

## *Foster and TNT Australia Pty Ltd [2014] AATA 852* (14 November 2014)

### Key Points

- Whether a psychological condition is compensable pursuant to section 5A where there are non-work related factors

### Background

Mr Foster was employed with TNT as a truck driver. On 5 February 2011, he sustained an injury to his left elbow.

TNT accepted liability for "*left elbow lateral epicondylitis*" but Mr Foster subsequently developed psychological symptoms and made a claim on 1 October 2012 for his diagnosed psychological condition.

On 21 May 2013, TNT issued a reviewable decision refusing his claim for compensation for his psychological condition on the basis that it was not work-related to a significant degree. Mr Foster sought further review at the AAT.

The Tribunal was required to consider whether Mr Foster's psychological condition was an "*injury*" pursuant to section 5A of the SRC Act that arose out of or in the course of his employment or was an aggravation of his left elbow injury, and if not, whether it was a "*disease*" pursuant to section 5B of the SRC Act and was contributed to, to a significant degree, by his employment.

### The Law

Section 5A relevantly defines "*injury*" as an injury other than a disease that is a mental injury arising out of or in the course of the employee's employment, or an aggravation of a mental injury other than a disease arising out of or in the course of the employee's employment.

Section 5B defines a disease as an ailment or aggravation of an ailment that was contributed to, to a significant degree, by the employee's employment.

The Tribunal referred to *Comcare v Canute* [2005] FCAFC 262 where it was held by Gyles G that the definitions of *injury* and *disease* in the SRC Act are broad enough to allow the conclusion that a psychological condition resulting from a physical injury may be considered to be either a mental injury or an ailment and therefore an *injury* for the purposes of the SRC Act. Further, where the physical injury is sustained either arising out of or in the course of employment, any psychological condition caused by that physical injury may also be regarded as having arisen out of the employment or was contributed to by the employment to the required degree to be compensable.

### Conclusion

In considering whether Mr Foster's psychological condition arose out of or in the course of his employment and his left elbow injury, the Tribunal noted that he had begun using illicit drugs at the age of 19 and had a history of multiple non-work related injuries. It was also noted that Mr Foster had ongoing family and relationship difficulties. Mr Foster reported that he stopped using amphetamines in or about 2005/2006 after seeking treatment from a psychiatrist and attending a drug rehabilitation centre.

In late 2011, Mr Foster reported that he re-commenced using amphetamines for the first time since 2005 and also used methamphetamines to relieve both his pain and his depression at the perceived failure of his left elbow surgery in August 2011. Mr Foster admitted that he also had family problems at this time which contributed to his depressive mood but denied any ongoing psychological problems until his injury in 2011.

Mr Foster's treating psychiatrist, Dr McIntosh, told the Tribunal that in his opinion, Mr Foster would not have developed a methamphetamine problem if he had not suffered his left elbow injury as he appeared to have been functioning reasonably well in the four to five years prior to the injury, despite his non-work related stressors, predisposition to psychological issues and history of substance abuse. He stated that pain from Mr Foster's left elbow injury was significant in causing his psychiatric symptoms to develop. Dr Epstein, consultant psychiatrist, agreed with Dr McIntosh.

Mr Foster's treating general practitioner since 2002, Dr Nettleton, gave evidence that Mr Foster had become increasingly frustrated and depressed by his left elbow injury due to his chronic pain and restrictions. Dr Nettleton considered that the left elbow injury caused or aggravated his psychological condition which led to illicit drug use after abstinence of about 8 years.

Professor Burrows, consultant psychiatrist, accepted Mr Foster's left elbow injury had contributed to his condition but considered Mr Foster's non-work related stressors and substance abuse to be the most significant factors.

The Tribunal preferred the evidence of Dr McIntosh, Dr Epstein and Dr Nettleton stating that Professor Burrows gave little weight to Mr Foster's overall functioning in the five years prior to his left elbow injury. The Tribunal accepted that the evidence was supportive of Mr Foster's submission that he turned to illicit drug use in late 2011 because of the temporary relief it offered for his left elbow pain which had not been relieved by two surgical procedures.

The Tribunal was reasonably satisfied that, despite a history of relationship difficulties and drug use, Mr Foster had not had any psychiatric or psychological treatment for five years before his left elbow injury and appeared to have been functioning well both at work and at home. As such, it considered that whilst Mr Foster had certain vulnerabilities, his adjustment disorder was a *"mental injury arising out of, or in the course of his employment"* and constituted an injury for the purposes of section 5A(1)(b) of the SRC Act, and was therefore compensable. Accordingly, the Tribunal did not consider it was necessary to consider the application of section 5B of the SRC Act.

## Lessons Learnt

Although psychological conditions are generally viewed as diseases pursuant to section 5B of the SRC Act, this decision confirms that a psychological condition arising from a physical injury may constitute an injury pursuant to section 5A if it arises secondary to an accepted physical injury. If this is the case, then the degree of contribution of the accepted physical injury or any non-work related factors will not be relevant to the determination of liability.

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