An identifiable physiological change is not necessary for there to be an "*ailment*"

Wuth and Comcare [2022] FCAFC 42

Key Points

- Ms Wuth appealed a decision of the Tribunal, which found than she had not suffered an injury within the meaning of the SRC Act because there had been no identifiable physiological change evident.
- The Full Court of the Federal Court stated that it was unnecessary for there to be an identifiable physiological change before an employee could be found to have suffered an ailment within the meaning of section 4 of the SRC Act. It was sufficient if the employee's condition was diagnosed by a medical practitioner, based on their reported history and the practitioner's study of cause and effect.
- The Full Court of the Federal Court found the Tribunal had erred in requiring there to be an identifiable physiological change before the employee's ailment could be recognised
- Accordingly, the Full Court of the Federal Court allowed the appeal.

Background

Ms Wuth was employed as a member of the Australian Public Service until 27 May 2010. She contracted a viral condition in December 2005 which was unrelated to her employment and caused migraine headaches. Ms Wuth transferred her employment to the Department of Finance and Administration in November 2006. At that time, she no longer experienced headaches and her agreed work hours were 29.4 hours per week. However, Ms Wuth subsequently developed headaches after she began working additional hours in early 2007. She has not worked since May 2008 as a result of her chronic headaches and on 27 May 2010 she retired on invalidity grounds.

Ms Wuth submitted a workers' compensation claim on 29 April 2010 in respect of "*entrenched chronic daily headache (intractable migraine) arising from an exacerbation of post-viral fatigue*", which she first noticed on 12 February 2007. Associate Professor Raymond Garrick (Neurologist) provided a report dated 14 September 2009 in which he stated Ms Wuth's headaches originated from an inflammatory process but were currently aggravated by prolonged work hours, anxiety of work expectations and the probability of postural factors. Liability was initially denied by Comcare, because it considered her

condition was not significantly contributed to by her employment as required by section 5B of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**). However, the Tribunal determined with the consent of the parties on 14 September 2012 that compensation was payable. Comcare subsequently determined that the applicant was entitled to compensation for incapacity payments between
30 April 2007 and 27 May 2010, but that no compensation was payable from 28 May 2010 because of section 20 of the SRC Act.

The present dispute was the subject of several appeals and cross-appeals, including in relation to the calculation of Ms Wuth's normal weekly earnings and whether or not she suffered from an "*injury*" within the meaning of the SRC Act. This article relates only to the latter issue.

On 2 July 2014, Comcare affirmed a determination dated 21 March 2014 which denied liability to pay compensation for permanent impairment and non-economic loss pursuant to sections 24 and 27 of the SRC Act in relation to Ms Wuth's headache condition. This decision was the subject of several appeals and was ultimately remitted to the Tribunal for consideration in accordance with the law.

On 3 September 2020, the Tribunal affirmed the reviewable decision dated 2 July 2014 because it accepted Comcare's argument that Ms Wuth suffered a collection of subjectively reported symptoms without an accompanying physiological change, rather than an "*injury*" within the meaning of the SRC Act. This finding was purportedly made on the basis of the High Court decision of *Military Rehabilitation and Compensation Commission v May* [2016] 257 CLR 468.

Ms Wuth appealed this decision to the Federal Court. Ms Wuth contended that the Tribunal had misinterpreted the High Court's decision in *May* and had erred in law in finding that she had not suffered a compensable injury pursuant to section 14 of the SRC Act.

Comcare argued that the evidence before the Tribunal supported a finding that Ms Wuth's alleged headaches did not constitute an "*injury*" within the meaning of the SRC Act because there was no physiological change evident.

The Law

Section 14 of the SRC Act provides that Comcare is liable to pay compensation in respect of an "*injury suffered by an employee if the injury results in death, incapacity for work, or impairment*".

"*Injury*" is defined in subsection 5A(1) of the SRC Act to mean a disease suffered by an employee.

"*Disease*" was defined in section 5B(1) of the SRC Act as an ailment suffered by an employee or the aggravation of such an ailment, that was contributed to, to a material degree, by the employee's employment. Legislative change occurred after Ms Wuth's injury which altered this provision to require

the employee's employment to contribute to a "*significant*", rather than "*material*", degree to their "*disease*".

An ailment is defined under section 4 of the SRC Act and 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 for the proposition 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 Full Court of the Federal Court referred to *McNamara v Consumer Trader and Tenancy Tribunal* [2005] 221 CLR 646 and stated it was necessary to pay attention to the terms of the legislation and the facts under consideration in each case. This was to avoid applying judicial formulations directed to one particular form of legislation to another which was differently framed. The Federal Court referred to *Owners of the ship "Sin Kobe Maru" v Empire Shipping Co Inc* [1994] 181 CLR 404 and stated the definition of an "*ailment*" under section 4(1) of the SRC Act should be "*approached on the basis that Parliament said what it meant and meant what it said*".

The Federal Court observed that the High Court in *May* primarily focussed on identifying the characteristics of an injury within the meaning of section 5A of the SRC Act, because that was the type of condition Mr May claimed he had sustained. The Federal Court held that the requirement for there to be an identifiable physiological change, which was referred to in the High Court decision of *May*, only applied to an injury within the meaning of section 5A of the SRC Act and did not apply to an ailment. This was because the High Court did not specifically refer to the need for a physiological change to be evident before an ailment could be recognised, but it did so while discussing an injury under section 5A of the SRC Act. The High Court instead referred to the statutory language which applied at the time of Mr May's injury, which required his "*state*" to have been contributed to in a material degree by his employment with the Commonwealth. The Federal Court considered the High Court's statement that "*there must be more than an assertion by an employee that he or she feels unwell*" for there to be an ailment, was only "*general guidance*" to be applied in "*borderline cases*" and that it was necessary for the text of the SRC Act to be interpreted in each case. In the Federal Court's view, requiring there to be an identifiable physiological change in the context of an "*ailment*" would narrow the distinction between an "*ailment*" and an "*injury*".

Accordingly, the Federal Court found the Tribunal misdirected itself in finding that Ms Wuth had not suffered an "*ailment*" because no physiological change could be identified. It also erred in its statement there was common ground between the parties that no physiological change "*could*" be identified,

because no such concession had been made by Ms Wuth. Although the Federal Court did not consider a physiological change was required for Ms Wuth's injury to be compensable, it agreed with Associate Professor Paul Darveniza's view that, in relation to Ms Wuth's migraines, *"[just] because someone can't describe [a physiological change] doesn't mean to say it doesn't exist*".

The Federal Court stated there would be cases in which a physical or mental ailment could be diagnosed by a medical practitioner based on an employee's history and studies of cause and effect, without the need to refer to pathology or other diagnostic aids. It considered this case was distinguishable from that in *May*, because the Tribunal accepted Ms Wuth suffered from a condition which was diagnosed by a medical specialist and had been contributed to by her former employment.

Accordingly, the Federal Court allowed Ms Wuth's appeal and remitted the matter to the Tribunal for reconsideration according to law.

Lessons Learnt

The High Court's statement in *May* in respect of the need for there to be a "*physiological change*" only applied to an "*injury*" within the meaning of section 5A of the SRC Act. A diagnosis based on an employee's subjectively reported history and studies of cause and effect may be sufficient to conclude they have suffered a physical or mental "*ailment*" within the meaning of section 4 of the SRC Act, without the need to refer to pathology or other diagnostic aids.

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