

Prater and Comcare [2014] AATA 7

Key Points

- Determining whether notice of injury was given as soon as practicable
- Dismissal pursuant to Section 53 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth)

Background

Ms Lynette Prater (the **applicant**) had been casually employed by COMCAR as a Commonwealth driver since May 2001. COMCAR is a body administered by the Department of Finance (agency). Her role with COMCAR involved driving members of parliament and other dignitaries, to and from the airport and within Canberra. She was required to carry, load and unload the passenger's bags. Trolleys were available at some places to assist with this task.

The current application related to a left shoulder injury, which the applicant claims to have occurred on 20 November 2011. At about 10.50pm, the applicant was scheduled to pick up a senior Minister from Fairbairn Air Force Base, Canberra and to transport him to Parliament House. She stated that the Minister had 6-8 heavy metal cases. The applicant alleges that whilst loading and unloading this luggage, most of the weight was supported by her left hand and arm. Whilst doing so, the applicant alleges that she sustained a left shoulder injury

The Applicant did not lodge a formal notification of the injury until 14 August 2012, however, she completed a driver's report on 20 November 2011 reporting an injury to her left wrist. She states that she did not lodge an incident report on that date as she thought the injury would resolve. Notwithstanding, she still '*felt significant enough and painful enough*' to put in a driver's report.

Liability for this claim was denied on 18 September 2012 and that determination was affirmed on 13 November 2012. On 15 November 2012, the applicant applied for a review with the Tribunal. The matter was heard in Canberra on 18 September 2013 and 11 November 2013.

The Law

The three main issues that were identified in this matter were as follows:

1. Whether the injury arose out of or in the course of the Applicant's employment (section 5A(1) of the SRC Act);
2. Whether Comcare was liable to compensate the Applicant for her injury (section 14 of the SRC Act); and
3. Whether Comcare's liability was negated by the fact that the Applicant did not notify Comcare of her injury '*as soon as practicable*' pursuant to section 53 of the SRC Act.

An arthrogram performed on 26 July 2012 identified a partial tear in the supraspinatus tendon. The Tribunal accepted that this was the source of the Applicant's pain in her shoulder. There was no question that the Applicant was working for COMCAR on 20 November 2011. There was also no doubt that the Applicant's duty statement for her COMCAR role listed '*Lifting bags including into, and out of boot of vehicles*' as a '*core requirement*',

The Medical Assessment form completed by each COMCAR driver annually, dated 6 September 2011, stated that '*The examinee is deemed unfit for driving duties if restrictions are imposed that limit them to lifting items less than 23 kg*'. The Applicant was assessed as '*Fully fit*' following her annual medical assessment and had also been trained in the correct method for lifting bags in and out of a boot.

On the date of injury, however, she opined that the Minister's bags were '*heavy*'. The evidence of a witness who had previously driven the same Minister agreed that the Minister commonly had heavy bags. The evidence was unclear as to the weight of each individual bag however the Tribunal reasoned that as COMCAR drivers were used to lift bags of up to 23 kg, and as the applicant who was an experienced COMCAR driver, said she found these bags to be heavy, it is likely that these bags were heavier than permitted.

It is noted that the Applicant did not complain to her doctor about pain in her shoulder until two and a half months after the alleged date of injury. Her explanation for the delay was that she could not financially afford to stop working, she did not want the stress of lodging a compensation claim and she was hopeful that the injury would just resolve on its own.

However, the Tribunal needed to be satisfied that there were no other possible causes of the partial tear to the shoulder. The applicant's treating doctor stated in evidence that he had no knowledge of any '*recent fall*' or '*healing fracture*', which were both raised as possible causes of her shoulder injury in her radiology reports. He suggested in evidence that although he could not indicate how likely it was that lifting heavy bags could cause such a tear, no other explanation had been put forward.

It was accepted that the Applicant's shoulder had recovered to an extent between the events of 20 November 2011 and 5 February 2012. During this time, the Applicant's shoulder had been immobilized.

After she resumed driving on 5 February 2012 the pain again became significant. Accordingly, the Tribunal was satisfied that it was the Applicant's work as a COMCAR driver which was the cause of the recurrence of shoulder pain. It was also considered significant that the Applicant did not consult her doctor until 13 February 2012 when she had been working for COMCAR for five days.

Overall, the Tribunal found that the Applicant's recording of her injury on 20 November 2011 and the absence of any other identified causes, suggest that the Applicant's injury did arise out of and in the course of her employment, and which was exacerbated following resumption of her employment in February 2012.

Dismissal pursuant to Section 53 of the SRC Act

Section 53(1)(a) of the SRC Act states that the SRC Act :

does not apply in relation to an injury to an employee unless notice in writing of the injury is given to the relevant authority as soon as practicable after the employee becomes aware of the injury

Section 53(3) of the SRC Act further notes that where:

- (a) a notice purporting to be a notice referred to in this section has been given to the relevant authority;*
- (b) the notice, as regards the time of giving the notice or otherwise, failed to comply with the requirements of this section; and*
- (c) the relevant authority would not, by reason of the failure, be prejudiced if the notice were treated as a sufficient notice, or the failure resulted from the death, or absence from Australia, of a person, from ignorance, from a mistake or from any other reasonable cause;*

the notice shall be taken to have been given under this section.

Comcare contended that the claim should be dismissed under section 53 because the Applicant did not report the injury ‘as soon as practicable’ and that therefore, the delay prejudiced its ability to identify the cause of the injury. The applicant stated that it was not until July 2012 that the condition was properly diagnosed, and she was advised that her shoulder was considered sufficiently serious for surgery to be required. At that point, she allegedly turned her attention to the cause of the pain and realised that lodging a claim would be reasonable.

The Tribunal accepted that delay creates evidential difficulties for both parties however in this instance, the Tribunal acknowledged that it was not until July 2012 (eight months following the incident) that the applicant’s condition was accurately diagnosed. The factors that delayed diagnosis included the applicant’s partially justified belief that the condition would resolve with rest and that it was not until the applicant resumed her driving duties at work that it became evident that this had not occurred. Diagnosis was also delayed by the fact that plain x-rays do not generally identify soft tissue injuries and it was only after some unsuccessful cortisone injections that her true injury was identified, via arthrogram. Finally, her orthopedic surgeon did not recommend surgery until 20 July 2012 and therefore, until this recommendation was made, the applicant did not appreciate the severity of the condition and the notion that she needed to lodge a claim if it related to her employment. Once the Applicant’s condition was properly diagnosed, Ms Prater acted promptly, lodged an incident report and made her compensation claim and accordingly, the Tribunal held that the claim should not be barred under section 53 of the Act.

Conclusion

Overall, the decision under review was set aside and the Tribunal held that instead, Comcare was liable pursuant to section [14](#) of the SRC Act for the Applicant’s shoulder injury which has led to her incapacity for work.

Lessons Learnt

This decision is useful when there has been a significant delay between the applicant’s alleged date of injury and the lodgment of a claim for compensation. It illustrates that where this is the case, the employer must refer to section 53 to determine whether there are other factors impacting on the lodgment of a claim for compensation such a delay in proper diagnosis and whether the applicant reasonably perceived the injury as non-permanent or trivial. It is also relevant to consider the



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nature and timing of the applicant's actions once they identify the true nature of their injury or condition.

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