hba *legal.*

Fall once, shame on me; Fall twice, claim on you
Small and Comcare
[2017] AATA 2383

Key Points

- Ms Small was a horseback police officer with the AFP who sustained a workplace injury in 2009 for which a claim was made and compensation paid
- In 2010 she fell at home, and lodged a claim for compensation
- In 2016 Comcare held a meeting with Ms Small to discuss ceasing liability for compensation payments. At the meeting, she fainted and suffered injury, and lodged a third claim
- The Tribunal heard Applications relating to all three claims simultaneously

Background

Danielle Small was a horseback police officer with the Australian Federal Police. In the course of her employment, during a training exercise on 24 March 2009, she fell from a horse twice and sustained injuries to her lower back and other parts of her body (the **training injury**). She claimed and was paid compensation. Her symptoms largely settled but, from time to time, her lower back pain would 'flare up'.

On 24 September 2010, Ms Small fell down some stairs in her home and suffered lower back injuries (the **fall at home**). She claimed compensation. This claim was rejected, but compensation payments continued under the initial claim.

Following the fall at home, Ms Small's symptoms worsened gradually over time.

Some years later, Comcare decided Ms Small's injury had resolved some years previously, and hence a number of compensation determinations should be revoked. A meeting was arranged on 4 February 2016 to discuss this with her. During the meeting Ms Small fainted and fell to the floor, sustaining a number of injuries (the **meeting fall**). She made a further claim for payment of compensation. The claim was accepted in part, but claims relating to her lower back were rejected.

Comcare later determined that the injuries sustained in the **meeting fall** had resolved and Ms Small had no present entitlement to compensation.

Ms Small sought review in the Tribunal of:

- Comcare's determination to cease present liability for the **training injury**;
- Comcare's rejection of lower back injury claims resulting from the **meeting fall**; and
- Comcare's determination to cease present liability for the **meeting fall**.

The law

With reference to the Safety, Rehabilitation and Compensation Act 1988 (SRC Act), the Tribunal heard the three Applications simultaneously. The issues to be determined were:

- Did the **training injury** resolve before the fall at home?
- Did Ms Small sustain a fresh injury as a result of the **meeting fall**, for which Comcare is liable?
- Did the injuries Ms Small sustained as a result of the **meeting fall** (for which Comcare accepted liability) resolve on or before the date Comcare determined compensation was not payable for treatment expenses or incapacity for work in respect of those injuries?

Did the training injury resolve before the fall at home?

The determination of whether the **training injury** resolved prior to the **fall at home** required the assessment of a significant amount of medical evidence. While the arguments as to medical causation are too extensive to repeat here, the Tribunal did remind the parties on a number of occasions that it must have been reasonably satisfied on the balance of probabilities that the **training injury** resolved before the **fall at home**.

Importantly, referring to Re Day (2017) 340 ALR 368, the Tribunal pointed to the important distinction of substance to be drawn between probabilities on the one hand and mere possibilities, even if they are real as distinct from fanciful, on the other. That is, the balance of probabilities is not simply a matter of choosing between guesses or theories, on the basis that one seems more likely than another – it requires a consideration of all the evidence.

Did Ms Small sustain a fresh injury as a result of the meeting fall?

To answer this question, the Tribunal was required to consider whether the symptoms complained of constituted a 'disease' for the purposes of section 5A of the SRC Act, or if not, whether the symptoms constituted an 'injury (other than a disease)' per section 5A(b).

The Tribunal accepted that the work meeting was in the course of Ms Small's employment, but distinguished the fainting as an episode of spontaneous breathlessness that did not relate to the meeting, or her employment, in any way.

The Tribunal then considered that in order for the symptoms resulting from the **meeting fall** to constitute an injury other than a disease per section 5A(b) of the SRC Act, it needed to be reasonably satisfied that the increase in symptoms was not simply attributable to Ms Small's already existing lumbar spine condition. On the evidence, it was not.

Did the injuries Ms Small sustained as a result of the meeting fall resolve on or before Comcare determined compensation was not payable in respect of those injuries?

Following the **meeting fall**, Comcare accepted liability for injuries to Ms Small's head, neck, shoulder and hip.

This was largely a matter for medical evidence. However, Member Webb again referred to the necessity for a point to be proven on the balance of probabilities, not possibilities. He said (at [201]):

> *"I cannot properly be satisfied, as a matter of probability, that the injuries caused incapacity for work or required medical treatment on and after 21 March 2017. It is possible that they did, as Ms Small asserts. But possibility is not enough."*

Conclusion

The Tribunal was reasonably satisfied that Ms Small's 2009 low back injury did not resolve before 24 September 2010. Comcare's reconsideration of own motion determining no present liability to pay compensation for the **training injury** was revoked, and remitted to Comcare for reconsideration.

Both Comcare reviewable decisions relating to the **meeting fall** were affirmed, on the basis that:

- Ms Small did not suffer a new injury as a result of the meeting fall; and
- Comcare was correct to decline present liability for the injuries resulting from the **meeting fall** which it had accepted liability for.

Lessons Learnt

While this Hearing predominantly revolved around a consideration of medical evidence, there is an important lesson to be drawn from it. The lesson is that proving any point in issue before the Tribunal must be done in accordance with the reasonable satisfaction standard. This is for the Tribunal to decide - a medical expert simply using words such as 'probable' or 'possible' is not sufficient grounds to meet the legal test.

If the evidence before the Tribunal is not sufficient to enable it to be reasonably satisfied about a matter so as to upset the *status quo*, the *status quo* will remain in place.

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