

## *Kennedy v Comcare* [2015] AATA 334 (18 May 2015)

### Key Points

- The meaning of injury as defined by s 5A(1) of the SRC Act.
- Whether a knowingly false claim of a psychological condition is a wilful and false misrepresentation, defeated by operation of section 7(7) of the Act.

### Background

At all material times Mr Kennedy was employed by the Commonwealth Department of Industry, Innovation, Science, Research and Tertiary Education. In March 2012 he lodged a claim with Comcare for a condition he described as “*adjustment disorder with depression and anxiety*” first experienced in March 2011 and again in November 2011. On 21 November 2012 Comcare, by reviewable decisions, affirmed a previous determination to refuse both claims.

The Tribunal was required to consider whether Mr Kennedy’s disease satisfies the definition of “injury” in the Act and also, whether Mr Kennedy made wilful and false representations with respect to this disease, thereby causing the operation of s 7(7) of the Act to defeat his claim.

### The Law

Section 14 of the Act states Comcare is liable to pay compensation in respect of an “injury” suffered by an employee. An “injury” is defined by s 5A(1) of the Act to encompass (a) a disease suffered by an employee and (b) an injury (other than a disease) suffered by an employee arising out of the employee’s employment. “Disease” is defined by s 5B(1) of the Act to mean an ailment suffered by an employee, or the aggravation of such an ailment, that was significantly contributed to by the employee’s employment by the Commonwealth. “Ailment” is defined in s 4 of the Act to mean any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development).

Section 7(7) of the Act reads; a disease or aggravation of a disease, suffered by a employee, shall not be taken to be an “injury” for the purposes of the Act if the employee has made a wilful and false representation that he or she did not suffer from that disease, “*for purposes connected with his or her employment or proposed employment by the Commonwealth*”.

In coming to its decision, the Tribunal referred to Justice Mansfield’s comments on identically worded legislation in the *Seafarers Rehabilitation and Compensation Act 1992* (Cth). Mansfield J cautioned an interpretation of wilful and false representation where an employee at some point made a misrepresentation as to their fitness for work. The Tribunal similarly noted *Comcare v Porter* (1996) 70 FCR 139, which requires the representation be made without any belief that it is true.



## Conclusion

Comcare submitted that Mr Kennedy had on five occasions between October 2005 to May 2012, for purposes connected with his Commonwealth employment, made representations that he did not have a history or suffer from depression. Comcare relied upon evidence obtained from Mr Kennedy's medical records to submit that Mr Kennedy's representations were false and that the evidence established, to the high standard necessary, that they were knowingly false (willful and false).

Mr Kennedy did not submit any evidence as he withdrew from the hearing, having previously vacated several relistings.


The Tribunal considered five issues needed to be addressed in coming to its judgment:

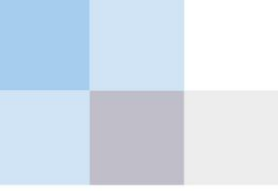
- (a) What does the evidence demonstrate about Mr Kennedy's history of depression?
- (b) What representations were made?
- (c) Were they for purposes connected with Mr Kennedy's employment or proposed employment with the Commonwealth?
- (d) Were the representations false?
- (e) Were the representations wilful?

(a) The Tribunal examined the medical history of Mr Kennedy as far back as 1990. From clinical notes and consultant reports, the Tribunal considered it was abundantly clear Mr Kennedy had a history of depression and generalized anxiety. It also held that, while Mr Kennedy's claim was for adjustment disorder with depression and anxiety, a better view was the ailment that afflicted him was depression; there was no relevant distinction to be drawn between depression and depressive disorder.

(b) The Tribunal then considered three representations made by Mr Kennedy. Two representations were made via health assessment forms arranged by an agency and department of the Commonwealth. The other representation was made during a psychiatric exam questionnaire in relation to Mr Kennedy's compensation claim for his depression. On each of these forms/questionnaires Mr Kennedy denied he suffered from a history of psychiatric illness. (c) When considering if these representations were made for purposes connected with Mr Kennedy's employment, the Tribunal noted the first two representations were made in the course of determining Mr Kennedy's suitability for permanent employment with the Commonwealth, and as such plainly satisfied the test. The third representation was made during Mr Kennedy's compensation claim for depression, said to arise from Mr Kennedy's workplace. This also provided an obvious connection with his Commonwealth employment.

The Tribunal then turned to considerations as to whether the representations were false and willful. (d) The Tribunal noted a representation may be made expressly, it may be implied, arise from silence or a combination of these elements. In the circumstances, it held the representations were expressly false. (e) Of the willfulness of the representations, the Tribunal held that it is not enough to show more falsity, Comcare must instead show at least one of the false representations was knowingly false. In this regard the Tribunal considered there was ample evidence. It identified a report from a follow up psychiatric examination arranged by Comcare, whereupon the consultant psychiatrist notes Mr Kennedy produced a letter acknowledging he previously falsely answered questions as to his psychiatric history and listing mitigating factors sought to explain and justify the false representations. The Tribunal considered by virtue of Mr Kennedy's statements rationalising





his falsity, it was clear Mr Kennedy's false representation was not a mere innocent misrepresentation.

## Lessons Learnt

This decision highlights the high standard of proof required to establish knowing falsity ('willfulness') and sets out the relevant questions to consider when contemplating a s 7(7) defence. The decision also notes that representations can be made expressly, impliedly, from silence or a combination of these elements. Finally, the case highlights depression or a depressive disorder can be considered a "disease" and "injury" for the purposes of the Act.

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