

Assumptions of fact deemed insufficient to invoke willful and false misrepresentation exclusion *JXTZ and Comcare* [2017] AATA 880

Key Points

- The Tribunal was required to consider whether the exclusion in section 7(7) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) (**SRC Act**) operated in the circumstances.
- The Tribunal determined that the evidence did not establish, on the balance of probabilities, that there had been a false and wilful misrepresentation of a medical history of anxiety and depression, therefore the exclusion did not apply.

Background

JXTX had a history of being sexually abused as a child and experienced related mental health problems in her youth which included a period of hospitalisation for a major depressive episode.

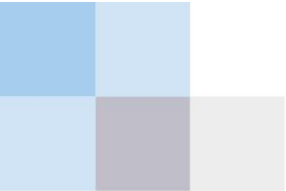
She submitted a claim for workers' compensation in respect of "*psychological and physical stress*" sustained during the course of her employment as a Registered Nurse with ACT Health.

Comcare initially accepted liability in respect of this condition, however it then issued a reviewable decision of own motion revoking the initial acceptance of liability on the basis that JXTX had misrepresented her prior history of major depression when completing her Pre-Employment Health Assessment form on 19 July 2012 and failed to disclose that she had previously been hospitalised for a major depressive episode to the assessing doctor.

Comcare contended that these omissions were deliberate acts carried out with full knowledge that they were not true and for the purpose of concealing medical information that would have prejudiced JXTX's prospects of securing employment with ACT Health. Therefore, it was argued that JXTX's misrepresentation was 'wilful and false', and her claim for compensation was precluded by section 7(7) of the SRC Act.

When JXTX was sent her offer of employment from ACT Health it was made known that this offer was conditional on her completing a pre-employment medical assessment, and a Pre-Employment Health Assessment form was attached setting out details of this assessment.

JXTX attended a pre-employment medical assessment on 19 July 2012 and was examined by a Dr Loughman. Neither JXTX nor Dr Loughman could recall whether they completed the Pre-Employment Health form, although when shown a copy of the form they both acknowledged that their handwriting was present on the form. JXTX asserted that she disclosed her history of child



abuse and related mental health problems to Dr Loughman during the assessment, however Dr Loughman could not be sure that she did and did not record it on the Pre-Employment Health Assessment form. This, Comcare argued, confirmed that JXTX did not fully disclose her prior mental health problems in order to increase her prospects of obtaining employment with ACT Health.

The Tribunal was required to determine whether JXTX failed to disclose her history of child abuse and related mental health problems during the pre-employment mental health assessment and, if so, whether this constituted 'wilful and false' misrepresentation which precluded her from claiming compensation by virtue of section 7(7) of the SRC Act.

The Law

Section 7(7) of the SRC Act provides that a disease, or aggravation of a disease, is not compensable if the employee has at any time, for purposes connected to their employment or proposed employment with the Commonwealth or a licensed corporation, made a wilful and false representation that they did not suffer, or had not previously suffered, from the condition being claimed.


In *National Australia Bank v Georgoulas* [2013] FCA 1412, the Federal Court determined that for the exclusion in section 7(7) of the Act to be engaged it must be established by clear and persuasive evidence that the representation was wilfully false.

In *Comcare Australia v Porter* [1996] FCA 562, the Federal Court determined that for the exclusion in section 7(7) of the Act to be engaged it must be established that the representation was made without any belief that it was true.

Conclusion

The Tribunal found that the evidence presented was not clear or persuasive, nor did it raise the possibility, by clear or cogent inference, that JXTX had made a misrepresentation about her previous medical history of anxiety and depression or that the misrepresentation was wilfully false. Emphasis was placed on the fact that it could not be assumed that JXTX had omitted to disclose information during her pre-employment medical assessment, rather it was necessary to be proven that JXTX had deliberately withheld information about her medical history, knowing that to do so would conceal the truth and perpetrate a falsehood.

In addition to the above, the Tribunal noted whether JXTX completed the Pre-Employment Health Assessment form or not, and whether she disclosed her previous mental health history or not, was not able to be determined due to the passage of time and the balance of evidence.





Lessons Learnt

The important lesson from this case is that in order to engage section 7(7) of the SRC Act it is insufficient to assume that a misrepresentation was wilful and false when there is a lack of contemporaneous evidence supporting this assertion. It is necessary to prove, on the balance of probabilities, with reference to clear and cogent evidence, that the misrepresentation was wilfully false and made without any belief that it was true.

Contact:

Andrew Gulyas

Solicitor

Direct: +61 (0) 2 9376 1122

andrew.gulyas@hbalegal.com

Nathan Hepple

Partner

Direct: +61 (0) 2 9376 1188

nathan.hepple@hbalegal.com

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