IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S243 of 2015

BETWEEN: MILITARY REHABILITATION AND COMPENSATION COMMISSION
Appellant

and

BENJAMIN JAMES EDWARD MAY
Respondent

APPELLANT'S REPLY

Filed for the **Appellant** by:
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Part I: Internet publication

1. This reply is in a form suitable for publication on the internet.

Part II: Reply to the Respondent's argument

2. The Respondent's submissions repeatedly refer to his difficulty in understanding the argument advanced by the Appellant;[1] and his attempt, in his paragraph 28, to identify the issues raised by the Appellant's submissions has misfired. Given the Respondent's confusion, the Appellant restates the core of its argument.

   2.1. Paragraphs 34-69 of the Appellant's submissions deny that the language of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the **SRC Act**) and authority establish that a person's experience of unpleasant effects, or symptoms, concurrent with employment, is sufficient to show that the person was "injured' or "got hurt" while at work, so that person can be said to have sustained "an injury (other than a disease)".

   2.2. The issue raised in paragraphs 70-74 of the Appellant's submissions is not whether the Tribunal separately assessed the Respondent's temporal case and causal case, but whether the Tribunal's finding that the Respondent had not sustained "an injury (other than a disease)" was a sufficient basis to affirm the rejection of the Respondent's claim, independent of any asserted connection (temporal or causal) with employment. Paragraph 72 explains why the Tribunal rejected a causal connection between the putative injury and employment.

   2.3. The issue raised in paragraphs 75-80 of the Appellant's submissions is not whether definitive diagnosis or objective clinical evidence was essential to support the Respondent's claim of "an injury (other than a disease)". The issue is whether the Tribunal was entitled to rely on the uncontradicted expert medical opinions in finding that it was not satisfied the Respondent had suffered an injury simpliciter.

Error of law 1

3. The Respondent seeks to attack the Appellant's argument as to the necessary, but unspoken, premise in s 4(1) of the SRC Act[2] – that a person may be unwell yet have neither a compensable injury simpliciter nor a compensable disease.

4. Taken to its logical extreme, the Respondent's argument is that any sudden or gradual experiencing of symptoms concurrent with employment qualifies as a compensable "injury". However, text, context (including the overall scheme of the SRC Act) and common sense dictates that this cannot be so.

5. A person may suffer sudden or gradual physiological symptoms, coinciding with attendance at employment, which do not qualify as compensable injuries, such as a person with an underlying heart disease, which causes episodic symptoms of angina (at work or elsewhere), which do not qualify as an injury simpliciter; whereas a resultant myocardial infarction at work could amount to a sudden or identifiable physiological change and qualify as a compensable injury.

6. The Respondent's assertion at paragraphs 48-53 that the Full Court did not distinguish, but followed, *Kennedy Cleaning* and *Zickar* is contradicted by his own submissions that the Full Court was correct to attach significant weight to the

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1 For example, Respondent's submissions, paragraphs 28, 45-46, 65, 73 and 86.

2 Respondent's submissions, paragraphs 46-47.

absence of the words "by accident" in the SRC Act,[3] and to resist "impermissibly taking the construction of the term 'injury' back to a time where the additional element of 'by accident' was present".[4] It is clear that the Full Court sought to distinguish those two (and other) authorities on the basis of (among other things) the earlier notion that an employee needed to suffer an injury by "accident".[5]

7. By describing the phrase "sudden or identifiable" as merely an "exemplar of meaning", rather than as an aspect of the ordinary meaning, of "injury (other than a disease)", the Full Court (a) eroded the understood demarcation between "disease" and "injury (other than a disease)"; and (b) attenuated and extended the ordinary meaning of "injury (other than a disease)".

8. The approach adopted by the Full Court deviated from the formulation endorsed in *Kennedy Cleaning* and *Zickar*. The Full Court's notion,[6] that the High Court in *Zickar* and *Kennedy Cleaning* was speaking in other than "definitional" terms when it described an injury simpliciter as a sudden or identifiable physiological change or disturbance of the normal physiological state, is incorrect.

   8.1. Gleeson CJ and Kirby J in *Kennedy Cleaning*,[7] for instance, describe an "injury" as "being" a sudden or identifiable physiological change. Contrary to the Respondent's submissions at paragraph 55, Gleeson CJ and Kirby J in *Kennedy Cleaning* considered (correctly) that one of the "points in common which all members of the majority [in *Zickar*] recognised and emphasised" was that "a sudden or identifiable physiological change, could nonetheless qualify within the ordinary application of [injury in the ordinary sense]".

   8.2. Although Toohey, McHugh and Gummow JJ did not use those words in *Zickar*, they held that "If there was no rupture there would be no event answering the description of personal injury"; and they cited (with express approval) earlier observations in *McIntosh* to the effect that a rupture is "something quite distinct from the defect, disorder or morbid condition which enables it to occur". Phraseology of that kind is consistent with the propositions that under the SRC Act (a) a person who suffers an injury simpliciter gets hurt, rather than becomes sick; and (b) getting physically hurt involves the suffering of some distinct (sudden or identifiable) physiological change.

9. Further, the matters summarised in paragraph 60 of the Respondent's submissions make the Appellant's argument for it. The passage from *Kennedy Cleaning* cited by the Respondent shows that the disease provisions exist as an alternative head of entitlement, where an employee's condition "does not manifest itself in the kind of sudden physiological change or disturbance of the normal physiological state that **will** constitute an 'injury' in the primary sense" (emphasis added).[8]

10. It seems that the Respondent seeks to rely[9] on physiological "changes" experienced following the administration of the vaccines on 10 November 1998.[10]

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3 Respondent's Submissions at paragraphs 36-37, and the second sentence of paragraph 61.

4 Respondent's Submissions at paragraph 37.

5 For example, [2015] FCAFC 93; (2015) 322 ALR 330 at 355 [109]: AB 109/30.

6 [2015] FCAFC 93; (2015) 322 ALR 330 at 374 [205]-[206]: AB 124/20-40.

7 (2000) 200 CLR 286 at 298 [35].

8 (2000) 200 CLR 286 at 300-301 [40] (Gleeson CJ and Kirby J).

9 Respondent's submissions, paragraph 44.

Those "changes" were irrelevant to the true inquiry, which focused on the Respondent's vertigo.

10.1. The Tribunal identified some symptoms (unsupported by objective evidence or pathology) and two ailments, diarrhoea and upper respiratory tract infection, which resolved.[11]

10.2. No connection with his complaint of vertigo was suggested or found.

Error of law 2

11. The Respondent says that he ran both a "temporal case" and a "causal case" in the Tribunal.[12]

12. The language of the SRC Act demonstrates that the decision-maker needs to ask whether there is "a disease" or an "injury (other than a disease)" before inquiring whether there is any employment connection (temporal or causal). The two inquiries are distinct.

13. Here, the Tribunal recorded that the Respondent contended that, as a result of the vaccinations, he suffered an injury in the course of employment.[13] The Tribunal was correct to reject that "causal case", on the basis of the overwhelming weight of medical evidence, for the reasons the Tribunal gave.

14. The Tribunal also considered, and disposed of, a "temporal case" by finding that the Respondent's subjective description of a collection of symptoms" was not an injury simpliciter for the purposes of the SRC Act.[14]

15. Accordingly, to the extent that the Respondent contends that the Tribunal failed to evaluate the claim as put, the Tribunal's reasons show that:

15.1. the Respondent's "temporal case" was rejected on the basis that the evidence did not prove to the requisite standard that he had suffered an "injury (other than a disease)" in the primary sense;[15] and

15.2. the Respondent's "causal case" was rejected on the bases (a) that there was no "injury (other than a disease)" and (b) that his putative injury was not caused by the vaccinations received on 10 November 1998.[16]

16. There was nothing in the history given by the Respondent or the findings made by the Tribunal to indicate that he "got hurt" in the course of his employment, rather than "became sick" concurrent with his employment by the RAAF.[17] The history given by the Respondent was simply one of a person who, at the highest, "became sick" over a period of time concurrent with employment for inexplicable reasons.

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10 As found by the Tribunal: [2011] AATA 886 at [59]: AB 24.

11 See [2011] AATA 886 at [59]: AB 24/20.

12 Respondent's submissions, paragraph 62.

13 [2011] AATA 886 at [43]: AB 19/22.

14 [2011] AATA 886 at [58]: AB 24-25; [2011] AATA 886 at [61]: AB 25.

15 [2011] AATA 886 at [58]-[59], [61], [63]: AB 23-25.

16 [2011] AATA 886 at [61]-[62]: AB 24-25. Contrary to paragraph 21(g) of the Respondent's submissions, Dr Loblay said it was "not ... completely impossible" that the Respondent's condition was related to his vaccinations: [2011] AATA 886 at [57]: AB 23. Dr Loblay's opinion was not challenged. On the basis of Dr Loblay's unchallenged evidence it was open to the Tribunal to find that there was no room for lay inference.

17 [2011] AATA 886 at [11]-[14]: AB 25/10.

17. The Respondent contends that the Tribunal found, at [62] of its reasons,[18] "an injury: vertigo";[19] and that the Full Court correctly held that the Tribunal found, on the facts, that the Respondent suffered a sudden and identifiable change.[20] Those contentions misrepresent the Tribunal's finding, which was only that the Respondent was "significantly disabled by vertigo". It expressly rejected the Respondent's case that he had suffered "injury (other than a disease)" for the reasons it gave, as summarised in paragraphs 21-25 of the Appellant's submissions.

18. Contrary to paragraph 78 of the Respondent's submissions, the arguments advanced in paragraphs 70-74 of the Appellant's submissions develop grounds 2 and 3 in the Notice of Appeal.[21]

Error of law 3

19. The Respondent relies on a range of authorities in an effort to devalue the important role that medical science can have in evaluating a claim for compensation.

20. It can be accepted that lay inference can also have a role to play in identifying the existence and cause of a disease or an injury simpliciter, and the absence of a scientifically supported diagnosis does not preclude finding the existence or cause of a disease or injury.

21. But making such findings on the basis of lay inference alone, where medical science denies, or finds improbable, any sudden or identifiable physiological change, or that employment has contributed to an employee becoming sick, would:

    21.1. elevate speculation over reasoned fact-finding;[22]

    21.2. violate the proposition that the Tribunal should not make a positive decision where the evidence leaves it in a state of uncertainty;[23] and

    21.3. involve a distinct departure from the Tribunal's function of arriving at the "correct or preferable" decision.[24]

22. Further, it is unclear from the Respondent's submissions whether he contends that, on the basis of the remitter proposed by the Full Court at [220] (AB 128), the Tribunal would be entitled to find that there was a "causal" link between the vaccinations and his alleged symptoms. Ultimately, the Appellant submits that the Full Court was in error because it has misunderstood the Tribunal's findings.

    22.1. The absence of a specific diagnosis or objective evidence simply served to reinforce the Tribunal's conclusion that the Respondent did not suffer an "injury (other than a disease)". The real basis of the Tribunal's finding was that conventional medical thinking (in an overall evaluative sense, not

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18 [2011] AATA 886 at [62]: AB 9-10.

19 Respondent's submissions, paragraph 76. See also paragraph 83 of those submissions, referring to [2011] AATA 886 at [48]: AB 21/5.

20 Respondent's submissions, paragraph 44.

21 At AB 141.

22 *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538 at 569 (Dixon J).

23 *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 358 (Woodward J). Paragraph 99 of the Respondent's submissions ignores that proposition.

24 *Drake v Minister for Immigration* (1979) 24 ALR 577 at 589 (Bowen CJ and Deane J); *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425 (Brennan J).

confined to the absence of a diagnosis or objective evidence) rejected the existence of an injury simpliciter.

22.2. It was properly open to the Tribunal to decline to draw a lay inference in the Respondent's favour where expert opinion stood firmly against drawing such an inference.

The exercise that the Full Court remitted to the Tribunal has already been undertaken, and has produced an outcome unfavourable to the Respondent. Given the absence of error of law in the Tribunal's approach, there would be no point in requiring the same exercise to be undertaken again.

23. Further, there is no support for the Respondent's apparent contention that the SRC Act is intended to compensate employees for any ailment or injury that they might encounter.[25] In every case, the relevant definitional and employment connection requirements of the SRC Act must be met, without turning the legislation into a de facto form of injury insurance or social security legislation.

24. The example given by the Respondent, of an employee suffering injury when falling at work,[26] contradicts, rather than supports, his theory that idiopathic conditions are necessarily compensable. In the example given, the "injury" sustained is not a syncope but (say) a laceration or broken bone. That sudden or identifiable physiological change or disturbance of the normal physiological state (a laceration or broken bone) would be an "injury (other than disease) ... arising ... in the course of ... employment".

Conclusion

25. Ultimately, the approach adopted by the Tribunal and Buchanan J was correct.

26. The question for the Tribunal was whether the Respondent's claimed condition qualified as an "injury" or an "ailment", and then to decide whether there was an employment connection following the results of that inquiry. The Tribunal did so. It relied on medical evidence in making its findings of fact, as it was entitled to do. There is no sound reason in law or fact to support the Full Court's intervention.

Dated: 12 February 2016

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25 Respondent's submissions, paragraphs 104-105.

26 Respondent's submissions, paragraph 105.