

Armstrong and Comcare [2014] AATA 658 (10 September 2014)

Key Points

- The Tribunal was required to consider whether Ms Armstrong's aggravation of multiple chemical sensitivity resulted in a permanent impairment with the meaning of the SRC Act, and if so, whether the impairment met the 10% threshold.
- The Tribunal had to also consider the method of assessing impairment in instances where there is no applicable Table under the Comcare Guide or the AMA Guide.

Background

Ms Armstrong was employed by the Department of Human Services as a Customer Services Advisor.

Ms Armstrong had an accepted workers' compensation claim in respect of "*aggravation of allergic rhinitis, cause unspecified*", which was described in the reviewable decision as "*aggravation of multiple chemical sensitivity (MCS)*" with a deemed injury date of 28 October 2011. Ms Armstrong attributed her condition to "*constant exposure to perfumes/oils and chemicals*", a condition she noticed from 1995 and markedly worsened in late 2011 to early 2012.

On 17 April 2013, Ms Armstrong sought compensation for permanent impairment and non-economic loss pursuant to sections 24 and 27 of the SRC Act in respect of her accepted condition. Liability for the permanent impairment and non-economic loss claim was rejected by Comcare, and this decision was affirmed on review. Ms Armstrong sought review of the decision at the Administrative Appeals Tribunal.

The Law

Section 24 of the SRC Act states that where an injury to an employee results in a permanent impairment, Comcare is liable to pay compensation to the employee in respect of the injury.

Section 4 of the SRC Act relevantly defines "*impairment*" to mean the loss, the loss of the use, or the damage or malfunction, of any part of the body or of any bodily system or function or part of such system or function.

Section 4 also defines "*permanent*" to mean likely to continue indefinitely.

Conclusion

The Tribunal was required to consider whether Ms Armstrong's condition constituted a permanent impairment for the purposes of the SRC Act.

There is no Table applicable to Ms Armstrong's condition under the Guide to the Assessment of the Degree of Permanent Impairment (Edition 2.1) (**Guide**) or the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Edition 2001) (**AMA Guide**).

Comcare argued that Ms Armstrong did not suffer impairment since the accepted condition was solely reactive, and that it did not fall within the expression “*permanent impairment*” and therefore could not be assessed under the Guide.

Ms Armstrong gave evidence that she remained sensitive to chemicals outside of her workplace, such as smoke and cleaning agents. Her diary reflected that she experienced symptoms for about one tenth of her waking hours. Professor Paul Gatenby (allergist/immunologist) acknowledged that there were no appropriate Tables for Ms Armstrong’s condition, but nonetheless assessed her level of permanent impairment at 10% in line with her periods of being symptomatic.

Consistent with the decision of *Comcare v Broadhurst* [2011] FCAFC 39, the Tribunal held that where both the Guide and the AMA Guide do not contain an appropriate Table to assess the condition, an impairment assessment was to be made using clinical judgment, comparing measurable impairment resulting from the unlisted condition to measurable impairment resulting from similar conditions with similar impairment of function in performing activities of daily living. With regards to multiple chemical sensitivity, the Tribunal held that the condition could fall within the general category of other intermittent and reactive conditions.

The Tribunal accepted that Ms Armstrong suffered damage or malfunctions to parts of her body and to bodily functions when she was experiencing symptoms. On balance, given the longevity and gradual increase in sensitivity of her condition, the absence of any improvement since 2012 and the severity of her symptoms, the Tribunal found that Ms Armstrong’s underlying sensitivity condition was permanent and that she was likely to experience symptoms in the future whenever she was in contact with chemicals to which she is sensitive. However, the Tribunal noted that Professor Gatenby’s impairment assessment was rough, and did not identify the proportion to which Ms Armstrong’s condition was attributed to non-work related factors.

In light of the imprecise impairment assessment, the requirement that the Tribunal could only take into account the proportion of her impairment attributable to the workplace and Ms Armstrong’s evidence that at least some of her symptoms related to non-work factors, the Tribunal was not satisfied that Ms Armstrong’s level of permanent impairment met the minimum level of 10%. Accordingly, the decision under review was affirmed.

Lessons Learnt

The decision outlines that the Tribunal expects medical practitioners to provide an impairment assessment even where the Guide and the AMA Guide do not apply. In undertaking this assessment, practitioners are to compare measurable impairment resulting from the unlisted condition to measurable impairment resulting from similar conditions with similar impairment of function in performing activities of daily living.

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