

Tribunal finds headaches are not an “injury” *Wuth and Comcare* [2020] AATA 3625

Key Points

- The Tribunal was required to consider liability for a chronic daily headache condition.
- The Tribunal highlighted the importance of distinguishing between symptoms and an identifiable physiological change.
- In the absence of any physiological change the Tribunal concluded that Ms Wuth had not suffered an injury for the purposes of the SRC Act.

Background

Ms Wuth commenced employment with the Department of Finance in 2007. Ms Wuth reported working long hours and being stressed, which resulted in headaches. Ms Wuth ceased working in 2008, and her employment with the Department was terminated in 2010, on the grounds of medical invalidity.

In September 2012, Comcare accepted liability to pay compensation for “*chronic daily headache*” deemed to have occurred on 27 February 2007. The Applications before the Tribunal concerned:

1. A denial of liability to pay compensation for permanent impairment and non-economic loss pursuant to sections 24 and 27 of the SRC Act in respect of her headaches;
2. A reviewable decision which calculated Ms Wuth’s Normal Weekly Earnings (**NWE**) at \$1,260.38.

Ms Wuth relied on the evidence of Associate Professor Paul Darveniza (Neurologist) was that Ms Wuth suffered chronic daily headaches with migrainous features which continued to be work related. He considered she suffered a 30% whole person impairment. This assessment was based on his clinical judgment and the history reported to him.

Comcare relied on the evidence of Dr Ross Mellick (Neurologist), who diagnosed chronic daily headache. Dr Mellick considered that from July 2010, it was unlikely that Ms Wuth’s condition remained causally connected to her employment. Rather, he considered intervening life stressors had contributed. Further, he could not establish that she suffered any permanent impairment.

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.

Section 5B of the SRC Act defines a disease as an ailment, or an aggravation of an ailment that was 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.

The High Court decision of *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR



468 is authority that subjectively experienced symptoms, without an accompanying physiological or psychiatric change, is not enough to constitute a disease for the purpose of the SRC Act.

Conclusion

The Tribunal considered whether Ms Wuth's condition satisfied the test for an injury as set out in *May*, specifically whether she had suffered an injury under the SRC Act. It was common ground between the parties that no physiological change could be identified in Ms Wuth which accounted for the headache condition. Professor Darvenzia told the Tribunal that the condition could be ascertained by the history provided by Ms Wuth, not by physiological change. Comcare submitted that her condition could be described as a collection of subjectively reported symptoms without any accompanying identifiable physiological change or disturbance, therefore, her condition did not amount to an injury under the SRC Act.

The Tribunal accepted Comcare's contention and found that Ms Wuth's chronic daily headache condition did not constitute an injury for the purposes of section 14 of the SRC Act.

The Tribunal further found that Ms Wuth did not suffer a permanent impairment as there was evidence that there was treatment available which could improve her condition. Further, it considered that Professor Darvenzia had not demonstrated the process by which he reached his conclusion. The Tribunal found this failed to meet the requisite standard, and therefore, it could not accept his assessment as to her permanent impairment.

Having determined that Ms Wuth's chronic headache condition did not constitute an injury under the SRC Act, it was unnecessary for the Tribunal to make a finding related to the calculation of her NWE

The reviewable decisions were affirmed.

Lessons Learnt

In circumstances where a person suffers symptoms without an identifiable physiological change, there can be no injury under the SRC Act. Mere subjective symptoms are not enough to meet the threshold test set out in section 5A of the SRC Act.

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