

Tribunal affirms Cleanaway's position on hernia claims and reasonable administrative action

*Barry and Cleanaway Operations Pty Ltd [2021] AATA 369
(3 March 2021)*

Key Points

- The Tribunal was asked to decide whether a truck driver was entitled to compensation in respect of a hernia and a psychological condition.
- The Tribunal did not accept the evidence of the employee and found that there was no evidence that a hernia had been sustained at work.
- The Tribunal found that the psychological claim was excluded as it was caused by reasonable administrative action.

Background

Mr Barry commenced employment with Cleanaway Operations Pty Ltd on 31 July 2015 as a truck driver.

Mr Barry lodged various claims for workers' compensation in respect of hernias claimed to have been sustained at work, as well as for "*pains to the umbilicus post-surgery, seroma, scar tissue, scarred and contracted mesh*" and a psychological condition.

Mr Barry also submitted a claim for permanent impairment and non-economic loss pursuant to sections 24 and 27 of the SRC Act in respect of "*depression with anxiety and insomnia*", sustained on 17 August 2017. Liability to pay compensation for permanent impairment and non-economic loss was denied.

Mr Barry sought review of six reviewable decisions at the Administrative Appeals Tribunal:

1. A denial of liability for a psychological condition described as "*depression with anxiety insomnia*", sustained on 17 August 2017, pursuant to section 14 of the SRC Act.
2. A denial of liability to pay compensation for medical treatment in respect of surgery obtained in respect of "*para umbilical hernia*", with a date of injury of 12 July 2016, pursuant to section 16 of the SRC Act.
3. A denial of liability in respect of "*pains to the umbilicus post-surgery, seroma, scar tissue, scarred and contracted mesh*", sustained on 26 March 2017, pursuant to section 14 of the SRC Act.
4. A denial of liability to pay compensation for permanent impairment and non-economic loss in respect of "*depression with anxiety and insomnia*", sustained on 17 August 2017, pursuant to sections 24 and 27 of the SRC Act.

5. A denial of liability in respect of “*para umbilical hernia*”, sustained on 12 July 2016, pursuant to section 14 of the SRC Act.
6. A denial of liability in respect of “*recurrent small hernia*”, sustained on 26 March 2017, pursuant to section 14 of the SRC Act.

A hearing was conducted by video link in December 2020. Mr Barry was self-represented.

The Law

Section 5A of the SRC Act sets out that an injury means:

- (a) a disease suffered by an employee: or
- (b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee’s employment: or
- (c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee’s employment), that is an aggravation that arose out of, or in the course of, that employment:

but does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee’s employment.

Disease is defined in section 5B as:

- (a) an ailment suffered by an employee: or
- (b) an aggravation of such an ailment:

that was contributed to, to a significant degree, by the employee’s employment.

Section 24 of the SRC Act provides that where an injury to an employee results in a permanent impairment, Cleanaway will be liable to pay compensation to the employee in respect of that injury.

Section 27 of the SRC Act provides that where an injury to an employee results in a permanent impairment and compensation is payable in respect of the injury under section 24, Cleanaway is liable to pay additional compensation in accordance with this section to the employee in respect of that injury for any non-economic loss suffered by the employee as a result of that injury or impairment.

Conclusion

In the written decision, the Tribunal was critical of the conduct and behaviour of Mr Barry during the hearing. According to the Tribunal, Mr Barry failed to question witnesses in the appropriate manner, gave his own evidence in a way that was embellished and reconstructed, used inappropriate and offensive language, smoked a cigarette during the hearing and at one stage refused to take any further part in the hearing.

In relation to the hernia claims, the Tribunal found that Mr Barry did not report any injury on 12 July 2016

and the contemporaneous medical notes from his general practitioner recorded complaints of pain in a different area of the body. The Tribunal accepted the opinions of Associate Professor Renaut and Dr Bourke that Mr Barry did not suffer an umbilical hernia as a result of his work at Cleanaway.

The Tribunal noted that there were no witnesses to the claimed recurrence of a hernia that apparently occurred in March 2017. The Tribunal accepted Associate Professor Renaut's evidence that Mr Barry did not suffer from a recurrence of a hernia, but instead developed a seroma, secondary to the operation to insert mesh to the lining of his abdomen. As the original condition was not work-related, the Tribunal concluded that the seroma was also unrelated to Mr Barry's employment.

The Tribunal therefore affirmed all of the reviewable decisions in relation to Mr Barry's claimed hernias.

Dr Paul Grech, Mr Barry's treating psychologist, gave evidence at the hearing on behalf of Mr Barry. Dr Grech conceded that being a psychologist, he deferred to the opinion of Associate Professor George Mendelson, who is a psychiatrist and gave evidence at the hearing on behalf of Cleanaway.

The Tribunal concluded that Mr Barry suffered from an adjustment disorder, based on the diagnosis of Associate Professor Mendelson. The Tribunal found that the causative factors included:

- (a) being advised by Dr Bourke that he was at risk of losing his job
- (b) the implementation of a rehabilitation program in accordance with Dr Bourke's assessment of fitness for duty
- (c) his unsuccessful application for an alternate role within Cleanaway, based at Tyabb;
- (d) a meeting held on 6 June and a subsequent written warning letter dated 8 June 2017.

The Tribunal found that the first factor could not be said to have arisen out of, or in the course of, Mr Barry's employment.

The Tribunal found that the steps taken in relation to the second factor fell within the definition of reasonable administrative action, taken in a reasonable manner, pursuant to section 5A(1) of the SRC Act.

The Tribunal could not find anything unreasonable in the way that Cleanaway decided the third factor. The Tribunal found that Mr Barry's unsuccessful application fit the definition of anything reasonably done in connection with the failure to obtain a transfer within the meaning of section 5A(2)(f) of the SRC Act.

Finally, the Tribunal found that the meeting and written warning constituted disciplinary action within the meaning of section 5A(2)(d) of the SRC Act. The Tribunal also stated that the meeting could be considered counselling action within the meaning of section 5A(2)(b) of the SRC Act.

The Tribunal therefore affirmed the two reviewable decisions in relation to the psychological condition.

Lessons Learnt

When investigating claims for workers' compensation, it is important to obtain and to retain contemporaneous evidence such as witness statements, file notes, emails and records of conversations.

Memories of workplace events can fade, which is where the contemporaneous records are imperative to establish the factual background before coming to the correct decision on liability.

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