

Back claim fails for former pasta maker *Hovenden and Comcare [2020] AATA 3695 (21 September 2020)*

Key Points

- The Tribunal was asked to decide whether an employee suffered an exacerbation of his low back condition as a result of his work as a Customer Service Officer for Services Australia.
- The Tribunal found that flare ups of symptoms did not amount to aggravations of the pre-existing degenerative condition and found in favour of Comcare.

Background

On 27 November 2001, Mr Hovenden sustained an injury to his lower back while employed as a part-time process worker with Pasta Master, a food processing company. Liability for the injury was accepted by the insurer under the Victorian Workcover scheme and Mr Hovenden was compensated for incapacity for work and medical expenses. Mr Hovenden subsequently obtained employment with Services Australia, as a Customer Service Officer.

On 11 December 2018, Mr Hovenden submitted a claim for workers' compensation in respect of an alleged exacerbation of the symptoms of his lower back condition while serving a customer on 26 November 2018. Mr Hovenden attributed the injury to the ergonomic set up of his work station.

Liability to pay compensation was denied under section 14 of the *Safety, Rehabilitation and Compensation Act 1988 (Cth)* (the **SRC Act**). The decision was affirmed on reconsideration and Mr Hovenden sought further review of that decision at the Administrative Appeals Tribunal.

A hearing was conducted by video link in July 2020. Mr Hovenden asserted that while the degenerative condition in his spine was not itself an injury under the SRC Act, the tightness and pain in his back experienced during his employment with Services Australia amounted to an aggravation of the pre-existing condition.

The issue for the Tribunal to decide was whether the tightness and pain experienced by Mr Hovenden was compensable under the SRC Act as a matter of causation, considering in particular section 5B(1) of the SRC Act.

The law

“Disease” is defined in section 5B(1) of the SRC Act as an ailment suffered by an employee or the aggravation of such an ailment, that was contributed to, to a significant degree, by the employee’s employment.

An ailment is defined in s 4 of the SRC Act as a physical disorder, defect or morbid condition (whether of sudden onset or gradual development). The expression “significant degree” is defined as a degree substantially more than material.



Conclusion

Mr Hovenden's evidence was that his symptoms developed gradually over the weekend after he noticed some stiffness on completing his work day on Friday 16 November 2018. Mr Hovenden gave evidence that he did not initially seek treatment for the tightness and pain he experienced because he was used to dealing with flare ups of symptoms in his back.

The applicant relied on the evidence of his treating General Practitioner, Dr Thompson who described the condition as an exacerbation of chronic lumbar disc degeneration. Dr Thompson did not identify any change to the underlying back condition, and he acknowledged the short-term nature of the symptoms.

Comcare relied on the evidence of Dr Hwang, occupational physician who gave evidence that Mr Hovenden had a history of chronic back pain which was manageable, with occasional flare ups. Dr Hwang gave evidence that, noting the pre-existing pathology, the optimal ergonomic setup at work, and the absence of any specific precipitating event, Mr Hovenden's episode of back pain had developed spontaneously. This was not unusual in a person with a well-established history of back pain. Dr Hwang was of the view that it would be just as likely that Mr Hovenden would have developed acute lower back pain with spasms if he had been undertaking normal day to day activities and had not been at work on 16 November 2018.

The Tribunal noted that it was well established on his own evidence that Mr Hovenden had experienced flare ups of pain in his lumbar spine over many years, associated with non-work-related activities such as gardening, prolonged sitting and sleeping in an unusual position.

The Tribunal found that the medical evidence did not establish that the symptoms suffered by Mr Hovenden on and after 16 November 2018 resulted in any identified worsening of his underlying degenerative condition. The Tribunal was satisfied that the symptoms suffered by Mr Hovenden were a consequence of his pre-existing condition and were consistent with the flare ups he had previously experienced outside of work. The Tribunal was not satisfied that Mr Hovenden suffered an aggravation of his degenerative spinal condition on 16 November 2018. The Tribunal was not satisfied that the tightness and pain experienced by Mr Hovenden on and after 16 November 2018 was an injury within the meaning of the SRC Act. The Tribunal affirmed the decision under review.

Lessons Learnt

The Tribunal accepted that when an employee has a pre-existing degenerative condition, they may suffer flare ups of symptoms from time to time. Without evidence that the underlying condition has been made worse, those flare ups will not constitute an aggravation of the pre-existing condition.

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