

Federal Court – Full Court

***Cook v ASP Ship Management* [2009] FCAFC 113 (2 September 2009)**

On 5 July 1993, Mr Cook (the Applicant) suffered a severe attack of cellulitis (the accepted condition) at work for which he received compensation from ASP Ship Management Pty Ltd (the Respondent).

The Applicant then made two further claims for compensation in relation to the accepted condition. In 1995 the Applicant claimed compensation for permanent impairment of his lower left leg arising from the accepted condition and in 2000 the Applicant claimed compensation in respect of a separate injury to the left ankle which he claimed to have suffered as he was leaving the ship to seek treatment for the accepted condition.

Both claims were rejected by the Respondent and in 2006 the Administrative Appeals Tribunal (the Tribunal) affirmed the Respondent's decisions. The Tribunal ruled that it was not satisfied that the Applicant had suffered a degree of Whole Person Impairment of greater than 2% as a result of his accepted condition nor had suffered an injury to his left ankle.

The Applicant appealed the Tribunal's decision to the Federal Court (the Court) on the grounds that the Tribunal had failed to afford him procedural fairness by proceeding to hear the applications for review in his absence. In first instance, the Federal Court held that the Tribunal had not breached its duty to ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case. Consequently the appeal was dismissed.

The Applicant then appealed the matter to the Full Federal Court on the following four grounds:

- (i) Procedural unfairness/no recognition of appellants [*sic*] deafness and severity of injury;
- (ii) Error of Law! Reliance on AAT judgment when unable to attend thro' [*sic*] illness;
- (iii) Misunderstanding basic facts of case;
- (iv) Narrow judgment of facts AAT knew at the time - misuse of surreptitious' [*sic*] phone recording-failure to independantly [*sic*] determine whether illness was factual.

In a decision dated 2 September 2009, the Full Court dismissed the appeal. In doing so, the Court noted that, while an appeal from a decision of the Tribunal is limited to an appeal on a question of law, the Applicant's four grounds of appeal appeared to invite the Court to form its own views as to the facts. Further, the Court was unable to discern any error by his Honour at first instance and could not otherwise find any basis to overturn the Tribunal's exercise of discretion to proceed in the absence of the appellant. For these reasons, the Court held that the appeal was 'entirely without merit' and dismissed it accordingly.

Administrative Appeals Tribunal decisions

***Murrihy and Teekay Shipping (Australia) Pty Ltd* [2009] AATA 957 (15 December 2009)**

Mr Murrihy (the Applicant) was employed as an assistant engineer on a number of different vessels operated by Teekay Shipping (Australia) Pty Ltd (the Respondent). In January 2008 the Applicant injured his back whilst working aboard one vessel, however it did not appear to be serious at the time and he continued working.

The Applicant received treatment for the pain, but his condition began to deteriorate. Despite this, the Applicant transferred to another post on a different vessel – a floating storage and off-take class vessel (FSO) – which entitled its crew to an extra allowance due to its remote location. In November 2008, the Applicant was forced to cease working on the FSO due to

the severity of the pain caused by his earlier injury. The Applicant has not worked since and claimed compensation for incapacity, which he argued should be calculated using an NWE that incorporates his extra FSO allowance.

In its decision, the Tribunal considered the application of sections 13 and 3 of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (the Act) to determine whether the Applicant's NWE should incorporate either his earnings in January 2008 (being his earnings immediately before his injury) or his earnings in November 2008 (being his earnings immediately before his incapacity).

The Tribunal concluded that there was no ambiguity in the word "injury" and consequently the Applicant was not entitled to include the FSO allowance when calculating his NWE because these earnings post-dated his injury. Further, the Tribunal considered that there was no other evidence or arguments that suggested the Respondent had made an error in its calculations under section 13.

***Lawson and Stateships* [2009] AATA 871 (11 November 2009)**

Mr Lawson (the Applicant) suffered a compensable injury to his right knee in July 1991 and has received ongoing compensation since 1994. In 2006, Stateships (the Respondent) arranged for the Applicant to attend a vocational rehabilitation assessment. The Applicant attended and subsequently made a claim for compensation for medical expenses incurred in relation to an adjustment disorder which allegedly arose as a result of a number of factors including the requirement to attend a rehabilitation program after 12 years of incapacity wherein he was denied the opportunity to undertake rehabilitation and the possibility of returning to the workplace after long-term incapacity.

In its decision, the Tribunal accepted that the Applicant suffered from an adjustment disorder which the Tribunal considered to be an "ailment" in the form of a mental ailment, disorder, defect or morbid condition. However, the Tribunal was not satisfied that the Applicant's employment had contributed to his adjustment disorder as there was no evidence that his initial knee injury was the *sine qua non* for his contraction of the adjustment disorder.

Consequently, the Tribunal was satisfied that, because the Applicant had not established that he suffered "an injury" within section 28 of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth), he was not entitled to obtain compensation for the cost of medical treatment under that section.

***Smith and Captain Cook Cruises Pty Ltd* [2009] AATA 779 (9 October 2009)**

Mr Smith (the Applicant) was formerly employed by Captain Cook Cruises (the Respondent) and sought compensation for a psychiatric condition which he claimed arose out of, or was aggravated by, the circumstances in which he was removed from one of the Respondent's vessels when his employment was terminated in 1996.

In its decision, the Tribunal outlined at length the disputed factual circumstances of the Applicant's removal from the Respondent's vessel and determined that it would rely on the evidence provided by the vessel's Captain as opposed to that of the Applicant.

In terms of medical evidence, the Tribunal was satisfied that the Applicant had suffered from post traumatic stress disorder and depression since 1991 and had been treated for these conditions since 1993.

On the basis that the onset of the Applicant's conditions pre-dated his removal from the Respondent's vessel, the Tribunal considered whether the Applicant's condition had been aggravated by what occurred in 1996. In this regard, the Tribunal was satisfied, on the basis of the medical evidence before it, that the Applicant's condition had not been aggravated by his employment. Consequently, the Tribunal affirmed the decision under review on the grounds that the Applicant had not suffered an injury for the purposes of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth).