

You don't always have to put in a fresh claim, according to the Federal Court *Ellison and Comcare* [2022] FCA 95

Key Points

- The Federal Court was asked to decide whether the Administrative Appeals Tribunal had erred in finding that it had no jurisdiction to consider a claim for workers' compensation for Mr Ellison's underlying degenerative disease of the spine.
- The Federal Court found there had been an error of law and Mr Ellison's appeal was allowed.

Background

Mr Ellison was employed by the Australian Customs Service (**Customs**) as a Marine Tactical Officer. Mr Ellison injured his back during a training exercise on 21 April 2009 and he submitted a claim for workers' compensation.

Comcare accepted liability to pay compensation in respect of a 2009 injury described "lumbar sprain", pursuant to section 14 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) (the **SRC Act**). Liability to pay compensation for incapacity for work and medical treatment, pursuant to sections 16 and 19 of the SRC Act, was ceased as of 11 January 2018, on the basis that any ongoing symptoms were due to a pre-existing disease, described as degenerative pathology in the spine. Mr Ellison applied for a reconsideration of the determination, and by a reconsideration decision dated 6 April 2018, Comcare affirmed the determination. He then applied for review of the decision in the Administrative Appeals Tribunal. On 2 April 2020, the Tribunal affirmed the reviewable decision.

Mr Ellison appealed the Tribunal's decision to the Federal Court, pursuant to section 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) (the **AAT Act**). Mr Ellison contended that the Tribunal made an error of law in concluding that it did not have jurisdiction to decide whether Mr Ellison was entitled to workers' compensation in respect of degenerative disease in his lower back which he argued was contributed to, to a significant degree, by his physically demanding work for Customs from 2002-2009, as distinct from the low back injury he suffered on 21 April 2009.

The Law

Section 5A of the SRC Act defines injury as a physical or mental injury arising out of, or in the course of, an employee's employment. Disease is defined in section 5B to mean an ailment or aggravation of an



ailment which has been contributed to, to a significant degree, by an employee's employment.

Section 54 sets out the requirements for a claim for compensation under the SRC Act. Relevantly, in the Full Federal Court decision of *Szabo v Comcare* [2012] FCAFC 129 (**Szabo**), the Full Court noted the Tribunal found that the notice of injury and claim for compensation were in respect of a specific aggravation of a pre-existing condition and not in respect of the nature and conditions of employment. The Full Court upheld the Tribunal's finding that the further notices of injury given after the specifically claimed aggravation, and the medical opinions supporting a 'nature and conditions' claim, did not extend the Tribunal's jurisdiction to include consideration of a 'nature and conditions' claim.

Section 44 of the AAT Act allows Appeals to the Federal Court of Australia from decisions of the Tribunal.

Conclusion

The Tribunal was satisfied that Mr Ellison had suffered two conditions for the purposes of the SRC Act:

1. An aggravation of the underlying degenerative disease, sustained in the April 2009 work accident, which Mr Ellison had ceased to suffer the effects of by 11 January 2018; and
2. Underlying degenerative disease, which was present prior to the April 2009 work accident, which he continued to suffer the effects of after 11 January 2018.

The Tribunal did not decide whether Mr Ellison was entitled to compensation in relation to the underlying degenerative disease (injury 2 above) because it considered Mr Ellison's claim related to an injury resulting from the April 2009 work accident only. In the Tribunal's view, Mr Ellison had not made a claim under section 54 of the SRC Act for the underlying degenerative disease and accordingly, the Tribunal concluded it had no jurisdiction to decide such a claim.

The Federal Court held that the Tribunal erred in finding it had no jurisdiction to determine whether Mr Ellison was entitled to compensation for the underlying degenerative disease, for the following reasons:

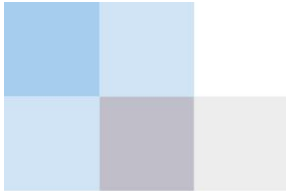
1. The Tribunal was not restricted to the case expressly articulated by Mr Ellison;
2. The Tribunal's jurisdiction was not limited to the injury notified in the claim form; and
3. A claim for the underlying degenerative disease was raised by the materials before the Tribunal.

The Federal Court found that Comcare was appropriately informed as to the nature of the claimed injury and its connection with employment and had a fair opportunity to properly investigate the claim. The claim for the underlying degenerative disease was before Comcare as part of the reconsideration request from Mr Ellison and the Tribunal had jurisdiction to consider and decide on it.

The Appeal was allowed and the matter was remitted to the Tribunal to be determined.

Lessons Learnt

The decision suggests that claims do not need to be determined strictly in terms of the specific condition



identified in the claim form, so long as there is some evidence before the decision maker of the broader claim that the applicant is attempting to make. A determining authority is required to consider all of the substantive issues raised in the materials before it, including all of the medical evidence and the details provided in the reconsideration request.

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