

Howes and Comcare [2015] AATA 39 (28 January 2015)

Key Points

- Whether breast reduction surgery could be considered a “*treatment that it was reasonable for the employee to obtain in the circumstances*” pursuant to section 16 of the SRC Act.

Background

Ms Howes worked in client services for the Australian Taxation Office and sustained an injury in the beginning of 2005. Ms Howes sought compensation for neck and shoulder pain which was diagnosed as “*Intervertebral disc disorder - cervical region*”.

Comcare accepted liability for this injury on the basis that it resulted from constant computer use during her work. Comcare also accepted liability for “*sprain of shoulder and upper arm (right)*”, “*suacromial bursitis (right)*”, and “*erosion of teeth*” pursuant to s 14 of the Safety Rehabilitation and Compensation Act (**SRC Act**).

On 2 November 2009, Ms Howes underwent bilateral breast reduction surgery and abdominoplasty. Ms Howes contended that the breast reduction surgery was recommended by several medical practitioners to treat her compensable injuries. Comcare contended the breast reduction surgery was not undertaken in relation to her compensable injuries nor was it undertaken at the direction of a legally qualified medical practitioner.

The Tribunal was required to consider:

- 1) whether the breast reduction surgery was undertaken at the direction of a legally qualified medical practitioner;
- 2) whether the breast reduction surgery was considered to be “therapeutic” for the purposes of falling within the definition of medical treatment; and
- 3) the purpose for which the breast reduction surgery was undertaken.

The Law

Section 16(1) of the SRC Act provides that Comcare will be liable to pay for medical treatment obtained in respect of a compensable condition if it was reasonable for the employee to obtain in the circumstances.

Section 4 defines “medical treatment” to be therapeutic treatment obtained at the direction of a legally qualified practitioner.

The Tribunal considered the case of *Rope and Comcare* [2013] AATA 280 for clarification of what would constitute ‘therapeutic treatment’. In essence, this case found that one must consider what the original purpose or object of the treatment is. This case highlighted that the beneficial effects associated with the treatment would not be enough to classify it as therapeutic treatment.

Conclusion

The Tribunal placed weight on the evidence obtained from Dr Taylor and Dr Milovic (Plastic Surgeons) in considering Ms Howes' argument. Dr Milovic performed the breast reduction surgery on Ms Howes. He opined that Ms Howes would experience relief of the pain in her shoulders and back after the procedure. Dr Taylor opined that Ms Howes would find an improvement in her neck and back pain from the reduction in weight. The Tribunal found that both Dr Taylor and Dr Milovic had 'directed' Ms Howes to undergo breast reduction surgery.

Although Dr Taylor and Dr Milovic directed Ms Howe to undergo the treatment, the Tribunal found that it could not be considered therapeutic for the purposes of falling within the definition of medical treatment. Both doctors recommended the surgery as a way of relieving the pain in Ms Howes' neck and shoulders due to the excessive weight of her breasts. The Tribunal found that the surgery could not be therapeutic merely because it may have provided some benefit to Ms Howes' compensable injuries.

The Tribunal found that the breast reduction surgery was not for the benefit of the compensable injuries and that Ms Howe would have undertaken the surgery regardless. Ms Howe was inconsistent with the contemporaneous material causing her to be portrayed as an unreliable historian and making her argument as to the purpose of the surgery weak. Ms Howe did not mention the breast reduction surgery to any doctors she saw after the surgery when questioned on her treatment for her compensable injuries. Further, in reports from Dr Pell there was a recommendation for a discectomy and neurolysis directed primarily at treating her compensable injuries. Ms Howes did not undergo the surgery option or show any consideration for it. The Tribunal found that the treatment she had undergone was more likely to be cosmetic and was not a reasonable treatment for excessive weight, even if the weight loss was required urgently.

Finally, the Tribunal noted that the breast reduction surgery was not a part of a treatment plan for Ms Howe. The Tribunal noted that the treatment must be part of an integrated plan that involves the coordination of all providers. There was no coordination or plan involved in the breast reduction surgery.

Lessons Learnt

The decision of the Tribunal confirms that to be considered a reasonable form of treatment for the purposes of s 16 of the SRC Act, the treatment must be undertaken at the direction of a legally qualified medical practitioner, therapeutic and for the primary purpose of treating the compensable injury. Furthermore, the Tribunal noted that it should be part of a treatment plan which involves the coordination of all providers.

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