[2014] AATA 765

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number | 2012/2558 |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President P E Hack SC** |
| Date | **23 October 2014**  |
| Place | **Brisbane (heard in Townsville)** |

The decision under review is affirmed.

.........................[Sgd]...........................................

**Deputy President P E Hack SC**

**CATCHWORDS**

WORKERS’ COMPENSATION – service in Australian Regular Army – thoracic back degeneration – no medical evidence to support relationship between present condition and army service – decision under review affirmed

**LEGISLATION**

Safety, Rehabilitation and Compensation Act 1988 (Cth) ss 5A, 5B, 14, 147

# REASONS FOR DECISION

**Deputy President P E Hack SC**

**23 October 2014**

## Introduction

1. The applicant, Mr Jason Roberts, served in the Australian Army between January 1991 and January 2002. Since his discharge he has been a sworn member of the
Queensland Police Service.
2. Mr Roberts is afflicted by back pain. In November 2010 he made a claim to the respondent, the Military Rehabilitation and Compensation Commission, for compensation pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (Cth)(the Act), for a condition he described as thoracic back degeneration, which he attributed at that time to his involvement in the Army Apprentice School’s tug of war team.
3. On 28 April 2011 a delegate of the Commission determined that there was no liability to pay compensation for the claimed condition. That decision was affirmed on reconsideration on 11 May 2012.
4. Mr Roberts now seeks a review of that decision. For the reasons that follow I am of the view that the decision under review ought to be affirmed.

## The legislative scheme

1. No detailed examination of the statutory scheme is required. By virtue of s 14 of the Act (as modified by s 147), the Commission is liable to pay compensation, in accordance with the Act, in respect of an injury suffered by an employee if the injury results in death, incapacity for work or impairment.
2. The term “injury” is defined in s 5A of the Act to mean:

(a) a disease suffered by an employee; or

(b) an injury (other than a disease) suffered by an employee, that is a physical or mental [injury](http://www.austlii.edu.au/au/legis/cth/consol_act/sraca1988368/s5a.html#injury) arising out of, or in the course of, the employee's employment; or

(c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment;

[thereafter follows an irrelevant exception]

The term “disease” is defined in s 5B of the Act. It provides:

 (1) In this Act:

"**disease**" means:

(a) an ailment suffered by an employee; or

(b) an aggravation of such an ailment;

that was contributed to, to a significant degree, by the employee's employment by the Commonwealth or a licensee.

(2) In determining whether an ailment or aggravation was contributed to, to a significant degree, by an employee's employment by the Commonwealth or a licensee, the following matters may be taken into account:

(a) the duration of the employment;

(b) the nature of, and particular tasks involved in, the employment;

(c) any predisposition of the employee to the ailment or aggravation;

(d) any activities of the employee not related to the employment;

(e) any other matters affecting the employee's health.

This subsection does not limit the matters that may be taken into account.

(3) In this Act:

"significant degree" means a degree that is substantially more than material.

## The factual background

1. Mr Roberts commenced his service in the Army Apprentice School. In addition to the usual range of sporting activities he was a member of the School’s tug of war team. His statement of 20 February 2012[[1]](#footnote-1) details the considerable amount of lifting and pulling, in training and competition, as well as the weights he carried in regular pack marches and as a radio technician serving in East Timor.
2. Mr Roberts has identified an incident that occurred on 14 August 1996 as likely contributing to his present back conditions. On that occasion he was riding a bicycle to his base when he collided with a vehicle. He was thrown from his bicycle on to the bonnet of the vehicle, striking his head on its windscreen, and fell from there onto the road, eventually striking the concrete kerb on the other side of the road. The Commission has accepted liability to pay compensation in respect of a fracture to the toe in this incident. It was compensable because compensation at that time extended to claims arising from the employee’s journey to and from the place of employment.
3. Mr Roberts says that from that time he has suffered back pain and headaches.
4. The medical records from the Regimental Aid Post (RAP) of 14 August 1996 relating to Mr Roberts’ attendance following that incident are in the material.[[2]](#footnote-2) Mr Clark, counsel for the Commission, pointed to the absence in those notes of any reference to a back injury. What is recorded about Mr Roberts’ back is limited to:

Back – good [range of movement] Two grazes R shoulder centre spine

On 19 August 1996 Mr Roberts attended the RAP complaining of a stiff neck.[[3]](#footnote-3) He was sent for an x-ray of his cervical spine.

1. Despite Mr Roberts’ evidence of back pain and headaches thereafter there is only one complaint of back pain in the Army medical records to Mr Roberts’ discharge: an entry on 12 March 1998 when Mr Roberts was complaining of “tiredness, nausea, back pain, headaches”.[[4]](#footnote-4) Additionally, it should be noted that Mr Roberts attended the RAP on
18 September 1996 complaining of a headache and nausea from the previous afternoon which he had spent at the rifle range.
2. In August 2001 Mr Roberts underwent a medical examination in connection with recruitment to the Queensland Police Service. He was required to complete a questionnaire[[5]](#footnote-5) in his own handwriting by circling “yes” or “no” to questions predicated with the question,

Do you HAVE, or have you EVER had, any of the following:

Mr Roberts answered “no” to these questions,

9. Injuries, including head or back

…

11. Migraines or persistent headaches

Mr Roberts said, in re‑examination, that he probably did not read, or read properly, the introductory words. The notes of the examining doctor recorded that he had normal curvature of his spine, full mobility and could straight leg raise to 90° with no discomfort.

1. Mr Roberts undertook what was described as a “Comprehensive Preventative Health Examination” in late November 2001 in anticipation of his discharge from the
Regular Army. In that examination he was required to answer various questions regarding his general health. He answered “no” to a question asking whether he had “any persistent back or joint pain” and to a question asking whether he suffered migraines or severe headaches.

## The medical evidence

1. Mr Roberts relied on reports of Dr Richard Emery, described in the material as a spine specialist. Unfortunately Dr Emery, I was told, had left Australia a short time prior to the hearing and was unable to be called to give evidence. In his report of 25 January 2013[[6]](#footnote-6) Dr Emery referred to having reviewed Mr Roberts on 3 December 2012 at which time,

he was suffering from symptoms relating to some degree of kyphoscoliosis which I am sure has been aggravated during his time in the Army when he was required to carry heavy backpacks and maintain and perform peak levels of physical activity.

He went on to note that Mr Roberts had developed “some neuropathic symptoms”. In his later report,[[7]](#footnote-7) and in response to questions from the solicitors for the Commission, Dr Emery identified that Mr Roberts had neuropathic symptoms that arose as a result of the motor vehicle accident in 1996 and that those symptoms had gradually become worse with the passage of time.

1. The Commission relied on reports of Dr Peter Steadman, an orthopaedic surgeon and Dr Gregory Ohlrich, a consultant neurosurgeon. Both were available to give evidence and were cross-examined by Mr Winkleman who represented Mr Roberts at the hearing.
2. Given Dr Emery’s reference to neuropathic symptoms it is as well to start with Dr Ohlrich’s description of neuropathic pain. He said,[[8]](#footnote-8)

Neuropathic pain can be defined as pain caused by abnormal function of the nervous symptom due to injury or disease. With neuropathic pain an individual’s perception of the pain is dissociated from the end-organ injury or dysfunction. Neuropathic pain is due to an abnormality in the functioning of the nervous system rather than an abnormality in the “end-organ” where the pain is perceived.

Having considered the various medical records and reports, Dr Ohlrich concluded that Mr Roberts’ description of back symptoms were not consistent with neuropathic pain.[[9]](#footnote-9) He said,[[10]](#footnote-10)

There is no evidence of central nervous system sensitisation. The clinical findings are not consistent with any abnormality in the peripheral or central nervous system.

1. Dr Steadman examined Mr Roberts in November 2012. There is some dispute about some aspects of that examination however I find it unnecessary to resolve those minor controversies beyond noting that I regard it as highly improbable that Dr Steadman would have made the comment, attributed to him by Mr Roberts, about Mr Roberts’ motives for making the claim. Mr Roberts’ recollection is, I conclude, faulty although I do not doubt that he has come to genuinely believe that what presently ails him is attributed to his service in the Army.
2. Dr Steadman reported[[11]](#footnote-11) that Mr Roberts had a substantial length of scoliosis of his spine. Scoliosis is a developmental or idiopathic condition which can lead to degeneration and pain. It was likely, he thought, to be a pre-existing condition. He considered that there were “­non-physical factors” affecting Mr Roberts’ presentation. He said,[[12]](#footnote-12)

There are some concerns in the clinical examination in relation to his symptomatology, in particular the light touch of the upper thoracic spine causing pain, making him withdraw during the examination. There are no other significant signs other than the scoliosis, with a full range of motion of his spine.

1. Dr Steadman’s second report[[13]](#footnote-13) was prepared with the benefit of further, and earlier, medical records from Mr Roberts’ period of service. In particular, he noted a report of September 1990 where a medical officer had noted a ½ cm right femoral shortening and a posture affected with a lateral tilt which he considered was likely to be the long term cause of the scoliosis. Dr Steadman did not consider that the bicycle accident in 1996 or the general rigours of service, as reported by Mr Roberts, would have contributed to Mr Roberts’ back condition. In his opinion Mr Roberts would have developed the present scoliosis condition as a natural progression of his pre-service condition.

## Consideration

1. I do not doubt that Mr Roberts is genuinely convinced that his undoubtedly active service life, his participation in the tug of war team, the burdens he carried over the years and the bicycle accident contributed to his present condition. But there is no medical evidence to support that belief. The evidence is all to the contrary effect.
2. It is, I think, significant that Mr Roberts reported, at both his entry into the Police Service and his exit from the Army, that he had no back injuries or headaches. The service medical records bear that out. That must undermine the value of the medical opinion predicated on the accuracy of such a history. The only evidence that supports a connection between Mr Roberts’ present condition and his Army service is the opinion of Dr Emery set out in paragraph 14 above. That opinion is presented as an *ipse dixit*, without disclosing the logic that underlies the conclusion. Moreover Dr Emery was not able to be called to explain his conclusions or comment on the contrary views of Dr Ohlrich and Dr Steadman.
3. I prefer the opinion of those practitioners. I had the benefit of hearing their explanations for the conclusions they reached. There is no doubt that Mr Roberts suffers from a scoliosis however the evidence does not demonstrate that it has any relationship with his service. And I accept Dr Ohlrich’s opinion that there is no evidence of any neuropathic origins for the pain that Mr Roberts reports.
4. Mr Winkleman presented Mr Roberts’ case on the basis that over his years of service he had lifted and carried a cumulative total of ­­­­­739,000 kilograms and that, necessarily, that must have caused Mr Roberts' back pain. As both Dr Ohlrich and Dr Steadman pointed out, the logic is, with respect, flawed. Crude measures of that type may assist in determining issues of causation for some conditions that come under the
*Veterans’ Entitlements Act 1986* (Cth) but they are no substitute for, and cannot rebut, medical evidence.
5. I am then not satisfied that there is any relationship between Mr Roberts’ present condition and his service in the Army. It is unnecessary to determine whether Mr Roberts’ condition is a disease or an injury simpliciter. On either basis the necessary causal relationship is absent.
6. It follows that the decision under review was correct. It will be affirmed.

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| I certify that the preceding 25 (twenty -five) paragraphs are a true copy of the reasons for the decision herein of Deputy President P E Hack SC |

..............................[Sgd].......................................

Dated 23 October 2014

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| Date of hearing | **13 October 2014** |
| Advocate for the Applicant | **Mr K Winkleman** |
| Counsel for the Respondent | **Mr C J Clark** |
| Solicitors for the Respondent | **Sparke Helmore** |

1. Exhibit 1, pages 71-74. [↑](#footnote-ref-1)
2. Exhibit 1, pages 233-234. [↑](#footnote-ref-2)
3. Exhibit 1, page 232. [↑](#footnote-ref-3)
4. Exhibit 1, pages 52. [↑](#footnote-ref-4)
5. Exhibit 9. [↑](#footnote-ref-5)
6. Exhibit 2. [↑](#footnote-ref-6)
7. Exhibit 3. [↑](#footnote-ref-7)
8. Exhibit 8, page 9. [↑](#footnote-ref-8)
9. Exhibit 8, page 9. [↑](#footnote-ref-9)
10. Exhibit 8, page 11. [↑](#footnote-ref-10)
11. Exhibit 4, pages 8 & 9. [↑](#footnote-ref-11)
12. Exhibit 4, pages 13. [↑](#footnote-ref-12)
13. Exhibit 5. [↑](#footnote-ref-13)