

You gotta fight, for your right... to reconsideration *Dabbs and Comcare [2017] AATA 518*

Key Points

- The Tribunal was required to consider whether Mr Dabbs should be allowed to seek reconsideration of a determination after the period for reconsideration had expired.
- The Tribunal did not grant an extension to seek reconsideration because he had not demonstrated good reasons for his delay.

Background

Mr Dabbs started working at the Department of Veterans Affairs in 1998. On 23 January 2009, Mr Dabbs suffered an acoustic shock injury to both ears as a result of being exposed to microphone feedback at a work-related Australia Day function.

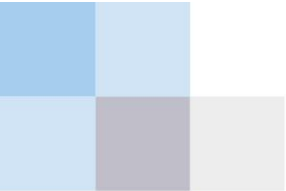
Through 2011, Mr Dabbs claimed that there were a number of incidents which aggravated his condition. As a result of each incident, he had to take time off of work, for which he claimed incapacity payments under section 19 of the *Safety Rehabilitation and Compensation Act 1988* (Cth) (the SRC Act). Initially, Comcare accepted liability to pay incapacity payments for these periods of time. However, on 6 December 2011, Comcare issued a decision which denied liability for incapacity payments, because the aggravations did not occur as a direct result of the accepted injury. Mr Dabbs did not seek reconsideration within 30 days of receipt of the determination.

On 6 September 2013, Comcare wrote to Mr Dabbs, and again provided the determination of 6 December 2011. Mr Dabbs eventually sought reconsideration of the decision on 3 April 2014. On 9 April 2014, Comcare refused to extend the time for Mr Dabbs to lodge his request for reconsideration on the basis that the period allowed for seeking reconsideration had passed.

The Tribunal was required to consider whether to grant an extension of time to Mr Dabbs to lodge his request for reconsideration.

The Law

Section 62(3) of the SRC Act provides that any request for reconsideration of a decision shall set out the reasons for the request and be given to the determining authority within 30 days after the day on which the determination first came to the notice of the person making the request, or within a period allowed by the determining authority.



In *Hunter Valley Developments Pty Ltd v Cohen, Minister of Home Affairs and Environment* (1984) 3 FCR 344 at 348, Wilcox J stated that normally, proceedings commenced outside the prescribed period will not be considered. Wilcox J set out six principles which guide when the discretion to grant an extension of time should be exercised:

- That the application for an extension of time must show an acceptable explanation for delay and it is fair and equitable in the circumstances to extend the time;
- Whether the applicant has rested on his or her rights and whether the respondent was entitled to regard the claim as being finalised;
- Whether there is any prejudice to any other party;
- That the mere absence of prejudice to other parties is not enough to justify the grant of an extension. However, any wider prejudice to the general public is a relevant factor;
- The merit of the substantive application; and
- Considerations of fairness between the applicant and other persons in a similar position.


Conclusion

In his request for reconsideration, Mr Dabbs stated that he did not receive the determination when it was issued, and as such, was unaware he could seek reconsideration until September 2013. The Tribunal was satisfied that Mr Dabbs had received the determination at the time it was issued and Mr Dabbs knew, or ought to have known, that his pay had been reduced to take into account the decision not to pay him incapacity payments.

The Tribunal decided that Mr Dabbs had not shown an acceptable explanation for the delay in seeking reconsideration. The Tribunal found that Comcare would suffer significant prejudice if the extension of time was granted, the merits of the application were not strong and did not mitigate against the factors against granting the extension of time.

Lessons Learnt

An applicant should not rest on his or her right to reconsideration. Where an applicant has delayed seeking reconsideration, the decision-maker should consider whether it would be unfairly prejudiced by granting the extension, the applicant's reasons for delay, and wider public considerations.





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