

Conforti and K & S Freighters Pty Ltd [2013] AATA 542 (2 August 2013)

Key Points

- Section 16 payments for medical expenses in relation to physiotherapy
- Active vs Passive Physiotherapy

Background

Sam Conforti commenced employment with the respondent in March 2006 as a truck driver. He developed problems in his shoulders and ceased driving duties in September 2006. On 13 September 2011 the respondent issued a reviewable decision, which ceased liability for medical treatment (in the form of physiotherapy) pursuant to section 16 for “*subacromial bursitis, right shoulder*”.

Mr Conforti stated that “*the physiotherapy treatment for his right shoulder has been beneficial because it makes him feel more comfortable, and helps him sleep because it lessens the pain. He added that it also reduces his reliance on medication*”. In consideration of this issue, opinions were sought from Physiotherapist Mr Phu, Orthopaedic Surgeons Mr O'Brien and Mr Shannon, and occupational and environmental physicians Dr Bloom and Dr Elder.

Mr Phu was of the view that ongoing treatment was essential in relation to work and activities of daily living and further noted that “*that physiotherapy will only provide maintenance and will prevent the injury from worsening*” though he expressed doubts that Mr Conforti would fully recover.

Mr O'Brien told the Tribunal that “*physiotherapy is a valid and reasonable method of pain relief as an alternative to medication because it helps to treat the pain even though such treatment will not cure the problem*” and concluded that, in Mr Conforti's circumstances, ongoing physiotherapy was “*beneficial and justifiable*”.

Meanwhile, Dr Bloom stated that “*the physiotherapy was essentially passive in nature as it involved massage and manipulation, heat treatment and ultrasound and had been unsuccessful because the pain had worsened ... treatment of Mr Conforti's shoulder condition should be aimed at functional restoration which would require a mobilising and strengthening exercise program, followed by a self-managed program of exercises*”. Dr Elder also opined that the physiotherapy was passive in nature for similar reasons and further noted that “*such treatment was of no long-term functional benefit*”.

Under cross-examination Dr Bloom agreed that “*physiotherapy treatment had provided some short term relief from the pain but he maintained that such treatment would not assist with chronic dysfunction. He also agreed that a mobilising and strengthening exercise program could be administered by a health professional such as an exercise physiologist or an experienced physiotherapist.*”

Mr Shannon stated that the physiotherapy undertaken by Mr Conforti, *“being of a passive nature involving palliative measures such as massage, was a waste of time ... physiotherapy should be directed to an exercise program ... physiotherapy of an active nature involving the right shoulder may be beneficial to Mr Conforti.”*

The Law

On the issue of whether the treatment was reasonable in the circumstances pursuant to section 16(1) of the SRC Act, the Tribunal noted that in *Re Jorgensen and Commonwealth* [1990] AATA 129 Gray J stated:

...In my view, the question of reasonableness in the circumstances is intended to raise issues as to whether some kind of medical treatment other than that undertaken, or in some cases no medical treatment at all, would have been better for a person suffering from the particular injury.

In *Re Chowdhary and Comcare* [1998] AATA 448 the Tribunal stated:

... While provision of temporary relief from pain through physiotherapy will in many circumstances qualify as medical treatment which is reasonable for an employee to obtain, there will in some cases come a point where it is no longer reasonable unless it is part of a plan for permanent improvement in the health of the employee.

Further, in *Re Popovic and Comcare* [2000] AATA 264 the Tribunal stated:

*In relation to the applicant's claim for physiotherapy treatment expenses, in our view there is no role for passive physiotherapy in the applicant's current treatment regime. The physiotherapy he was having could not improve him in the long term, has limited, if any, short term benefit, and may in fact be contra-indicated. Any therapeutic benefit he received was small and short-lived. We accept that pain relief, even short-term relief or reduction in pain, can be therapeutic (*Comcare v Watson* (1997) 73 FCR 273 at 276 per Finn J). However, in this case any benefit is outweighed by the counter-productive effect of it leading the applicant to a dependent state, inhibiting his ability to learn to cope, and to embark on pain management programs to assist him with that object. Taking into account the whole of the evidence before us, we consider that in the applicant's case it was not in his best interest for passive physiotherapy modalities to have continued.*

Conclusion

Overall, the Tribunal held that although the temporary relief or benefit obtained by physiotherapy had been helpful to Mr Conforti, the evidence from Mr O'Brien, Dr Bloom, Dr Elder and Mr Shannon that passive or palliative physiotherapy does not contribute to long-term or lasting improvement was more persuasive. Therefore, the Tribunal concluded that passive or palliative physiotherapy does not constitute medical treatment that is reasonable for the purposes of s 16 of the SRC Act.

Further, the Tribunal accepted the evidence from Dr Bloom, Dr Elder and Mr Shannon in relation to the long-term benefit of an active therapeutic program and found that a *“functional approach to physiotherapy by means of an active physiotherapy program administered by an appropriately qualified physiotherapist or exercise physiologist constitutes medical treatment that is reasonable, and the cost should be met by the respondent.”* In summary, the Tribunal found it was only reasonable to pay compensation under Section 16 for physiotherapy if it is active physiotherapy as opposed to passive physiotherapy.

Lessons Learnt

This decision is useful when denying section 16 claims where the medical evidence indicates that physiotherapy is *“passive”* rather than *“active”* and therefore is only providing pain relief rather than actually improving the applicant’s condition in the long-term.

This case, together with the arguments in *Re Chowdhary and Comcare* and *Re Popovic and Comcare* make it clear that it is essential that physiotherapy be active in nature if the respondent is to make section 16 payments for physiotherapy.

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