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O'Kane v Comcare [2014] SCA 341
(9 April 2014)

Key Points

- The Tribunal was required to consider whether the claimed conditions of hearing loss and tinnitus should be correctly classified as injuries or diseases

Background

Mr O'Kane commenced work as a bus driver in 1974. No hearing test was conducted prior to his appointment. He received an involuntary redundancy package in January 1996, however he later recommenced as a casual part-time bus driver, becoming permanent part-time in April 1996.

Mr O'Kane had a number of non-work related incidents which affected his hearing. In April 1996, he was *"king hit"* on his left temple at a local hotel. Mr O'Kane made a claim for victim's compensation following this incident, in respect of bruising, damage to teeth and nerve damage to the right ear including hearing loss. In June 2001, Mr O'Kane was assaulted outside the same hotel, and in a statutory declaration stated that he had sustained hearing loss and would require hearing aids. He sought criminal injuries compensation for the cost of the hearing aids following the assault.

On 8 August 2004, Mr O'Kane ceased work as a bus driver.

Mr O'Kane has had a number of hearing tests. A test performed in May 2008 indicated binaural hearing loss of 33.9%. In June 2008, his hearing loss was assessed at 15.5%. In October 2011, a further test indicated hearing loss of 41.3%, and in June 2012, hearing loss of 50.6%.

In December 2010, Mr O'Kane lodged a claim for permanent impairment and non-economic loss in respect of hearing loss and tinnitus. Comcare accepted liability for the claim, however this decision was later revoked and liability was denied. The denial was based on a number of reports from Dr Mattison, who stated that Mr O'Kane's hearing loss was most likely due to a familial form of deafness unconnected with his employment, and also to the assaults in 1996 and 2001. Mr O'Kane sought review of this decision at the Tribunal, and later at the Federal Court.

The Law

"Injury" is defined as a physical or mental injury arising out of, or in the course of, employment.

"Disease" is defined as an ailment or aggravation that was contributed to, to a significant degree, by employment.

Relevantly to this matter, sections 7(2) and (3) provide that where an employee suffers a disease or aggravation of a disease, any employment in which he was engaged at any time before the symptoms of the aggravation first became apparent shall be taken to have contributed, to a significant degree, to the disease or aggravation if the incidence of the disease or aggravation among persons who have engaged in such employment is significantly greater than the incidence of the disease or aggravation among persons who have engaged in other employment. This provision stands unless the contrary is established.

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Conclusion

Tribunal decision

The Tribunal referred to the decision of *Re: Sandercock v Military Rehabilitation and Compensation Commission* [2013] AATA 517, and confirmed that there was no consistent view as to whether hearing loss was to be classified as an injury or disease for the purposes of the SRC Act. The Tribunal noted the distinction between injury and disease as the difference between *"a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state"* as compared with the underlying pathology that constitutes the disease. Applying that distinction, acoustic trauma, if it results in sudden damage to sensitive hair cells of the inner ear as well as the hearing nerve would amount to an injury while age-related hearing loss, being a slowly degenerative process, would amount to a disease. The Tribunal therefore found that Mr O'Kane's hearing loss was an injury, as it resulted from damage to the sensitive hair cells of the inner ear. In respect of the claim for tinnitus, the Tribunal found that, although it may have been initiated by trauma, the condition had been perpetuated and worsened by Mr O'Kane's general hearing loss. Accordingly the Tribunal found that his tinnitus was itself an injury.

The Tribunal then turned to whether Mr O'Kane's claimed conditions arose out of or in the course of his employment. Mr O'Kane provided an account of how he considered his conditions arose, giving evidence regarding the noise of the buses, noisy ticket validators placed behind the driver's head, and a two-way radio the volume of which could not be adjusted. It was also noted that six of the 12 drivers who drove the same type of vehicles as Mr O'Kane had put in hearing claims which were accepted by Comcare. There was no question that, to the extent that Mr O'Kane's hearing loss was due to driving buses, it arose out of or in the course of his employment. However, the Tribunal was not satisfied on the evidence that Mr O'Kane's hearing loss was due to his work. This was predominantly due to an absence of evidence about the length and frequency of exposure to noise, as well as medical and other evidence about the contributing effects of the two assaults, his aging and the possibility of some familial predisposition. The evidence that his hearing had worsened since leaving work was also significant.

The Tribunal then turned to consider whether Mr O'Kane's claimed condition of tinnitus arose out of or in the course of his employment. Mr O'Kane's evidence was that his tinnitus was severe, continuous and interfering with his sleep. Despite the medical evidence at the hearing, the doctors stated that it there was no way to know what had caused Mr O'Kane's tinnitus. In this state of evidence, the Tribunal was not satisfied that Mr O'Kane's tinnitus was sufficiently associated with his hearing loss for it to have arisen out of or in the course of his employment.

Federal Court decision

Mr O'Kane appealed the Tribunal's decision to the Federal Court. The grounds of appeal mainly focused on whether the Tribunal erred in law by finding that Mr O'Kane's conditions were properly classified as injuries under section 5A of the SRC Act, and also whether the Tribunal erred in law by failing to consider the application of section 7.

The Federal Court found that Mr O'Kane's submission that the Tribunal had misdirected itself by failing to apply the definition in section 5B was merely a consequence of the Tribunal finding that the hearing loss and tinnitus were each an injury rather than a disease. The Federal Court found in the same way in relation to Mr O'Kane's ground of appeal relating to the Tribunal's failure to consider section 7. As that section applies specifically to diseases, given the Tribunal's findings that the hearing loss and tinnitus were each injuries, the Federal Court found that there was no requirement that the Tribunal consider argument relating to this section.

The Federal Court's decision stated that the Tribunal had indicated its clear finding of fact that a number of events constituted the injury to Mr O'Kane and that, over the years, these had accumulative impacts on his hearing. The Federal Court did not accept that the Tribunal was required to make a finding of fact as to the specific date on which each injury occurred. Ultimately, the Federal Court found that the Tribunal's decision was adequately reasoned and subject to no legal errors, and therefore dismissed the appeal.

Lessons Learnt

The decision provides an excellent example of the thought process of the Tribunal and Federal Court when considering whether a hearing loss claim should be properly characterised as an injury or a disease. It is clear that there is no general authority categorising hearing loss claims as either an injury or a disease, and that the facts of each case need to be considered carefully to determine which definition is more applicable.

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