

Former AFP officer not entitled to compensation for  
psychological condition sustained in 1987  
*Ascic v Comcare* [2021] FCA 1498

## Key Points

- The Federal Court was required to consider whether the Tribunal erred in finding that an Australian Federal Police Officer was not entitled to compensation for permanent impairment for a psychological condition.
- The Federal Court applied *Kostas v HIA Insurance Services Pty Ltd t/as Home Owners Warranty* [2010] HCA 32 and found Mr Ascic's impairment became permanent prior to the commencement of the *Safety, Rehabilitation and Compensation Act 1988* (Cth), which *disentitled* him to compensation for permanent impairment.
- The appeal was dismissed.

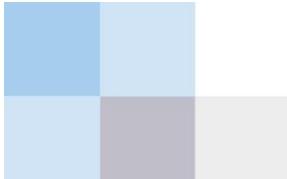
## Background

Mr Ascic was employed by the Commonwealth Police from 25 December 1973, which subsequently became known as the Australian Federal Police (**AFP**). Mr Ascic submitted a claim for workers' compensation in relation to a psychological condition and by determination dated 25 May 1988. Comcare accepted liability to pay compensation for '*depression and acute paranoid reaction to perceived stress in employment*' sustained on 11 December 1987. Mr Ascic retired from the AFP on 1 September 1988 on the grounds of invalidity.

Mr Ascic initially received incapacity payments pursuant to the *Compensation (Commonwealth Government Employees) Act 1971* (**the 1971 Act**) until that Act was repealed by the *Safety, Rehabilitation and Compensation Act 1988* (**the SRC Act**). From that time, his entitlements were determined in accordance with the transitional provisions in Part X of the SRC Act.

On 12 December 2016, Mr Ascic submitted a claim for permanent impairment in respect of the accepted condition. Comcare denied liability to pay compensation for Mr Ascic's claim because his condition became permanent prior to the commencement of the SRC Act and the 1971 Act did not provide for lump sum compensation for psychological conditions. In these circumstances, section 124(3) of the SRC Act excluded Mr Ascic's entitlement to compensation for permanent impairment.

On 18 May 2017, Mr Ascic sought a review of Comcare's decision dated 16 March 2017 at the Administrative Appeals Tribunal. The Tribunal affirmed the reviewable decision on the basis that Mr Ascic's impairment became permanent prior to the commencement of the SRC Act and because there was no evidence that he had sustained a new impairment after the commencement of the SRC Act. Mr



Ascic appealed the Tribunal's decision to the Federal Court of Australia.

The Federal Court was required to consider the following questions of law:

1. Whether the Tribunal erred in construing section 27 of the 1971 Act by failing to find that it could be relied upon, in isolation, to establish an entitlement to compensation for permanent impairment;
2. Whether there was any evidence to support the Tribunal's finding that Mr Ascic's impairment became permanent prior to the commencement of the SRC Act;
3. Whether the Tribunal should have considered claims other than permanent impairment, to which Mr Ascic may have been entitled.

## The Law

Section 24 of the SRC Act requires Comcare to pay compensation where an injury to an employee results in permanent impairment.

Section 124(3) of the SRC Act states that an employee is not entitled to compensation under section 24 if, based on the date on which the impairment became permanent, they were not entitled to such compensation under the 1971 Act. Relevantly, the 1971 Act did not entitle workers to compensation for permanent impairment for psychological conditions.

In *Brennan v Comcare* [1994] FCA 360, Burchett J observed that an employee would only be disentitled to compensation because of section 124(3) of the SRC Act where a particular impairment became permanent prior to the commencement of the SRC Act. If an employee suffered a permanent impairment after this time, compensation may be payable under section 124 of the SRC Act notwithstanding the fact that the injury occurred prior to its commencement.

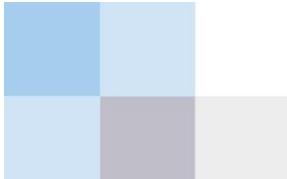
The Full Court of the Federal Court found in *Department of Defence v West* (1988) 85 FCR 491 that the progression or gradual worsening of an impairment will not constitute a new impairment, unless there is a change in the underlying patho-physiological condition causing the impairment.

In *Kostas v HIA Insurance Services Pty Ltd t/as Home Owners Warranty* [2010] HCA 32, the High Court stated an error of law occurs where a decision-maker makes a finding of fact for which there is no evidence.

## Conclusion

The Federal Court found the Tribunal had correctly interpreted the relevant sections of the 1971 Act, which did not create liability for compensation for permanent impairment relating to psychological conditions.

The Federal Court applied *Kostas* and found the Tribunal had not erred in concluding Mr Ascic's impairment became permanent prior to the commencement of the SRC Act, because it had sufficient



evidence before it. This evidence included the fact that Mr Ascic ceased employment and retired on invalidity grounds before the SRC Act was introduced.

The Federal Court stated it was not open to the Tribunal to determine any other claims Mr Ascic may have purported to make in the course of the hearing, because section 64 of the SRC Act confined its powers of review to reviewable decisions within the meaning of section 62 of the SRC Act.

Accordingly, the Tribunal did not err in focusing its decision on the determination of Mr Ascic's claim for permanent impairment.

The Federal Court did not consider a number of other grounds of appeal raised by Mr Ascic because they were either repetitive, did not raise a valid question of law, or contained unsubstantiated submissions.

The appeal was dismissed.

## Lessons Learnt

Compensation for a permanent impairment sustained prior to the commencement of the SRC Act will only be available in accordance with the transitional provisions found in Part X of the SRC Act. This means that section 124(3) of the SRC Act would disentitle an employee to compensation for permanent impairment if it arose prior to the commencement of the SRC Act and was not available under a predecessor Act.

A finding of fact will constitute an appealable error of law if it was made with no evidence to support it.

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