VeRBosity Volume 16 No. 3

Contents

July - September 2000

Editor's notes

This edition of *VeRBosity* contains reports on seven Federal Court decisions relating to veterans' matters handed down in the period from July to September 2000.

The cases of *Thompson* and *Gartrell* deal with "accrued rights" relating to the making of Statements of Principles. *Harris* and *Arnott* deal with aspects of the definition of "trauma" in relation to spinal conditions. *Applebee* relates to the assessment of the sequela of a war-caused disease. *Hill* and *Husband* both deal with issues relating to Special rate pension.

This edition includes reports on selected AAT decisions handed down in the period from July to September 2000. Information is also included about Statements of Principles issued recently by the Repatriation Medical Authority and matters under formal investigation.

Robert Kennedy
Editor

Administrative Appeals Tribunal

Re Webb and Repatriation Commission

R Handley

N1997/993
03 Jul 2000

AAT settlement negotiations - no agreement in writing

This case raised an interesting jurisdictional issue as to whether the Tribunal had the power to enforce an alleged oral agreement between the parties as to the rate of pension payable to Mr Webb.

A hearing of Mr Webb's application for review of decisions including the rate of pension payable to him was listed for hearing on 20 and 21 May 1999. On 17 May 1999, his solicitor telephoned the Tribunal to advise that the matter had been settled. The Tribunal confirmed this with the Repatriation Commission's advocate. On 19 May 1999, his counsel confirmed that the matter had been settled and informed the Tribunal that he would be drafting the terms of settlement. Having spoken with the Commission's advocate, the Tribunal vacated the hearing. Subsequently, the parties were unable to agree on written terms of settlement.

Submissions

Mr Webb's counsel submitted that there had been agreement between the parties on all major issues and that the Commission should be estopped from denying that agreement. It was contended that, as a result, he was entitled to assume that there was a concluded agreement that he would be paid Special rate pension, and in vacating the hearing, he had acted to his detriment.

The Commission submitted that section 42C of the *Administrative Appeals Tribunal Act 1975* empowered the Tribunal to make a decision in accordance with written terms of settlement signed by the parties and lodged with the Tribunal. The existence of a written document setting out the terms of the agreement, signed by or on behalf of the parties and lodged with the Tribunal is a vital pre-condition to the operation of section 42C, and in this case there was none.

The Commission submitted that the Tribunal had no power to conduct an inquiry into settlement negotiations which took place between the parties in May 1999 and that it would be acting *ultra vires* if it did so.

Agreement in writing

Section 42C of the *Administrative Appeals Tribunal Act 1975* provides:

> "(1) If, at any stage of a proceeding for a review of a decision:
>
> (a) agreement is reached between the parties or their representatives as to the terms of a decision of the Tribunal in the proceeding or in relation to a part of the proceeding or a matter arising out of the proceeding that would be acceptable to the parties (other than an agreement reached in the course of a mediation under section 34A); and
>
> (b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and

(c) the Tribunal is satisfied that a decision in those terms or consistent with those terms would be within the powers of the Tribunal;

the Tribunal may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (2) or (3) is relevant in the particular case.

(2) If the agreement reached is to the terms of a decision of the Tribunal in the proceeding, the Tribunal may make a decision in accordance with those terms without holding a hearing of the proceeding or, if a hearing has commenced, without completing the hearing.

(3) If the agreement relates to a part of the proceeding or a matter arising out of the proceeding, the Tribunal may in its decision in the proceeding give effect to the terms of the agreement without, if it has not already done so, dealing at the hearing of the proceeding with the part of the proceeding or the matter arising out of the proceeding, as the case may be, to which the agreement relates." (underlining added)

Tribunal's conclusions

The Tribunal accepted the Commission's submission that the Tribunal had a discretion to make a decision in accordance with terms agreed by the parties, but only if the agreement was in writing. The Tribunal concluded:

"In the Tribunal's view, it has no power to act on an estoppel such as that which the Applicant has submitted arises in this case. While the Tribunal acknowledges the frustration for the Applicant to which the Respondent's conduct in the pre-hearing negotiations gave rise, this is not something which can influence the Tribunal's decision. The Tribunal has no power to grant the relief sought by the Applicant."

Formal decision

The Tribunal decided that it had no jurisdiction to enforce an agreement arising in the course of settlement negotiations between the parties.

[Ed: An application by Mr Webb to the Federal Court was dismissed on the ground that the Court lacked jurisdiction to deal with the matter. The Court's decision will be reported in the next edition.]

Re Keenan and Repatriation Commission

O'Connor J, Way & Lynch

Q1998/87
17 Aug 2000

Prostate cancer - animal fat consumption

Mrs Keenan lodged an application for review with the Tribunal against a decision that the death of her late husband was not war-caused. Mr Keenan had rendered operational service in the Pacific theatre during World War 2 from 1942 to 1945. He died in 1997 from prostate cancer which was first diagnosed in 1990.

Mrs Keenan contended that the late veteran's death was the result of a diet which was high in animal fat and related to his service in that he commenced such a diet both during his service and as a result of that service, and continued that diet post-war.

She raised the following hypothesis:

- the veteran's death was a result of malignant neoplasm of the prostate;
- malignant neoplasm of the prostate can be caused by an increase in

animal fat consumption by at least 40% and to at least 70 grams per day for at least 20 years before the clinical onset of the disease (in terms of SoP No 95 of 1995 as amended by No 191 of 1996);

- the veteran consumed animal fat in that amount and over that period of time;
- the veteran's habit of consuming animal fat was related to his service in the armed forces, in that the diet was contributed to by his introduction to armed services food which had a higher fat content than the food he consumed before commencing his service.

Applicant's submissions

Mrs Keenan submitted that there was sufficient evidence before the Tribunal to establish that the veteran's increase in consumption of animal fat during service played a role in his post-war increase in consumption compared with his pre-war consumption of animal fat.

A medical witness, Dr Kenardy, referred to various studies and expressed the view that exposure to an elevated level of fat in the diet can possibly lead to an increased preference and consumption of animal fat.

There was evidence before the Tribunal that the late veteran's diet varied during war service. While operating as a coast watcher behind enemy lines, his diet was low in animal fat. During other periods, he adopted the high fat diet of the US forces to which he was attached as a liaison officer. She told the Tribunal that after the war, he preferred a high fat diet. She said that he liked big steaks with chips and eggs three times a day, would always eat cream when he could get it, ate cheese every night, was a very liberal user of butter, was a great chocolate eater and would eat as much ice cream as he could get.

Respondent's submissions

The Commission submitted that there was insufficient data before the Tribunal as to the veteran's fat intake. The Commission submitted further that the veteran's experiences between 1942 and 1945 cannot be implicated in his diet some fifteen years later, and that the return to a normal diet including fresh fruit, vegetables and meat broke any nexus that might otherwise have existed between a service-related increase in animal fat and the veteran's intake of animal fat between 1960 and 1977. That is, any increase in the veteran's consumption of animal fat between 1960 and 1977 cannot be "related to service" as required by the SoP.

Tribunal's conclusions

The Tribunal found that Mr Keenan's death was war-caused. It acknowledged the scientific unreliability of the dietary surveys which were intended to gather information as to fat ingestion by veterans over many years.

It concluded in the following terms:

> "The Tribunal considers that included in the many processes operative in the determination of dietary preference and ingestion there are factors special to war service. These are physical, psychological and emotional factors. It would be impossible to mention them all as they differ between the three services and they are different for each individual. Some of these factors include separation from normal life for periods of years; periods of panic and fear interspersed with boredom; a lack of privacy; basic camping facilities; dull and repetitive basic cooking and abstinence from and longing for favourite foods. The expert witnesses appear not to have considered these parameters, which impact on veterans in their post-war behaviour. Thus a narrow focus on

the dubiously accurate levels of fat in the diet as the only factor in causing a link to an excessive fat ingestion after the war is considered inappropriate. It is particularly so in relation to this beneficial legislation, which requires reasonable certainty that a link does not exist before the claim can be rejected.

This general consideration of the expert evidence before the Tribunal convinced the Tribunal that because of the inherent inaccurate basis of the post-war fat consumption survey and the pre-war and wartime diet surveys all comparisons derived from these figures cannot aspire to any degree of mathematical precision. However, … it is on this evidence the Tribunal must make its decision. Further, the current knowledge is limited as the processes surrounding fat preference and ingestion are both multifactorial and complex, which in turn limits the guidance available to the Tribunal as to which of the factors are the most significant amongst these many processes.

This veteran had, by any measure, an extraordinary period of operational service. Dietary change, either by deprivation and almost starvation, and excess, when a liaison officer with the US troops, was a significant factor in this service. There is no evidence of pre-war diet and we have accepted the agreed average for comparison but post-war there is evidence that the veteran craved and sought when he could get it, the 'American diet' high in animal fat to which he was introduced during the war. Although … one might expect that his life, for a significant period after the war, separated him from these opportunities he adopted this diet wherever he could.

We are satisfied that he was affected by his war experiences and his adoption of a post-WW2 high fat diet, when free to do so, was related to these experiences. We also consider the persistence and intensity of this veteran's desire for rich fatty foods was of such a degree that to postulate his ingestion of above average fat was restricted to the better documented seventeen years in Tamworth would be unreasonable. The applicant's evidence as to her husband's diet when he was residing with her under her supervision indicates that his usual diet was also reasonably high in fat.

While the veteran's post-war dietary history suffers from a lack of exact recall because of the passage of time and other difficulties as outlined above, nevertheless we are satisfied, after careful consideration of all the material before us and the submissions made by both parties, that the necessary factor in paragraph 1(b) of the relevant SoP, namely 'increasing animal fat consumption by at least 40%, and to at least 70gm/day for at least 20 years before the clinical onset of malignant neoplasm of the prostate', has been met."

Formal decision

The Tribunal set aside the decision under review and substituted its decision that Mr Keenan's death was war-caused.

[Ed: This case was heard together with five other applications also involving death from prostate cancer. In *Re Brown, Re Paint* and *Re Towle*, the Tribunal decided that the veterans' deaths were war-caused. In *Re Collingwood* and *Re Grace*, the Tribunal affirmed the decisions that the veterans' deaths were not war-caused.]

Re Repatriation Commission and Freeman

Gibbs

V1999/648
21 Aug 2000

Post traumatic stress disorder & psychoactive substance abuse - no evidence of stressor

The Repatriation Commission applied to the Tribunal for review of a decision of the VRB that Mr Freeman's post traumatic stress disorder and substance abuse were war-caused. Mr Freeman served in the RAN from 1967 to 1974. He had operational service on board *HMAS Derwent* from 4 to 8 November 1971 in South Vietnam.

In support of his claim, Mr Freeman relied on an incident that occurred on 6 November 1971 while he was carrying out the duties of Gun Direction Officer (Blind) on *HMAS Derwent* while the ship was at anchor in Vung Tau harbour, in South Vietnam. He was located in the operations room in an enclosed compartment and was responsible for monitoring radar to detect incoming aircraft. His evidence was that he observed an unidentified aircraft on his radar screen. He was unable to contact the bridge and panicked out of fear that the aircraft might have been hostile. After a short delay of some 30 to 45 seconds, the aircraft transmitted a signal which enabled it to be identified as friendly.

Mr Freeman relied on the existence of the following factor in the Statement of Principles (No 15 of 1994) in order to raise a reasonable hypothesis connecting PTSD with the circumstances of his service:

> "1(a) experiencing a stressor prior to the clinical onset of post traumatic stress disorder;"

The term **"experiencing a stressor"** is defined as meaning the following (derived from DSM-IV):

> "(a) the person experienced, witnessed, or was confronted with an event that involved actual or threatened death or serious injury, or a threat to the person's, or other people's, physical integrity; and
>
> (b) the person's response to that event involved intense fear, helplessness or horror;"

Diagnosis of PTSD

The main issue between the parties was the correct approach to establishing a diagnosis. The Commission's counsel submitted that before a diagnosis of PTSD could be made, the Tribunal was required to examine whether, as an objective fact, the applicant had been exposed to a traumatic event. The issue of whether a particular disease exists is to be decided to the Tribunal's reasonable satisfaction, not on the "beyond reasonable doubt" standard of proof. (See *Repatriation Commission v Cooke* (1998) 14 *VeRBosity* 100).

The Commission submitted that it only becomes necessary to consider the application of factors in the relevant SoP if the Tribunal is reasonably satisfied that there is a diagnosis of the claimed condition. The Commission submitted that in this case, the Tribunal could not be so satisfied.

The Commission's view was that the reasoning of the VRB in relation to PTSD focussed mainly on the symptoms suffered by the veteran as a consequence of exposure to a traumatic event. In its view, the Board's reasoning contained very little examination of whether he satisfied the equivalent to paragraph (a) of the diagnostic criteria in the definition of PTSD or the equivalent definition of "experiencing a stressor".

Mr Freeman's counsel submitted that the question of diagnosis was to be decided on the basis of credible evidence, including medical evidence and not by reference to the definition in the SoP. In this case, all medical opinion supported a diagnosis of PTSD. This diagnosis was based on the fact that he had observed an unidentified aircraft on his radar screen (a fact admitted by the Commission).

It was submitted that the Commission was seeking to have Mr Freeman establish facts by reference to a SoP to the reasonable satisfaction standard and before the process required by s 120(1) and (3) was relevant.

Tribunal's findings

The Tribunal accepted the Commission's submission as to the correct approach to establishing a diagnosis. The Tribunal found as follows:

1. Before examining the issue whether PTSD and substance abuse are war-caused, the Tribunal must satisfy itself whether or not there is a diagnosis of PTSD and substance abuse;
2. In doing so the Tribunal is bound by the decision of the Full Court of the Federal Court in *Repatriation Commission v Cooke*, that is to say the issue whether a particular disease exists is to be decided to the Tribunal's reasonable satisfaction;
3. Consideration by the Tribunal of the factor or factors in the relevant SoPs will only be necessary if the Tribunal is reasonably satisfied that there is a diagnosis of both conditions;
4. Upon the Tribunal being so satisfied, the principles established by the Full Court of the Federal Court in *Deledio* are to be applied;
5. In determining whether Mr Freeman has a diagnosis of PTSD, the Tribunal must be reasonably satisfied that all of the diagnostic criteria (a) through (f) inclusive in the definition of PTSD contained in the relevant SoP, are met.

The Tribunal then referred to Mr Freeman's evidence concerning the circumstances in which he had been placed by the observation of an unidentified aircraft on the radar screen. The Tribunal also considered evidence by a retired naval officer who was serving on *Derwent* at the time of the alleged incident. He could not recall the radar observation and said that the bridge would have been manned at all times. If a report had been conveyed to the bridge that an unidentified aircraft was approaching, this would have resulted in the Action Stations alarm being activated.

The Tribunal was reasonably satisfied that Mr Freeman does not suffer from PTSD as defined in the SoP. It said that based upon the documentary and oral evidence, it could not be said that Mr Freeman was "confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of himself or others".

The evidence was that the possibility of the *Derwent* firing on the aircraft never arose as Mr Freeman was not in a position to give any order that would have resulted in the death of the occupants of the approaching aircraft.

The Tribunal concluded finally that if there was a diagnosis of PTSD, the hypothesis that it was connected with operational service was not reasonable as it was not consistent with the "template" in the SoP.

Psychoactive substance abuse

In relation to substance abuse, Mr Freeman relied on the factor set out in paragraph 1(a) of the SoP (No 5 of 1994):

> "1(a) experiencing a stressful event prior to the clinical onset of psychoactive substance abuse or dependence, and maintaining the abuse or dependence post-service;"

The term "stressful event" is defined as follows:

> " **'stressful event'** means an incident in which there were external stimuli (such as combat) that would result in psychological stress, and where there were subjective symptoms of increased stress."

The Tribunal was satisfied that the hypothesis that this condition was related to operational service was not reasonable. It said that the example "such as combat" in the definition of "stressful event", was intended to convey the severity of the event comprehended by the definition. Given the event described by Mr Freeman and taking an objective view of it, this part of the definition was not satisfied.

Formal decision

The Tribunal set aside the VRB's decision and substituted its decision that Mr Freeman's post traumatic stress disorder and psychoactive substance abuse were not war-caused.

[Ed: Mr Freeman has lodged a appeal to the Federal Court against this decision.]

Re Nightingale and Repatriation Commission

Breen

Q99/77
01 Sep 2000

Special rate - whether loss of income

This case dealt with the issue of whether Mr Nightingale had suffered a loss of income in terms of qualifying for pension at the Special rate. At the time of lodging his application for increase, he was aged 73 years and 9 months. He served in the RAAF during World War 2 and has a number of war-caused disabilities including post traumatic stress disorder and a back condition.

After discharge from the RAAF, the applicant began a courier company which he ran for a number of years. He then ran a building company for around six years, sub-contracting all the physical work due to his back condition. He then operated a poultry farm for around twenty years and a horse stud for around four years. In both instances he employed others to do the manual work and made his money through his sales and management skills.

In 1982 the applicant's wife came into some money and together they built a set of flats in Toowoomba and managed them themselves. The applicant's contribution to this business was to show people flats, collect rent, write cheques to pay the bills and carry out odd jobs, such as letting people in who had locked themselves out or attending disturbances.

In 1989 his wife died. Shortly after that one of his daughters took over running the units and in return the applicant let her stay in one of the units free of charge. This would have resulted in Mr Nightingale forfeiting around $6,400 in rent per year. Later, a second daughter took over this task and also received a unit free of charge. During this time Mr Nightingale continued to carry out the same tasks as before but to a lesser degree.

In 1992 the applicant remarried and his new wife, Olive, and her friend, Gail, took over the tasks the applicant's daughter had been doing. The applicant has paid wages to them both in the amount of around $10,000 per year. In 1995 Gail completely took over the tasks of

collecting rents, attending disturbances and showing people through the units, as the applicant could no longer cope with them. He now simply writes the cheques for the business and deposits the rent monies at the bank. All other tasks involved in running the units are undertaken by Olive, Gail or tradespeople.

Loss of income

The Tribunal concluded that Mr Nightingale was unable to work more than 8 hours per week as a result of his war-caused disabilities alone and could no longer undertake the "last paid work" that he was engaged in, which was the management of the block of units.

The Tribunal also concluded that the applicant was suffering a loss of earnings on his own account which he would not be suffering if he were free of the incapacity, because he had to employ other people to manage the units. The Commission contended that the applicant actually earned more after his first wife died, as he then received her share of the partnership profits as well, and so could not be suffering from a loss. However, the Tribunal found that it was only after this increase in earnings that he employed his daughters to assist in management and subsequently sacrificed around $6,400 a year for their services. As such, a loss did occur. Then, from 1992, he began paying wages to Olive and Gail at $10,000 a year, constituting a further loss of earnings.

Formal decision

The Tribunal set aside the decision under review and determined that the veteran was eligible for Special rate pension.

Re Reading and Repatriation Commission

Forgie & Keane

Q1999/91
20 Sep 2000

Statements of Principles - whether accrued rights & liabilities

Mrs Reading applied to the Tribunal for review of a decision that the death of her late husband was not war-caused. The late veteran had served overseas in the Middle East and New Guinea during World War 2. There was evidence that he increased his smoking due to his operational service and continued smoking at the same level until 1955 and then at a reduced level until 1966 when he was diagnosed with diabetes. It was contended that his smoking led to the onset of diabetes mellitus; his diabetes mellitus led to ischaemic heart disease and this was the cause of his death in 1994.

Statements of Principles

An important issue raised in this case was whether the Tribunal was obliged to decide the matter in accordance with the Statements of Principles in force at the date of the Repatriation Commission's decision in November 1995 or in accordance with the SoP in force at the time of the hearing before the Tribunal. This issue was important as it was common ground between the parties that if the earlier SoP (No 174 of 1995) in respect of diabetes mellitus was applied, the claim could not succeed, whereas if the current SoP (No 82 of 1999) was applied, the hypothesis concerning smoking and diabetes mellitus would be upheld by it.

The Tribunal noted that the issue of whether it was obliged to apply the SoP applied by the Commission or a subsequent SoP was considered by the

Full Court of the Federal Court in *Repatriation Commission v Keeley* (2000) 31 AAR 150 (Lee, Cooper and Kiefel JJ). The Court concluded that the SoP in force at the time the Commission made its decision should be applied in subsequent reviews. In the *Keeley* case, the earlier SoP was more beneficial to Mrs Keeley's case than the SoP which replaced it. In this case, the current SoP was more beneficial to Mrs Reading's case than the earlier SoP.

The Tribunal observed that the Full Court did not address the precise situation in this case where the current SoP is more beneficial than the earlier SoP. Lee and Cooper JJ in *Keeley* appear to have assumed that the law as it stood when the right was accrued would be more beneficial than a subsequent amendment.

The Tribunal considered whether the fact that the later SoP was more beneficial to Mrs Reading's case than the earlier SoP should determine the issue of which SoP was to be applied. The Tribunal did not think this was the case. The Tribunal said on this point:

> "Does the fact that the later SoP 82 is more beneficial to Mrs Reading's case than the earlier SoP 174, mean that there has been shown to be an intention that it apply rather than that which applied when she made her claim? We do not think that it does. The only difference between the situation in this case and that in *Keeley* is that the outcome is more beneficial to the claimant for the person. The other factors taken into account in *Keeley* remain the same. That is to say, the scheme of the Act and the need for consistency of decision making remain the same. There has been a change in the claimant's substantive right although, on this occasion, the change has been to lower the bar to the remedy.
>
> We do not consider that fact that the application of the later SoP would lead to a more beneficial outcome than the earlier SoP can, in itself, lead to a different conclusion. It is not only rights which are preserved pursuant to section 8 of the *Acts Interpretation Act 1901* but also privileges and, more relevantly in this case, obligations and liabilities acquired, accrued or incurred under the repealed legislation. Where a SoP has been made, the Commission acquires an obligation to determine a person's claim in accordance with that SoP. Although we have paid it the greatest regard, it follows that, with respect, we do not agree with the view expressed by the Tribunal in *Re Zoarder and Secretary, Department of Social Security* (1998) 26 AAR 342, Mathews J, President) that s 8:
>
> > '… applies where the change in the law would otherwise deprive a claimant of rights already accrued. It operates to prevent a claimant being unfairly disadvantaged by changes in the law between the making of a claim and the time of its determination (*Re Reilly and Secretary, Department of Social Security* (1987) 12 ALD 407 at 414). Accordingly, it will normally (if not invariably) only apply to preserve rights where the change in the law is disadvantageous to the person asserting the right. It is difficult to conceive of a situation where the law has moved from a restrictive to a less restrictive regime where the applicant could be said to have an accrued right which will require preservation under s 8(c). …'
>
> The only way in which consistency of decision making can be maintained is if the finding of their Honours in *Keeley* applies equally whether the

change to the later SoP is beneficial to claimants or not. If it were otherwise, the applicable SoP could be determined by the particular circumstances of each claimant for what might be beneficial to one might not be beneficial to another. It could also be determined by the persistency exhibited by a claimant in pursuing his or her appeal rights. If he or she decides to accept the Commission's initial decision, he or she might be disadvantaged against a person who does not and, while proceeding in the VRB or this Tribunal, finds that the RMA has made a SoP more favourable to his or her claim. The person who accepted the Commission's decision would need to make a new claim and his or her entitlement would be determined by the date of that new claim. The person who proceeded would have his or her entitlement determined by reference to the date of his or her original, but usually significantly, older claim.

Taking all of these matters into account, we have concluded that SoP 82 does not indicate any intention to displace SoP 174 as the appropriate SoP by which to consider Mrs Reading's claim. As the material does not point to the hypothesis being consistent with that SoP, it cannot be regarded as reasonable. As the link between Mr Reading's smoking and his diabetes is an essential link in the hypothesis proposed on behalf of Mrs Reading, it follows that we do not consider that hypothesis that Mr Reading's death was war-caused is reasonable."

Formal decision

The Tribunal affirmed the decision that the late veteran's death was not war-caused.

[Ed: In *Re Ryan* (22 September 2000), the Tribunal also decided that although the later SoP was more beneficial to the veteran, it was obliged to apply the SoP in force at the date of the Commission's decision. However, in *Re Olsen* (18 October 2000), the Tribunal declined to follow *Re Reading* and *Re Ryan* and applied the later, more beneficial SoP. *Re Olsen* will be reported in the next edition.]

Federal Court of Australia

Harris v Repatriation Commission

Finn J

FCA 873
4 July 2000

Lumbar spondylosis - trauma to spine - assumed facts

Mr Harris appealed to the Federal Court against a decision of the Tribunal that his lumbar spondylosis was not war-caused. He served in Vietnam and was engaged in patrols around the Nui Dat region.

Mr Harris told the Tribunal that he suffered a back injury during a patrol through heavy scrub. He was required to break through the scrub and in order to do so was propelled forward by his section commander who was walking immediately behind him. He said that in the course of being propelled forward, his pack shifted to the right and his body was twisted and he landed on his back. He said that he hit a rock or stump on falling and felt pain in his lower back. He was able to continue normal duties and could not recall any limitation of movement of his back after this incident. He did not seek medical assistance apart from occasional aspirin for back pain.

Statement of Principles

In its decision, the Tribunal applied Statement of Principles No 52 of 1998 concerning lumbar spondylosis. It was common ground between the parties that in the light of the subsequent Full Court decision in *Repatriation Commission v Keeley* (2000) (16 *VeRBosity* 40), the Tribunal should have applied the SoP as in force at the date of the Repatriation Commission's original decision. Finn J observed on this point that although technically there may have been an error of law, application of the earlier SoP would not have materially affected the outcome and it was therefore futile to remit the matter for rehearing on this basis.

The SoP that should have been applied (No 105 of 1995 as amended) included a definition of "trauma to the lumbar spine" in the following terms:

> " **'trauma to the lumbar spine'** means an injury to the lumbar spine caused by the force of an extraneous physical or mechanical agent that causes the development, within 24 hours of the injury being sustained, of **acute symptoms and signs of pain, tenderness, and altered mobility or range of movement of the joint, and where such acute symptoms and signs last for a period of at least one week** immediately after the injury occurs, unless medical intervention has occurred. Where medical intervention for the injury has occurred (eg splinting, corticosteroid injection, surgery), and there is evidence relating to the extent of injury and treatment, such evidence may be considered;" (emphasis added)

Dr Stone, rehabilitation physician, was of the opinion that Mr Harris fell within the definition of "trauma to the lumbar spine" in the SoP applied by the Tribunal. The Tribunal referred to the Full Court's decision in *Repatriation Commission v Deledio* (1998) (14 *VeRBosity* 45) and concluded that the hypothesis failed to fit within the template in the SoP and was not reasonable. It declined to assume for the purposes of the hypothesis that Mr Harris had suffered altered mobility or range of movement.

Submissions

Mr Harris's counsel submitted that, in light of Dr Stone's evidence and having regard to Mr Harris's inability to recall whether there was any restriction in his movement, it was open to the Tribunal to assume that he had "altered mobility or range of movement of the joint".

Finn J said that in this case, the minimum factors identified in the SoP that could relate lumbar spondylosis to operational service were the suffering of trauma to the lumbar spine before the clinical onset of lumbar spondylosis and the trauma was itself related to the service rendered by a person. In relation to the trauma component, this required that the injury in question caused the development of "acute symptoms and signs" of (i) pain, (ii) tenderness and (iii) altered mobility or range of movement.

Finn J concluded that the Tribunal did not address directly the actual issue posed in stage 3 of *Deledio*, i.e. whether the hypothesis was consistent with the "template" to be found in the SoP. This involved an error of law. However, Dr Stone's evidence was not consistent with and did not point to the existence of *acute signs and symptoms* of altered mobility. In these circumstances, it would be futile to remit the matter for rehearing as the Tribunal could not properly have made the assumption that Mr Harris suffered acute symptoms and signs of altered mobility.

Formal decision

The Court dismissed Mr Harris's appeal.

[Ed: Mr Harris's appeal to the Full Federal Court was dismissed with costs. The Full Court's decision will be reported in the next edition.]

Hill v Repatriation Commission

Wilcox J

FCA 929
11 July 2000

Special rate - dog breeding activity not remunerative work - whether economic loss

Mr Hill appealed to the Federal Court against a decision of the Tribunal that he did not qualify for Special rate pension. He was previously in receipt of Intermediate rate pension and lodged an application for increase in pension in 1996 at the age of 60 years.

Mr Hill had a number of war-caused disabilities including cervical spondylosis, lumbar scoliosis and generalised anxiety disorder. He served in the RAAF from 1958 to 1978 and was later employed in a civilian capacity for 11 years by the Department of Defence. He was retrenched from that employment in March 1989. He claimed that he had accepted the offer of redundancy made by the Department of Defence only because his war-caused disabilities made it increasingly difficult for him to cope with the requirements of the position.

After his retrenchment, Mr Hill moved to the North Coast of NSW. He attempted to earn a living from breeding dogs but sold only about 10 dogs and failed to make a profit over several years. He told the Tribunal that he ceased dog breeding in 1994 because of back pain caused by lifting the dogs that weighed 18 to 19 pounds. Mr Hill also said he was unable to manage the grooming requirements.

The Tribunal decided that he did not satisfy the requirements for the Special rate on the basis that he was not prevented from undertaking remunerative work due to war-caused disabilities alone, in terms of s 24(1)(c) of the

VE Act. The Tribunal found that his work as a dog breeder was not "remunerative work" but was merely a hobby which had produced very limited income. It also found that he had not been engaged in remunerative work after his retrenchment in 1989. The Tribunal said that it was required to consider whether he had suffered a loss of salary or wages, or earnings on his own account, only in the period since 1993, when he was granted Intermediate rate pension.

Appeal grounds

Mr Hill's counsel submitted that the Tribunal had made two errors of law:

1. by not applying the correct test of whether the applicant's dog breeding activities amounted to "remunerative work" within the meaning of s 24(1)(c) of the *VE Act*; and
2. by confining itself to the question of whether he had suffered a loss of salary or wages, or earnings on his own account, in the period since 1993.

Court's conclusions

In relation to the first ground, Wilcox J was of the opinion that the Tribunal was correct in concluding that Mr Hill's dog breeding activities did not constitute "remunerative work" within the meaning of s 24(1)(c). Wilcox J said:

> "There may be cases where an activity in which a veteran engaged failed to return a net profit to the veteran, but may nonetheless be regarded as 'remunerative work' for the purposes of s24(1)(c). One example may be a case where the veteran attempted to establish himself or herself in a particular activity, being a continuation of remunerative work previously undertaken by the veteran, but was denied success by his or her war-caused disability. If the decision maker was satisfied that the attempt would have been successful, in the sense of providing 'earnings on his or her own account' - that is, net earnings after deduction of expenses - but for the war-caused disability, I see no difficulty about concluding that the veteran has been prevented, by the war-caused disability, 'from continuing to undertake remunerative work that the veteran was undertaking' and, by reason thereof, has suffered a loss of earnings on his or her own account.
>
> However, that is not the present case. Although the Tribunal found that his war-caused disabilities were the catalyst for Mr Hill's decision to give up dog breeding, there is no basis in the evidence for a conclusion that, absent those disabilities, the dog breeding activity would have yielded Mr Hill a profit, either immediately or in the longer term. On the contrary, Mr Hill made clear that his fundamental problem was that the price he could obtain for the puppies was inadequate to cover his costs. As it was not suggested that his costs were inflated by his disabilities, this problem obviously had nothing to do with his war-caused disabilities."

In relation to Mr Hill's second ground of appeal, Wilcox J accepted that the Tribunal had made an error of law. Mr Hill had relied on the loss of his public service position in 1989 as one of two bases for his claim in terms of s 24(1)(c). It was therefore incumbent on the Tribunal to deal with that matter and was erroneous for it to limit its consideration to the extent to which Mr Hill's position had changed since 1993. It was required to determine whether he satisfied the criteria set out in s 24 and was not bound by the conclusions of the earlier Tribunal which had granted Intermediate rate pension in 1993. The Tribunal's failure to consider loss of the public service position constituted an error of law.

Wilcox J observed that the Full Court's decision in *Starcevich v Repatriation Commission* (1987) 76 ALR 449 had established that consideration of whether a veteran was, at application day, "prevented from continuing to undertake remunerative work that the veteran was undertaking", and had lost income, is not confined to consideration of the question whether the veteran would then have been working in his or her most recent employment. Nor is it fatal to a claim of prevention from continuing to undertake remunerative work in some sphere that the veteran has worked at something else in the meantime, or that there is a substantial temporal gap between the cessation of work in that sphere and the date of the application. Those factors may make it difficult for the veteran to obtain a favourable factual finding, but they do not mean that the previous work is to be excluded from consideration.

Formal decision

The Court allowed Mr Hill's appeal and remitted the matter to the Tribunal for rehearing.

Thompson v Repatriation Commission

Madgwick J

FCA 939
19 July 2000

Accrued rights - no Statement of Principles when Commission decided claim - SoP issued before AAT determination - whether AAT bound to apply

Mr Thompson lodged an appeal to the Federal Court against a decision of the Tribunal that his irritable bowel syndrome ("IBS") was not war-caused. He rendered operational service during World War 2 in the Cape York area. He gave evidence at the AAT that he sought treatment for irregular bowel movements and constipation in early 1944 and was given Epsom Salts by a medical officer. He continued to experience bowel problems after the war and occasionally took Epsom Salts as well as other remedies.

Dr Engelman, gastroenterologist, gave evidence at the AAT that it was likely that the use of Epsom Salts, which the veteran started taking during war service, may have contributed to his IBS. He said that the use of Epsom Salts had been shown to cause nerve damage to the colon.

The AAT followed the decision of the then President (Mathews J) in the case of *Re Ogston and Repatriation Commission* (1998) (14 *VeRBosity* 33) and said it was bound to apply the SoP as in force at the time of its decision. The veteran did not satisfy the requirements of the SoP as the use of Epsom Salts was not included as a factor related to service. Accordingly, the AAT affirmed the decision that his IBS was not war-caused.

Chronology

10 April 1995 Mr Thompson lodged claim in relation to IBS

29 June 1995 His claim was refused by the Repatriation Commission

15 August 1995 Mr Thompson applied to the VRB for review of the Commission's decision

29 March 1996 VRB affirmed the decision that IBS was not war-caused

11 June 1996 Mr Thompson applied to the AAT for review of the VRB decision

16 August 1996 Repatriation Medical Authority determined a SoP concerning IBS (Instrument No 103 of 1996)

7 October 1998 AAT found that none of the SoP factors existed in the

veteran's case and affirmed the decision that IBS was not war-caused

Submissions

The essential issue in this case was whether the SoP issued after the application for review but before the determination of the matter by the AAT, should have been applied by the AAT. Mr Thompson's counsel submitted to the AAT that he was entitled to have his case heard in accordance with the law in force at the time of his application to the AAT, that is, without reference to the SoP. This would enable the veteran to rely on Dr Engelman's opinion that his IBS was related to war service.

Court's conclusions

Madgwick J observed that this case presented another variation on themes explored in the cases of *Ogston v Repatriation Commission* (1999) (15 *VeRBosity* 36) and *Repatriation Commission v Keeley* (2000) (16 *VeRBosity* 40) regarding the consequences of the making of a Statement of Principles during the processes of original and appellate determination of claims under the *VE Act.* In *Ogston*, the relevant sequence was: claim to Commission; determination of SoP; original determination by Commission. In *Keeley* it was: claim to Commission; determination of first SoP; original determination by Commission; application to VRB for review; determination of second SoP; determination by VRB.

Madgwick J referred to the decision in *Keeley* in which the Full Federal Court held that introduction of the SoPs following amendments to the *VE Act* in 1994 had affected substantive rights and not merely procedural rights. Madgwick J said that upon lodgment of his claim, the veteran had acquired a right to a pension subject to the conditions in section 120. He also had a right to have the Commission's decision reconsidered on review. His Honour continued:

> "In my view, it is 'least likely to work or cause unfairness' (in the language of the majority in *Keeley*) if an intention is imputed to Parliament that, after a veteran (or his or her dependant) has made a claim on one legally relevant set of criteria and embarked on the exercise of a right of review of a claim so based, the substantive rules governing the claim should not be changed to the complainant's disadvantage."

It followed that Mr Thompson was entitled to have his case reviewed by the AAT without reference to the SoP that was determined after lodgment of his application for review.

Formal decision

The Court allowed Mr Thompson's appeal and remitted the matter to the Tribunal for rehearing.

[Ed: The Repatriation Commission has lodged an appeal to the Full Federal Court.]

Gartrell v Repatriation Commission

Whitlam, Lindgren & Gyles JJ

FCA 1228
9 August 2000

Accrued rights - Statement of Principles determined after claim lodged but before Commission's decision

Mr Gartrell appealed to the Full Court from a decision of Madgwick J. (See 16 *VeRBosity* 40). The veteran had lodged a claim with respect to prostate cancer which he contended was due to smoking. The Administrative Appeals Tribunal refused his claim on the basis

that this link with war service was not upheld by the Statement of Principles which was made after the claim was lodged.

Mr Gartrell submitted that his claim should have been determined without applying the SoP. Madgwick J decided that the Court was bound by the decision of the Full Court in *Ogston v Repatriation Commission* (1999) (15 *VeRBosity* 36) in which it was held that the Tribunal was bound to apply the SoP, despite the fact that there was no SoP when the claim was lodged.

Full Court appeal

On further appeal, Mr Gartrell submitted that in light of the more recent decision of the Full Court in *Repatriation Commission v Keeley* (2000) (16 *VeRBosity* 40), the decision in *Ogston* should not be followed.

The Repatriation Commission submitted that *Ogston* was directly applicable on the facts, and could not be distinguished. The Full Court observed that this was correct, although in this case (as in *Keeley*) more than one SoP had been made since 1 June 1994 (all since the original claim) and each had the effect of denying his claim. The issue in *Keeley* was whether, if a SoP does not deny a claim and is then revoked and replaced by a SoP that does, the claim must be considered according to the first rather than the later SoP. That question did not arise here.

The Repatriation Commission also submitted that the decision in *Keeley* was consistent with and depended upon the correctness of *Ogston*. In *Keeley* (as here) there was no SoP in existence at the time of the claim. The first SoP was made prior to the refusal of the claim by the Commission, and did not rule out success in the claim. The second SoP, which did, was made after review by the VRB but prior to the decision of the Tribunal. The starting point of the judgment in *Keeley* was that the first SoP was binding as it gave rise to an accrued right.

The Full Court accepted the Commission's submission and dismissed the appeal, saying:

> "… the position is that there is a recent, and reasoned, decision of the Full Court directly in point. It, in turn, upheld the decision of Mathews J sitting as a member of the Administrative Appeals Tribunal. The Full Court decision which we are invited to follow in preference to it is, in truth, in accordance with it. The decision in *Ogston* was unanimous. Special leave to appeal to the High Court from it was refused. It cannot be said to be clearly wrong. Indeed, it appears to accord with the usual principles applicable in situations of this kind. We have no proper course other than to follow *Ogston.*
>
> We recognise, of course, that there may be difficulty in reconciling all of the reasoning in the judgments in *Keeley* with all of the reasoning of the judgment in *Ogston*. That is not the concern of this Court in these proceedings. That will arise when, and if, the correctness of the decision in *Keeley* becomes necessary to decide in another case."

Formal decision

The Full Court dismissed Mr Gartrell's appeal.

Repatriation Commission v Applebee

Weinberg J

FCA 1246
6 September 2000

Assessment - GARP - whether glaucoma a sequela of war-caused disease

The Repatriation Commission lodged an appeal to the Federal Court against the Tribunal's decision concerning Mr Applebee's incapacity. He had lodged a claim in respect of eyesight which was refused by the Commission as not being war-caused. On review, the Tribunal decided that bilateral open angle glaucoma was a sequela of his war-caused cerebrovascular disease and assessed pension at 80% of the General rate. (See 14 *VeRBosity* 38)

Legislation

Section 19(5) of the *VE Act* directs the Commission to assess, under ss 22, 23, 24, 25, 27 or 30, the rate or rates at which pension is payable once the Commission has determined that an injury or disease is war-caused under s 19(3)(b). Section 19(7) specifies that the Commission is to assess a veteran's combined incapacity from all war-caused injuries and diseases.

Section 22(2) of the *VE Act* provides that the rate at which pension is payable to a veteran (which is not otherwise covered by ss 23, 24 or 25) is determined by reference to the degree of the veteran's incapacity determined in accordance with s 21A.

Section 21A relevantly provides:

> "**21A** (1) The Commission shall … determine the degree of incapacity of a veteran from war-caused injury or war-caused disease, or both, according to the provisions of the approved *Guide to the Assessment of Rates of Veterans' Pensions*."

Grounds of appeal

The Repatriation Commission submitted that in concluding that Mr Applebee's glaucoma was a sequela of his war-caused CVD, the Tribunal failed to conform to the requirements of the *VE Act* and the Guide which required that:

- the Tribunal first determine whether Mr Applebee's glaucoma was war-caused; and
- only determine that glaucoma was war-caused if the contention that glaucoma was probably connected to war service was upheld by the relevant Statement of Principles.

The Commission also submitted that the Tribunal erred in law in concluding that there was an inconsistency between the general instructions at pages 8-9 and Chapter 5 of the Guide which justified the Tribunal in finding that glaucoma was a sequela of Mr Applebee's CVD.

The Tribunal had acknowledged that the introduction of the Guide prevented it from taking into account the sequela of an accepted condition when assessing incapacity under the Guide, until that condition had been separately determined to be war-caused within s 9 of the *VE Act*. The AAT accepted that s 120B(3) and the terms of the SoP would prevent it from finding that Mr Applebee's glaucoma was a war-caused disease. It was accepted by both parties that his glaucoma could not satisfy the requirements of the SoP. The Commission submitted that the effect of these matters was that any *symptoms* of glaucoma suffered by the veteran could not be taken into account in assessing the rate of pension payable by reason of the CVD.

The Tribunal also noted the instructions in the Guide to the effect that where any

specific instructions in another chapter of the Guide were given, then to the extent of any inconsistency those specific instructions were to prevail over the general instructions in the introduction to the Guide. The Tribunal said that Chapter 5 of the Guide contained specific instructions for assessing neurological impairment (such as CVD) which were inconsistent with the general instructions about sequelae.

The Commission submitted that there was nothing in Chapter 5 of the Guide which is inconsistent with the general instructions relating to sequelae. There being no inconsistency, the Tribunal was required to follow the general instruction and determine separately that the glaucoma was war-caused or defence-caused before it could determine that it was a sequela of CVD. Its failure to do so constituted an error of law.

Error of law

Weinberg J accepted the Commission's submission that the Tribunal had erred in law. There was no inconsistency between the general instructions regarding sequelae and Chapter 5 of the Guide. The general instructions to the Guide were therefore applicable. It followed that the glaucoma had to be separately determined to be war-caused in order for it to be considered a sequela of the accepted condition. As the glaucoma was the subject of a SoP which it could not satisfy, it could not be determined to be a sequela of CVD. The error by the Tribunal arose by virtue of the fact that it went further than was permitted in finding that the glaucoma was a sequela of the CVD.

Formal decision

The Court allowed the Commission's appeal and set aside the Tribunal's decision that the veteran's glaucoma was a sequela of his war-caused cerebrovascular disease.

Husband v Repatriation Commission

Hill, Carr & Weinberg JJ

FCA 1276
8 September 2000

GARP assessment - intermittent impairment - Special rate - condition not claimed

Mr Husband lodged an appeal to the Full Court against the decision of French J, dismissing his earlier appeal against a decision of the Tribunal that he did not qualify for Special rate pension. (See 16 *VeRBosity* 15).

The Tribunal refused his claim for Special rate pension on the basis that he was not prevented from undertaking remunerative work by defence-caused injury or disease alone, in terms of s 24(1)(c) of the *VE Act.* The Tribunal decided that he was not prevented from working, but had decided not to seek further employment until he fully recovered from defence-caused leptospirosis. The AAT also found that his inability to work in the latter part of the assessment period was due to chronic fatigue syndrome which was not defence-caused.

Submissions

Mr Husband submitted that the Tribunal had erred in law in deciding that he was ineligible for either the Intermediate or Special rates of pension. He submitted that having determined that his degree of incapacity was 80% of the General rate the Tribunal did not need to consider s 21A or the *Guide to the Assessment of Rates of Veterans' Pensions*. He submitted that the determination of incapacity for undertaking remunerative work, for the purposes of applying ss 23 and 24, was not to be made in accordance with the Guide. The Guide was to be applied only to determine the minimum degree of incapacity of 70%

referred to in ss 23(1)(a)(i) and 24(1)(a)(i). Capacity to undertake remunerative work was to be determined by having regard only to the matters set out in s 28, to the exclusion of anything contained in the Guide.

Section 21A relevantly provides:

> "**21A** (1) The Commission shall … determine the degree of incapacity of a veteran from war-caused injury or war-caused disease, or both, according to the provisions of the approved *Guide to the Assessment of Rates of Veterans' Pensions*."

The Full Court observed that the Tribunal had not, in fact, referred to s 21A or the GARP. It rejected this main submission, saying:

> "First, s 21A(1) relevantly requires the degree of incapacity of a veteran from defence-caused disease to be determined according to the provisions of the Guide. That reference to incapacity is a reference to the effects of that disease and not a reference to the disease itself - see s 5D(2), there being no contrary intention apparent. Secondly, it is, in our view, entirely consistent with s 28, and in particular s 28(c), for the Commission or the Tribunal to assess the *actual* 'degree of incapacity' (the language of s 21A), rather than simply note that it is over the 70% threshold, for the purposes of assessing the degree to which any physical or mental impairment has reduced the veteran's capacity to undertake the relevant remunerative work. The reference in s 28(c) to '... the physical or mental impairment of the veteran as a result of the injury or disease ...' must surely be to the actual impairment (in the relative degree) not to some notional impairment. The same reasoning applies to the assessment [required by ss 23(1)(b) and 24(1)(b)] whether the veteran's incapacity is of itself alone of such a nature as to render the veteran incapable to the extent referred to in those sub-paragraphs. Finally, if s 28 were to be applied in the manner suggested by the appellant there would be the incongruity of the Guide not applying for the purposes of ss 23(1)(b) or 24(1)(b) but being applicable for the purposes of ss 23(1)(c) and 24(1)(c). In our view it is sufficiently clear that Parliament's intention was that the Guide should be used generally for the assessment of pension rate entitlements, whether general intermediate or special."

Mr Husband submitted further that the Tribunal, having found that chronic fatigue syndrome was a consequence of leptospirosis and that chronic fatigue syndrome was incapacitating, should have found that he was incapacitated from leptospirosis. The Full Court rejected this submission on the basis that the Tribunal had found that his symptoms of chronic fatigue syndrome were not due to leptospirosis.

Finally, Mr Husband submitted that the Tribunal had erred in law in failing to consider whether he was incapacitated from his lumbar thoraco spondylosis. The Full Court said that there was no need for the Tribunal to consider this issue. Having found that the chronic fatigue syndrome was the main cause of his incapacity to work, it was simply impossible for any other cause to be the sole cause.

Formal decision

The Full Court dismissed Mr Husband's appeal.

[Ed: Mr Husband has applied for Special leave to appeal to the High Court.]

Arnott v Repatriation Commission

Sundberg J

FCA 1336
19 September 2000

Lumbar spondylosis - Statement of Principles - acute symptoms and signs of pain

Mr Arnott appealed to the Federal Court against a decision of the Tribunal that his lumbar spondylosis was not war-caused. He served in the Australian Army in Vietnam in 1967-68 and contended that his back condition was related to his operational service.

Before the Tribunal the parties agreed that the applicable Statement of Principles was Instrument No 27 of 1999. Clause 5 listed the factors that were required to exist before a reasonable hypothesis was raised connecting lumbar spondylosis with the circumstances of operational service. One of the factors was:

> "(h) suffering a trauma to the lumbar spine before the clinical onset of lumbar spondylosis."

The expression "**trauma to the lumbar spine**" was defined, so far as material, as:

> "a discrete injury to the lumbar spine that causes the development, within 24 hours of the injury being sustained, of acute symptoms and signs of pain and tenderness, and either altered mobility or range of movement of the lumbar spine. These acute symptoms and signs must last for a period of at least seven days following their onset ..." (emphasis added)

The Tribunal noted that there were three incidents relied on by the applicant to bring his case within factor (h). The first was when he tripped over a wire while wearing a heavy pack. The second was when he stepped into a hole while on patrol which caused severe ankle injury. The third was when he was pulled out of a swampy area which caused his back to be wrenched.

The Tribunal concluded that while the material relied on by the applicant did point to a hypothesis connecting his injuries with his service, that hypothesis did not fit the template in the SoP, and accordingly the hypothesis was not reasonable.

Wrong SoP applied

Mr Arnott submitted that in accordance with the Full Court's decision in *Repatriation Commission v Keeley*, which was handed down subsequent to the Tribunal hearing, the SoP to be applied by the Tribunal was that in force at the time of the Commission's determination.

There were four differences between the applicable SoP and that applied by the Tribunal in this case:

- the former speaks of "an injury" to the lumbar spine while the latter refers to "a discrete injury" to the lumbar spine;
- the former speaks of an injury "caused by the force of an extraneous physical or mechanical agent" while the latter does not deal with the cause of the injury;
- the former speaks of altered mobility or range of movement of "the joint" while the latter speaks of altered mobility or range of movement of the "lumbar spine";
- the former requires the symptoms to last for at least a week after the injury occurs while the latter requires them to last for at least seven days after their onset.

Sundberg J said that nothing turned on the absence of the word "discrete" in the

applicable SoP. On the facts of the case there was no relevant difference between "an injury to the lumbar spine" and a "discrete injury to the lumbar spine". Each incident relied on was a separate event, unconnected with any other. The Tribunal's decision would have been the same if it had been directed to the correct SoP. It was therefore pointless to remit the matter to the Tribunal for rehearing on this basis alone.

Meaning of acute

Mr Arnott submitted secondly that the Tribunal erred in law in interpreting "acute" as meaning "sudden and severe".

Sundberg J noted that *Blackiston's Gould Medical Dictionary* 3rd ed defines "acute" as:

> "1. Sharp; severe. 2. Having a rapid onset, a short course, and pronounced symptoms. Compare chronic."

The *Macquarie Dictionary* gives this meaning:

> "brief and severe, as disease (opposed to chronic)."

The *Shorter Oxford English Dictionary* says "acute" in relation to diseases means:

> "Coming sharply to a crisis, not chronic."

Sundberg J concluded on this point:

> "In my view the word 'acute' in the definition contemplates symptoms etc that are severe or significant. The temporal factor is already dealt with by the words 'injury ... that causes the development, within 24 hours of the injury being sustained ...'. Since a precise temporal element has been stipulated, it would be strange if 'acute' were to mean 'of sudden onset'. The Tribunal thought 'acute' meant sudden and severe. It decided the issue against the applicant on the ground that the ankle and wire incidents did not give rise to severe symptoms rather than because the symptoms were not of sudden onset. Thus in relation to the ankle incident, the Tribunal said that the applicant suffered *some* back pain, that the ankle injury was considerably more *severe*, that there was no evidence that the ankle injury may have *masked the severity* of any back injury, and that the incident was not reported. In relation to the wire incident the Tribunal accepted that the applicant suffered *some* back pain. The conclusion that this pain did not amount to 'acute' symptoms is clearly a reference to the nature rather than the temporality of the symptoms. These conclusions were plainly open on the evidence, and indeed pointed to by it."

Other grounds

The third submission by Mr Arnott was that the Tribunal had failed to apply s 119(1)(h) of the *VE Act* which requires the Commission to take account of any difficulties in obtaining evidence or deficiencies in official records.

Sundberg J said that there was no need for the Tribunal to refer to s 119(1)(h) in the circumstances of this case as the applicant had given evidence about the extent of his back injury.

Sundberg J also concluded that several other submissions by the applicant failed to disclose errors of law by the Tribunal.

Formal decision

The Court dismissed Mr Arnott's appeal.

[Ed: Mr Arnott has lodged an appeal to the Full Court against this decision.]

Statements of Principles issued by the Repatriation Medical Authority

September – November 2000

Number of Instrument	Description of Instrument
21 of 2000	Revocation of Statement of Principles (Instrument No.29 of 1998 concerning goitre and death from goitre), and Determination of Statement of Principles under subsection 196B(2) concerning goitre and death from goitre
22 of 2000	Revocation of Statement of Principles (Instrument No.30 of 1998 concerning goitre and death from goitre), and Determination of Statement of Principles under subsection 196B(3) concerning goitre and death from goitre
23 of 2000	Revocation of Statements of Principles (Instrument No.231 of 1995, Instrument No.362 of 1995, and Instrument No.94 of 1997 concerning malignant neoplasm of the bladder and death from malignant neoplasm of the bladder), and Determination of Statement of Principles under subsection 196B(2) concerning malignant neoplasm of the bladder and death from malignant neoplasm of the bladder
24 of 2000	Revocation of Statements of Principles (Instrument No.232 of 1995, Instrument No.363 of 1995, and Instrument No.95 of 1997 concerning malignant neoplasm of the bladder and death from malignant neoplasm of the bladder), and Determination of Statement of Principles under subsection 196B(3) concerning malignant neoplasm of the bladder and death from malignant neoplasm of the bladder
25 of 2000	Revocation of Statement of Principles (Instrument No.77 of 1994 concerning Hodgkin's disease and death from Hodgkin's disease), and Determination of Statement of Principles under subsection 196B(2) concerning Hodgkin's disease and death from Hodgkin's disease
26 of 2000	Revocation of Statement of Principles (Instrument No.78 of 1994 concerning Hodgkin's disease and death from Hodgkin's disease), and Determination of Statement of Principles under subsection 196B(3) concerning Hodgkin's disease and death from Hodgkin's disease

Copies of these instruments can be obtained from:

- **Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001**
- **Repatriation Medical Authority, 4th Floor 127 Creek Street, Brisbane Qld 4000**
- **Department of Veterans' Affairs, PO Box 21, Woden ACT 2606**
- **Department of Veterans' Affairs, 13 Keltie Street, Phillip, ACT 2606**
- **RMA Website: *http://www.rma.gov.au/***

Repatriation Medical Authority

CONDITIONS UNDER INVESTIGATION AS AT 22 NOVEMBER 2000

Description of disease or injury	Factors under investigation	Date gazetted
Acquired cataract [Instrument Nos 146/96 & 147/96]	Required level of exposure to solar radiation	23-06-99
Acquired pes planus [Instrument Nos 302/95 & 303/95]	- - -	04-10-00
Acute lymphoid leukaemia [Instrument Nos 77/95 & 78/95]	- - -	16-08-00
Alzheimer's disease [Instrument Nos 378/95 & 379/95]	- - -	03-11-99
Aplastic anaemia	- - -	03-11-99
Asthma [Instrument Nos 59/96 & 60/96 as amended by Nos 75/97 & 76/97]	- - -	03-11-99
Atherosclerotic peripheral vascular disease [Instrument Nos 87/95 & 88/95]	- - -	25-10-00
Bronchiectasis [Instrument Nos 35/97 & 36/97]	- - -	17-11-99
Carpal tunnel syndrome [Instrument Nos 71/97 & 72/97]	- - -	03-11-99
Chondromalacia patellae [Instrument Nos 320/95 & 321/95]	- - -	21-06-00
Chronic gastritis [Instrument Nos 60/99 & 61/99]	- - -	04-10-00
Chronic lymphoid leukaemia [Instrument Nos 79/95 & 80/95]	- - -	19-07-00

Chronic pancreatitis [Instrument Nos 47/97 & 48/97]	- - -	01-03-00
Chronic solar skin damage [Instrument Nos 33/96 & 34/96]	Required level of exposure to solar radiation	23-06-99
Chronic ulcerative colitis [Instrument Nos 144/96 & 145/96 as amended by Nos 179/96 & 180/96]	Stress	04-08-99
Congenital pes planus [Instrument Nos 304/95 & 305/95]	- - -	04-10-00
Deep vein thrombosis [Instrument Nos 43/98 & 44/98]	- - -	10-05-00
Dengue fever [Instrument Nos 139/95 & 140/95]	- - -	01-03-00
Giant cell arteritis [Instrument Nos 85/96 & 86/96]	- - -	22-03-00
Gulf War syndrome	- - -	17-11-99
Hypertension [Instrument Nos 25/99 & 26/99]	Sleep apnoea	18-08-99
Hypertension [Instrument Nos 25/99 & 26/99]	- - -	10-05-00
Inflammatory periodontal disease [Instrument Nos 368/95 & 369/95]	- - -	25-10-00
Lumbar spondylosis [Instrument Nos 27/99 & 28/99]	- - -	04-10-00
Malignant melanoma of the skin [Instrument Nos 97/95 & 98/95 as amended by Nos 189/96 & 190/96]	- - -	18-08-99
Malignant neoplasm of the lip epithelium [Instrument Nos 105/96 & 106/96]	Required level of exposure to solar radiation	23-06-99

Malignant neoplasm of the lung [Instrument Nos 29/96 & 30/96 as amended by Nos 149/96 & 150/96]	Exposure to herbicides used in Vietnam, namely 2,4-D, 2,4,5-T, cacodylic acid or picloram	23-06-99
Meniere's disease [Instrument Nos 27/97 & 28/97]	- - -	10-05-00
Mesangial IGA glomerulonephritis	- - -	17-11-99
Motor neurone disease [Instrument Nos 245/95 & 246/95]	- - -	18-08-99
Multiple chemical sensitivity	- - -	21-06-00
Multiple sclerosis [Instrument Nos 170/95 & 171/95]	- - -	22-11-00
Neuropathy	- - -	03-11-99
Non-melanotic malignant neoplasm of the skin [Instrument Nos 45/98 & 46/98]	Required level of exposure to solar radiation	23-06-99
Osteoarthrosis [Instrument Nos 41/98 & 42/98 as amended by Nos 19/99 & 20/99]	- - -	18-08-99
Osteoporosis [Instrument Nos 61/97 & 62/97]	- - -	25-10-00
Otitis externa [Instrument Nos 292/95 & 293/95]	- - -	04-10-00
Porphyria cutanea tarda [Instrument Nos 71/94 & 72/94]	Exposure to herbicides used in Vietnam, namely 2,4-D, 2,4,5-T, cacodylic acid or picloram	23-06-99
Psoriasis [Instrument Nos 21/98 & 22/98]	- - -	22-03-00
Pterygium [Instrument Nos 60/98 & 61/98]	Required level of exposure to solar radiation	23-06-99

Sensorineural hearing loss [Instrument Nos 45/96 & 46/96 as amended by Nos 1/98 & 2/98]	- - -	25-10-00
Soft tissue sarcoma [Instrument Nos 49/98 & 50/98]	Exposure to herbicides used in Vietnam, namely 2,4-D, 2,4,5-T, cacodylic acid or picloram	23-06-99
Tinnitus [Instrument Nos 43/96 & 44/96]	- - -	10-05-00

Administrative Appeals Tribunal decisions – July to September 2000

Carcinoma

colon
- alcohol
  - **Miles, P M** 08 Sep 2000

Cardiovascular disease

hypertension
- alcohol abuse
  - **Kerr, K** 01 Sep 2000
- alcohol dependence or alcohol abuse
  - **Muller, D M** 05 Jul 2000
- psychoactive substance abuse
  - **Byrne, P R** 03 Jul 2000
  - **Carmody, F E** 21 Jul 2000
- salt ingestion
  - **Hardcastle, K** 18 Aug 2000
  - **Paul, D** 04 Sep 2000

hypertension with ventricular hypertrophy
- alcohol abuse
  - **Gorton, R** 11 Aug 2000

hypertension & ischaemic heart disease
- alcohol abuse
  - **Nichols, R F A** 05 Sep 2000

ischaemic heart disease
- hypertension
- psychoactive substance abuse
  - **Fogarty, W F** 24 Aug 2000

Circulatory disease

varicose veins
- inability to obtain appropriate clinical management
  - **McClure, G A** 14 Jul 2000

Death

acute myeloid leukaemia
- benzene
  - **Salter, E** 11 Aug 2000

brain tumour
- whether chronic bronchitis contributed to bronchopneumonia
  - **Ellercamp, P** 14 Jul 2000

cerebrovascular accident
- hypertension - salt ingestion
  - **Swan, M** 07 Aug 2000

cirrhosis of liver
- war-related drinking habit
  - **Wotherspoon, R** 12 Jul 2000

colon cancer
- hepatitis A
  - **Watkins, G F** 26 Jul 2000

dementia
- ECT treatment & deep sleep therapy
  - **Boland, M** 01 Sep 2000

diabetes & ischaemic heart disease
- smoking
  - **Reading, M L** 20 Sep 2000

ischaemic heart disease
- hypertension
  - **Chamberlain, N P** 27 Sep 2000
- inconsistent statements as to whether smoking war-caused
  - **Day, V** 24 Aug 2000
- salt ingestion
  - **Norris, E M** 01 Sep 2000
- smoking
  - **Smith, S K** 15 Sep 2000

ischaemic heart disease & diabetes
- smoking & obesity
  - **Dennis, C T** 03 Jul 2000

metastatic carcinoma
- **Gale, N C** 18 Aug 2000

non-Hodgkin's lymphoma
- smoking
  - **Bowers, N J** 22 Sep 2000

pneumonia & prostate cancer
- chronic bronchitis
Telford, N 13 Sep 2000

prostate cancer
- animal fat intake
Brown, P L 17 Aug 2000
Collingwood, D G 17 Aug 2000
Towle, B 17 Aug 2000
Grace, S 17 Aug 2000
Paint, G A 17 Aug 2000
Keenan, P L 17 Aug 2000
Skelton, J M 25 Aug 2000

renal failure
- aggravation by tropical service
Drennan, M J 16 Aug 2000

stomach cancer
- smoking not war-caused
Kruger, B 02 Aug 2000

suicide
- depressive disorder & psychoactive substance abuse
Taylor, J 04 Aug 2000

Dental condition

gross incisional wear
- inability to obtain appropriate clinical management
Cotterill, E B 04 Jul 2000

Dependant

remarried after veteran's death
- ceased to be a dependant
Graham, P 25 Sep 2000

Dermatological disorder

psoriasis
- treatment with beta-blockers & alcohol abuse
Hayes, A M 29 Aug 2000

Diabetes

diabetes mellitus
- rubella virus
Benson, S W J 09 Aug 2000

Digestive disorder

acute pancreatitis & fatty liver
- alcohol abuse
Kerr, K 01 Sep 2000

Disability pension

narcolepsy
- head injury
Woodford, J F 08 Sep 2000

Entitlement

Statements of Principles
- whether accrued rights & liabilities
Reading, M L 20 Sep 2000
Ryan, R G 22 Sep 2000

Extreme disablement adjustment

whether lifestyle ratings sufficient
Kershaw, F H 17 Aug 2000
Davis, W D 11 Sep 2000

Gastrointestinal disorder

alcoholic diarrhoea & gastro-oesophageal reflux disease
- alcohol consumption
Thompson, E M 02 Aug 2000

irritable bowel syndrome
- service diet
Clarke, J 04 Jul 2000

peptic ulcer
- smoking
Miles, P M 08 Sep 2000

ulcerative colitis
- inappropriate clinical management
Lowe, S K 22 Sep 2000

General rate pension

Guide to Assessment (1998) (GARP)
- assessment
Martin, K 09 Aug 2000
- assessment of sequelae
Ryan, V M 01 Sep 2000

Hearing loss

tinnitus
- aircraft noise
  Davies, A G 28 Aug 2000

Jurisdiction

settlement negotiations
- no agreement in writing
  Webb, M R 03 Jul 2000

Musculoskeletal

bunions
- ill-fitting boots
  Cotterill, E B 04 Jul 2000

gout
- obesity
  Nichols, R F A 05 Sep 2000

rotator cuff syndrome
- overuse of arm
  Manton, H 11 Jul 2000

Osteoarthrosis

big toe
- sporting injury
  Clapham, B T 03 Aug 2000

knee
- trauma to the relevant joint
  Hodgkinson, M J 21 Aug 2000

knees
- trauma to a joint
  Byrne, P R 03 Jul 2000
  Cotterill, E B 04 Jul 2000
- trauma to the relevant joint
  Barnes, N 03 Aug 2000

shoulder & hip
- parachute accident
  Ragen, J T 07 Sep 2000

Psychiatric disorder

bipolar disorder
- Ubon service
  Robinson-Watterston, J 15 Aug 2000

generalised anxiety disorder
- experiencing a stressful event
  Fogarty, W F 24 Aug 2000
  Lowe, S K 22 Sep 2000

generalised anxiety disorder & alcohol abuse
- experiencing a stressful event
  Kerr, K 01 Sep 2000

post traumatic stress disorder
- aggravation
  Ross, A 25 Sep 2000
- experiencing a stressor
- locked in ship's magazine
  Chaplin, S J 04 Jul 2000
- experiencing a stressor
- Indonesian fishing vessel & percussion charges in Vung Tau
  Lowes, T 08 Aug 2000
- experiencing a stressor
  Cahill, T 13 Sep 2000
- truck accident
  Miles, P M 08 Sep 2000
- no diagnosis
  Benjamin, D 09 Aug 2000

post traumatic stress disorder & psychoactive substance abuse
- experiencing a stressor
  Wilson, A J 04 Aug 2000
- no evidence of stressor
  Boyd, G I 27 Jul 2000
  Freeman, T H (resp) 21 Aug 2000
- no evidence of trauma
  Corran, R C 20 Jul 2000

psychoactive substance abuse
- driver at Sale Air Base
  Thompson, E M 02 Aug 2000
- experiencing a stressful event
  Benjamin, D 09 Aug 2000
- Vietnam service
  Lucas, R W 07 Aug 2000

specific phobia - enclosed spaces
  Williams, E J 31 Jul 2000

Remunerative work

Intermediate rate

Lucas, R W 07 Aug 2000
Carne, D L 24 Aug 2000
Smith, B J 09 Aug 2000
Hourigan, L M 21 Jul 2000

- voluntary redundancy from CPS

Jorm, P E 09 Aug 2000

whether prevented by war-caused disabilities alone

- auditor aged 59

Brown, P L 08 Aug 2000

- barman

Somers, I 13 Jul 2000

- bus driver

Nichols, R F A 05 Sep 2000

- cartoonist

O'Leary, K J 18 Sep 2000

- educator aged 52

Cathcart, L 11 Aug 2000

- over 65 provisions applied

Denmead, L 26 Sep 2000

- panel beater aged 74

Grundman, V R 24 Jul 2000

- partnership in nursery business

Strange, W E 05 Jul 2000

- security officer/computer technician

Muller, D M 05 Jul 2000

- unit manager aged 73

Nightingale, J A 01 Sep 2000

- voluntary redundancy aged 64

Law, V F 05 Jul 2000

whether prevented from working 8 hours per week

- whether condition permanent

Bestwick, D G 17 Jul 2000

Respiratory disorder

chronic airflow limitation

- smoking

Linton, G A 27 Jul 2000

chronic bronchitis

- smoking

Williams, E J 31 Jul 2000

Spinal disorder

cervical spondylosis & lumbar spondylosis

- trauma

Southwell, W 08 Aug 2000

intervertebral disc prolapse

- trauma from motor cycle accident

Schawalder, M 21 Aug 2000

lumbar spondylosis

- back injury

Jacobs, D W 13 Sep 2000

- no discrete injury

Ferns, R S 18 Jul 2000

- parachute accident

Ragen, J T 07 Sep 2000

- trauma

Muller, D M 05 Jul 2000
Roberts, G W 29 Sep 2000

- trauma from dismantling aircraft

Knight, L R 04 Aug 2000

- trauma from forced aircraft landings

Monaghan, W D J 21 Jul 2000

lumbar spondylosis & thoracic spondylosis

- malalignment

Avery, B D 12 Jul 2000

scoliosis, thoracic spondylosis & lumbar spondylosis

- aggravation by naval service

Wright, M H 21 Jul 2000

spondylolisthesis

- severe high energy trauma

Bartos, J C 29 Sep 2000

Words and phrases

experiencing a stressor

Ross, A 25 Sep 2000

trauma to a joint

Cotterill, E B 04 Jul 2000

trauma to the relevant joint

Hodgkinson, M J

21 Aug 2000