

## *Saunders v Telstra Corporation Limited* [2015] AATA 8 (12 January 2015)

### Key Points

- Whether the applicant's section 45 election and subsequent settlement of his common law claim in respect of his physical injury disentitled him from later claiming compensation for permanent impairment and non-economic loss under the SRC Act for a secondary psychological condition

### Background

From 1994 to 2006, Mr Saunders was employed as a sales consultant by Telstra. On 17 June 1999, he lodged a claim for workers' compensation in respect of "*acute muscular back strain*" sustained on 16 June 1999. By determination dated 16 July 1999, Telstra accepted liability for "*aggravation of acute musculoligamentous strain of the lower back*" pursuant to section 14 of the SRC Act.

On 15 April 2002, Telstra accepted liability to pay compensation for permanent impairment and non-economic loss pursuant to sections 24 and 27 of the SRC Act in respect of Mr Saunders' compensable back condition, described as "*constant severe pain in lower back area radiating down left leg*". Attached to Telstra's letter of 15 April 2002 was an election form, inviting Mr Saunders to accept the compensation calculated pursuant to sections 24 and 27 or alternatively, to elect to commence common law proceedings for non-economic loss pursuant to section 45 of the SRC Act. Mr Saunders elected and commenced proceedings in the County Court of Victoria.

In his Statement of Claim in the common law proceedings, Mr Saunders pleaded injuries arising from the incident on 16 June 1999 including an injury described as a "*psychological reaction*". Mr Saunders and Telstra settled the common law action and signed a Deed of Release dated 21 April 2004. The Deed specified that the settlement between the parties resolved all injuries and causes of action resulting from the incident on 16 June 1999, in addition to any entitlement to compensation under sections 24 and 27 in relation to injuries sustained in the incident.

On 8 April 2012, Mr Saunders lodged a further workers' compensation claim for a secondary psychological injury arising from the incident on 16 June 1999. Telstra accepted liability pursuant to section 14 of the SRC Act for "*adjustment disorder with depressed mood*". On 7 May 2012, Telstra denied liability to pay compensation for permanent impairment and non-economic loss in respect of the secondary psychological condition, on the basis that Mr Saunders had already been compensated for non-economic loss in respect of that condition as part of the common law settlement. This decision was affirmed, and Mr Saunders sought further review at the Tribunal.

The Tribunal was required to consider whether Mr Saunders' claim for permanent impairment and non-economic loss was disallowed because of the election and subsequent settlement of the common law claim in respect of his compensable back condition. Counsel for Mr Saunders argued that the SRC Act was an injury based scheme and, as no claim had been made in respect of the psychological injury at the time of the election, the election could not have included the psychological condition. Counsel for Telstra contended that a common law action in respect of an incident or injury resolves all liability disputes once and for all and, given the psychological injury was pleaded in the Statement of Claim, Mr Saunders could not recover under sections 24 or 27.

## The Law

Sections 24 and 27 allow for the payment of lump sum compensation in respect of compensable injuries resulting in permanent impairment and non-economic loss.

Sections 44 and 45 outline the limited circumstances under which an employee can commence common law proceedings against the Commonwealth or a relevant authority.

Section 48 provides that compensation is not payable for an injury for which damages have been recovered. Limited exceptions are provided in section 48(5), none of which are applicable to this matter.

The Tribunal undertook a comprehensive review of the SRC Act. In examining sections 44 and 45, the Tribunal determined that the relevant injury was one for which the Commonwealth or relevant authority "*would be... liable*", rather than one for which damages would be payable.

## Conclusion

The Tribunal agreed in part with the argument put forward by Mr Saunders' Counsel that the election made by Mr Saunders could not have included an election in respect of his psychological injury as that injury had not yet manifested and no claim for compensation had been made in respect of it at the time of making the election.

The Tribunal also accepted Telstra's argument regarding the "*once and for all*" nature of common law actions. In light of this principle and given the wording in Mr Saunders' Statement of Claim, the Tribunal was of the opinion that damages had already been awarded in respect of Mr Saunders' psychological condition by way of settlement, bringing it within the scope of section 48 of the SRC Act. Accordingly, the Tribunal found that Mr Saunders was not entitled to claim any compensation under the SRC Act in respect of his secondary psychological condition.

## Lessons Learnt

The decision provides a good example of the interaction between the sections dealing with lump sum payments for permanent impairment and non-economic loss under the SRC Act and the sections dealing with common law claims. The matter has been appealed to the Federal Court, and it will be interesting to see whether the Tribunal's decision is upheld.

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