

## *11 year delay no barrier to claim Sarraf and Comcare (Compensation) [2018] AATA 3196*

### Key Points

- The applicant made a claim for workers' compensation in 2016, in respect of an aggravation of an injury sustained in September 2005.
- The Tribunal found that the claim for workers' compensation satisfied the requirements set out in section 53 of the SRC Act, despite the 11 year delay in making the claim.

### Background

The applicant made a workers' compensation claim in April 2004 for an aggravation of a back injury. On 28 September 2005, the applicant attended his General Practitioner and obtained a medical certificate which stated that he had sustained a further aggravation of his back injury as a result of prolonged sitting at work on 26 September 2005. The applicant was certified as unfit for work from 27 September 2005 until 28 December 2005.

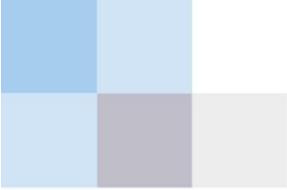
The applicant did not make a claim in respect of the 26 September 2005 aggravation until 24 October 2016. Liability in respect of this claim was denied and the applicant made an Application for review with the Tribunal.

A preliminary issue arose as to whether the applicant had given notice of the claim "as soon as practicable" as is required under section 53 of the *Safety, Rehabilitation and Compensation Act 1988 (Cth)* (**the SRC Act**).

### The Decision

The applicant submitted that, as he was already in receipt of compensation payments at the time the aggravation occurred, he did not consider that he was required to lodge a formal claim in respect of the aggravation. Further, he believed that he would have told his manager of the aggravation on the day it occurred. The applicant asked that the Tribunal excuse any failure to follow correct procedure because this occurred at a time when he was suffering high levels of pain, spasms and associated trauma, and was weakened and incapacitated by years of chronic pain, depression and anxiety.

The respondent contended that the applicant did not provide notice of the aggravation until he made his claim for workers' compensation until 24 October 2016 and therefore failed to give notice of the injury as soon as practicable after becoming aware of the injury, as required by section 53(2) of the SRC Act. The respondent contended the medical certificate provided on 28



September 2005 did not explain the nature of the injury to be accepted as sufficient notice under section 53 of the SRC Act.

Comcare further contended that the respondent had been unduly prejudiced by the delay, as it had been deprived of the opportunity to arrange an independent medical examination closer in time to the aggravation.

Senior Member Cunningham was required to consider whether the applicant had given notice of his injury in accordance with the requirements of section 53 of the SRC Act.

## Conclusion

Senior Member Cunningham accepted that the medical certificate provided by the applicant on 28 September 2005 contained sufficient detail of the nature of the injury and its alleged connection with his employment. Senior Member Cunningham did not accept that the respondent was unduly prejudiced by the delay of a formal notice of claim because there was plenty of medical evidence on file from the time the aggravation was claimed to have been sustained.

She noted that the applicant should have been aware of his rights in respect of making a claim for workers' compensation. On balance however, Senior Member Cunningham did not accept the respondent was unduly prejudiced by the delay. Therefore, she determined that the applicant's claim for workers' compensation had been made in line with the requirements of section 53 of the SRC Act.

## Lessons Learnt

When considering whether a claimant has complied with the requirements of section 53 of the SRC Act, the length of the delay in advising of an injury is only one of a number of factors which needs to be considered. It must also be established that the employer has been unduly prejudiced by the delay. We would caution employers from rejecting claims where they have received notice of an incident through informal means, such as a medical certificate, unless there is some compelling evidence of prejudice.

## Contact:

Rebecca Tloczek  
Solicitor  
Direct: +61 (0) 8 9265 6020  
rebecca.tloczek@hbalegal.com

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

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