

May v Military Rehabilitation and Compensation Commission [2015] FCAFC 93

Key Points

- The Full Federal Court has found that:
 - there is no requirement that an injury requires that there be a “*sudden or identifiable physiological change*”.
 - the terms “injury” and “disease” are not mutually exclusive.
 - the legislation and authorities do not preclude an injury being established solely on the basis of an account from an employee of the disturbances to his or her body or mind, without a formal diagnosis, or corroborating pathology or medical opinion.

Background

Mr May was a member of the Royal Australian Airforce (**RAAF**). Between 10 November 1998 and 30 March 2000, Mr May received various vaccinations in the course of his employment. Mr May’s evidence was that he experienced an adverse reaction to these medications. He said that his tongue felt swollen, he felt dizzy and experienced nausea and diarrhea. In the succeeding years, Mr May underwent a series of investigatory procedures which produced no clear identification of the cause of his symptoms.

On 20 November 2002, Mr May completed a claim for compensation in respect of “*low immunity, fatigue, illnesses, dizziness*” which he claimed was caused by the vaccinations. Liability for Mr May’s claim was denied on the basis that the specialists who had examined him were unable to diagnose any specific condition or determine a cause for his symptoms. The decision maker was therefore unable to connect the claimed condition to Mr May’s employment with the RAAF. The decision was affirmed by reconsideration, and Mr May sought further review at the Administrative Appeals Tribunal.

The Tribunal’s decision

The Tribunal affirmed the reviewable decision. Like the primary decision maker, the Tribunal was unable to establish what it saw as the requisite connection between Mr May’s claimed condition and his employment with the RAAF, notwithstanding that the Tribunal found Mr May to be an honest witness and accepted that he suffered from the symptoms that he described. The Tribunal placed heavy reliance upon the definition of injury provided by *Kennedy Cleaning Services v Petkoska* [2000] HCA 45, that an injury involved a “*sudden or identifiable physiological change*”, and also struggled with the fact that no medical specialists had been able to provide a diagnosis of Mr May’s condition, or identify any pathology which corroborated his reported symptoms.

Mr May appealed the Tribunal’s decision to the Federal Court

The Federal Court's decision

The single Judge did not allow Mr May's appeal, as it considered that there were no questions of pure law to be determined. Mr May appealed the decision to the Full Federal Court.

The Law

Section 5A of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**) provides the definition of "injury":

- (a) *a disease suffered by an employee; or*
- (b) *an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or*
- (c) *an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment.*

The Full Federal Court undertook a comprehensive review of the relevant authorities in respect of the definition of "injury", which can be found at paragraphs [22] – [120] of the written judgment.

Conclusion

The Full Federal Court undertook an exhaustive review of the development of the definition of injury through over a century of legislation and legal authority. The major findings of the Court were as follows:

- there is no requirement that an injury requires that there be a "*sudden or identifiable physiological change*";
- the terms "injury" and "disease" are not mutually exclusive; and
- the legislation and authorities do not preclude an injury being established solely on the basis of an account from a claimant of the disturbances to his or her body or mind, without diagnosis, or corroborating pathology or medical opinion.

The Full Federal Court found that the Tribunal had erred in its decision by failing to appreciate that Mr May's condition could exist and be compensable without the need for a formal diagnosis, or corroborating medical or pathological evidence. This was particularly important given the Tribunal found that Mr May was a truthful and reliable witness. Further, the Court found that the Tribunal erred by requiring that there be some causal link between Mr May's condition and his employment, given his claim was for an injury and therefore required only a temporal connection to employment.

The most significant findings of the Full Federal Court related to the definition of injury in the SRC Act. The Court found that while adjectives such as "*sudden*" and "*identifiable*" help to emphasize the distinction between an injury and a disease, these qualifications are not contained within the

legislation and it is therefore not appropriate to use the terms to qualify what can and cannot constitute an injury. The Court found at [110] that an injury involves nothing more than a “physiological change or disturbance of the normal physiological state”.

At [112]:

“In circumstances where one has physiological change, and the enquiry is whether there is the mere progression of a disease, or an event or identifiable change that can be seen as a separate injury, there will be room for debate and factual assessment. Suddenness may assist in the demarcation of the injury from the progression of the disease. However, if one has, as here, physiological changes without apparent aetiology or any real diagnostic explanation then “suddenness” may have less relevance. To elevate it to a pre-requisite to the finding of injury may be to introduce an element of fortuity or incident or accident to the concept of injury that was discussed in cases such as Ockenden as relevant to “injury by accident”, thus impermissibly taking the construction and application of these provisions back to a time where an additional element was present.”

The Full Federal Court remitted the matter back to the Tribunal to be reheard according to law.

Lessons Learnt

The decision of the Full Federal Court has certainly muddied the waters regarding the distinction between an injury and a disease, and it is conceivable that, based on the Full Court’s findings, conditions which were previously considered to be diseases may now fall within the definition of injury. This would, of course, mean that employees would then only need to establish a temporal connection to employment, rather than proving that their employment was a significant contributing factor to the condition. The causation test for injuries is lower than the test relating to diseases.

The other findings of the Federal Court emphasise principles that were already in existence. It is well established that a condition does not require a diagnosis for compensation to be awarded. However, in circumstances where there is no diagnosis or medical explanation for the condition, the evidence of the employee must be of such a standard to allow a decision to be made in reliance of it.

Employers and insurers are hopeful for an appeal.

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