

Tribunal confirms physiological change necessary for an “Injury” under Comcare scheme

QXQH and Comcare [2021] AATA 3036

Key Points

- The Tribunal was asked to consider whether an Executive with Services Australia was entitled to further compensation in relation to a shoulder injury suffered in 2015.
- The Tribunal found that the original injury was a sprain, without physiological change, which did not constitute an “Injury”.
- The Tribunal found in favour of Comcare and the decision under review was affirmed.

Background

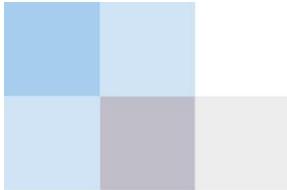
QXQH (the Applicant) was employed as an Executive Level 2 Director with Services Australia. On 13 October 2015, the Applicant sustained a right shoulder injury while opening a fire door. He submitted a claim for workers’ compensation in respect of “*Restricted use of Right Shoulder – likely impingement syndrome*” noting that he had previously had a similar injury in 2006, which he had surgically repaired. Liability to pay compensation was accepted for “*partial tear rotator cuff (right)*”.

On 7 June 2016, the Applicant underwent a right shoulder arthroscopy and rotator cuff repair under Dr Maurizio Damiani, Orthopaedic Surgeon. The applicant underwent a further surgical treatment to his shoulder on 16 March 2017.

Dr Nicholas Burke, Occupational Physician, examined the Applicant in February 2018 and noted the previous shoulder injury and surgical repair in 2006. Dr Burke reported that the principal cause for the ongoing symptoms and disability remained underlying degenerative changes.

Dr Philip Allen, Orthopaedic Surgeon, provided a report dated 24 October 2019 in which he diagnosed the applicant as suffering from degenerative right shoulder disease, which had progressed over the years and predated the 2015 work injury. In a supplementary report dated 23 June 2021, Dr Allen confirmed his opinion that the 2015 incident resulted in an exacerbation of the applicant’s underlying degenerative changes in the right shoulder. Dr Allen was of the opinion that there was no objective evidence of any significant material change to the shoulder as a result of the 2015 work accident.

On 10 February 2020, the Respondent determined that there was no present liability to pay compensation in respect of medical treatment, incapacity to work and household and attendant care, under sections 16, 19 and 29 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the SRC Act) in relation to the



accepted shoulder condition. The decision was made on the basis that any ongoing symptoms were attributable to pre-existing degenerative changes in the shoulder. This decision was affirmed upon reconsideration and the Applicant sought review by way of application to the Administrative Appeals Tribunal.

The Respondent arranged for the Applicant to be assessed by Professor Peter Steadman, Orthopaedic Surgeon, who opined that the Applicant's current shoulder condition arose in 2006. Professor Steadman reported that the degeneration in the shoulder was part of a long clinical journey of gradual decline and was not due to the work accident in 2015.

The Law

Pursuant to section 16(1) of the SRC Act, where an employee suffers an injury, Comcare is liable to pay compensation, in respect of the cost of medical treatment obtained in relation to the injury, being treatment that it was reasonable for the employee to obtain in the circumstances.

Section 19 of the SRC Act provides that where an employee is incapacitated for work as a result of an injury, Comcare is liable to pay to the employee in respect of the injury, for each week that is a maximum rate compensation week during which the employee is incapacitated.

Section 29(1) of the SRC Act provides that where, as a result of an injury (other than a catastrophic injury) to an employee, the employee obtains household services that he or she reasonably requires, Comcare is liable to pay compensation of such amount per week.

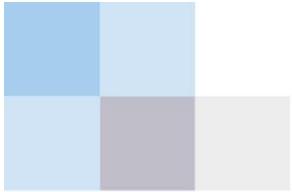
The authority in *Telstra Corporation Ltd v Hannaford* [2006] FCAFC 86, is that the acceptance of liability does not mean that a later decision maker cannot make new findings of fact that undermine that acceptance.

Conclusion

The Tribunal noted that there was no dispute that liability had been accepted for '*partial tear rotator cuff (right)*' with a date of injury of 13 October 2015. The Respondent contended that the Applicant suffered a simple sprain injury at work on 13 October 2015 and that it did not bring about a physiological change in the shoulder. It followed that liability should never have been accepted for the sprain injury. If the Applicant did suffer a sprain that brought about physiological change, that did constitute an "Injury", it resolved within 4 to 6 weeks after the incident and any ongoing symptoms were due to underlying degenerative change.

The Tribunal found that the preferable diagnosis as a result of the event on 13 October 2015 was a musculoskeletal sprain of which a physiological change did not result. The Tribunal found that the sprain to the Applicant's shoulder could not be considered to be an "Injury" for the purposes of section 5A(1)(b) of the SRC Act and therefore no liability existed under section 16, 19 and 29 of the SRC Act.





It was noted that even if the Tribunal had found that the musculoskeletal sprain was an “Injury” for the purposes of section 5A of the SRC Act, based on the preferred evidence of Professor Steadman and Dr Allen, the effects of such an injury resolved well before the reviewable decision or at least by the time the Applicant saw Dr Allen in October 2019. This indicated that the Applicant’s past and present pain resulted from the underlying degeneration in his shoulder, rather than the sprain sustained in 2015.

The decision under review was affirmed.

Lessons Learnt

When assessing liability for an injury under the SRC Act, the Tribunal will look for evidence of a physiological change. Without demonstrable physiological change, a medical condition will not be considered to be an “Injury” under section 5A(1)(b) of the SRC Act.

Contact:

Michaela Broughton
Solicitor
Direct: +61 478 064 183
Michaela.Broughton@hbalegal.com

Kate Watson
Partner
Direct: +61 409 578 461
Kate.Watson@hbalegal.com

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