

What constitutes an injury pursuant to section 5A of the SRC Act?

MRCC v May [2016] HCA 19

Key Points

- The High Court of Australia had to consider whether “dizziness” should be classified as an injury pursuant to section 5A of the SRC Act, or a disease pursuant to section 5B.

Background

Mr May enlisted in the Royal Australian Airforce (**the RAAF**). At the time of his enlistment he was recorded as being healthy and fit. During his deployment with the RAAF, he was required to undergo various vaccinations. Mr May reported that, as a result of the vaccinations, he suffered a series of adverse reactions, namely low immunity, fatigue and dizziness affecting his entire body and immune system.

Mr May lodged a claim for workers’ compensation pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the SRC Act**) in respect of “*low immunity, fatigue, dizziness – immune system/ whole body*” as a result of the series of vaccinations he had been required to undergo during his time with the RAAF. The Military Rehabilitation and Compensation Commission (**the MRCC**) denied the claim on the basis that a connection between the claimed condition and his employment with the RAAF could not be found. Mr May made a request for reconsideration. By reviewable decision, the determination denying liability to pay compensation was affirmed. He then lodged an Application for Review with the Administrative Appeals Tribunal (**the AAT**).

The Tribunal Decision


The Tribunal found that Mr May had been “*significantly disabled*” by his condition, loosely described as vertigo, but that he had failed to establish that he had suffered a physical injury which resulted in a “*sudden or identifiable physiological change*” attributable to the series of vaccinations he had received during his enlistment with the RAAF. The AAT therefore held that Mr May had not suffered an injury or disease pursuant to sections 5A and 5B of the SRC Act.

The Federal Court Decision

Mr May appealed the AAT’s decision to the Federal Court of Australia. The appeal was dismissed on the basis that there had been no legal error.

The Full Federal Court Decision

An appeal was then made to the Full Court of the Federal Court of Australia. The Full Court found that the Tribunal had erred in its decision by failing to consider that Mr May’s condition



could exist and be compensable without the need for a formal diagnosis and/ or supporting medical evidence. Further the Full Federal Court found that the Tribunal erred by insisting on a causal link between the symptoms, the vaccinations, and requiring a clear medical diagnosis.

The MRCC then appealed to the High Court by grant of special leave.

The Law

Section 5A of the SRC Act relevantly defines injury as, an injury that arose out of, or in the course of, an employee's employment, or an aggravation of an injury that arose out of or in the course of an employee's employment. An injury can be either physical or mental. Disease is separately defined.

Section 5B of the SRC Act defines a disease as an ailment or an aggravation of an ailment that is contributed to, to a significant degree, by an employee's employment.

In *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45 at 35, Gleeson CJ and Kirby J make reference to a *"long line of decisions in Australia"* which recognised that an injury involves a *"sudden or identifiable physiological change"*. Gleeson CJ and Kirby J further explained at 39 that *"If... something... can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an 'injury' in the primary sense of that word"*.

Conclusion

Counsel for Mr May accepted that he did not suffer a disease pursuant to section 5B of the SRC Act, instead contending that he suffered an injury pursuant to section 5A of the Act. Put simply, the High Court had to consider whether Mr May's symptoms could be considered an injury pursuant to the SRC Act.

The High Court held that Mr May did not suffer an injury pursuant to section 5A of the SRC Act, because the nature and incidents of any physiological or psychiatric change could not be established on the evidence available. That is, the Court was not satisfied, on the balance of probabilities, that Mr May suffered an injury simpliciter amounting to a sudden or identifiable physiological change in the normal functioning of the body. While it was accepted that Mr May did experience debilitating dizziness (loosely described as vertigo), the Court was not satisfied that the dizziness suffered was enough to show that Mr May had suffered an injury, in the absence of any physiological evidence.

French CJ, Kiefel, Nettle and Gordon JJ considered that *"there must be more than an assertion by an employee that he or she feels unwell"* however, *"suddenness is not necessary for there to be an injury in the primary sense"*.



Lessons Learnt

The present case does not change the status of the law and is beneficial to employers. While suddenness is no longer a criteria in satisfying what may constitute an injury simpliciter pursuant to section 5A of the SRC Act, an employee will still need to show that a physiological or psychiatric change has occurred, and that change must be supported by medical evidence and satisfied on the balance of probabilities.

Contact

For more information on this article, please contact:

Brett Ablong
Partner
Direct: +61 (0) 8 9265 6001
Brett.ablong@hbalegal.com

Visit www.hbalegal.com for more case articles and industry news.

Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.

