

## *Talevski and K & S Freighters Pty Ltd [2014] AATA 334* (29 May 2014)

### Key Points

- Whether an employee suffered an injury to his right knee in the course of his employment or alternatively, a disease, or aggravation of a disease, that was contributed to, to a significant degree, by their employment.
- In light of the lack of contemporaneous documentation in respect of the claimed injury, the Tribunal had to give careful consideration to the presentation and credibility of the witnesses.

### Background

Mr Talevski commenced employment as a delivery driver with K & S Freighters Pty Ltd (**K&S**) in June 2011.

On 4 July 2011, Mr Talevski claimed to have sustained an injury to his right knee while delivering cylinders to a café. K&S denied liability in respect of the right knee injury.

On 22 July 2011, Mr Talevski claimed to have sustained injuries to his left upper limb and lower back whilst climbing off a truck. K&S denied liability in respect of the left upper limb and lower back injuries.

The determinations were affirmed by reviewable decisions, and Mr Talevski sought review in the Administrative Appeals Tribunal.

### The Law

Pursuant to section 5A of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the Act**), an “injury” is defined as:

- “a disease suffered by an employee; or*
- an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or*
- an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment.”*

Section 5B of the Act defines a “disease” as an ailment or aggravation of an ailment to which the employment was a significant contributing factor.

## Conclusion

### The Left Knee Injury

K&S contended that Mr Talevski never attended the café where he claimed the incident occurred, and that he did not report or display symptoms afterwards. Due to a lack of evidence surrounding the incident, the Tribunal had to come to a determination based on the oral evidence of witnesses from K&S and Mr Talevski. The two witnesses from K&S appeared to take the view that if they could not recall an event then it did not occur. Accordingly, the Tribunal preferred the evidence of Mr Talevski who had been a particularly detailed historian and a consistent and straightforward witness. The Tribunal held that Mr Talevski sustained an injury to his right knee in the course of delivering cylinders to a café.

In respect of whether the right knee condition was an injury or a disease, the Tribunal preferred the Orthopaedic Surgeon's opinion, who distinguished between an acute tear and a degenerative tendon. Noting that a tear is a change to the structure of a tendon, the Tribunal found that Mr Talevski had suffered a frank injury to his knee.

### The Lower Back and Left Upper Limb Injury

K&S contended that they were not aware of Mr Talevski's hotel incident until a later time, and that the Tribunal ought to reject his evidence as the credibility of his earlier café incident evidence was questionable. Given that the Tribunal had previously accepted Mr Talevski's evidence in respect of the café incident, and that K&S did not produce any evidence to the contrary, the Tribunal also accepted Mr Talevski's evidence that he sustained a left limb and back injury while delivering cylinders to a hotel.

Noting the medical evidence, the Tribunal held that Mr Talevski suffered a common extensor tendon injury and that he had therefore suffered a frank injury to his left elbow.

Based on the medical evidence available, the Tribunal also found that Mr Talevski had suffered an aggravation of his underlying degenerative back condition in the hotel incident, and that the effects of the aggravation were likely to be temporary.

## Lessons Learnt

The decision of the Tribunal highlights the importance of presenting reliable and credible evidence at Hearing. As in this matter, when the only evidence available is the recollection of the parties, the consistency of their evidence is paramount.

From a practical point of view, licensees should ensure that thorough documentation on the movement of employees and all documents surrounding the circumstances of an incident are collected and retained. Additionally, only reliable and consistent witness should be called to give evidence to the Tribunal in order for a party to have the best chance at obtaining a favourable decision.

The logo for hba legal. is presented in a black-bordered box. The text 'hba legal.' is written in a lowercase, serif font. The 'h' and 'a' are in a dark grey color, while 'ba' and 'legal.' are in a lighter grey color. The logo is positioned in the top left corner of the page, partially overlapping a decorative graphic of colored squares (blue, purple, and grey).

For more information on this article, please contact:

Brett Ablong

Partner

Email: [brett.ablong@hbalegal.com](mailto:brett.ablong@hbalegal.com)

Direct Line: (08) 9265 6001

*Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.*