Tribunal applies *May* and finds Armoured Vehicle Driver is no longer entitled to compensation for arm injury

Pearson and Prosegur Pty Ltd [2021] AATA 312

Key Points

- The Tribunal was asked to decide whether Mr Pearson was entitled to ongoing compensation for incapacity to work and medical treatment expenses, in respect of a soft tissue injury to the left arm.
- The Tribunal considered the principles in *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468 and found no evidence of physiological change, beyond subjectively described symptoms.
- The Tribunal found in favour of the employer.

Background

Mr Pearson was employed by Prosegur Australia Pty Ltd (**Prosegur**) as an armoured vehicle driver, commencing in late 2015. He had an accepted claim for compensation in respect of "*left arm injury*" sustained on 30 January 2018, as a result of a fall at work. On 4 April 2018, the description of Mr Pearson's injury was amended to "*soft tissue injury affecting the neck shoulder musculature on the left*".

On 26 June 2018, Prosegur determined that it was not presently liable to pay compensation for incapacity to work, pursuant to section 19 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the SRC Act**), on the basis that Mr Pearson was no longer incapacitated for work and had successfully returned to pre-injury hours. That determination was affirmed by reviewable decision dated 16 August 2018.

On 30 August 2018, Prosegur determined that it was not presently liable to pay compensation for medical expenses, pursuant to section 16 of the SRC Act. By reviewable decision dated 26 September 2018, Prosegur set aside the determination dated 30 August 2018 and substituted a decision accepting liability to pay reasonable pharmaceutical expenses and monthly GP reviews for the accepted condition pursuant to section 16 of the SRC Act.

Mr Pearson sought review of the reviewable decisions dated 16 August and 26 September 2018 at the Administrative Appeals Tribunal.

The Tribunal was required to consider:

a) whether from 26 June 2018, Mr Pearson was incapacitated for work as a result of the accepted condition; and

b) whether from 1 January 2019, Mr Pearson was entitled to compensation for medical treatment for the accepted condition.

The Law

Pursuant to section 16 of the SRC Act, where an employee suffers an injury, the employer is liable to pay for the cost of medical treatment obtained in relation to the injury, being treatment that was reasonable to obtain in the circumstances.

Section 19 of the SRC Act provides that where an employee is incapacitated for work as a result of an injury, the employer is liable to pay compensation for incapacity for work.

The High Court decision of *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468 provides that subjectively experienced symptoms, without an accompanying physiological change, are not enough to constitute a disease for the purpose of the SRC Act.

The principle emerging from the Full Federal Court's decision in *Telstra Corporation Ltd v Hannaford* (2006) 151 FCR 253 is that it is within the Tribunal's jurisdiction to make a finding as to whether or not an employee had a disease at the time of hearing and that in making that determination the Tribunal can rely on expert evidence that the employee never had the disease.

Conclusion

Mr Pearson submitted that the evidence supported a finding that Prosegur acted prematurely in June and August 2018, in ceasing weekly payments of compensation and medical treatment expenses. Further, he contended that the argument raised by Prosegur that he did not suffer an injury was not supported by the decision in *Hannaford*.

The Tribunal did not accept Mr Pearson's argument and found that pursuant to *Hannaford*, it was entitled to make new findings of fact, to the effect that Mr Pearson ceased suffering the effects of his injury on or around 26 June 2018. Accordingly, the Tribunal accepted the evidence of Mr Fredrick Phillips (Orthopaedic Surgeon) that there was never any evidence of any relevant change in Mr Pearson's physiology. Under the principles emerging from *May*, Mr Pearson's subjectively experienced symptoms, without an accompanying physiological change, were not sufficient to establish the existence of an "*injury*" for the purpose of section 5A(1) of the SRC Act.

Therefore, the Tribunal found that there was insufficient evidence that from 26 June 2018, Mr Pearson was suffering from an injury for the purposes of section 19 of the SRC Act or that after 31 December 2018, Mr Pearson was suffering from an injury which would make Prosegur liable for reasonable treatment under section 16 of the SRC Act. The Tribunal noted that there was no probative evidence presented by Mr Pearson as to what "*reasonable treatment*" he had received after 31 December 2018, or what "*reasonable treatment*" Mr Pearson now sought.

The Tribunal found that Mr Pearson had failed to establish ongoing liability on the part of Prosegur under either section 16 or 19 of the SRC Act. Accordingly, the reviewable decisions dated 16 August and 26 September 2018 were affirmed.

Lessons Learnt

The Tribunal has reinforced its position that, in line with the authority of *May*, an employee cannot be found to have sustained an injury under the SRC Act in situations where their subjectively described symptoms are not accompanied by any identifiable physiological change.

Contact:

Lauren Bishop
Solicitor
Direct: (08) 9265 6012
lauren.bishop@hbalegal.com

Claire Tota
Partner
Direct: (08) 9265 6011
Claire.tota@hbalegal.com

Visit www.hbalegal.com for more case articles and industry news.