

*Fisher and Military Rehabilitation and Compensation Commission*  
[2013] AATA 934  
(23 December 2013)

## Key Points

- Whether the applicant's chronic obstructive pulmonary disease due to cigarette smoking was connected to his service in the Australian Army.
- Whether the Australian Regular Army was liable to pay compensation in accordance with section 14 of the [Safety, Rehabilitation and Compensation Act 1988](#) in respect of the applicant's chronic obstructive pulmonary disease.

## Background

Wayne Fisher ("the applicant") served in the Australian Regular Army ("the army") from 18 November 1981 until 22 May 1990. On 26 July 2011, he brought a claim for rehabilitation and compensation in respect of "*chronic obstructive pulmonary disease*" ("COPD").

The applicant alleged that he developed a smoking habit as a result of his service in the army, and that this in turn caused the development of his COPD. On 12 September 2011, the Military Rehabilitation and Compensation Commission ("MRCC") issued a determination rejecting his claim, which was affirmed in a reviewable decision dated 28 November 2012.

The applicant completed a series of statements, which set out a series of events relating to his smoking habits and resultant COPD. Firstly, the applicant stated that, in training, there were frequent breaks which were called a "smoko", where his fellow soldiers would smoke. He stated that he was offered cigarettes during smokos and also from his roommates, all of whom smoked. He stated that he accepted and smoked cigarettes on these occasions in an attempt to "*fit in*". After three months, he was smoking about 25 cigarettes per day on a regular basis and continued at that level throughout his service.

While in the army, the applicant alleges that he only ever smoked in the company of others and did not smoke on his own. He agreed that this changed in his post service work as a truck driver where he smoked on his own and at an increased rate. He confirmed that he had attempted to cease smoking in the 1990s and had been advised to stop smoking by his treating doctors.

### The Evidence

Dr Edwards noted that the applicant "*started smoking before he entered the Army*" and that the contributing factor to the applicant's emphysema was his long history of cigarette smoking.

In evidence were extracts from a Cancer Council publication entitled "*Tobacco in Australia*" where it was stated that "*Quit campaigns were established in each state from 1983 used social marketing to 'sell' the message that smoking was harmful...*". The authors of this publication also identified that the factors influencing the uptake of smoking included:

*“peer affiliations and friendships”, “a sense of alienation”, “home smoking policies” and the “opportunity to smoke ...research has consistently identified peer group influences as a significant factor in uptake of smoking”.*

In evidence was also a Defence Instruction entitled “*Smoking in the Workplace*”, dated 14 October 1988, along with amendments, dated 21 November 1989 and 30 June 1995. The Defence Instruction stated that its aim was to “*achieve a smoke-free working environment*” and it then went on to outline all the measures that the Australian Defence Force (ADF) was taking to discourage smoking.

## The Law

Representatives for the applicant relied on *Re Bryant and Military Rehabilitation and Compensation Commission*<sup>1</sup>, and *Military Rehabilitation and Compensation Commission v Wall*<sup>2</sup> as authorities where cigarette smoking was accepted as being causally related to service in the defence force. It was further submitted that the applicant’s COPD was an ailment that was contributed to, to a significant degree, by his employment by the Commonwealth, that it was a disease as defined in section 5B of the SRC Act and that therefore, the applicant had sustained an injury as defined by section 5A of the SRC Act. This reasoning met the requirements of section 14 of the SRC Act and accordingly, the applicant’s legal representative asserted that the decision under review ought to be set aside.

Meanwhile, the respondent submitted that the applicant’s army service was not causally associated with the applicant’s smoking as it “*merely provided the setting in which the applicant chose to take up smoking.*” It was further submitted that the outcomes in *Wall* and *Bryant* should not be relied upon because in those cases, the smoking commenced in the 1950s, a period where the awareness of the dangers of smoking did not exist, unlike when the applicant commenced smoking in 1981. It was further submitted that the decisions in *Wall* and *Bryant* should not be relied upon because those decisions did not apply the test of causation under section 5B of the SRC Act.

Finally, it was submitted that after the applicant left the army, his smoking increased and this increase was without the social environment created by the army. Accordingly, the respondent’s legal representative submitted that the decision under review ought to be affirmed.

The Tribunal noted the arguments of both and was satisfied that there existed a relationship between smoking and national service in the Army in circumstances similar to those of the applicant.

The Tribunal further noted that in *Wall* it was stated that:

*[t]he “real question ... is whether the Applicant’s smoking habit can be said to have arisen out of or in the course of his employment ... or whether his employment was a contributing factor”. ... it must be proved that the disease was caused by the employment and not merely*

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<sup>1</sup> [2012] AATA 186

<sup>2</sup> [2005] FCAFC 127; (2005) 88 ALD 1

*contracted during the said employment ... In this case ... to adopt a smoking habit is a risk of that employment'.*

## Conclusion

Whilst the Tribunal accepted the facts provided in the applicant's statements, it was also noted that there was no evidence to indicate that his service in the army necessarily required him to smoke. The Tribunal stated that although there was a temporal connection between the applicant's smoking and his employment, there was no causal connection between the applicant smoking and the performance of his employment duties.

It was also noted that the applicant voluntarily enlisted in the army at a time when there was already a public awareness of the harm associated with smoking. Therefore, the applicant's decision to commence smoking was made with knowledge of the associated risks.

Finally, the Tribunal noted that once the applicant was discharged from the army and became a truck driver, his smoking increased substantially, which was unrelated to his employment with the Army.

In view of the above, the Tribunal held that:

*Under [s 5B](#) of the Act, an ailment must have been contributed to, to a significant degree, by the applicant's employment with the Commonwealth. ... To be a contribution of a significant degree, it must have been a degree that is substantially more than material. I am satisfied that the applicant's employment in the army did not contribute to a significant degree to his smoking and that, accordingly, his COPD was not significantly contributed to by that employment.*

Accordingly, the decision under review was affirmed.

## Lessons Learnt

This decision is useful when denying liability pursuant to section 14 of the SRC Act in circumstances where the applicant has sustained an injury due to a conscious decision with full knowledge of the risks involved.

This case makes it clear that if an employer is to be held liable for a disease pursuant to the SRC Act, there must be a causal connection between the harmful/risky behaviour and the performance of the applicant's employment duties.

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