

## McAullay and Comcare [2014] AATA 163 (26 March 2014)

### Key Points

- The Tribunal had to consider whether the applicant was fit to undertake a rehabilitation program pursuant to section 37 of the SRC Act.
- In determining this, the Tribunal had to consider whether, based on the medical evidence, the applicant had the physical capacity to undertake a rehabilitation program, and if so, whether the applicant should undertake a rehabilitation program.

### Background

Ms McAullay commenced employment with CRS Australia on 21 July 2008 as an Employment Services Consultant.

On 2 August 2011, Ms McAullay made a claim for compensation under the SRC Act in respect of “acute neck strain on background of chronic neck injury” allegedly sustained on 15 July 2011.

By determination dated 12 October 2011, Comcare accepted liability to pay compensation pursuant to section 14 of the SRC Act in respect of “aggravation of neck sprain (left)”.

On 6 July 2012, the Department of Human Services made a determination under section 37 of the SRC Act that a “rehabilitation provider... develop an appropriate rehabilitation program with the goal of achieving a return to pre-injury hours and duties.” A rehabilitation program was subsequently developed. This determination was affirmed by reviewable decision, and Ms McAullay sought review of that decision with the Tribunal.

### The Law

Section 36(1) of the SRC Act provides as follows:

*“Where an employee suffers an injury resulting in an incapacity for work or an impairment, the rehabilitation authority may at any time, and shall on the written request of the employee, arrange for the assessment of the employee’s capability of undertaking a rehabilitation program.”*

Section 37(1) of the SRC Act states that:

*“A rehabilitation authority may make a determination that an employee who has suffered an injury resulting in an incapacity for work or an impairment should undertake a rehabilitation program.”*

The SRC Act further states at section 37(3) that when making a determination under section 37(1), a rehabilitation authority shall have regard to:

- “(a) any written assessment given under subsection 36(8);*
- (b) any reduction in the future liability to pay compensation if the program is undertaken;*
- (c) the cost of the program;*
- (d) any improvement in the employee’s opportunity to be employed after completing the program;*
- (e) the likely psychological effect on the employee of not providing the program;*
- (f) the employee’s attitude to the program;*
- (g) the relative merits of any alternative and appropriate rehabilitation program; and*
- (h) any other relevant matter.*

## Conclusion

Ms McAullay contended that, due to her accepted neck injury, she was not fit to undertake a rehabilitation program. Comcare argued to the contrary.

In respect of medical evidence, Dr Joel Silbert (Occupational Physician) and Dr Mary Wyatt (Occupational Physician) considered that Ms McAullay was, notwithstanding her neck injury and resulting neck pain, physically capable of undertaking a rehabilitation program and undertaking her pre-injury employment duties on a full time basis.

However, Dr Andrew Harper (Occupational Physician) opined that Ms McAullay, by reason of her neck injury and resulting neck pain, was “*totally incapacitated for all forms of gainful employment*” and, furthermore, was not fit to undertake a rehabilitation program, and would remain so until she received sufficient and proper treatment to enable her to manage her neck pain.

The Tribunal had to consider whether Ms McAullay “*should undertake a rehabilitation program*” pursuant to section 37(1) of the SRC Act. When considering this issue, the Tribunal had regard to the effect of Ms McAullay’s compensable neck injury only, and did not consider any psychiatric or psychological condition from which she may have be suffering. The Tribunal also noted that as the particular rehabilitation program developed in this case was not a part of the reviewable decision, it was therefore not under review by the Tribunal

In making their determination, the Tribunal stated that it was not a question of whether the existing particular rehabilitation program should be undertaken, but whether Ms McAullay should undertake any rehabilitation program. Accordingly, the Tribunal considered that the factors listed under section 37(3) (b) to (g) were not applicable as they applied to a particular rehabilitation program.

With respect to the Tribunal having regard to “*any written assessment given under subsection 36(8)*” pursuant to section 37(3)(a), the Tribunal considered a 2012 medical report of Dr Silbert. The Tribunal also considered “*any other relevant matters*”, as required under section 37(3)(h), which included Ms McAullay’s evidence and the medical evidence.

The Tribunal preferred the evidence of Dr Silbert and Dr Wyatt that Ms McAullay was, notwithstanding her neck injury, physically capable of undertaking a rehabilitation program. As Ms McAullay was deemed physically capable of undertaking a rehabilitation program, the Tribunal considered that there was no good reason why she should not undertake an appropriate rehabilitation program. Accordingly, the decision under review was affirmed.

## Lessons Learnt

The decision of the Tribunal provides further clarity on determinations for rehabilitation programs under section 37 of the SRC Act.

In the event that a rehabilitation program is in existence but is not under review, the Tribunal will not consider whether that particular rehabilitation program should be undertaken, but will consider whether the applicant should undertake any rehabilitation program. Accordingly, the Tribunal will only consider the factors listed in section 37(3) that are relevant.

Finally, the question of whether an applicant should undertake a rehabilitation program is a question of fact, which is based on medical evidence.

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