result of his work. Senior Constable MacKenzie was driving to work at the North Rockhampton Police Station from his home in Yeppoon with a colleague, Constable Michael Koellner. A tropical storm passed through the area of the accident around the time of the collision. Mr Brown's vehicle collided with that of the police officers and the two men were killed instantly. The cause of the collision and the location of the impact point were the subject of contest and were considered at length by the coroner.

It was held that a major contributory factor in the collision was the adverse weather conditions. The site of the accident was relatively exposed to the weather. It was concluded that this would have made driving difficult. Visibility of both drivers would have also been affected.

Mr Brown's fatigue was also considered. The coroner noted that Mr Brown had worked a 13-hour shift as the last shift of the roster prior to driving home, and had expressed some tiredness to a co-worker, Mr Korn, during the trip home, as well as to Ms Hillier, Mr Brown's de facto wife, before the journey. It was held that this, whilst not conclusive in the circumstances, provided support to the contention that Mr Brown was tired and fatigued.

It was also held to be reasonable on the evidence to conclude that a person who was tired might have a slower reaction time than he might ordinarily have. The coroner stated that this may have impacted on Mr Brown in trying weather conditions. It was held that the movement of his vehicle onto the incorrect side of the road was also a factor indicating fatigue or momentary inattention on the part of the driver.

In such circumstances, the coroner found that the contributing causal factors in the collision included the adverse weather conditions, and, to a lesser extent, fatigue, particularly in relation to the potential effect on Mr Brown's reaction time to unexpected events such as gusty winds. Whilst the coroner was not satisfied that fatigue on the part of Mr Brown was the major contributing factor in the collision, the coroner was satisfied that there were sufficient indications that it was likely to have been a contributing factor. The coroner did not consider that there was sufficient evidence of fatigue on the part of Senior Constable MacKenzie sufficient to contribute to the collision.

The second motor vehicle accident (the Dysart motor vehicle accident) involved Mr Wilson who died in a two-vehicle accident on Dysart-Middlemount Road, Dysart on the morning of 1 February 2007. Mr Wilson worked at the Norwich Park Mine and had worked a night shift. He left the mine site in his car at the end of his shift. Some of his colleagues later described him as being very tired at the time. During the 30-minute journey to his accommodation in Dysart, Mr Wilson's vehicle passed onto the incorrect side of the road and collided with an oncoming vehicle driven by Ms Katie Harrold. She was not seriously injured but Mr Wilson died instantly from his injuries. There were no weather conditions affecting the area at the time. Possible fatigue of Mr Wilson, driver inattention and the condition of the road were raised during the inquest as potential causative factors in the collision.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **18** Date: **3/9/2012** Time: **18:24:38**
bwpageid:: 140102::
bwservice::0::

With regards to the issue of fatigue, the coroner considered the evidence of Sergeant McKinnon, who had extensive first-hand knowledge of policing and was first on the scene of the accident. Sergeant McKinnon was of the opinion that fatigue contributed to the accident. It was noted that other experts investigating the accident concurred with this assessment. In further support of such a conclusion, the coroner noted that:

> Ms Harrold's evidence was to the effect that there was no apparent reason for Mr Wilson's vehicle moving to the incorrect side of the road. Various descriptions were given by Mr Wilson's workmates regarding his fatigue during and after working a night shift immediately before the fatal drive. The expert opinion of Professor Smith in relation to the shift cycles, the number of consecutive night shifts, and the working of extra shifts during days off, inferred that Mr Wilson would have been fatigued.

In such circumstances, the coroner accepted that the objective evidence indicated that Mr Wilson was fatigued at the end of his night shift roster.

Furthermore, driver inattention was also raised as a potential cause for the collision. In this regard, the coroner noted that Mr Wilson may have been inattentive for any number of reasons. Although not making a definitive finding on this issue, the coroner stated that:

> The movement of the vehicle towards the oncoming traffic and the point of impact on the incorrect side of the road without marked avoidance of the collision are likely to be indicative of inattention or fatigue and a loss of concentration on the task of driving.

Finally, the condition of the road was considered. The coroner noted that the condition of the road as described by witnesses who were regular users of the road was such that there was a tendency of drivers to stay towards the middle of the road, reducing the margin for error of colliding with oncoming traffic. The coroner accepted the evidence that to that extent, the condition of the road was a minor contributing factor as it appeared to influence the driving behaviour of at least one of the drivers involved in this collision.

The coroner was therefore satisfied on the evidence that the cause of the collision was driver inattention and/or fatigue on the part of Mr Wilson exacerbated by the width and condition of the road.

Before making any recommendations, the coroner considered whether there were any matters connected with the deaths in which improvements to public safety could be made to avoid deaths occurring in similar circumstances in the future. The issue of driver fatigue was raised in this context, particularly in relation to shift workers. The coroner noted these collisions occurred in Central Queensland and involved mine workers and others. The coroner noted that the mining industry represents a subsystem of road use within the broad road use system within the Bowen Basin and the rest of regional Queensland. There is, accordingly, an overrepresentation of fatigue-related crashes in this region and is significant in comparison to the rest of the State.

In this context, the coroner considered the evidence of Professor Narelle Haworth who commented on shift work. It is worth repeating that evidence here:

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **19** Date: **3/9/2012** Time: **18:24:38**
bwpageid:: 140103::
bwservice::0::

> Epidemiological and experimental studies have shown shift work to be associated with an increased risk of road crashes for a wide variety of occupations from nurses and medical residents, to truck drivers, especially on the commute home after a nightshift (Akerstedt, Peters, Anund and Kecklund, 2005). Shift work appears to contribute to fatigue by two mechanisms; increasing the likelihood that activity will occur after too many hours of wakefulness and rotation of shift cycles causing circadian dysrhythmia. Most of these studies examine workers who are working rotating 8 hour shifts which are often associated with circadian dysrhythmia.

It is relevant to note that the shift lengths relevant to the mine workers in these matters were around 12 hours long.

It is also worth noting the coroner's observations on fatigue:

> Fatigue is a complex issue involving individual circumstances and work and private factors. Work issues are varied given the wide range of differing factors in workplaces, including mines, such as the geographical location and it's proximity to the residence of the workers, the size of the workforce, the nature of the operation and hours of work/roster designs. The management of the risk of fatigue from shiftwork, especially in a commuting workforce, needs to be considered within an occupational health and safety framework with flexibility for individual workplace variations. Further, the framework needs to be developed as a result of extensive consultation with employers, employees, regulators and researchers.
>
> The evidence given by many workers called during the course of the Inquest suggest that a long distance commute by shift workers to and from the workplace is not an isolated event undertaken by a few in Central Queensland. The evidence of the Police at Dysart was unchallenged and paints a concerning picture of many fatigued drivers at the termination of shift driving long distances and long hours in a state of fatigue potentially putting themselves and other road users at risk. A broad based educational and information program warning workers about the hazard of shiftwork and commuting is in place in the mining industry with a good general awareness of the risk by workers according to the evidence. The decision by the worker to commute seems governed by the need to return home at the end of the shift roster together with an under-estimation of the risk of crashing whilst driving fatigued.

These comments, relevantly, makes a number of suggestions aimed at managing fatigue in those industries where shift work is common, such as the mining industry.

Further to these comments, the coroner noted that managing the commute from work to home at the conclusion of a roster in the mining sector was an area requiring review, particularly as this aspect of the workday is not normally considered or covered in the required Safety and Health Management Plans of many mines. Whilst guidelines and testing for fatigue and other performance-inhibiting issues (such as drugs and alcohol) at the commencement of rosters and individual shifts have been established to ensure safe operation of workers on mine sites, the same scrutiny is usually not given to activities after the roster for what the coroner called "obvious reasons":

> In some cases, Fatigue Management guidelines provide for information based training for workers to alert them to the dangers of fatigue including driving long distances after roster without rest. Some do not.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **20** Date: **3/9/2012** Time: **18:24:38**
bwpageid:: 140104::
bwservice::0::

The Construction, Forestry, Mining and Energy Union (the CFMEU) submitted during the Inquest that one of the clear issues in relation to the enforcement and implementation of a fatigue management policy across the industry is the deficiency in the current system relating to the implementation of plans. The CFMEU was concerned that an interim policy be developed and implemented to ensure that there is a standard against which any operational fatigue policies can be measured. To this end, the CFMEU proposed that an operational definition of "fatigue" be developed, having reference to the maximum number of shift hours based on a day, a week, a shift cycle, and a gross shift length (hours of work plus travel). The CFMEU was quick to point out that the geographical distances and travel times also need to be taken into account in relation to any fatigue policy.

It was also noted that Professor Andrew Dawson, a prominent Industrial Fatigue Specialist and an International Fatigue Management Expert, stated in evidence that the journey home should be part of a risk assessment process for the employer in managing fatigue. The coroner quoted Professor Dawson, who favoured a robust legislative solution:

> It's absolutely critical to assess the impact of commutes because they effectively . . . extend the work period in that they reduce the opportunity for sleep . . . the question of how best to manage that is really complex . . . and you have to be really careful .. and look at the overall system of work and how (the controls) will be managed.
>
> . . .
>
> There should be very clear regulatory and legislative requirement to have a fatigue management plan and that should be enforced strongly .....

With this in mind, the coroner went on to note that various efforts have been made at some mines to address this issue through control measures. Mr Wilson had apparently worked at a mine which has bussed workers to and from accommodation each shift. Evidence was received in the Inquest that approximately 67% of mines have a bussing policy in place and that buses were used by significant portions of the workforce in those situations. Bussing is clearly one control measure which could be used as one of a number of solutions to address the risk of the journey home from fatigue.

That having been said, it is clear that the coroner considered that the issue of controlling the risk associated with work related commuting within a shiftwork population is both complex and directly linked to public safety, as well as reducing or preventing future deaths from occurring in circumstances similar to the present matters.

A further issue raised in the Inquest was that, alarmingly, one of the reasons why workers who gave evidence at the Inquest indicated that they did not rest before travelling home was that there was some concern in the industry that they would not be covered by appropriate workers' compensation insurance if there was a substantial deviation in their journey. The coroner stated that a response was sought from WorkCover Queensland in relation to this issue which indicated that each matter would be judged on a case-by-case basis if an application for compensation was made in those circumstances. The coroner expressed the view that this issue obviously needed to be resolved and workers affected informed of their legal position. The coroner stated: "It is obvious that appropriate rest before commuting travel is a safety issue which should not adversely impact a worker's insurance rights."

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **21** Date: **3/9/2012** Time: **18:24:38**
bwpageid:: 140105::
bwservice::0::

Recommendations

Finally, although the coroner made a number of recommendations in relation to a number of issues relevant to the Inquest, on the issue of fatigue in particular the coroner recommended, notably, that Queensland Transport, in conjunction with the Queensland Police Service, should review and adopt an operational definition of fatigue, and that ongoing consideration be given by the Queensland Police Service to the development of a fatigue-specific driving offence. The coroner further recommended, in the meantime, the utilisation of additional investigative techniques to establish fatigue until such time as appropriate fatigue detection methodology is available. The coroner also recommended that mine operators fully explore control measures to reduce or eliminate the risks associated with workers commuting whilst fatigued. And, finally, that the Queensland Government prioritise initiatives to address fatigued driving as a critical public safety issue.

The examination of the findings arising from the Inquest set out above provides insight into some of the issues prevailing in the mining industry relevant to the management of fatigue, and the implementation of fatigue-related policies. The Inquest findings also highlight the difficulty often associated with the management of fatigue, such as the lack of a clear definition as to what is fatigue, and clear guidance on how to identify whether a worker may be suffering from fatigue which may increase the risk of a workplace incident occurring.

This is important as it is not only work-related factors which might impact on fatigue, but, as discussed, other factors may also have an impact such as the time taken to commute to and from work, a lack of sleep between shifts, difficulties in a person's private affairs may mean a worker is fatigued and at an increased risk of harm in performing a work activity.

Given the obvious dangers associated with the impact of fatigue on workers' safety and the safety of others (as highlighted by the Inquest findings), those persons involved in the mining industry must take a risk-based approach to manage the issues associated with fatigue, to ensure that workers and others are not exposed to increased risks of harm. Measures that can be taken to manage the issue include:

- implementing a policy which forms part of the safety management system for a mine to manage fatigue-related issues (such a requirement already exists under mining legislation);[20]
- providing an education program to inform workers of the causes of fatigue and measures to be taken to reduce the risk of incidents arising from fatigue;
- providing training to supervisors and managers on the signs to look for which may indicate that a worker is suffering from fatigue;
- monitoring the impact of shift lengths and shift cycles on the health and wellbeing of workers, and implementing modified shifts (which may include more regular rest breaks, where necessary) in order to manage identified risks;
- considering work design issues and the impact of those issues on the fatigue of workers;
- where fatigue presents as an issue, it may be necessary to consider whether a medical examination or testing should be undertaken to identify any underlying cause of fatigue, such as:
  - — heart disease;
  - — diabetes;

[20] See, for example, s 89 of the Mining and Quarrying Safety and Health Regulation 2001 (Qld).

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **22** Date: **3/9/2012** Time: **18:24:38**
bwpageid:: 140106::
bwservice::0::

  - — high blood pressure;
  - — depression;
- where appropriate, implementing specific controls to manage the risk of fatigue, for example, bussing workers to and from work.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **23** Date: **3/9/2012** Time: **18:24:39**
bwpageid:: 140107::
bwservice::0::

[The next page is 140,127]

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **24** Date: **3/9/2012** Time: **18:24:39**
bwpageid:: 140108::
bwservice::0::

[140,500] Drugs and alcohol

[140,500.1] *How do drugs and alcohol affect fitness for work?*

The potential for alcohol and drugs to affect an employee's fitness for work has long been a source of concern in the mining industry. The knowledge that drugs and alcohol significantly impairs a workers fitness for work, particularly in the mining industry, highlights the need for careful assessment of the risks involved and for systematic efforts to control the problem.

The consumption of drugs and alcohol can affect an employee's motor coordination, judgment, intellectual processes and reaction time. Some analgesics, for example codeine, can affect the ability to use machinery safely.[21]

From a fitness for work perspective, whilst lost productivity is the general result of drug and alcohol impairment, drug and alcohol misuse can also contribute to workers injuring themselves or others and/or damaging equipment or material.[22] It can also undermine workers' physical and mental health, and damage their family life or threaten job security.

Beyond this, in the case where an employee loses his/her job, the employer loses not only the skills and experience of that employee, but the time and investment involved in that employee's recruitment and training. The employer also has to bear the costs of recruiting and training a replacement. Even in cases where there is no job termination, the employer has to carry the costs associated with:[23]

- tardiness;
- absenteeism;
- errors and misjudgements; and
- loss of efficiency.

Whilst effective control of occupational drug and alcohol use is necessary, it is difficult to achieve, given the sensitive, personal nature of the issue, and the fact that it may be part of the culture of the workplace: for example, employees might regularly enjoy a "smoko", taking time off work to do so, or may regularly consume alcohol on work premises following a shift.[24] The focus therefore should be on work performance and the consequences of impaired work performance and/or unsafe behaviour, rather than directly identifying personal habits or problems that may or may not be related to the legitimate concerns of the employer.

[140,500.2] *Risk factors and risk control*

The risk factors discussed above in relation to fatigue can also lead to increased risk of hazardous patterns of alcohol and drug use. For example, short breaks between shifts may mean that prescription drugs are more likely to be used to aid sleep.[25] The presence of other contributing risk factors can also be identified. These include the likelihood of alcohol consumption associated with work, such as the presence of a bar or work-related

[21] CCH Commentary, Occupational Health and Safety, Australian Managing Occupational Health and Safety, WHS Risk Management, Managing Social Risks, [¶35-100] Alcohol and other drugs, last reviewed 13 April 2011.

[22] Australian Safety and Compensation Council, *Work-Related Alcohol and Drug Use: A Fit for Work Issue*, Department of Employment and Workplace Relations, March 2007, p 2.

[23] Ibid at, pp 3–4, 10.

[24] Ibid, pp 21–23.

[25] CCH Commentary, Occupational Health and Safety, Australian Managing Occupational Health and Safety, WHS Risk Management, Managing Social Risks, [¶35-100] Alcohol and other drugs, last reviewed 13 April 2011.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **25** Date: **3/9/2012** Time: **18:24:39**
bwpageid:: 140127::
bwservice::0::

social events where alcohol is offered and consumed. Similarly, workplace pressures which can trigger a shift from the use to abuse of substances, in predisposed individuals, include:[26]

- the management style at a particular workplace;
- work practices;
- deadlines and workload fluctuations;
- shiftwork;
- discrimination;
- harassment; and
- organisational restructuring.

Risk identification is an important part in managing fitness for work in the context of the consumption of drugs and alcohol.[27] That having been said, risk identification does not mean that those individuals who have difficulties dealing with drug or alcohol use should be unfairly targeted. On the contrary, any approach to managing and eliminating the risks associated with drug and alcohol use should involve testing, such as through breath tests, and these tests should be used as part of an agreed and holistic approach.

[140,500.3] *Drug and alcohol testing*

Drug and alcohol testing is a sensitive matter, and issues of the rationale and validity of such tests must be carefully addressed. Employers need to give due regard to individuals' rights to privacy when considering the matter of drug and alcohol testing in industry. There is also an issue as to whether an employer has the right to information (such as via analysis of an employee's blood) which does not necessarily have a bearing on work safety, or even performance.

Recent case law demonstrates the shift towards drugs and alcohol testing as a means to minimise the workplace health and safety risks associated with the consumption of these substances.

Mandatory testing was a "reasonable employer instruction"

In the case of *Wagstaff Piling Pty Ltd; Thiess Pty Ltd v Construction, Forestry, Mining and Energy Union*, the Full Bench of Fair Work Australia found that Thiess and a subcontractor, Wagstaff Piling, were entitled to test workers for drugs and alcohol. Thiess conducted random drug and alcohol tests on its employees and those of its subcontractors on a major road project between January and March of 2011 before the Construction, Forestry, Mining and Energy Union (the CFMEU) announced that its members would no longer cooperate. The CFMEU argued that the Victorian Building Industry Alcohol and Other Drugs Policy (1993) (the Policy) did not contain any provision for testing, and a disputes panel and then a Fair Work Commissioner found in its favour. However, the Full Bench, in upholding the appeal from Thiess and Wagstaff Piling, found that while the Policy was "silent" on compulsory drugs and alcohol testing, it did not prohibit it.

The Full Bench noted that when the Policy was first developed, testing was rare, and held that mandatory testing was a "reasonable employer instruction".

Drug and alcohol testing in the mining industry is commonplace, and mining laws require safety and health management systems to incorporate risk control measures

[26] Australian Safety and Compensation Council, *Work-Related Alcohol and Drug Use: A Fit for Work Issue*, Department of Employment and Workplace Relations, March 2007, pp 3–4, 10.

[27] Ibid, p 2.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **26** Date: **3/9/2012** Time: **18:24:39**
bwpageid:: 140128::
bwservice::0::

associated with the impact of drug and alcohol use and the safety of mine workers.[28] The issue of drug and alcohol testing has, however, been a contentious one.

The nature of drug and alcohol testing

In the case of *Construction, Forestry, Mining and Energy Union v HWE Mining Pty Limited*, Fair Work Australia ruled that a mining company was not obliged to switch from saliva test to urine test to screen employees for drugs, despite its commitment to do so. HWE Mining used random on-site urine drug testing to screen employees' fitness for work. The CFMEU contested the testing regime, urging the company to move to saliva testing because urine tests are capable of indicating the presence of drugs such as cannabis long after impairment has ceased. It submitted that saliva testing more closely correlates to the period of actual impairment.

Fair Work Australia held that the dispute between the parties was:

> [U]ltimately about an intrusion into employees' privacy and whether employees who consume cannabis privately while on an extended break from work should be exposed to a risk of a positive urine screening test when there is no prospect that they remain impaired when they return to work.

Furthermore, it was held that the exercise of management prerogative was not unreasonable, because urine testing for drugs was more reliable and effective than saliva testing, and mining companies faced "onerous statutory occupational health and safety obligations". Fair Work Australia also noted that:

> The nature of the mining process and the plant and equipment used in mining is such that employees who are impaired by drugs or alcohol present a substantial risk to themselves and others that must be controlled.

While mine operators should ensure that drug and alcohol testing regimes form part of the safety management system at the mine, this should be done in consultation with the workforce and workforce representatives to avoid disputes and ensure that an appropriate testing regime can be effectively implemented.

[28] See, for example, s 42 of the Coal Mining Safety and Health Regulation 2001 (Qld).

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **27** Date: **3/9/2012** Time: **18:24:39**
bwpageid:: 140129::
bwservice::0::

[The next page is 140,151]

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **28** Date: **3/9/2012** Time: **18:24:39**
bwpageid:: 140130::
bwservice::0::

[140,600] Medical fitness

[140,600.1] *General*

Whilst fitness for work in relation to fatigue and drugs and alcohol is important, general medical fitness must also be considered.

In addition to protecting the safety of persons at mines, it is a statutory requirement that the health of persons at mines and persons who may be affected by mining operations is maintained. The risk of injury or illness to any person resulting from mining operations must be at an acceptable level. Accordingly, the obligation on employers to take reasonable care for the health and safety of their employees extends to medical fitness. To achieve this, employers are empowered, and often required, to undertake health assessments of their employees prior to the commencement of (and periodically during) their employment. In this way, the obligations on employers to manage the medical fitness of their employees and to monitor their mental and physical health through health assessments makes it clear that managing the physical and psychological impairment issues of employees forms an essential part of broader fitness for work.

There is increasing awareness that medical fitness issues need to be managed in both a proactive and reactive sense by, for example, providing on-site facilities, educating workers about sleep management, and ensuring that medical facilities are available to assist workers with impairment issues. Further to this, the mining-specific legislation in Queensland, New South Wales and Western Australia require the periodic health assessment or medical examination of mine workers to determine their fitness for work. This effectively requires that fitness for work programs at mine sites be developed and implemented. In Queensland, for example, the legislation also prescribes minimum "fitness provisions" that must be included in fitness for work programs, and includes requirements for consultation and agreement with mine workers when developing particular aspects of the fitness provisions.

In addition to the obligations arising under the mining-specific legislation, employers in all states and territories have a duty at common law to take reasonable care for the safety and health of their employees. This duty extends to medical fitness. Again, the implementation of a fitness for work program is an important and effective means for ensuring compliance with this common law duty.[29]

[140,600.2] *An "acceptable level of risk"*

One aspect of medical fitness concerns an employee's mental capacity and physical ability to perform the tasks which the role requires. For example, if an employee's medical health is such that the employee is unable to perform certain tasks, this limitation will affect the employee's fitness for the role which the employee has been assigned. An unacceptable level of risk to that employee's health and safety would result if that employee were to continue in the role, despite the medical incapacity.

The question of what constitutes an "acceptable level of risk" in terms of a mine worker's medical fitness is dealt with in the case of *Johnson v Anglo Coal (Callide Management) Pty Ltd*.[30] In that case, the meaning of "acceptable level of risk" was limited to the Queensland coal mining context — in the Coal Mining Safety and Health Act 1999 (Qld) — which is to say:

> "Risk" is defined in s 18 of the Act to meant the risk of injury or illness to a person arising out of a hazard and it is specified that risk is measured in terms of consequences and likelihood.

[29] Australian Safety and Compensation Council, *Work-Related Alcohol and Drug Use: A Fit for Work Issue*, Department of Employment and Workplace Relations, March 2007, p 1.

[30] [2006] 1 Qd R 235; [2005] QSC 255; BC200506826.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **29** Date: **3/9/2012** Time: **18:24:39**
bwpageid:: 140151::
bwservice::0::

"Hazard" is defined in s 19 of the Act as a thing or a situation with potential to cause injury or illness to a person. The expression "acceptable level or risk" is defined in s 29 of the Act as follows:

> **What is an acceptable level of risk**
>
> **29(1)** For risk to a person from coal mining operations to be at an '**acceptable level**', the operations must be carried out so that the level of risk from the operation is—
>
> (a) within acceptable limits; and
>
> (b) as low as reasonably achievable,
>
> (2) To decide whether risk is within acceptable limits and as low as reasonably achievable regard must be had to—
>
> (a) the likelihood of injury or illness to a person arising out of the risk; and
>
> (b) the severity of the injury or illness.

Section 30 of the Act sets out what the Act requires to achieve an acceptable level of risk. Part 3 of the Act sets out the safety and health obligations of the various persons involved with a coal mine including the site senior executive. Section 5(1) of the Regulation expressly provides that Chapter 2 of the Regulation (other than ss 47(3) and 52(1)) prescribes ways of achieving an acceptable level of risk at a coal mine in the circumstances mentioned in Chapter 2.[31]

Furthermore, the court in *Johnson v Anglo* recited the decision of the Full Bench of the AIRC in *Hale Creek Coal Pty Ltd v Construction, Forestry, Mining & Energy Union*, Australian Industrial Relations Commission, Melbourne, 12 July 2004 PR 948938, where the Full Bench considered the role of the nominated medical adviser in stating that:

> the decision as to [the] worker's fitness for work is not . . . the NMA's to make. It is the decision of the [site senior executive]. A production worker with a number of restrictions, some of which go to the workers' core duties, could still attend the mine and perform, for example, word processing duties in the Administration Building and not constitute and unacceptable level of risk. Such decisions are the [site senior executive's] discretion.[32]

What can be taken from this case is that the decision about whether the level of risk to an employee is at an acceptable level of risk is a decision that must be made based on a number of factors, including:

- all of the knowledge of the tasks that the employee may be required to carry out;
- all of the medical information available, including any restrictions applying to the employee;
- the likelihood of injury to the employee; and
- the possible consequences for the employee, in terms of the severity of the possible injuries that employee might suffer at work.

[140,600.3] *Health assessments*

As mentioned, and as can be seen from the legislation, an employee may be subject to health assessments prior to the commencement of, and periodically during, their employment to assess, amongst other things, their medical fitness for work. The issue of health assessments has arisen in the case law and assists in understanding the application of the legislative requirements in this area.

While a mine worker may, under statute, be required to undergo a health assessment, this requirement can be limited in its reach. In the case of *Edwards v North Goonyella*

[31] *Johnson v Anglo Coal (Callide Management) Pty Ltd* [2006] 1 Qd R 235; [2005] QSC 255; BC200506826 at [37].

[32] Ibid at [33].

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **30** Date: **3/9/2012** Time: **18:24:39**
bwpageid:: 140152::
bwservice::0::

Coal Mines Pty Ltd,[33] the court held that a coalmine operator could not force its employees to submit to a medical examination unless it was part of a health assessment as provided for under the Coal Mining Safety and Health Regulation 2001 (Qld). In so finding, the court held that there was no statutory right allowing the employer to compel tests other than those provided for under the CMSHR, nor was any implied right to do so necessary for the operation of the employment contract as the regulation of the health and safety of coalminers was already adequately provided for in the statutory framework governing their employment.

In the Western Australian case of *John Edwin Rowe v Barminco Pty Ltd*[34] an employee was terminated from his employment as a shift boss following a medical assessment in which it was found that he failed to meet the necessary standard of physical fitness. The employee was said to have deficient eye sight, a somewhat defective knee, and abnormal lung function. The employee submitted that his dismissal was unfair and disputed that he was physically unfit for work. Before the Western Australian Industrial Relations Commission, there was conflict in the evidence between the testimony of the employee and the medical practitioners he consulted, particularly between a doctor who was a member of the clinic to which he was sent by the employer-respondent, and the employee's personal doctor.

The Senior Commissioner held that:

> Even if the Applicant had provided the Respondent with a more favourable medical assessment of his physical capabilities, the decided cases make it clear that in the final analysis it is for the Respondent to decide which of two contradictory medical opinions it wishes to act upon (see: *W.G. Jefferies v B P Tanker Co Ltd* [1974] IRLR 260). No one can sensibly question that, in the mining industry, particularly underground, high standards of safety are required and there is simply no scope for unnecessary risks. In those circumstances the Respondent could be forgiven for choosing to act upon the least favourable assessment of the Applicant's physical condition. The fact that the Applicant so far has worked without mishap is no reason to suggest that the Respondent should continue to run a risk of which it was unaware, until the medical examination of the Applicant.
>
> . . .
>
> Furthermore, in the face of the medical advice given to the Respondent, I am satisfied the Respondent's decision to terminate the Applicant's employment fell within the range of responses of a reasonable employer faced with the situation under review. Thus, I am not satisfied that the Applicant's dismissal was, in all the circumstances, unfair. Having regard to the fact, as is common ground, that as the shift boss it is the responsibility of the Applicant to manage an evacuation in the case of an emergency and to generally superintend the safety of the miners underground, the Respondent cannot, in my opinion, be said to have acted irrationally or unfairly in terminating his employment as an underground shift boss, whether it be at the Davyhurst mine or at the Plutonic mine. That is all the more so, having regard to the statutory obligation on mine owners and contractors to ensure that mining operations are safe. Indeed, having regard to the growing emphasis on safety in the workplace and having regard to the nature of underground mining and the potential for emergencies, I cannot think that it was unreasonable for the Respondent not to want to run the risk of having the Applicant work underground. The fact is that all medical evidence suggests that there was a risk in having the Applicant employed underground. In my view, it is a risk which the Respondent should not be forced to take against its will. Not only was he dismissed, as I find, for a good and sound reason, there was, as I find, no suitable alternative employment for him within the Respondent's enterprise.[35]

[33] [2005] QSC 242; BC200506422.

[34] [1997] WAIRComm 170.

[35] Ibid.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **31** Date: **3/9/2012** Time: **18:24:39**
bwpageid:: 140153::
bwservice::0::

Clearly, these cases demonstrate that the specific legislative regime relating to the carrying out of health assessments must be considered along with any allied industrial relations risks which may arise.

Whilst health assessments are prescribed and their reach defined in the Queensland, New South Wales and Western Australian mining legislation, those States and Territories without specific fitness for work provisions, must look to general legal principles to determine whether an employer can compel or require an employee to undertake a health assessment or medical examination.

Whether an employer can, at law, require an employee to attend and participate in a medical examination will depend upon whether the employer has a statutory or contractual right to do so. If a contractual right exists, an employer can generally rely on such an express term to direct an employee to attend a medical assessment, although the nature of any express contractual right should be properly understood. If there is no express term in the contract of employment, the courts can imply such a term into the employee's employment contract. There is a significant body of case law on this topic.

In the matter of *R v Darling Island Stevedoring and Lighterage Co Limited; ex parte Halliday*,[36] Dixon J stated:

> If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable.[37]

In the case of *Blackadder v Ramsey Butchering Services Pty Ltd*,[38] Madgwick J considered the circumstances in which such a term may be implied. In that case, his Honour held:

> It is, in my opinion, essential for compliance with [OH&S] duties, 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. . .
>
> The matters will generally require a sensitive approach including, as far as possible, respect for privacy. Nevertheless, I assume that there now should be implied by law into contracts of employment terms such as those set out in the first two sentences of the preceding paragraph.[39]

His Honour also held that whether it was reasonable for an employer to request an employee, who, in that case, had his reinstatement ordered by the Industrial Relations Commission, to attend a medical examination would always be a question of fact. Accordingly, such a term will only be implied in a particular case if it is a reasonable requirement in all the circumstances. This is essentially determined by reference to the legitimacy of the grounds upon which the employer has relied to form its view as to the worker's incapacity to perform the requirements of the worker's employment.

This case went on appeal to the High Court[40] but the question of whether there was such an implied term in a contract of employment was not confirmed. McHugh J's

[36] (1938) 60 CLR 601; 12 ALJR 172; BC3890103.

[37] *R v Darling Island Stevedoring and Lighterage Co Limited; ex parte Halliday* (1938) 60 CLR 601 at 621–622; 12 ALJR 172; BC3890103.

[38] (2002) 118 FCR 395; 113 IR 461; [2002] FCA 603; BC200202318.

[39] *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 118 FCR 395; 113 IR 461; [2002] FCA 603; BC200202318 at [63] and [69].

[40] *Blackadder v Ramsay Butchering Services Pty Ltd* (2005) 221 CLR 539; 215 ALR 87; [2005] HCA 22; BC200502369.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **32** Date: **3/9/2012** Time: **18:24:39**
bwpageid:: 140154::
bwservice::0::

reasoning was inconsistent with there being such a term necessarily implied in contracts of employment. His Honour held that an employer cannot evade the operation of a reinstatement order by making it subject to the employer's satisfaction concerning the fitness of the employee.

In the case of *Thompson v IGT (Australia) Pty Ltd*,[41] Goldberg J held that a direction that an employee attend a psychological assessment was made on reasonable terms and was "reasonably necessary" in the circumstances following a period of unexplained absences and excessive leave by an employee. On the facts, the court considered that it was "reasonable, and probably necessary" for the employer to give the direction in circumstances where there was a history of absences because of a medical condition, there were inconsistencies in the statements made by the employee as to the state of his health, and there were a number of unexplained absences.

Accordingly, the court found that the direction to attend was not made because of the employee's alleged disability, but to find an explanation for his absences, to comply with its health and safety obligations, and to find out the extent to which he was able to perform the inherent requirements of his work.

Furthermore, in the case of *Salat v NSW Police Force*[42] an employee was directed to attend a psychiatric assessment following concerns for her welfare and the welfare and safety of other employees. The employee failed to attend the medical appointment and was uncooperative on following occasions. The employee was subsequently dismissed and brought a claim against the employer for unfair dismissal.

The Industrial Relations Commission of New South Wales examined whether the employer's direction that the employee attend a medical assessment had been lawful and reasonable. Referring both to the Code of Conduct and Ethics and the Fitness to Continue Procedures of the New South Wales Police Force, the commission found that the employer did have the power to direct an employee to undergo a medical assessment. The direction had been given because of the supervisor's genuine concern for the employee's wellbeing. Ultimately, the commission found that, based on the medical reports, the employer did have grounds to terminate the employment: the termination was not harsh, unreasonable or unjust.

The issue of whether an employee can be required to undergo a health assessment has been the subject of argument before courts and commissions. Employers need to adopt a considered approach before deciding when to issue any such direction. There are a number of principles which can be taken from the case law to assist employers in considering whether it may be appropriate to direct an employee to attend a health assessment, including:

- understanding the statutory regime which applies, in particular, whether that regime places any restrictions on the employer issuing a directive to an employee to attend a health assessment;
- ensuring there is a reasonable basis to require an employee to undergo a health assessment, such as, a reasonable belief based on properly formulated evidence that the employee may not be fit to perform the requirement of the employee's role without exposing them or others to an unacceptable level of risk;
- ensuring the terms upon which the direction to an employee to attend a medical assessment are made are reasonable and that any enquiries only go so far as is necessary for the employer to understand whether there is any medical issue impacting upon the employee's fitness for work, and that information that is

[41] (2008) 173 IR 395; [2008] FCA 994; BC200805151.

[42] [2011] NSW IRComm 1040.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **33** Date: **3/9/2012** Time: **18:24:40**
bwpageid:: 140155::
bwservice::0::

obtained is kept confidential by the employer, such that only those persons who need to understand the information know about it.

Often, the right for an employer to attend a health assessment, and the obligation for an employee to follow such a directive, may be contained as an express term within the employee's contract of employment, an industrial instrument, or within agreed protocols contained within the safety and health management system for a mine. If such terms exist, it is important for employers to ensure they follow the requirements contained within those instruments.

[140,700] Privacy issues

Fitness for work programs and initiatives inevitably impact upon employees' privacy and participation by employees in work activities outside normal working hours. Drugs and alcohol, for example, may be consumed by an employee for recreational purposes outside work hours, but still have an impact on an employee's work performance during working hours. While it is clear that the established mining legislation and accompanying health and safety obligations require that an employee not carry out work at a mine if that employee is under the influence of alcohol or impaired by drugs, there is still the need for an employer to demonstrate that outside of work hours, the use of drugs or alcohol has a relevant connection to the employment in implementing and enforcing a particular fitness for work program.[43]

There have been cases where industrial tribunals have found that the termination of an employee's employment arising from the employee testing positive against drugs or alcohol limits was unfair because the taking of the substance had not occurred while the employee was at work.[44] In these circumstances, employers would need to demonstrate that out of hours use of drugs or alcohol has a relevant connection to the employment. Fitness for work policies need to make clear that what is prohibited is the presence of alcohol or drugs in an employee's system, regardless of whether or not the substance was consumed at work.[45]

For example, in the case of *Debono v TransAdelaide*,[46] a train driver was involved in a fatal incident which was not his fault. Nevertheless, he was subsequently dismissed after his urine sample tested positive for marijuana. He advised *TransAdelaide* that he had ingested some marijuana after finishing work. The commissioner reinstated the employee.[47] This was because, in part, although it might be appropriate to dismiss a train driver who took drugs or whose work performance was impaired by drugs, it was not commonsense to extend such a prohibition to what essentially went towards "lifestyle rather than conduct at work".[48] The commissioner was not satisfied that the terms of the employer's drug policy had been clearly communicated to, and understood by, the employee. In these circumstances, the commission found it was not valid to terminate employment as the employee was not aware that a positive marijuana reading would be deemed to reflect impairment.[49]

In the Western Australian case of *BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards Sawmills and Woodworkers Union of Australia Western Australian*

[43] Bilal Rauf and Brett Elgar, *Fitness for Duty in the Mining Industry — A Legal Perspective*, Queensland Resources Council, p 3.

[44] Ibid.

[45] Ibid.

[46] *Debono v TransAdelaide* (1999) 46 AILR 4-158.

[47] Ibid.

[48] Ibid.

[49] Ibid.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **34** Date: **3/9/2012** Time: **18:24:40**
bwpageid:: 140156::
bwservice::0::

Branch,[50] it was held that it was reasonable for a company to take steps to establish a testing scheme designed to detect and deter against the consumption of drugs in the workplace, regardless of privacy concerns. The commissioner held:

> It is trite to say that the Company has a duty to ensure, so far as is reasonably possible, that it maintains a safe working environment. . . . [W]e consider it reasonable for the Company to take steps to put in place a scheme designed to detect, so far as is possible, the level of consumption of drugs by employees and to implement procedures designed to deter the use of drugs in the workplace. Not only is the presence of drugs in the workplace prohibited by law, but credible evidence before the Commission suggests that the use of certain drugs has the potential to impact on safety in the workplace.
>
> . . . [T]he random nature of the testing process is likely to be an effective deterrent, more especially because the Programme appears to have the support of a significant majority of the workforce. As previously noted, many of the tasks of employees at the Company's worksites include performance demands which are safety sensitive and adversely affected by the intoxicating effects of the drugs. In those circumstances it seems to us to be reasonable to require that employees make themselves available for drug testing on demand rather than be required to exhibit some debilitating signs before being required to undergo such a test. It cannot be overlooked that the Company has an obligation to protect the privacy of its employees but it also has an obligation to protect the safety of all of its employees in the workplace so far as is reasonably foreseeable. Even The Privacy Committee of New South Wales, which considered drug testing in the workplace and which, as a general proposition, recommended against drug testing on the grounds of invasion of privacy, acknowledged 'that workplace safety is a concern of such importance that drug testing for safety reasons is justified in certain circumstances', albeit that it denounced the concept of random drug testing (The Privacy Committee of New South Wales (1994) "Drug Testing in the Workplace" 8.1; 8.2).[51]

It is clear that employers must protect the privacy of employees in undertaking drug and alcohol or other medical testing. Provided, however, that an appropriate privacy regime is implemented, testing regimes can be implemented to ensure that mine workers are fit to perform their role and that fitness for work issues do not create an unacceptable level of risk to the health and safety of mine workers and others.

[50] *BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards Sawmills and Woodworkers Union of Australia Western Australian Branch* [1998] WAIRComm 130.

[51] Ibid.

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **35** Date: **3/9/2012** Time: **18:24:40**
bwpageid:: 140157::
bwservice::0::

[The next page is 160,001]

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **36** Date: **3/9/2012** Time: **18:24:40**
bwpageid:: 140158::
bwservice::0::

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **37** Date: **3/9/2012** Time: **18:24:40**
bwpageid:: 160001::
bwservice::0::

Job: specialist/msl/allvols/serv_0/fitness_293997
Page: **38** Date: **3/9/2012** Time: **18:24:41**
bwpageid:: 160002::
bwservice::0::