

It's a tie - the worker gets surgery, but the employer wins right to stop paying workers' compensation

Wragg and Cleanaway Operations Pty Ltd [2019] AATA 43

Key Points

- The Tribunal was required to consider whether a rubbish truck driver, who broke his arm, continued to be entitled to incapacity payments in circumstances where he could earn his full pre-injury wages.
- The second issue for the Tribunal to consider was whether there was any liability on the part of the employer to pay for a second operation on the injured arm.
- The Tribunal found in favour of the employer on the first point, but in favour of the worker in relation to the surgery.

Background

On 10 August 2015, Mr Travis Wragg submitted a claim for workers' compensation for a broken left arm, after a fall at work. Cleanaway accepted liability to pay compensation for the fracture. Mr Wragg received workers' compensation for incapacity to work and for medical treatment, including the cost of surgery. Mr Wragg returned to full time truck driving duties.

In a determination dated 3 August 2016, Cleanaway denied liability to pay for further surgery.

Cleanaway also determined that as of 23 March 2017, Mr Wragg had the ability to earn his full income and as such he would no longer receive workers' compensation.

Mr Wragg sought review of both of those decisions at the Administrative Appeals Tribunal.

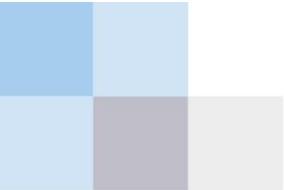
Medical Treatment

Medical treatment provided to Mr Wragg included arthroscopic surgery and physiotherapy but he continued to complain of pain and paraesthesia. Mr Wragg's treating surgeon recommended further surgery, but Cleanaway led evidence from independent medical experts that surgery was not warranted in the circumstance as it would provide little benefit.

The Tribunal took into consideration the potential risks of the surgery including that the surgery could produce more scar tissue and reduce the range of movement of the arm. On balance, the Tribunal was satisfied that the potential benefits outweighed the risks. The Tribunal accepted the evidence of the applicant's treating surgeon that the surgery had a reasonable prospect of increasing the range of movement and reducing his pain.

Incapacity

The question to be determined was whether the applicant was fit to undertake his pre-injury duties in the relevant period. The applicant asserted that pain, numbness and the need for analgesia caused him to work less hours and to take days off, using up his personal leave.



The Tribunal looked at whether the duties provided to the applicant during the relevant period were suitable, in that they did not cause an aggravation of the arm injury.

The Tribunal found that the applicant failed to provide medical evidence that supported his claims of increasing pain, numbness or a requirement for medication. The Tribunal preferred the employer's evidence which indicated that the applicant was fit for pre-injury duties, with some restrictions on lifting, and was capable of earning his full pre-injury wages during the relevant period.

The Decision

The Tribunal found that the employer was liable for the cost of the second surgery.

The Tribunal found that the applicant had the ability to earn his full income and to undertake suitable employment, meaning he had no entitlement to compensation for incapacity to work as at 22 March 2017.

Lessons Learnt

When it comes to deciding whether proposed medical treatment is appropriate, the Tribunal will weigh up the potential risks with the benefit the treatment could provide to the worker.

It is submitted that in most cases the Tribunal will give the worker the benefit of the doubt because it will assume he or she will not put their own health at risk.

In terms of capacity to work, subjective complaints of ongoing symptoms as well as an increased need for treatment, will not be enough for a Tribunal to conclude that a worker was unfit for work. Complaints such as those made by the applicant need to be substantiated with evidence such as contemporaneous medical records.

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