

Bulletin

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CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Administrative Appeals Tribunal Decisions

A psychiatric assistance dog is neither “medical treatment” nor “an aid” as defined in the Safety, Rehabilitation and Compensation Act 1988

Brideson by guardian Lynette Brideson and Australian Capital Territory (Compensation) [2019] AATA 2314 – Deputy President Humphries – 31 July 2019

Summary

The AAT disallowed a claim for the costs of maintaining a psychiatric assistance dog under the SRC Act. This decision contrasts with the approach taken by the WCC in Parsons v Corrective Services NSW [2018] NSWCC 227 (Bulletin no. 24), which held that the provision of an assistance dog and the costs of maintaining it are reasonably necessary for the purposes of s 60 WCA.

Background

In September 2011, the worker suffered work-related PTSD and Bruxism. Comcare accepted liability under s 14 of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act). In 2014 he acquired a dog as a family pet, but on 3 February 2016, he applied to have it trained as a Psychiatric Service Dog. After it was trained as a *mind dog*, he was able to go to public places with it that he had previously avoided (because he suffered additional stress or panic attacks). On 30 July 2016, he claimed the costs of insurance premiums, animal registration, dog training, dietary food, grooming, veterinary costs, de-sexing and vaccination, on the basis that it was a psychiatric assistance dog (or mind dog).

Comcare rejected the claim because these costs did not satisfy the criteria in s 16 (1) of the SRC Act. It asserted that the dog: (1) was not *medical treatment* as defined in s 4; (2) was not obtained in relation to the accepted medical condition; and (3) if it was considered medical treatment, it was not reasonable medical treatment in the circumstances. It asserted that a psychiatric assistance dog could fall within ss 16 and 29 of the SRC Act.

The applicant sought reconsideration of that decision and asserted that the costs are compensable under either ss 16 or 39 of the SRC Act, but Comcare affirmed its decision

and asserted that an *aid* must be something that is artificial in nature and not a dog or other animal. The applicant then sought a merits review by the AAT.

Relevant legislation

Section 16 of *the SRC Act* provides:

- (1) Where an employee suffers an injury, Comcare is liable to pay, in respect of the cost of medical treatment obtained in relation to the injury (being treatment that it was reasonable for the employee to obtain in the circumstances), compensation of such amount as Comcare determines is appropriate to that medical treatment.

Section 4(b) of *the SRC Act* defines *medical treatment*, relevantly, as “*therapeutic treatment obtained at the direction of a legally qualified medical practitioner...*”

Section 39 of *the SRC Act* provides that the cost of an *aid or appliance*, reasonably required by the worker, can be recovered, relevantly, as follows:

- (1) Where:
 - (a) an employee suffers an injury resulting in an impairment; and
 - (b) the employee is undertaking, or has completed, a rehabilitation program or has been assessed as not capable of undertaking such a program;the relevant authority is liable to pay compensation of such amount as is reasonable in respect of the costs, payable by the employee, of:
 - ... (e) any aids or appliances for the use of the employee, or the repair or replacement of such aids or appliances;being ... or aids or appliances reasonably required by the employee, having regard to the nature of the employee's impairment and, where appropriate, the requirements of the rehabilitation program...

Deputy President Humphries identified the issues as follows:

- (1) In relation to s 16: (a) whether the dog is *medical treatment* as defined in s 4 (1); (b) whether the dog was obtained *in relation to* the worker's accepted injuries; and (c) whether it was *reasonable* for the worker to obtain the dog in the circumstances; and
- (2) In relation to s 39: (a) is the dog an aid or an appliance; and (b) was the dog reasonably required by the worker having regard to the nature of the impairment arising from his injury or injuries.

Humphries DP held that the dog is not a form of medical treatment under s 16 and he noted several difficulties with the worker's claim, including that the dog was not obtained at the direction of a medical practitioner. The definition appears to contemplate that obtaining the treatment follows from the giving of the direction for that treatment to occur and it does not fall within the definition of *medical treatment*.

However, even if the dog was obtained at the direction of a medical practitioner, s 16 requires *medical treatment* to be reasonable for the employee to obtain in the circumstances and he doubted that a psychiatric assistance dog could ever satisfy that provision. He stated:

42. For treatment to be reasonable...to obtain, it must plainly be efficacious to some extent. As already noted, to be therapeutic treatment need not be curative; it may merely relieve the symptoms or effects of the condition. But inherent in the requirement that medical treatment be reasonable to obtain is the notion that the

treatment actually achieves a therapeutic benefit, however defined. Treatment which purports to be procured in relation to a condition but which does not actually cure or relieve that condition cannot, in my view, be reasonably obtained as required by s 16 (1). As much may be taken from Finn J's observation in *Comcare v Watson* (at 277) that treatment of an injury must be appropriately adapted to its purpose or is effective in some degree in realising that purpose. The concept of treatment being effective is a requirement applied in many decisions of the Tribunal: see for example *Alamos and Comcare* [2014] AATA 629 at [24]; *Pethes and Comcare* [2018] AATA 483 at [49]-[50]; *Durham and Comcare* [2014] AATA 753 at [59] - [62]. ...

Humphries DP held that the dog was at best an adjunct to *medical treatment*. While he accepted that it had conferred some practical benefits in the management of the worker's PTSD, it was not clear that these were conferred as *medical treatment* rather than as general benefits relating to well-being that accrues to many dog owners. He stated:

46. ...The Tribunal takes official notice of the fact that many people derive comfort and fulfilment from their relationship with animals, dogs in particular. Such relationships can be of particular benefit to a person during periods of distress. Given the uncertain state of the clinical research on the therapeutic value of assistance dogs, real doubt must be entertained about whether the benefits to Mr Brideson from Ted rise any higher than those he would obtain from a dog which had not been designated or prepared as an assistance dog...

48. The test to be applied here is not simply how Mr Brideson perceives the benefits derived from Ted. As Gray J said in *Jorgensen and Commonwealth* (1990) 23 ALD 321:

In my view, the question of reasonableness in the circumstances is intended to raise issues as to whether some kind of medical treatment other than that undertaken, or in some cases no medical treatment at all, would have been better for a person suffering from the particular injury. The idea of reasonableness involves objectivity. A reference to the circumstances raises subjective factors, but they are intended to be subjective factors related to the nature of the injury, and not to details of the personal life of an applicant for compensation. ...

56. It would be unwise for the Tribunal to opine that a psychiatric assistance dog could never constitute medical treatment, but on the state of the evidence before it in the present proceedings the proposition is very doubtful. Of course, to find for an applicant, the Tribunal must draw some satisfaction from the sum of the evidence before it that an applicant's claim meets the test of eligibility set out in the relevant legislation (see *Beezley v Repatriation Commission* [2015] FCAFC 165 at [68]); in the circumstances of this application, it is difficult to reach that level of satisfaction.

Humphries DP noted that the worker conceded that the dog could not be *an appliance*. He held that it cannot be *an aid* and stated, relevantly:

64. ...The inclusion of an assistance dog in the category aids or appliances would not seem to be consistent with either the common understanding of those terms or with the intention of Parliament, as discerned from the minister's second reading speech and the Explanatory Memorandum.

65. The object of s 39 and the nature of its relationship with the evidence outlined above strongly guard against a conclusion that animals fall within the ambit of the provision. The object of s 39 is to provide for compensation to be payable in respect

of an injury for alterations, modifications or aids or appliances. As stated above, s 39 only makes express provision for inanimate objects. In order to accept the construction which Mr Brideson advances as finding that animals can be an aid, it would need to be shown on the balance of probabilities that a psychiatric assistance dog is a means or source of help or assistance. The Tribunal outlined above how an uncertain and vague evidential basis has been put forward in this case to determine the extent to which dogs may aid people with psychiatric conditions such as PTSD. Given this, it is difficult to see how Parliament could have intended animals to fall within the ambit of s 39.

Humphries DP held that even if the dog was *an aid*, the *SRC Act* does not make provision for the costs of its care and upkeep and those costs would not be recoverable because the dog was *not reasonably required* by the worker. Accordingly, he affirmed Comcare's decision.