

## Comcare not liable to pay compensation for medical expenses where injury is not in connection with employment

*Hewitt and Comcare (Compensation) [2023] AATA 991*

### Key Points

The Tribunal was required to consider whether Comcare had present liability to pay compensation to Ms Hewitt for medical expenses.

### Background

Ms Hewitt was employed by the National Oceans Office (now absorbed into the Marine Division of the Department of the Environment and Heritage). On 27 July 2005, she submitted a claim for workers' compensation for an injury to her lower back and right sciatica as a result of "*I coughed*". Comcare accepted liability to pay compensation pursuant to section 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the SRC Act**) in respect of "*aggravation of displacement of intervertebral disc – lumbar*" sustained on 19 July 2005. She sustained two further incidents of back pain in 2009 and 2017.

On 25 May 2018, Dr Mitchell wrote to Comcare stating Ms Hewitt had "*Failed Back Surgery Syndrome*" following her L4/5 surgery and that she required a trial of spinal cord stimulation. He requested that Comcare accept liability for this treatment.

On 26 July 2018, Ms Hewitt lodged a Notification of a Newly Reported Condition (the 2018 notification) in relation to "*chronic back pain/nerve pain – hyperalldynia [sic]*". Ms Hewitt was asked to describe how the new injury had been caused by her existing compensable condition to which she advised it "*began with severe episode of L4/5 back pain in 2009*".

On 17 April 2019 Comcare determined it had not present liability to pay compensation for medical expenses under section 16 of the SRC Act. This decision was affirmed on reconsideration on 6 January 2020.



## The Law

Section 14 of the SRC Act provides that the employer 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.

Section 5A(1) of the SRC Act provides as follows:

"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;

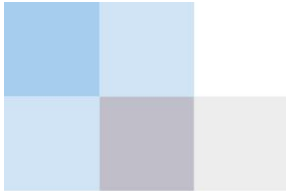
but does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

Pursuant to section 16 of the SRC Act, where an employee suffers an injury, the employer is liable to pay for the cost of medical treatment obtained in relation to the injury, being treatment that was reasonable to obtain in the circumstances.

## Conclusion

The Tribunal was satisfied that the weight of the medical evidence pointed to Ms Hewitt suffering from a multilevel degenerative change of the lumbar spine, which was aggravated by the 2005 coughing incident. The Tribunal noted there was also a significant body of evidence which pointed towards pre-existing degenerative changes in Ms Hewitt's lumbar spine before the 2005 coughing incident, and that this fortified the conclusion reached. In addition, the Tribunal accepted Comcare's contention that hypermobility was an alternative condition causing Ms Hewitt's pain, which is not in any way related to her employment.

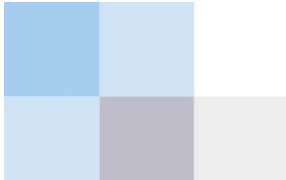
The Tribunal found that the L4/L5 disc protrusion or disc aggravation suffered by Ms Hewitt as a result of the 2005 coughing incident should be considered within the meaning of s 5A(1)



of the SRC Act as it applied in 2005. The Tribunal applied the analysis of s 6(1)(b) of the SRC Act which encompasses the 'journey provisions' and governs whether an injury is deemed to have occurred in the course of the employee's employment. The Tribunal explained that the applicant was engaging in a social activity when travelling to and from dinner after hours. The Tribunal could not find evidence, with respect to the injuries suffered as a result of the 2005 coughing incident, that any connection has been established by the applicant between the injury, the circumstances in which it occurred and her employment itself. The Tribunal found that no liability arose for Comcare to pay compensation to Ms Hewitt with the respect to the 2005 coughing incident as the injury did not occur in the course of her employment. Accordingly, the Tribunal found that the original section 14 determination accepting liability for "*aggravation of displacement of intervertebral disc-lumbar*" should be undercut.

With respect to the 2009 incident, the Tribunal found that because Ms Hewitt failed to make a separate claim for this injury there was no decision concerning that incident which could be the subject of review by the Tribunal. Further, for the Tribunal to make a finding that the 2009 incident was in some way a part of the condition Ms Hewitt suffered as a result of the 2005 coughing incident, it would fall into error. The Tribunal made reference to Ms Hewitt's evidence which indicated that the pain she suffered because of the 2009 incident was predominantly left-sided. Further, the Tribunal also made reference to the evidence of Dr Reiter, rheumatologist, in which she opined because of the pain distribution being different to the right-sided pain Ms Hewitt experienced, this indicated that the origin of such pain was different. This suggested that Ms Hewitt's symptoms from the 2009 incident were more likely than not to have arisen from a different cause.

Ms Hewitt contended the evidence and medical diagnoses that was before the Tribunal was all speculative and without additional testing the experts who examined her were unable to state for certain what her pain drivers might be; the Tribunal disagreed. The Tribunal concluded that the allegations of failed disc replacement surgery, or as Dr Mitchell described it, "*Failed Back Surgery Syndrome*", had not been established. The Tribunal accepted Comcare's contention that there was no continuing causal relationship between the disc aggravation or L4/5 disc protrusion experienced by Ms Hewitt since 2013 when the disc replacement surgery was undertaken. Similarly, Tribunal also concluded that there was no continuing causal connection between the disc aggravation of the L4/5-disc protrusion arising from the December 2017 incident and the commencement of Ms Hewitt's claim for a chronic pain syndrome from that date. The Tribunal also accepted Comcare's contention that the



disc replacement surgery was undertaken in respect of a non-compensable condition, on the basis that the July 2005 incident was not work-related, there was no claim for the 2009 incident, and the 2017 incident was also not work related. The Tribunal also found that the disc replacement surgery did not fail. The Tribunal concluded that the disc replacement surgery cannot be an injury for the purposes of the SRC Act in the absence of a work derived condition.

The Tribunal acknowledged that Ms Hewitt's claim for chronic pain secondary to the accepted condition of the disc aggravation or L4/5 disc protrusion had not been established by Ms Hewitt. The 2005 and 2017 incidents were not work related, and an essential ingredient for such claim must have and continue to have the characteristics of having been contributed to, to a significant degree, by the employment.

Accordingly, the reviewable decision was affirmed.

## Lessons Learnt

The decision confirms that liability to pay compensation may be ceased in circumstances where the applicant does not have and does not continue to have the characteristic of having been contributed to, to a significant degree, by their employment. Should the employment cease to contribute in a material degree to an ailment, it does not matter that it was the same ailment as that from which the applicant suffered earlier.

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