

No compensation: sailor's 'workplace' hip injury would have happened anywhere

Ross and Comcare (Compensation) [2020] AATA 4350

Key Points

- The Tribunal was asked to decide on liability for a stress fracture of the hip sustained on a Commonwealth Maritime Vessel.
- The Tribunal highlighted the importance of distinguishing between whether a condition was made worse by work, or whether it simply became worse while the employee was at work.
- The Tribunal found in favour of Comcare.

Background

Ms Ross was employed by a Commonwealth government department (**the Department**) as an APS6 Officer. On 2 December 2017, Ms Ross was deployed to a maritime vessel and three days later she noticed soreness in her right hip following repetitive climbing of stairs. Ms Ross submitted a claim for workers' compensation on 17 January 2018, in respect of "*[s]tress related fracture which has resulted in need for a hip replacement (right side)*".

On 24 April 2018, Comcare denied liability to pay compensation under section 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the SRC Act**) in respect of "*osteoarthritis, localized (right)*", on the basis that the condition was not contributed to, to a significant degree, by Ms Ross' employment with the Department. Comcare affirmed the determination on reconsideration and Ms Ross sought review of that decision at the Administrative Appeals Tribunal. A hearing was conducted by videoconference in July 2020.

The Law

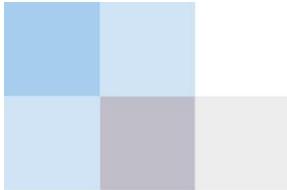
An injury is defined under section 5A of the SRC Act as an injury arising out of, or in the course of, an employee's employment.

A disease is defined under section 5B of the SRC Act as an ailment, or an aggravation of an ailment, which has been contributed to, to a significant degree, by the employee's employment.

Under section 4 of the SRC Act, an ailment means any physical or mental ailment, disorder, defect or morbid condition.

Conclusion

Ms Ross relied on the evidence of her treating Orthopaedic Surgeon, Dr Vara Mukundala, that she sustained a stress fracture of the femoral head which required a hip replacement.



Comcare relied on the evidence of Dr Ian Kelman, Orthopaedic Surgeon, who diagnosed pre-existing osteoarthritis of the right hip, leading to the stress fracture. He considered that climbing stairs may have caused the femoral head to collapse earlier than would normally be expected, but that it would have done so in any event.

The Tribunal accepted the opinion of Dr Kelman over that of Ms Mukundala - he gave evidence at hearing and was able to explain how he made his findings and how he reached his diagnosis.

The Tribunal found that Ms Ross' condition was best categorised as an ailment under section 4 of the SRC Act, because it was more akin to the natural progression of a morbid affection of the body, which is characteristic of a disease. Further, the medical evidence indicated that there was no sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, which suggested a disease rather than an injury simpliciter. In reaching its decision, the Tribunal relied on the opinion of Dr Kelman, who reported that “[t]here is no doubt that she would have developed the current condition as a natural progression of the pre-existing condition irrespective of employment”.

Comcare relied on the authority in *Comcare v Reardon* (2015) 148 ALD 356 and submitted that Ms Ross' condition happened to become worse at work but that it was not made worse by her employment. Therefore, Ms Ross' employment did not contribute to the aggravation of her pre-existing osteoarthritis to the required “*significant degree*”. Dr Kelman was of the view that the collapse of the femoral head would have occurred regardless of the activity Ms Ross was undertaking. He considered that Ms Ross' employment could be afforded a less than 5% contribution to her condition. The Tribunal considered that such a contribution fell short of being substantially greater than one that was trivial. The Tribunal applied the language employed by Mortimer J in *Reardon*, and concluded that although Ms Ross' condition became worse at work, the extent to which it was made worse by her employment was minimal and did not reach the level of being significantly contributed to by her employment with the Department.

The Tribunal affirmed the decision under review.

Lessons Learnt

In reaching its decision, the Tribunal highlighted the importance of distinguishing between whether a condition was made worse by work, or whether it simply became worse while the employee was at work.

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