QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*McPherson v Workers' Compensation Regulator* [2018] QIRC 010
PARTIES:	**McPherson, Stuart** (Appellant) **v** **Workers' Compensation Regulator** (Respondent) WC/2016/133
PROCEEDING:	Appeal against a decision of the Workers' Compensation Regulator
DELIVERED ON:	1 February 2018
HEARING DATES:	9, 10, and 11 October 2017
HEARD AT:	Mackay
MEMBER:	Industrial Commissioner Black
ORDERS:	**1. The appeal is allowed.** **2. The decision of the regulator dated 6 July 2016 is set aside.** **3. Costs are reserved.**
CATCHWORDS:	APPEAL AGAINST DECISION – Psychiatric or psychological injury – employment relationship conceded – whether supervisor complied with important safety procedure – whether supervisor's related instruction to a subordinate was reasonable – whether subordinate was made complicit in non-compliance.
CASES:	*Workers' Compensation and Rehabilitation Act 2003* s 32, s 550 *Coal Mining Safety and Health Act 1999*, s 62 *Coal Mining Safety and Health Regulation 2017*, s 78
APPEARANCES:	Mr P T Cullinane, Counsel, instructed by Taylors Solicitors, for the Appellant. Mr S P Gray, Counsel, directly instructed, for the Workers' Compensation Regulator.

Decision

Introduction

[1] At the time of his injury the appellant had been employed by BHP Billiton Mitsubishi Alliance (BHP) at the Peak Downs Mine in the capacity of diesel fitter. His injury was sustained on 22 August 2015. The appellant did not resume work at the mine until approximately 14 months after the date of injury. As at the date of the proceedings, the appellant remained employed by BHP and he had, in total, been employed at the Peak Downs mine for about 21 years.

[2] The appellant lodged an application for compensation with the self-insurer on 10 September 2015. In his application he identified an over time injury covering a period from August 2015 to 10 September 2015. He said that he reported the injury to his employer on 24 August 2015. His description of the cause of injury was expressed in the following terms: "Continued harassment and bullying from supervisor that led to a break down and panic attack and unable to attend work."

[3] In the application, the appellant described the injury as "anxiety/depression" and said that his condition was being treated by Gryphon Psychology and by Dr Robyn Ferguson. Dr Ferguson issued a workers compensation medical certificate on 10 September 2015 in which she diagnosed the injury as "adjustment disorder - generalised anxiety" and referred the appellant to Gryphon Psychology for counselling.

Matters in Contention

[4] The respondent conceded that the appellant was a worker within the meaning of the *Workers' Compensation and Rehabilitation Act 2003* (the Act), that he had suffered a personal injury in the form of a psychological or psychiatric disorder, and that his employment was the major significant contributing factor to development of his disorder.

[5] While the respondent conceded that the requisite association between the disorder and employment had been established, it did not accept that management action relevant to the development of the disorder constituted unreasonable management action. The effect of the respondent's position was that while the relevant management action may have fallen short of perfection and may have been blemished, it was not, on a consideration of all the relevant facts and circumstances, unreasonable.

[6] In terms of the evaluation of management action, the parties agreed that consideration should be confined to events occurring on 22 August 2015.

The Legislation

[7] The relevant parts of the legislation are set out below:

> "**32 Meaning of *injury***
>
> (1) An ***injury*** is personal injury arising out of, or in the course of, employment if—

(a) for an injury other than a psychiatric or psychological disorder—the employment is a significant contributing factor to the injury; or
(b) for a psychiatric or psychological disorder—the employment is the major significant contributing factor to the injury.

…

(5) Despite subsections (1) and (3), ***injury*** does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—
(a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
(b) the worker's expectation or perception of reasonable management action being taken against the worker;
(c) action by the Regulator or an insurer in connection with the worker's application for compensation."

Evidence

[8] Evidence in the proceedings was given by the appellant and the following persons, all of whom were employed by the mine operator at the Peak Downs Mine on or about 22 August 2015:

- Arthur Marsh had been employed at the mine since 2006 in the capacity of heavy equipment diesel fitter. He was assigned to field duties at and around 22 August 2015. Both Mr Marsh and the appellant were assigned to work in the workshop on Dozer 401 at the start of their shift on 22 August 2015;

- Justin Hansen had been employed at the mine for ten years as a heavy equipment diesel fitter. Justin Hansen was a fitter assigned to work on a machine in the workshop on 22 August 2015;

- Shaun Hansen had been employed at the mine since 2012. He was first employed in the capacity of mine planning manager and subsequently took the role of maintenance manager in October 2015;

- Peter Barron had been employed at the mine for about seven and a half years. He commenced supervising the appellant in 2014 and continued to supervise him until some time in 2016;

- Kerry Ward had been employed at the mine in the capacity of Mobile Maintenance Superintendent. He worked at the mine for three years. He was one of Mr Barron's supervisors.

Chronology

[9] The appeal turns on an evaluation of management action associated with events at work involving the appellant which occurred between 7:00 am and 12:15 pm on 22 August 2015. The appellant said that work for the day commenced around 6:30 am and was scheduled to finish at 6:45 pm. A pre-start briefing was held at the start of each shift and

this would normally finish around 7:00 am. Following the briefing, the practice was for workers to collect tools and materials required for the assigned job and to prepare for the commencement of work, which usually occurred around 7:15 am.

[10] The appellant said that soon after being assigned to work on Dozer 401, he told Mr Barron that the ripper tyne had to be removed from the dozer, an activity which had to be completed outside the workshop and required the dozer to be moved into the field. The appellant asked Mr Barron to assign an operator to this task, however when the operator arrived and could not start the machine, the appellant discovered that Mr Marsh had not removed his isolation lock. This prompted him to attend again on Mr Barron and ask him to contact Mr Marsh on the two way radio.

[11] Mr Barron's evidence was that the pre-start meeting commenced at 6:40 am and usually finished at 7:00 am. He said that it could take fitters up to half an hour to collect the required tools and get to their assigned machine. Mr Barron said that after the pre-start meeting he directed the appellant and Mr Marsh to work on Dozer 401. However shortly thereafter, following a request from the field, he reassigned Mr Marsh to field duties.

[12] A medical centre record in the evidence as Exhibit 1, discloses that the appellant presented at the centre at 8:15 am on 22 August 2015 and was discharged at 9:00 am with an outcome "returned to routine duties" recorded. The appellant reported that he had been feeling generally unwell with nausea and dizziness.

[13] A further record in the evidence as Exhibit 2 disclosed that the appellant again attended at the centre at 11:45 am before being discharged at 12:15 pm with an outcome "returned to residence" recorded. The appellant reported that his earlier condition had worsened and reported symptoms of malaise, nausea, headache, fever, pale palor and muscle ache. The appellant did not resume work that day.

[14] Mr Marsh said that after the pre-start briefing he acquired his tools from the tool locker area and attended at Dozer 401 where he completed a hand over from the night shift. Shortly after that Mr Barron told him that he was being re-assigned to field work. On the evidence, Mr Marsh would have left the workshop to work in the field somewhere around 7:30 am. Mr Marsh's recollection was that he had returned to the workshop from his first field assignment by 8:15 am.

[15] The effect of Mr Barron's evidence was that the appellant raised the isolation lock issue with him before he had presented at the ambulance station. While he initially said that approach had occurred around 8:30 am, he subsequently acknowledged that:

> "it could even have been a little bit beforehand because I know it wasn't long into the shift when I got a call for the breakdown out in the field, so I asked Arthur to come out and then it was a little while after that when Stuart come in and asked me – well, he explained to me that Marshy had left his lock on".

His recollection was that he gave the instruction to remove the isolation lock before the appellant left the workshop to visit the paramedic.

[16] I am satisfied on the evidence that the appellant would have requested Mr Barron to arrange for an operator to move Dozer 401 into the field sometime around 7:30 am.

Depending on which version of the evidence is preferred the operator would have taken between 5 minutes and 20 minutes to arrive. The operator is then required to complete a pre-start routine before starting the machine. Hence it is likely that Mr Marsh's lock would have been discovered around 7:50 am. The appellant would have approached Mr Barron about the need to recall Mr Marsh to the workshop soon after 7:50 am. Following this exchange with Mr Barron, the appellant returned to Dozer 13 and removed Mr Marsh's lock around 8:00 am, before leaving the workshop and attending on the paramedic at 8:15 am.

[17] In terms of the appellant's first attendance on the medical centre, it was Mr Barron's evidence that when he noticed that the appellant was not on the workshop floor, he was told by one of the fitters that the appellant had gone to the ambulance station. Given that the normal course was for the injured worked to attend the ambulance accompanied by his supervisor, Mr Barron proceeded to the ambulance station. After waiting at the station for about 30 minutes, Mr Barron returned to his office when shortly thereafter he received a call from the paramedic who told him the appellant was not well.

[18] When the appellant returned to the workshop, Mr Barron said that he enquired about his welfare and told him that he must be accompanied by a supervisor in the event that a visit to the ambulance station is necessary. The effect of the appellant's response was to deny any knowledge of such a procedure.

[19] On Mr Barron's account, the appellant then returned to work on Dozer 401, but sometime later, around lunchtime the appellant approached him and told him that he was not well and that he was going home. Mr Barron asked that he obtain a doctor's certificate.

Central Issue

[20] The management action in question related to an exchange that took place between Mr Barron and the appellant shortly before 8:00 am on 22 August 2015. The appellant had approached Mr Barron and had informed him that an isolation lock had been placed on Dozer 401; that the lock belonged to Mr Marsh; and that Mr Marsh needed to be recalled to the workshop to effect removal of his lock.

[21] In response to the appellant's approach, Mr Barron instructed the appellant to remove Mr Marsh's isolation lock in circumstances where at that point in time Mr Barron had not tried to contact Mr Marsh; where both Mr Barron and the appellant knew that such an instruction did not comply, or fully comply, with safety procedures; where both were very familiar with the procedures; and where, in a hierarchy of safety rules, it was known that the particular procedure was considered a "life saving" rule.

The Isolation Lock Rule

[22] The employer's standard operating procedure dealing with isolation and tagging is in the evidence as Exhibit 6. The procedures relevant to a forced removal of a personal isolation lock are set out below:

> "1. Where a worker has failed to remove their Personal Isolation Lock and Tag and the equipment is to be returned to service:

(a) All reasonable efforts are to be made to contact the owner of the Personal Isolation Lock and Tag;
(b) Where possible the worker is to return to the worksite and remove their Personal Isolation Lock and Tag

2. Where contact with the worker has been unsuccessful, or the worker is unable to return to work, the following must apply:

(a) The Supervisor and a person competent in isolation of the equipment must establish beyond all doubt that the person is no longer on site and is unable to return to site;

(b) The Supervisor is to inform the Superintendent (or higher) or their delegate of the need to conduct a forced removal of a Personal Isolation Lock and Tag;

(c) The superintendent may authorise the Supervisor and the competent person to remove the lock and tag once they are satisfied that all reasonable efforts have been made to establish contact with the owner of the lock and tag;

(d) An incident report must be raised and the worker whose lock was forcibly removed contacted prior to beginning work on their next rostered shift.

Note:

An incident report must be raised in any instance where a Personal Isolation Lock is removed by anyone other than the owner of the lock except when removed during an Emergency as detailed in the site Emergency Response Plans."

[23] The importance of the isolation lock rule was emphasised throughout the evidence. The rule was categorised as a "life saving" rule and it was acknowledged that strict compliance with the rule could save lives. Alternatively, the consequences of non-compliance could be very serious and could result in a workplace fatality. The appellant explained the purpose of the isolation lock rule in the following terms (T1-5):

> "… Well, an isolation lock is what we use to isolate the machines for the safety of everyone involved that's working on that machine. So anyone that's working on that machine has to fill out a danger tag, put their lock on the machine so there's no way the machine can be started or moved while somebody's working on that machine."

[24] While the evidence surfaced some incidence of non-compliance with particular parts of the isolation lock procedure, in general terms the evidence established that the safety rule was well known and well understood by all. While the procedure itself does not specifically mandate a walk-around of the machine by the supervisor and fitter prior to removal of the lock, there was no dispute in the evidence that this activity formed an integral part of the application of the procedure.

[25] Mr Ward said that the process for a forced lock removal required that the supervisor must conduct a walk-around of the machine and satisfy himself that there is no one working in or on the machine before removing the isolation lock. These functions, he said, could not be delegated. Mr Ward said that other procedures also needed to be followed including documenting the incident and notifying the mine superintendent or the maintenance manager.

[26] The fundamental requirements were that all reasonable efforts must be made to contact the owner of the lock and to arrange for the owner to return to the relevant location and to remove his or her lock. If the owner of the lock were unable to return and effect removal, a forced removal of the lock could be undertaken provided that a supervisor was present during the removal and had before the removal completed a stringent inspection of the equipment or machinery to ensure that the owner of the lock was not in the vicinity of the equipment or machinery. Mr Barron expressed his understanding of the procedure in the following terms (T2-33):

> "- - - what did you understand the process was?---The process was that I was to fill out the form, try and – well, firstly, try and contact the person, which I – I did, and fill out the lock removal form, and to go out and do a walk-around with the fitter to ensure that nobody's on the machine."

[27] Further, in his evidence, Mr Barron made the following concession in terms of the application of the procedures (T2-41):

- That the policies and procedures in relation to isolation locks were regarded as "life-saving rules" or as a "golden rule";
- That there were limited circumstances in which an isolation lock can be removed by someone other than the person who placed the lock;
- That he failed to follow standard operating procedures relating to the removal of isolation locks (22 August 2015 incident);
- That he was familiar with the standard operating procedures on and before 22 August 2015;
- That he knew that the procedure required that he get authorisation from his superintendent before effecting the forced removal of the isolation lock;
- That he did not complete a walk-around of Dozer 401 prior to giving permission for the removal of the lock.

Removal of Isolation Lock on 22 August 2015

[28] The effect of the appellant's evidence was that Dozer 401 had to be moved out of the workshop and into the field to facilitate the removal of the ripper tyne, an activity that was a precondition to the removal of the transmission. This requirement caused the appellant to ask Mr Barron to despatch an operator to the workshop to move the machine out into the field. It was only after the operator arrived and could not start the machine that the appellant discovered that Mr Marsh's isolation lock had not been removed. This development necessitated a second approach to Mr Barron.

[29] Relying on his understanding that Mr Marsh was on field duties, the appellant proceeded to the supervisor's officer for the purpose of making contact with Mr Marsh on the two-way radio. His intention was to ask Mr Marsh to return to the workshop and remove the

isolation lock. However, when he arrived at the supervisor's office and explained his circumstances, Mr Barron's response was not to try to contact Mr Marsh but to tell the appellant to "just take it off. I'll do the paperwork later". The appellant's evidence about the central issue is set out below (T1-17):

> "What did you observe?---Yeah, I went to the starter isolator to check that it was turned on and realised there was a – a lock and tag on that isolator.
>
> So what did you do?---I immediately went into the supervisor's office. Because I'd seen Marshy the lock owner – because all our locks have got our name written on them I saw it was Marshy's lock. I knew I'd seen him in the shop not long before that and I thought I'll go and grab him on the two-way and tell him to quickly come back and take his lock off.
>
> Sure. Now, you – you're saying that you wanted to use a two-way. You didn't have a two-way with you?---No.
>
> Do I understand that the two-way was – would have been in the supervisor's office?---Yeah, there's two two-ways mounted on the wall in the supervisor's office.
>
> Okay. So you've gone to the supervisor's office; what did you do?---I just walked in, headed towards where the two-ways were on the wall, and while I was heading in that direction I said to Peter, "What ute's Marshy in?" because my intention was to get the call sign of the ute that Marshy was in and give him a call and get him to come back. Before I could get to the two-ways and do that, Barron started hitting me with questions about, "Why do I want to know where Marshy is? What's going on with your dozer?" all that sort of stuff. So –
>
> And what was your response?---I said, "Marshy's left his lock on it", and he said to me, "Just take it off. I'll do the paperwork later."
>
> What was your response to that?---Well, I – I was a bit unsure. I've never had a supervisor tell me to break the rules like that before which – isolation lock removal is a big thing. And it's been drummed into us for years you do not remove someone else's lock. You follow the process. The supervisor has to be involved. You have to do the paperwork and all that sort of stuff. So I wasn't sure what to do but I knew if didn't do what he wanted that would cause problems for me down the track as well as in he would be harder on me because I'm not doing exactly what he wants me to do."

[30] Notwithstanding his reluctance, the appellant returned to Dozer 401 and proceeded to remove the isolation lock. In cross-examination, the appellant said that as far as he knew it no one was in the vicinity of the dozer at the time that he commenced to remove the lock. He also accepted that he thought it was safe for the lock to be removed. While this task was completed, the operator remained at the side of the machine. When the lock was removed the operator powered up the machine and moved it out of the workshop. It was not in dispute that Mr Barron was not present at any stage of this process and that he had remained in his office.

[31] It was Mr Barron's evidence that the appellant came to his office and told him that Mr Marsh had not removed his isolation lock. He said that he responded by telling the appellant that he would try to contact Mr Marsh and that the appellant should "have a look over the machine and remove the lock". He said that he told the appellant that he would "fill out the lock removal form". Mr Barron said that he did try to make radio contact with Mr Marsh, but without success. He also said that he completed the lock removal form. He accepted however that he did not seek the prior approval of the superintendent and that he did not go out into the workshop and complete a walk-around of Dozer 401.

[32] Mr Barron also accepted (T2-41) that he could have waited for Mr Marsh to return from site before instructing that the lock be removed. He also conceded that he may have told the appellant to remove the lock before he attempted to contact Mr Marsh. In these circumstances the appellant would not have known when he returned to Dozer 401 whether contact had been made with Mr Marsh or not. Mr Barron attributed his failure to comply with the procedure to the pressure of work (T2-33):

> "Okay. And why didn't you do the walk-around with Mr McPherson?---Oh, I just – lapse moment due to workload, I suppose, but I don't really know why because I'd – I'd never not done the walk-around, so I just must have had a lapse moment, I suppose."

[33] There were some significant difference in the evidence of Mr Barron on the one hand and the witnesses for the appellant on the other hand. Mr Barron disputed the appellant's evidence about why it was necessary to recall Mr Marsh for the purpose of removing his isolation lock. It was Mr Barron's evidence that while he recalled that the appellant had asked him to get an operator to take a dozer into the field, he believed that this event occurred some weeks earlier. He did not believe that the event involved Dozer 401, nor did it occur on 22 August 2015.

[34] Mr Barron disagreed with the appellant's version of events that Dozer 401 was not immobilised and that its transmission had not been removed. He also maintained that the Dozer was parked in Bay 2 of the workshop which was adjacent to his office, and not Bay 13 as claimed by the appellant's witnesses.

Related Issues

[35] The determination to be made about management action requires consideration of a number of matters which are, to some extent or other, related to the central issue:

(i) Enforcement and compliance;
(ii) Location of Dozer 401;
(iii) State of Dozer 401;
(iv) Radio contact with Mr Marsh;
(v) Relationship between Mr Barron and the appellant.

Enforcement and Compliance

[36] A matter in contention in the proceedings related to the extent to which the isolation lock procedures were enforced and complied with. While the appellant emphasised the

seriousness of any deviation from the rules, the respondent drew attention to the practical application of the procedures and to illustrations of non-compliance, and suggested that the extent to which Mr Barron deviated from procedure should not be regarded as either serious or consequential.

[37] An illustration of something other than a strict enforcement of the isolation lock policy was canvassed during the cross-examination of Mr Marsh (T1-50) when he was asked to explain why he did not remove his lock from Dozer 401 at the end of his shift on 21 August 2015.

[38] Mr Ward's evidence was to the effect that if the diesel fitter working on the machine had occasion to leave the machine, the procedure was that the isolation lock should be removed on each occasion that the fitter departed. At the end of a shift, a fitter working on the machine who has placed his isolation lock on the machine, should remove the lock.

[39] Mr Barron said that if the person who places the lock on the machine leaves the machine for a period of time, he should remove the lock. The person should also remove the lock at the end of each shift. It was not permissible to leave a lock on a machine over several shifts.

[40] The effect of Mr Marsh's evidence was that he first placed the isolation lock on Dozer 401 some time during the previous day and that while he should have removed the lock at the end of his shift, the nature of the work performed on the Dozer during the night shift did not necessitate the removal of the lock (T1-51):

> "The question is whether the night shift should've taken your lock off, whether because of the nature of the work they were undertaking in the course of procedure?---It's not – if I leave – if you leave your personal isolation lock on a machine, there's no requirement for anyone to take it off unless they actually have to start the machine or energise the machine. If it doesn't need to be energised or started, there's no reason for them to take my lock off.
>
> So the work that you – they did overnight, based on the handover - - -?---Yeah.
>
> - - - is that consistent with what you just said?---Yeah. They didn't require to take – didn't have to take my lock off."

[41] Justin Hansen's evidence was that it was not uncommon to leave the lock on a machine over a number shifts when the machine is disabled and is not required to be started or moved (T1-60):

> "It's not only if you start the machine, it's – the idea is that your lock is only there whilst you're – your lock is only on the machine whilst you're on the work site. That's correct?---Yeah. But there's been many a time where you can leave a lock on a machine over a period of time if – if just say the machine was being worked on for an extended period, there's been times where people leave their locks on for a shift or two. That's not really that uncommon."

[42] Justin Hansen made it clear that when dozers are brought into the workshop for repair and maintenance, for the majority of time that the machine was in the workshop the machine was disabled and that all the work to be done was done with fitters' locks on the machine (T1-62):

> "Well, look, the question is, if these locks are on the machine, can some work still be performed on the machine without removing the locks?---Well, all you – all your work is performed on the machines while your lock is on the machine. So, I don't – I don't really understand the question.
>
> Well, I thought the lock was to prevent it – the machine being started, for example?---Yes. That's right.
>
> So - - -?---But we – you don't – you don't work on a machine when you're starting it. It's not always involving the starting machine. Nine times out of 10 the machine is disabled, so yeah.
>
> So in the majority of cases the work that you would perform in the workshop on the machine would be when the locks are on anyway?---For sure. Yes.
>
> You don't need to remove the locks?---No. Nine – yeah, 99 per cent of the time you'll have a lock on that machine and - - - "

[43] In essence, Mr Hansen said that when work was being performed on a machine in the workshop, on the great majority of occasions, there is no need to remove the safety lock because the machine is disabled and starting the machine was not possible.

[44] Despite the divergence in the evidence, very little turns on the issue. A safety implication is not associated with a left lock because for so long as the lock is installed, the machine cannot be started or energised. The forced removal of the lock on 22 August 2015 was significant because, given that the whereabouts of Mr Marsh were unknown, starting or energising the machine could have dire consequences for Mr Marsh's safety if he was working in the machine when it was started or moved.

[45] While it may have been implicit in the respondent's case that any deviation by Mr Barron from procedure should not be considered a serious omission, the evidence about historical practice did not suggest that deviations were common. The appellant's evidence was that across the 19 years of his employment he had never removed an isolation lock, nor had he been directed to remove an isolation lock. He was aware of two instances where it had occurred and in each of those cases both the fitter and the supervisor were involved in the removal of the lock.

[46] Mr Marsh's evidence was (T1-46) that across the 12 years of his employment he had only removed someone else's isolation lock on one occasion, and the removal was undertaken under the guidance of a supervisor. For his part, Justin Hansen said that during the course of his ten years of employment he had removed someone else's lock on two occasions following the appropriate processes.

Dozer 401

[47] Two issues were in dispute. Firstly, whether the dozer's transmission had been removed when the appellant commenced work on the machine at or about 7:30 am on 22 August 2015, and secondly, whether the dozer was parked in Bay 2 or Bay 13.

[48] It was the appellant's evidence that at the start of his shift on 22 August 2015, Dozer 401 was located in Bay 13. Bay 13 was located about 40 metres from the supervisor's office. Both Mr Justin Hansen and Mr Marsh agreed that the dozer was located in Bay 13. However in his evidence Mr Barron insisted that Dozer 401 was located in Bay 2, which was situated about two metres from his office window.

[49] If Dozer 401 had been located in Bay 2, just outside Mr Barron's office window and in his line of sight, it mitigated in favour of Mr Barron's position that Mr Marsh was never at risk when he directed the appellant to remove the isolation lock. The close proximity of the machine meant that his recollections about the state of the machine and Mr Marsh's whereabouts were more likely to be correct. Further it may have been a factor suggesting that a walk-around was not necessary.

[50] Whether Dozer 401 was totally disabled with the transmission out, or whether it was in a functioning state, capable of being energised, started or moved, was also relevant to a consideration of the consequences of the breach of procedure, and whether Mr Marsh's safety had been compromised.

[51] The appellant said that shortly after 7:00 am he was talking to Justin Hansen in the workshop when Peter Barron approached and informed him that he was assigned to work on Dozer 401 (T1-11):

> "… he said the transmission had to be changed out. It was unserviceable. So I said to him, 'Okay, we're going to need to remove the ripper tyne out of the dozer', and – because to remove the transmission you have to remove the ripper tyne to get the ripper frame down low enough to physically be able to remove the transmission from the back of the machine."

[52] The effect of the appellant's evidence was that work on the dozer had yet to commence and no parts or items of equipment had been removed. In particular, the transmission had not been removed. Both Mr Justin Hansen and Mr Marsh also stated that the transmission had not been removed.

[53] It was Mr Marsh's evidence that on 22 August 2015 he was initially assigned to perform some work on Diesel 401 associated with a transmission fault but while he completed a handover with the night shift working on the machine, he did not commence work on Diesel 401 because he was called out to perform field maintenance. He said that at the time that he was at the machine, it was located in Bay 13 and that the transmission had not been removed from the machine (T1-43):

> "… On doing a changeover with the night shift fitters, they advised me that the transmission in the dozer was buggered and the decision was made that, we're going to pull the transmission out of the dozer. I went in to see the supervisor, Peter Barron, to ask him, 'What's the plan? Are we doing it there or are we going

to move it into another bay?', and that's – at that stage he said, 'Don't worry about that. I need you to go out and look at some other – other work out in the field.'"

[54] Mr Barron's evidence was different. He said that the work to be performed on Dozer 401 was included in the shift handover between him and the night supervisor and that it was his recollection that the transmission was out of the machine as at 7:00 am on the morning of 22 August 2015. He said that he could clearly see from his office window that the ripper tyne was off and that the bevel gear and the transmission had been removed.

[55] He thought that the transmission had been removed during the night shift preceding the day shift on 22 August 2015. This recollection however was not consistent with what he had said in a statement he had prepared in 2015 in relation to the internal investigation. In the statement he had said that "the machine was right outside my office window and had been sitting there for four shifts with the transmission out of it" (T2-50).

[56] The work logs relevant to Dozer 401 (Exhibit 4) contradicted Mr Barron's account. The logs included entries to the following effect:

(i) an entry dated 20 August 2015 noting that following complaints by operators about problems with gear changes, the machine would need to be brought back to the workshop for repair;
(ii) an entry dated 21 August 2015 noting that testing of the transmission had been conducted;
(iii) an entry at 07:31:29 on 22 August 2015 stating that "Stuart, Zane, Ethan began removing transmission";
(iv) an entry at 09:33:06 on 22 August 2015 stating that "work orders raised to change out transmission, cooler, pump and hoses".

[57] The work logs record work being performed on the machine on 23, 24 and 26 August 2015. On 27 August 2015, an entry is made to the effect that the transmission and bevel gears had been installed.

[58] Mr Barron's evidence about the log entries was confusing. In the first instance he suggested that the entry made by Mr Glen Sutherland at 9:33 am on 22 August 2015 could not have been correct because Mr Sutherland was on night shift at the time. He also stated that times shown in the log were not Australian Eastern Standard times but were Greenwich Mean times, meaning that ten hours would need to be added to the times to obtain the actual time at the Peak Downs Mine.

[59] The difficulty with Mr Barron's explanations are that:

(i) If the entry about when work was commenced to remove the transmission should be read to mean 5:31 pm in lieu of 7:31 am, the appellant was not at work at that time; and
(ii) A proposition that work to remove the transmission commenced at 5:31 pm on 22 August 2015 was not consistent with Mr Barron's own evidence that Dozer 401's transmission had been removed during the night shift commencing on 21 August 2015.

[60] The evidence is more consistent with the appellant's version that, at the commencement of work on 22 August 2015, Dozer 401 had not been disabled with the transmission removed, and that work on the transmission did not commence on 22 August 2015 until after the dozer had been taken into the field and the ripper tyne removed. If the machine had been disabled, and the transmission removed, it would not have been necessary to remove the isolation lock and to take the machine into the field.

[61] Mr Barron countered this reasoning by casting doubt on the appellant's evidence that an operator was requested to move Dozer 401 on 22 August 2015. Mr Barron's recollection was that this event occurred some weeks earlier. The difficulty with this explanation is that it leaves unanswered the question of why, if the transmission was out and the machine disabled, it was necessary to remove Mr Marsh's isolation lock. In this regard I note Mr Justin Hansen's evidence that commonly machines in the workshop are in a dissembled state for most of the time, and that most of the work is performed with locks on.

Radio contact with Mr Marsh

[62] The appellant doubted whether Barron tried to contact Mr Marsh on the radio. Mr Marsh said that at the relevant time no one had tried to make contact with him. Nothing may turn on the issue, particularly in circumstances where Mr Barron agreed that he had not attempted to contact Mr Marsh prior to instructing the appellant to remove the lock. In the circumstances, when the appellant left Mr Barron's office, he did not know if an attempt had been made to contact Mr Marsh. In the appellant's mind the exact whereabouts of Mr Marsh would have been unknown. This may therefore have been a factor upon which he exercised his mind when he returned to the machine and removed the lock.

[63] Under the isolation lock rule Mr Barron was required to make contact with Mr Marsh prior to any consideration of a forced removal of Mr Marsh's lock from Dozer 401. Mr Marsh's understanding of the rule (T1-45) was that "if you're on-site, they're supposed to contact you to come and remove your lock. If they suspect you're off site, they check the TAMS gate through security, to see if you've left site".

[64] It was Mr Barron's evidence that he did try to contact Mr Marsh while Mr Marsh was out in the field. He said that he attempted to contact Mr Marsh on the radio on two or three occasions. He said that each attempt was made straight after the other (not separated by significant intervals of time), and that when these attempts failed he made no further attempt to contact Mr Marsh. Mr Barron said that he told the appellant to remove the isolation lock before he tried to contact Mr Marsh.

[65] Mr Marsh said he used a work vehicle to travel from the workshop to the field and that the vehicle was fitted with a two-way radio. He said that he also had with him a hand-held two way radio (T1-44). The two-way and hand-held devices were tuned to different transmissions to facilitate more effective coverage across the site.

[66] Mr Marsh estimated that he would have been out in the field for about an hour before returning to the workshop. Despite the relatively short period on site and despite the dual communication facility, Mr Marsh said that he did not receive any calls from Mr Barron on either the vehicle fitted two-way or the hand-held two way radio. While both

Mr Marsh and Mr Ward were of the understanding that radio transmissions at the mine were recorded or logged, no documentary evidence of transmission initiated by Mr Barron was tendered during the proceedings.

[67] The respondent suggested that the failure of Mr Barron to make contact with Mr Marsh was attributable to either "dead spots" in the communications network or excessive environmental noise. Mr Ward accepted that various reasons might explain why a radio call was not received by a diesel fitter in the field. While Mr Marsh conceded that there were circumstances where transmission could be interrupted or impaired, he did not believe that noise levels on the day would have been a factor (T1-52).

[68] Mr Marsh said that when he returned to the workshop he reported to Mr Barron and was assigned a number of other field jobs. Mr Barron did not inform him that it had been necessary to remove his isolation lock from Dozer 401 (T1-45).

Relationship between Mr Barron and the appellant

[69] The appellant complained in effect that Mr Barron exercised an overbearing and intimidatory supervisory style. The evidence around the issue was limited and is considered in a context where it would not be uncommon for relationships between supervisors and subordinates to feature some tension and abrasive exchanges.

[70] The appellant's position was that his less than harmonious relationship with Mr Barron was relevant to the central issue in the appeal in that it meant that the appellant was reluctant to challenge Mr Barron's direction to remove the isolation lock in circumstances where such a course of action was open to him under safety legislation. In this regard, the appellant claimed that had he elected to defy Mr Barron's instruction "that would cause problems for me down the track as well as in he would be harder on me because I'm not doing exactly what he wants me to do".

[71] Mr Marsh's evidence pointed to a capacity on Mr Barron's part to use direct, aggressive, and perhaps foul language in his interactions with subordinates. However this use of such language in my view does not necessarily amount to abuse or intimidation. While Mr Marsh also testified to the effect that he had heard Mr Barron speaking in an aggressive and offensive manner toward the appellant, the weight of the evidence does not support a finding that Mr Barron's supervisory style was harsh or aggressive.

[72] In the first instance, Mr Barron denied that he spoke in the manner alleged. Secondly, the effect of Mr Justin Hansen's evidence was that he had not heard Mr Barron treat the appellant in an aggressive or abusive manner. Thirdly, while Mr Ward described Mr Barron's supervisory style as loud and over-bearing, he said it was not aggressive. Fourthly, the appellant conceded during cross-examination that there were circumstances in which Mr Barron was justified in directing him to resume his assigned or productive work. Finally, Mr Ward accepted that during performance appraisals, he had not levelled any criticisms about Mr Barron's interpersonal style.

The Investigation

[73] While Mr Ward was not at work on 22 August 2015, he was notified of a breach, or potential breach, of isolation lock procedures by the acting superintendent on duty.

Having been notified of the incident, Mr Ward was obliged to investigate the matter and to inform his superior officer, Mr Shaun Hansen, of the matter. Mr Shaun Hansen's evidence was that his role was to oversee the investigation being conducted by Mr Ward and to make sure that the investigation determined whether a breach of procedure had occurred.

[74] Mr Ward said that he spoke to the appellant via telephone a day or so after the incident on 22 August 2015. He said that the appellant was "quite upset" during the discussion. Mr Ward said that the appellant told him that he was not getting on with Mr Barron and that it was his interactions with Mr Barron that were causing him stress. The isolation lock issue did not feature in the discussions between the appellant and Mr Ward until the following day on 25 August 2015.

[75] Mr Barron was on duty on 24, 25, and 26 August 2015 before taking rostered leave from 27 August 2015 to 31 August 2015 and attending a training program on 1 September 2015. Mr Ward did not discuss the issue with him until 2 September 2015 when Mr Barron resumed normal duties. However as soon as the investigation was commenced Mr Barron was stood down with pay. In the end result, his period of suspension lasted for seven weeks. Notwithstanding the investigation, Mr Ward accepted that Mr Barron took safety seriously and no evidence was adduced in the proceedings establishing that Mr Barron had any prior history of not observing safety rules.

[76] The investigation considered whether procedures associated with the forced removal of isolation locks were followed. Mr Shaun Hansen said that the investigation found that the standard operating procedures had not "been followed to the letter of the law", while Mr Ward agreed that an outcome of the investigation was that the isolation lock procedures were not being strictly enforced or strictly complied with. Mr Shaun Hansen said that while the investigation found that Mr Barron had breached procedure in not securing the authorisation of his superintendent to remove the lock, it also found that the procedure requiring the prior approval of the superintendent "wasn't something that was generally done". Mr Ward confirmed that the investigation established that supervisors did not always get prior oral authorisation before removing a lock.

[77] In respect to incident reports, Mr Ward accepted that the investigation established that in some cases the practice was to treat the lock removal form as the incident report and to therefore limit the documentary process to one action. In current terms, Mr Shaun Hansen said that supervisors were required to complete the lock removal form and to, as a separate measure, electronically enter a record of the incident.

[78] The investigation resulted in a finding that Mr Barron had not complied with procedure in not completing a walk-around of Dozer 401 before instructing the appellant to remove the safety lock. A file note or warning letter relating to the incident was placed on Mr Barron’s personnel file. The effect of Mr Ward's evidence was that the approach to discipline involved determining a penalty which was proportionate to the offence including a conclusion about whether the breach involved a deliberate act or should be considered a mistake or an unintended consequence. Mr Hansen said that the penalty arrived at was largely based on his view that while due process had not been followed, the breach of procedure was not intentional.

[79] A matter pursued during cross-examination was whether the outcome of the investigation or the resulting disciplinary penalty may have been different if the investigation had concluded that Dozer 401's transmission had not been removed at the time of the incident on 22 August 2015. An impression was open, on the evidence in the proceedings, that the version of events set out in the lock removal form completed by Mr Barron had been accepted by the investigators as factually correct. A related matter attracting attention in the proceedings was whether Mr Barron completed the lock removal form on 22 August 2015, or at some later date after the investigation had been commenced or foreshadowed. The form referenced a time of 9:30 am on 22 August 2015, but it was not clear on a reading of the form whether this time was a record of when the incident occurred, or when the form was completed.

[80] The effect of Mr Ward's evidence was that despite a search of Mr Barron's out tray some time between 27 August 2015 and 1 September 2015 when Mr Barron was on leave, a completed lock removal form could not be found. It was only when Mr Ward interviewed Mr Barron about the incident on 2 September 2015 and asked for the form, that Mr Barron went away and subsequently located the form. The inference was that Mr Barron never completed the form on 22 August 2015, and had only produced it when it was requested by Mr Ward. The proposition put to Mr Barron in cross-examination was that he filled out the form "after the fact in an attempt to cover" his tracks.

[81] The lock removal form is in the evidence as Exhibit 5. It is referred to as a "Danger Tag/Lock Removal Form". Mr Barron in completing the form stated that an attempt was made to contact Mr Marsh but he could not be contacted in the field. The effect of what Mr Barron also wrote was that the area had been physically checked by the appellant to ensure that Mr Marsh was not in, on or about, Dozer 401 when the isolation lock was removed, and that the appellant had checked the machine to ensure that "no person was still working on the equipment". Mr Barron also noted on the form that Dozer 401's transmission had not been fitted at the time.

[82] Shaun Hansen said that he was unsure whether the investigation proceeded on the basis that Mr Barron's version that the transmission had been removed was correct. He said that the important consideration was whether a procedure had been breached and that the transmission issue was not relevant to that finding. Despite this he accepted that the potential consequences for Mr Marsh if the machine were in an operational state and able to be started and moved, would be more severe.

[83] According to Mr Ward, both Mr Barron and the appellant may have been liable to discipline as a result of the removal of the isolation lock from Dozer 401. He said that the disciplinary penalty would be proportionate and have regard to whether the act or omission was deliberate or a mistake. Given that the appellant was acting under direction from Mr Barron, it was unlikely that the appellant would be disciplined.

[84] Shaun Hansen agreed that the investigation had resulted in some organisational change, not necessarily in the actual expression of procedures, but in how the procedures were to be implemented and the communication of management's expectations about implementation and compliance.

Respondent's Submissions

[85] The respondent submitted that the management action in contention should be confined to a consideration of Mr Barron's failure in conducting a "walk-around" of Dozer 401 before removing a safety lock on the machine. In this respect it was submitted that a walk-around of the machine had been completed by the appellant and the failure of Mr Barron to accompany the appellant should be construed as an isolated incident in the context of Mr Barron's accepted commitment to workplace safety. Further, the omission was in no sense intentional, occurred during a busy work period, and occurred in circumstances where Mr Barron was confident that Mr Marsh's safety was never compromised. These factors support a conclusion that Mr Barron's mistake should most appropriately be categorised as a management blemish, and not as unreasonable management action.

[86] In advocating this characterisation of Mr Barron's error, the respondent in part relied on the findings of the internal investigation. The respondent submitted that:

> "Importantly, the investigation did not find that it was Mr Barron's usual practice to completely disregard the standard operating procedure, and certainly it wasn't his practice to direct the worker to do the walk around of the equipment, rather than himself. This was an isolated event, when Mr Barron asked Mr McPherson to walk around the dozer. And he did that, as he explained, that – and he quite freely admitted that he didn't do what was required of the procedure. He explained that he was flustered. There was a lot of work on at the time. Whilst that's no complete excuse, it shows that there was no direct intention to disregard the procedure."

[87] It was a relevant consideration from the respondent's perspective that while a procedure had not been complied with, Mr Marsh had never been in any danger because it was known by all relevant persons that he was in the field and away from the workshop at the time that his safety lock was removed. Further, the appellant had worked at the Peak Downs mine for 19 years and he would have been very familiar with safety standards. It was an exaggeration to suggest that he would not have completed a walk-around of the machine or have taken other measures to ensure that Mr Marsh was not in the machine or in the vicinity of the machine before the isolation tag was removed. This was not a case where a worker's health and safety had been recklessly disregarded.

[88] The effect of the respondent's submission was that mitigating factors were relevant to the evaluation of management action and contributed to a finding that Mr Barron's breach of procedure should not be seen as a substantive failure of management but as an oversight or a blemish. The respondent's submission in this regard is supported by the following factors which emerge from a review of Mr Barron's evidence (T2-43):

- Mr Barron took all reasonable efforts to contact Mr Marsh;
- Mr Barron was confident that Mr Marsh was in the field, and he could see from his office that he was not in the workshop;
- Mr Barron knew that Mr Marsh was not working on the machine "because it had no transmission and bevel gear in it and it was facing my window" (T2-50);

- Mr Barron knew that the transmission, bevel gear and ripper tyne were all out of Dozer 401 on 22 August 2015, and the machine was not in an operational state;
- Mr Barron instructed that the isolation lock be removed on the basis that Mr Marsh was in the field and away from the workshop;
- Mr Barron did not tell the appellant to "just rip off" the isolation lock. His evidence was that he asked the appellant to complete the walk around "and just make sure that Arthur's not there";
- That normal practice was not to contact the superintendent before removing the isolation lock. His evidence was that (T2-55) "nobody ever contacted the superintendents in regards to removing locks. We just used to fill out the forms and put them in the out trays. That was just the standard there. And it's how it was for the – my turn (time) there."

Appellant's Submissions

[89] The appellant maintained that the evidence adduced by the appellant and supporting witnesses was to be preferred to the evidence of Mr Barron in that Dozer 401 was located in Bay 13 of the workshop and some 40 metres distance from Mr Barron's office, and that the transmission was in the dozer at the time that the appellant was instructed to remove Mr Marsh's lock. Findings to this effect were said to be supported by the following propositions:

(a) The appellant's version was corroborated by Mr Marsh and Mr Justin Hansen;
(b) Mr Barron's recollections were inconsistent with the documentary record;
(c) Mr Barron's evidence was inconsistent with the evidence of the appellant, Mr Marsh and Mr Justin Hansen.

[90] While it was not in dispute that Mr Barron had instructed the appellant to remove the isolation lock, and that Mr Barron had breached procedures by not completing a walk-around of the dozer, the appellant submitted that the breaches went further and encompassed the following:

(a) Mr Barron instructed the appellant to remove the lock before he attempted to contact Mr Marsh;
(b) Mr Barron did not try to contact Mr Marsh - a finding open because of the respondent's failure to call a witness who Mr Barron said was present when he made the calls;
(c) Mr Barron conceded that he could have waited for Mr Marsh to return from the field before instructing that the lock be removed;
(d) Mr Barron was not physically present, as he was required to be, when the isolation lock was removed;
(e) Mr Barron did not attempt to contact the acting superintendent to secure authorisation to remove the lock;
(f) Mr Barron did not complete an incident report as required.

[91] The appellant distinguished between the management conduct under review and a set of circumstances in which a management representative might inadvertently or otherwise fail to comply with a policy or procedure. While the latter instance of non-compliance

might in certain circumstances be characterised as a blemish, a finding that Mr Barron's conduct should be so characterised was not reasonably open in circumstances where not only did Mr Barron ignore a life saving rule, but he also directed the appellant to breach the same rule. Further, it was a serious omission for Mr Barron not to determine the location of Mr Marsh before instructing the appellant to remove the isolation lock.

[92] In this regard the appellant emphasised that, contrary to the narrative provided by Mr Barron, the consequences of the safety breach could have been severe because the dozer was in an operational state and it was possible that Mr Marsh was working under or within the machine at the time the isolation lock was removed. Mr Barron did not know where Mr Marsh was and his instruction to remove the isolation lock without clear confirmation of Mr Marsh's whereabouts amounted to a real and significant risk to Mr Marsh's safety.

[93] The appellant also took issue with any submission to the effect that a conclusion that Mr Barron's actions should amount to a blemish was consistent with the outcome of the internal investigation which only resulted in a file note being placed on Mr Barron's personnel file. The submission advanced was to the effect that, on the evidence in the proceedings, the disciplinary penalty decided in the investigation may have been based on an erroneous finding.

[94] The submission in this regard was that it was apparent on the evidence of Mr Shaun Hansen that the investigation proceeded on an understanding of the facts which was most favourable to Mr Barron. That is, it appeared that the investigation may have proceeded on the basis that the information included in the lock removal form completed by Mr Barron was correct and that Dozer 401 was disabled with its transmission removed at the time that the instruction to remove the lock had been given. As a consequence, the investigation erroneously proceeded on the basis that there was a negligible risk to the safety of Mr Marsh arising from Mr Barron's instruction and failure to complete a walk-around. If this consequence had been fully comprehended by the investigation, and if it had been known that at the time of issuing his instruction to remove the lock, Mr Barron did not know where Mr Marsh was, it was probable that Mr Barron's breach of procedure would have, or should have, resulted in a more severe penalty.

[95] Notwithstanding the flaws in the investigation, the appellant submitted that the investigation nevertheless established serious instances of non-compliance, led to the disciplining of Mr Barron for breaches of safety standards, and resulted in the implementation of corrective actions. The actions included the reinforcement of operating procedures relating to tagging and the removal of isolation locks, and the introduction of new procedures relating to the generation of hazard reports.

[96] The effect of the appellant's submission was that the nature of the corrective or consequential action was not consistent with a management view after the event that Mr Barron's misconduct comprised nothing more than a blemish.

[97] The legislative regime regulating safety standards in the coal mining industry was relied on by the appellant to demonstrate the significance of the safety breaches. In this regard the appellant relied on particular provisions of both the *Coal Mining Safety and Health Act 1999* and the *Coal Mining Safety and Health Regulation 2017*.

[98] Section 62 of the *Coal Mining Safety and Health Act 1999* requires the establishment of a safety and health management system which incorporated risk management elements and practices that ensured the safety and health of persons affected by coal mining operations. In terms of the Regulation, attention was drawn to s 78 which requires a coal mine to implement standard operating procedures dealing with isolating and tagging.

[99] It was the appellant's submission that the relevant management action needed to be evaluated in a setting in which the employer's operating procedures were breached and the relevant management action was inconsistent with the industry legislative safety scheme. Further it was unreasonable for management to issue an instruction which had the effect of making the appellant complicit in non-compliant conduct, not only in terms of his employer's policies but also in terms of industry and legislative standards.

Decision

[100] Whether the actions taken by Mr Barron constituted unreasonable management action is a question to be answered on an objective review of all the relevant facts and circumstances. This review includes both a consideration of the mine management perspective of the management action taken by Mr Barron, including the findings of the internal investigation, and also a consideration of the appellant's perspective of the management action. Ultimately the determination to be made will be based on all of the evidence adduced during the proceedings and the submissions of the parties.

[101] The appellant characterises the relevant management action as manifestly unreasonable either because, in itself it involved a breach of a critical safety rule and industry safety standards, or because of the fact that in instructing the appellant to breach safety rules it made the appellant complicit in breaches which he would not otherwise have contemplated committing. The respondent however urges that a single, isolated, and out of character deviation from a standard operating procedure does not, as a matter of degree, amount to unreasonable management action.

[102] While the appellant emphasised the severity of the safety breach and drew attention to the potential consequences of the breach, the respondent maintained that the breach should be kept in perspective and evaluated in circumstances where Mr Marsh's safety was never at risk, where some of the procedures associated with a forced lock removal were not observed in practice, and where the approach adopted by Mr Barron was, except for the failure to complete a walk-around, uncontroversial.

[103] However while the evidence supports a conclusion that some parts of the lock removal procedure were not generally complied with, they are not the critical elements of the procedure in terms of the objective of preserving life. Further, the evidence does not support the respondent's position around risk minimisation. This evidence relied primarily on Mr Barron's recollection of events in relation to the location of Dozer 401 and the state of Dozer 401 when the lock removal request was made on 22 August 2015.

[104] The evidence adduced in support of the appeal disputed the accuracy of Mr Barron's recollections. This evidence suggested that Mr Barron could not have been confident that Mr Marsh was still in the field when he directed the appellant to remove the lock, and that he was wrong in saying that Dozer 401 was in a disabled state and not capable of being energised, started or moved. If this evidence were accepted, it would be open

to conclude that, in issuing the instruction in the manner that he did, Mr Barron acted carelessly and without due regard for either the critical safety rule or the safety of Mr Marsh.

[105] I resolve the conflict in the evidence around these matters by preferring the evidence adduced by, or on behalf of, the appellant for the following reasons:

(i) While Mr Barron disputed the appellant's evidence that the isolation lock had to be removed to facilitate the movement of the dozer out of the workshop to effect the removal of the ripper tyne, Mr Barron did not provide an alternative explanation for why it was necessary to remove the lock. The appellant's version on the other hand was consistent with the rest of his evidence;

(ii) Mr Barron's evidence about the location of Dozer 401 was contradicted by the appellant, Mr Marsh and Mr Justin Hansen;

(iii) Mr Barron's evidence about the state of Dozer 401 was contradicted by the appellant, Mr Marsh, Mr Justin Hansen and by the documentary records.

[106] The effect of this finding is that the significant mitigating factors relied on by Mr Barron in explaining or justifying his breach of procedures are not available to support the defence of the appeal. In this regard I accept the final submission of the appellant that contrary to the respondent's version of events, the consequences of the safety breach could have been severe because Dozer 401 was in an operational state and it was more likely than not that Mr Barron could not have been confident that Mr Marsh was still in the field and had not returned to the workshop. In my view, while it may have been the case that Mr Barron presumed that the appellant would have taken the necessary precaution to ensure Mr Marsh's safety before removing his lock, the fundamental purpose of life saving safety rules is to eliminate any such margin for error.

[107] I also concur with the appellant's submission that a clear distinction can be drawn between the management conduct under review and particular forms of conduct of limited severity and consequence which might reasonably be forgiven. Mr Barron's election to ignore a life saving rule, to render a subordinate complicit in the breach, and to demonstrate behaviour inimical to the fostering of a critical safety culture, cannot be excused in the manner proposed by the respondent.

[108] While the evidence considered non-compliance by supervisors with the safety rules, little evidence was adduced about the consequences of non-compliance on the part of diesel fitters. In this regard it was the evidence of Mr Ward that under the terms of the *Coal Mining Safety and Health Act 1999*, every worker has the right to refuse to carry out an unsafe act. The inference, which I accept, was that the appellant was placed in an invidious predicament in being asked to carry out an instruction which breached safety procedures. In response, he either directly confronted his supervisor and refused to obey the instruction, or he complied with the instruction and rendered himself liable to a breach of company procedures and possibly, the Coal Mining Act. I accept that Mr Barron acted unreasonably in placing the appellant in this predicament.

[109] I am satisfied, on the balance of probabilities, the management action under review cannot be characterised as reasonable management action. Mr Barron's conduct was neither reasonable nor taken in a reasonable way.

[110] The appeal is allowed and the decision of the regulator's review unit dated 6 July 2016 is set aside and replaced by a decision that the appellant's claim for compensation is one for acceptance.