

Brady and Comcare [2013] AATA 559 (9 August 2013)

Key Issues

- The relevant period for the purposes of calculating the applicant's NWE must be a period prior to her date of injury, pursuant to section 8 of the *Safety, Rehabilitation and Compensation Act 1988* (**the SRC Act**)
- While the SRC Act should be construed in favour of the worker where possible, this does not extend to an interpretation which is, in effect, rewriting the legislation

Background

Ms Brady commenced employment with the Australian Federal Police (**AFP**) in February 2011, as a trainee in the Protective Service Officer Program.

In March 2011, Ms Brady lodged a workers' compensation claim in respect of an injury to her right shoulder. Liability was accepted in respect of "*supraspinatus (muscle) (tendon) strain (right)*".

At the time of her injury, Ms Brady was participating in a training program and earning a salary of \$45,844. Around June 2011, Ms Brady completed her training program and was deployed to Geraldton to perform operational duties. Her salary remained the same, however Ms Brady performed overtime and shift work, for which she received an allowance.

In August 2011, Ms Brady underwent surgery to her right shoulder. The parties agreed that, had she not sustained her injury, she would have continued to work night shifts and overtime.

Comcare calculated Ms Brady's NWE using her base salary, and did not include overtime or shift allowances. Ms Brady queried the calculations, and on 28 March 2012, Comcare issued a reviewable decision affirming the calculations. Ms Brady sought review of that decision with the Tribunal.

The Law

Pursuant to section 8(1) of the SRC Act, the formula for calculating a worker's NWE is as follows:

$$(NH \times RP) + A$$

where:

"**NH**" is the average number of hours worked in each week by the [employee](#) in his or her employment during the relevant period;

"**RP**" is the [employee's](#) average hourly ordinary time rate of pay during that period; and

"**A**" is the average amount of any allowance payable to the [employee](#) in each week in respect of his or her employment during the relevant period, other than an allowance payable in respect of special expenses incurred, or likely to be incurred, by the [employee](#) in respect of that employment.

Section 8 also provides a number of alternative methods of calculating an employee's NWE where the calculation in section 8(1) would not yield a fair result. These have not been reproduced here.

Section 4 of the SRC Act provides that "*normal weekly hours*" means the average number of hours (including hours of overtime) worked in each week by the employee during the relevant period, as calculated for the purpose of applying the formula in section 8.

In addition, section 4 provides that the relevant period is the period calculated under section 9, and section 9 relevantly provides:

- (1) For the purposes of calculating the normal weekly earnings of an employee before an injury, a reference in section 8 to the relevant period is, subject to this section, a reference to the latest period of 2 weeks before the date of the injury during which the employee was continuously employed by the Commonwealth or a licensed corporation.

The issue to be determined by the Tribunal was whether night shift payments and/or overtime rates should have been included in the calculation of Ms Brady's NWE.

Ms Brady sought to rely on the various subsections of section 8 to allow a recalculation of her NWE. She submitted that the relevant period for the purposes of calculating her NWE should have been a period during the time she was deployed to Geraldton and earning overtime and shift rates. She submitted that the non-inclusion of overtime and night shift rates in the calculation was contrary to the comments of Heery J in *Bortolazzo v Comcare* [1997] FCA 515; (1997) 75 FCR 385 at 388, who stated "*the underlying policy is that an injured employee should not be worse off during the period of incapacity as a result of work-related injury. ...*"

Conclusion

The Tribunal affirmed the decision under review and determined that the relevant period, pursuant to section 8 of the SRC Act, was the two weeks immediately preceding Ms Brady's injury. The Tribunal briefly considered the applicability of sections 8(2), (4), (5), (6) and (7) but determined they did not assist Ms Brady's argument.

The Tribunal also noted the preceding paragraph of Heery J's judgment in Bortolazzo, which stated:

"I accept the submission of counsel for the applicants that the Act is social legislation which ought to be construed, in the event of ambiguity, liberally in favour of injured employees ... But a liberal interpretation is one thing, rewriting the statute is another."

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