

Caplikas and Comcare [2015] AATA 170 (25 March 2015)

Key Points

- Whether 'reasonable' medical treatment within the meaning of s 16(1) of the SCR Act includes experimental treatments.

Background

Mr Caplikas injured both his knees at his work. In 2000 the left knee sustained a “*strain of the medial collateral ligament*”. In 2010 the right knee sustained a “*tear of the medial cartilage*”. Comcare accepted liability for both injuries under s 14 of the Act.

Mr Caplikas had undergone a range of treatments for both knees over the years with varying success. In 2012, in order to avoid knee replacement surgery, Mr Caplikas was recommended to try bilateral knee stem cell assisted arthroscopy – an experimental treatment.

The Tribunal was required to consider whether the proposed surgery was reasonable medical treatment to obtain in the circumstances pursuant to s 16(1) of the Act.

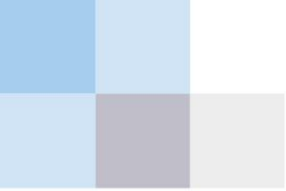
The Law

Section 16(1) of the Act states when an employee suffers an injury for which Comcare is liable to pay for, the medical treatment must be reasonable for the employee to obtain in the circumstances.

The Act offers no further guidance as to the meaning of 'reasonable', although medical treatment is defined in subsection 4(1) to mean, in part “*medical or surgical treatment by, or under the supervision of, a legally qualified medical practitioner*”.

In coming to its decision, the Tribunal referred to the decision of *Re Jorgensen and Commonwealth* (1991) 23 ALD 321, wherein it was held reasonableness involves an objective standard, while ‘in the circumstances’ was to be decided by subjective factors relating to the injury (as opposed to the personal circumstances of the employee). *Re Jorgensen* also notes where the cost of the relevant treatment can be weighed against the likely probable benefit, a cost-benefit analysis should be undertaken.

The Tribunal also referred to the decision in *Re King and Comcare* (1998) 53 ALD 791, which held that if a form of treatment is advocated by a significant minority of the medical profession but is regarded by the majority as controversial, obtaining that form of treatment would not necessarily be regarded as unreasonable, unless the treatment is undertaken on advice of a doctor whose views are at odds with the rest of the medical profession. Even when views are not supported by a significant minority, if there is evidence the treatment is having a beneficial effect on the patient the Tribunal may conclude it is reasonable. If diagnostic techniques are unreliable this too will affect the



meaning of reasonable. It is a question of degree and judgment as to whether a treatment is reasonable in the circumstances.

Conclusion

Mr Caplikas submitted evidence from treating doctors and from various medical studies on the efficacy of stem cell surgery. In particular he submitted evidence from his two treating specialists, who both concluded Synvisc injections, part of his traditional method of treatment, would no longer benefit Mr Caplikas's bilateral knee arthritis.

Comcare submitted evidence from consultant rheumatologist, Dr McGill, who concluded along with Mr Caplikas's orthopedic surgeon, Dr Burrow, that stem cell therapy had not been shown to be effective for knee injuries.

The Tribunal examined the consultant doctors' reports and noted all doctors acknowledged stem cell therapy is at minimum an 'evolving process'. The Tribunal also conducted a cost-benefit analysis by comparing the cost of the proposed surgery with the likelihood of success.

After examining the studies submitted, the Tribunal accepted Dr McGill's evidence that only a few employed control groups and only one study was relevant to Mr Caplikas's injury, peer reviewed, and showed promising results. That report did not recommend adoption of the treatment but instead further study.

The Tribunal also held there was no evidence of significant minority support from the medical profession of the treatment, after finding only 10 orthopedic surgeons out of 400 practiced the procedure. Consequently, the Tribunal affirmed Comcare's decision not to fund the proposed bilateral knee stem cell assisted arthroscopy, as it was not reasonable in the circumstances for Mr Caplikas to obtain.

Lessons Learnt

This decision highlights a reasonable treatment can be experimental. However without significant minority medical authority for the efficacy of a treatment in relation to the employee's injury, unless the treatment can be shown to be beneficial to the employee, it will not be considered reasonable in the circumstances. The decision also emphasises personal factors, such as the physicality of the employee's job, will not be considered when determining the subjective 'circumstances' relating to reasonable treatment.

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