

Rahimovski v Commonwealth Bank of Australia [2013] AATA 755 (23 October 2013)

Key Points

- When deciding whether an employer is liable to pay compensation in respect of an injury resulting in a permanent impairment, the Tribunal had to determine at what time they were required to be satisfied that the employee had suffered such an injury.
- The decision of the Tribunal confirms that, in some instances, the Tribunal may rely on evidence that was not available to a decision-maker at the time of a determination or a reviewable decision.

Background

Mr Rahimovski was an employee of the Commonwealth Bank (**CBA**) since 2007.

In February 2010, CBA accepted liability to compensate Mr Rahimovski in respect of post-traumatic stress disorder arising out of his employment with CBA.

In February 2011, Mr Rahimovski made a claim for compensation pursuant to section 24 of the *Safety, Rehabilitation and Compensation Act 1988* (**the Act**) on the basis that his injury had resulted in a permanent impairment. Liability for this claim was denied by CBA on 6 July 2011 on the ground that the impairment was not permanent. This determination was affirmed by reviewable decision on 6 July 2011, and Mr Rahimovski applied to the Administrative Appeals Tribunal for review.

In respect of the Application before the Tribunal, the parties agreed on the following facts:

1. Mr Rahimovski had not suffered a permanent impairment as at 16 September 2011, being the date of the reviewable decision;
2. Mr Rahimovski had suffered a permanent impairment by 18 October 2012, a date after he had applied to the AAT for review of CBA's decision;
3. Mr Rahimovski continues to suffer a permanent impairment.

No further medical evidence was discussed.

The Tribunal was required to consider whether, in the event that Mr Rahimovski did not suffer the permanent impairment at the time the claim was made, the Tribunal then had jurisdiction to review a new issue, namely a permanent impairment, which had not been considered in the determination and reviewable decision.

The Law

The High Court has made it clear that, in certain matters, the Tribunal should decide the question before it on the basis of evidence available at the time of the Tribunal's review, and is not restricted to the evidence available at the time of the reviewable decision.¹ To decide whether it is appropriate to consider evidence available at the hearing, it was necessary for the Tribunal to carefully consider the statutory provisions which govern the making of the decision under review.

Section 24 of the SRC Act states:

“for the purpose of determining whether an impairment is permanent, Comcare shall have regard to:

(a) The duration of the impairment;

(b) The likelihood of improvement in the employee's condition;

(c) Whether the employee has undertaken all reasonable rehabilitative treatment for the impairment; and

(d) Any other relevant matter.”

The Tribunal noted that there was nothing in section 24 which suggests that the Tribunal, as a decision-maker, should decide whether the impairment is permanent at any time other than the time of making its decision. The structure of the section was considered in *Lees and Comcare*², in which the Federal Court stated that:

“...The determination under s 14 established, amongst other things, that Comcare would be liable to pay compensation to Ms Lees under s 24 of the Act if the injury resulted in permanent impairment. We interpolate that we do not read s 24(1) of the Act as a second source of liability to pay compensation in respect of an injury to an employee resulting in impairment. We see that liability as being created by s 14 of the Act. Section 24 we understand as being intended to define the nature and extent of the liability to pay compensation in respect of an injury which results in permanent impairment”

Conclusion

The Tribunal held that, provided a claim for permanent impairment had already been considered in a reviewable decision, the Tribunal was able to review that decision on the basis of evidence available at the time of hearing.

Accordingly, the Tribunal held that as Mr Rahimovski had suffered an injury which had resulted in a permanent impairment, CBA was liable to compensate him in accordance with sections 24 and 26 of the SRC Act.

¹ *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

² *Lees and Comcare* [1999] FCA 753, [48].

Lessons Learnt

The decision of the Tribunal confirms that, in some instances, the Tribunal may rely on evidence that was not available to a decision-maker at the time of a determination or a reviewable decision. It also confirmed that, in relation to claims for permanent impairment, an employer can be found liable so long as an employee can establish that he suffered from a permanent impairment by the time of the hearing, even where he did not suffer from a permanent impairment at the time of the determination or even the reviewable decision.

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