Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Aylett and Comcare (Compensation) [2019] AATA 1474 (26 June 2019)

Division: GENERAL DIVISION

File Number(s): **2016/4269**

Re: **Melissa Aylett**

APPLICANT

And **Comcare**

RESPONDENT

DECISION

Tribunal: **A G Melick AO SC, Deputy President**

Date: **26 June 2019**

Place: **Hobart**

The decision under review is affirmed.

.....[sgd].....

A G Melick AO SC, Deputy President

COMPENSATION *– liability for medical expenses – determinations ceasing liability for medical expenses – whether material contribution to Applicant's condition by employment – reasonableness of treatment – massage treatment – physiotherapy treatment – decision under review affirmed*

Legislation

Safety, Rehabilitation and Compensation Act 1988 (Cth), s 16

Cases

Dunstan v Comcare [2011] FCAFC 108; (2011) 125 ALD 362

Rope and Comcare [2018] AATA 42; 158 ALD 183

Secondary Materials

The Clinical Framework for the Delivery of Health Services, WorkSafe Victoria

REASONS FOR DECISION

A G Melick AO SC, Deputy President

26 June 2019

1. The Applicant, Ms Aylett, was employed by the Australian Taxation Office (ATO) from May 1990 until 2001. She performed various administrative roles at the ATO, including a period of data entry associated with cheque processing.

2. In December 1998 the Applicant signed a claim for compensation in respect of a right shoulder injury, which she said she first noticed in November 1998.[1] She described the injury as *'right arm/neck/shoulder aggravated again'* and noted that it was the same injury as one suffered in August 1993. The Applicant did not have any time off work.

[1] T5, p 9.

3. It appears the Applicant had previously had an injury in October 1993. Clinical notes from that time refer to right carpal tunnel, right de Quervains and pain in the left and right trapezius.[2] A clinical note from November 1995 describes a right shoulder and neck/right arm injury from 25 August 1993 that flared up each year.[3]

4. The 1998 compensation claim was accepted by the Respondent and it is common ground that since that time the Applicant has continued to obtain treatment in the form of massage and physiotherapy. Her ongoing symptoms are chronic neck pain, right sided shoulder and arm pain, right neck and shoulder spasms and migraines.

5. In June 2015 the Respondent issued a determination ceasing liability for physiotherapy treatment under s 16 of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) for the condition of *'disorders of muscle, ligament, & fascia (right)'*.[4] The determination set out a physiotherapy treatment plan that, from 25 June 2015, decreased in frequency until ceasing treatments totally by 30 November 2015. Between 19 November 1998 and 30 March 2016 the Applicant received treatment on some 679 occasions.

6. In April 2016 the Respondent issued a separate determination that it was no longer liable to pay for massage treatment under s 16 of the SRC Act for the same condition of *'disorders of muscle, ligament, & fascia (right)'*.[5]

7. The Applicant sought review of the decisions referred to at paragraphs 5 and 6 above and on 17 June 2016 the Respondent issued a reconsideration affirming both decisions.[6]

8. The Tribunal conducted a hearing in March 2018. The Applicant gave oral evidence and was cross-examined by the Respondent's counsel. Dr Loretta Reiter and Associate Professor Romas, both rheumatologists, also gave evidence at the hearing.

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[2] Exhibit 3.
[3] Exhibit 3.
[4] T37.
[5] T42.
[6] T44.

ISSUES

9. The issues for the Tribunal to determine are:

(a) Whether the Applicant continues to suffer an ailment that was contributed to, in a material degree, by her employment; and

(b) If so, whether massage and/or physiotherapy is reasonable treatment.

RELEVANT LEGAL PRINCIPLES

10. Final submissions filed on behalf of the Applicant noted the relevant provisions of the SRC Act as they were at the time of the Applicant's claim, namely:

> ***4 Interpretation***
>
> ***ailment*** *means any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development).*
>
> *…*
>
> ***injury*** *means:*
>
> *(a) a disease suffered by an employee; or*
>
> *(b) an injury (other than a disease) suffered by an employee, being a physical or mental 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), being an aggravation that arose out of, or in the course of, that employment;*
>
> *but does not include any such disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.*
>
> *…*
>
> ***disease*** *means:*
>
> *(a) any ailment suffered by an employee; or*
>
> *(b) the aggravation of any such ailment;*
>
> *being an ailment or an aggravation that was contributed to in a material degree by the employee's employment by the Commonwealth or a licensed corporation.*
>
> ***14 Compensation for injuries***

> 1) *Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment. …*
>
> ***16 Compensation in respect of medical expenses etc.***
>
> 1) *Where an employee suffers an injury, Comcare is liable to pay, in respect of the cost of medical treatment obtained in relation to the injury (being treatment that it was reasonable for the employee to obtain in the circumstances), compensation of such amount as Comcare determines is appropriate to that medical treatment.*

11. I note that, although the definitions of *'injury'* and *'disease'* now appear in the SRC Act at ss 5A and 5B, there are no differences relevant to the determination of this matter.

APPLICANT'S EVIDENCE

12. The Applicant's case was heavily reliant upon the assertion that she was asymptomatic prior to commencing her data entry role with the ATO and that the development of her symptoms coincided with the repetitive duties.

13. The Applicant commenced work with the ATO in 1998 with her first role being in personnel and Human Resources. She was stationed at the front desk for in person and telephone enquiries and was also responsible for data entry.

14. After six months the Applicant was transferred to cash processing and keying cheques into a cheque processing machine. She would do this all day and began noticing headaches, numbness and pain. The numbness, including pins and needles, extended from her neck and shoulder to her fingers and eventually led to migraines.

15. The Applicant's symptoms lessened considerably on rostered days off and it seems they also lessened when she returned to the front counter and was not seated at the cheque processing machine.

16. The Applicant ceased working for the ATO in 2001 but said her symptoms never resolved. She gave evidence that she currently suffers from migraines, pain with some numbness and sometimes pins and needles. The Applicant manages these symptoms by doing exercises under hot water as recommended by the physiotherapist. She also uses ice packs, goes walking, does stretching, and takes hot baths with Epsom salts.

17. The Applicant stated that she has been seeing a physiotherapist for the entire period since making her compensation claim, of a frequency of about once per week. She said this was cut back to once per fortnight after she left the employ of the Commonwealth. The Applicant has also had massage (once per fortnight), acupuncture, laser acupuncture, cupping and ultrasound. She believes that the physiotherapy and massage reduces the extent of the migraines, the pain, and the numbness and tingling in the arm. The Respondent ceased paying for treatments in 2016 but the Applicant continued the physiotherapy and massage treatments, funded by herself and through private health insurance.

18. In her evidence, the Applicant stated that she remembered having a car accident many years ago but that, at the time of her employment with the ATO, she had no issues with her body in any shape or form. However, it became apparent during cross-examination that she had actually been involved in several motor vehicle accidents resulting in injuries and/or symptoms such as whiplash, neck pain and shoulder pain. Details of those motor vehicle accidents are set out below.

19. I accept that the Applicant was honest in her evidence but find that the effect of much of that evidence was undermined by her failure to remember what I consider to be significant past traumas. Of particular significance was the non-reporting of the motor vehicle accidents to examining specialists, the effect of which is discussed further below.

History of motor vehicle accidents

20. There was a partially disclosed history of motor vehicle accidents involving the Applicant prior to her employment with the ATO that was, when fully elicited, relevant to the medical evidence. The Applicant's recollection of these accidents was poor. During cross-examination the Applicant referred to an accident which took place when she was in 'prep' but it is not clear from the evidence what injuries she suffered. In addition, there were the following motor vehicle accidents:

    (a) 22 June 1989 – the Applicant was a passenger in a vehicle which ran into a turning vehicle. The vehicle was written off. A report from Dr Liddell dated 7 July 1989 describes the Applicant having been fitted with a cervical collar after the accident

and as suffering significant interscapular discomfort.[7] She had pain across the top of her shoulders and in the interscapular region, and significant discomfort up the left side of her neck and the anterior aspect of her left shoulder. The Applicant also had non-specific weakness affecting both upper limbs. Dr Liddell noted that her cervical spine movements were severely and diffusely restricted and she had a severe degree of tenderness in the midline, especially to the left of the midline, in the mid cervical spine region. He had advised the Applicant not to return to work until she had improved significantly.

A note from a physiotherapist dated 1 August 1989 records that the Applicant had returned to work but needed a collar for long periods of desk work, that C2 and C3 were the most tender, and that the referred pain in the arms had settled but she was still complaining of head pain.[8] By 22 August 1989 the physiotherapist reported that the Applicant's range of movement was greater but that she still had intermittent headaches.[9]

(b) 5 January 1990 – clinical notes state that the Applicant's vehicle '*ran head on into a cross vehicle*'.[10] She was initially certified unfit for work for three days. Clinical notes from 13 January 1990 indicate that the Applicant's neck was stable with moderate stiffness. There is a reference to neck and back stiffness on 23 January 1990 and another reference to the Applicant's neck dated 2 February 1990, though the rest of the latter entry is difficult to interpret.

(c) 15 December 1991 – an ambulance assessment sheet notes that the Applicant was driving at 30 km/hour and lost control in the wet colliding with a wall. She was described as having full movement and sensation to limbs and no neck stiffness but a cervical spine collar was applied. Clinical notes from St Helens Private Hospital on the same day refer to a sore neck. On examination there was no bony tenderness but the Applicant was tender over the left trapezius and had a reduced range of motion.

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[7] Exhibit 3.
[8] Exhibit 3.
[9] Exhibit 3.
[10] Exhibit 3.

MEDICAL EVIDENCE AT THE HEARING

21. In the reports provided prior to the hearing there were two competing medical opinions in respect of the Applicant's condition, those of Dr Loretta Reiter and Associate Professor Romas, both of whom are rheumatologists. Both rheumatologists accepted the Applicant was suffering a condition impacting her right upper limb but their opinions differed in respect of diagnosis and causation.

22. Dr Reiter produced a report dated 11 January 2017.[11] She noted that a CT scan of the Applicant's cervical spine from March 2016 showed right C7/T1 facet joint hypertrophy. Dr Reiter also referred to an ultrasound of the right shoulder from March 2016 showing mild thickening of the subacromial bursa at rest and the dynamic examination was positive for subacromial impingement with symptomatic bunching of the bursa on abduction. Her diagnosis of the Applicant was of a prior myofascial pain syndrome affecting the right upper limb, given previous tender trigger points of the muscles in the right shoulder and right upper limb, but Dr Reiter concluded that the Applicant's current symptoms were due to C7/T1 facet joint degenerative disease and very mild right shoulder impingement.

23. Associate Professor Romas provided a report dated 10 March 2017 in which he noted that, on examination, there was no abnormality of the Applicant's right shoulder or right upper limb and he detected no abnormally reactive myofascial trigger points.[12] In reporting on the abnormalities shown on the 2016 CT scan of the cervical spine and ultrasound of the right shoulder, the Associate Professor described these as *'common incidental findings'*. He said that the clinical findings were consistent with a chronic regional pain syndrome. The condition included myofascial pain syndrome, which he said is diagnosed only in the presence of typical trigger points. Associate Professor Romas further opined that the myofascial pain syndrome was contributed to by the Applicant's employment with the ATO. Associate Professor Romas disagreed with Dr Reiter's conclusion and instead concluded that it was *'possible*' the Applicant's employment was, and still is, a causal factor of her injury or part of a nexus or chain of causal factors.

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[11] Exhibit 4.
[12] Exhibit 2.

24. Associate Professor Romas also gave oral evidence. In his written report he had noted that there was no past history of shoulder or neck injuries or conditions prior to the Applicant's employment with the ATO. During cross-examination the Associate Professor was told there was a history of a whiplash injury three or four years prior to the commencement of the Applicant's employment. His evidence was that the whiplash injury was much more likely to be the predominant causative factor *'by a long stretch'*. Associate Professor Romas also conceded that it was not unreasonable to come to the conclusion, as Dr Reiter had, that the minor degenerative changes in the Applicant's neck could be contributing to her symptoms.

THE AILMENT AND WHETHER THERE IS A MATERIAL CONTRIBUTION FROM THE APPLICANT'S EMPLOYMENT

25. A useful summary of the considerations surrounding *'material'* is contained in *Dunstan v Comcare* [2011] FCAFC 108:

> *18. The effect of s 19(1) and (2) of the SRC Act is to create an obligation on Comcare to pay, and an entitlement to an employee who is incapacitated for work as a result of an injury to receive, compensation. Section 54(1) of the SRC Act provides:*
>
> > *Compensation is not payable to a person under this Act unless a claim for compensation is made by or on behalf of the person under this section.*
>
> *19. The definitions of "injury" and "disease" were amended in 2007 by the Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007 (Cth), which added to the SRC Act s 5A, which contains the current definition of "injury", and s 5B, which contains the current definition of "disease". The amendments have clarified the meaning of the exclusionary provision in the definition of "injury" and changed the "material degree" test in the definition of "disease" by substituting a requirement that the disease be "contributed to, to a significant degree, by the employee's employment". "Significant degree" is defined in s 5B(3) of the SRC Act to mean "a degree that is substantially more than material". Both the first claim and the second claim preceded the amendments. The unamended definitions were applied by the Tribunal and it was not contended that the amended definitions should be applied in this appeal.*
>
> *…*
>
> *34. As the Full Court said in Treloar, "material" emphasises the need for evidence that "features of the employment did in fact and in truth contribute to the condition complained of" (at 323). Treloar involved a claim brought under the Compensation (Commonwealth Government Employees) Act 1971 (Cth), which was repealed and replaced by the SRC Act in December 1988.*
>
> *35. It was easier for an applicant under the former Act than for an applicant under the SRC Act to obtain an award of compensation: see Kowalski v The Military Rehabilitation and Compensation Commission (2011) 191 FCR 345 at [47]. In Comcare v Sahu-Khan [2007] FCA 15; (2007) 156 FCR 536 at [16], Finn J*

observed that the definition of "disease" in s 4 of the SRC Act required a much stronger causal relationship between the employment and the ailment than that prescribed by the 1971 Act. His Honour said that the words "in a material degree" required "an evaluation of all relevant contributing factors", making each case a matter of fact and degree.

36. Similarly, it should be observed that the legislation considered in Federal Broom did not contain any requirement of a "material" contribution. Rather, an injured employee was entitled to compensation where it could be shown that the employment was a "contributing factor to" the disease. The terminology was similar to the provisions of the 1971 Act considered in Treloar.

37. The suggestion of the Full Court in Treloar at 323 that the word "material" in the definition of "disease" in the SRC Act was not intended to add any significance to the words already used appears difficult to reconcile with the Second Reading Speech to the Bill which became the SRC Act. The relevant text of the speech is reproduced in Comcare v Canute [2005] FCAFC 262; (2005) 148 FCR 232 at [66] per French and Stone JJ:

> *It is intended that the test will require an employee to demonstrate that his or her employment was more than a mere contributing factor in the contraction of the disease. Accordingly, it will be necessary for an employee to show that there is a close connection between the disease and the employment in which he or she was engaged.*
>
> *In determining whether employment contributed in a material degree to the contraction of a disease in a particular case, regard would be had to whether the employment in which the employee was engaged carried an inherent risk of the employee contracting the disease in question and whether some characteristic or feature of the employment tended to cause, aggravate or accelerate the disease. [Emphasis added]*

38. At [67], their Honours said:

> *On this basis, the observations of the Full Court in Treloar at 323 that the relevant causal connection must be established on the balance of probabilities and not left in the area of possibility of conjecture are not controversial. Equally, it is plain that the present legislation was not intended to require that an employee demonstrate that their employment caused the disease or that it was the most important factor. It would also appear that the imposition of a "but for" test remains inappropriate. Having said this, the changes brought about by the enactment of the SRC Act were intended to require that the contribution be "more than a mere contributing factor" and, as such, the comments of the Court in Treloar must be assessed in this light. Content must be given to the word "material" contained in the definition of "disease" in the legislation as it presently stands. The inclusion of this term imposes an evaluative threshold below which a causal connection may be disregarded. However, it is not necessary for present purposes to consider the proper meaning of "material" and nothing more need to [sic] said about this issue.*

39. Canute must be regarded as authority for the proposition that the intention of Parliament was to impose a more stringent test of the causal relationship between employment and disease than the Full Court in Treloar had thought. In addition, as the Full Court had done in Treloar, French and Stone JJ in Canute rejected the notion that the "but for" test is an appropriate test of the causal relationship.

> *40. It follows that the Tribunal was required to consider whether the applicant's employment was "more than a mere contributing factor" to his incapacity. It is unnecessary, however, for a person claiming compensation to demonstrate that it was his or her daily duties, or specific aspects of the workplace environment, that resulted in his or her disease. Such an approach would constitute too narrow a focus. The requirement of a material contribution of the employment to the disease is a requirement that the claimant be able to point to his or her employment as a factor that operated actively to bring about the condition.*

26. The Applicant's counsel submitted that there was no persuasive evidence of an alternative cause of the ailment. Whilst it is true that there are references to the left side in the contemporaneous notes and reports, it appears the symptoms suffered by the Applicant after these motor vehicle accidents were not solely limited to her left side. I note the report of Dr Liddell referred to at paragraph 20 above.

27. Given the Applicant's poor recollection of the motor vehicle accidents, I prefer the contemporaneous evidence of her symptoms to her recollection that her earlier issues were left-sided only. Additionally, the Applicant's counsel's submission ignores Dr Reiter's opinion regarding the degenerative changes being responsible; an opinion Associate Professor Romas conceded was not unreasonable. It is therefore not possible to accept that submission. Rather, the preponderance of evidence is to the contrary.

28. I accept Dr Reiter's opinion that the degenerative changes are the cause of the Applicant's symptoms and, taking into account Associate Professor Romas' concession that the whiplash injury was more likely to be the predominant causative factor, I find that there no longer continues to be a material contribution to the Applicant's ailment from her employment with the ATO.

29. It follows that the Respondent has no liability for any treatment sought by the Applicant but for completeness the question of reasonable treatment is addressed below.

WHETHER MASSAGE AND/OR PHYSIOTHERAPY TREATMENT IS REASONABLE TREATMENT

30. The Applicant's evidence was that she has massage treatment and sees a physiotherapist once every fortnight. She believes that it reduces her migraines and the numbness and tingling in her arm.

31. Associate Professor Romas' opinion was that, whilst some form of manual therapy was indicated and had been effective in maintaining the activities of daily living, work ability and preventing migraines, 'simple' massage was not reasonable. However, he thought that physiotherapy was reasonable and noted that a physiotherapist would be capable of trigger point massage, supervising exercises and monitoring the condition.

32. Dr Reiter was of the opinion that, as the Applicant's symptoms had increased when she stopped physiotherapy and massage, it was reasonable that the treatments continue.

33. Dr Cooper, who the Applicant consults regularly, reported to the Respondent on 20 May 2015 that the massage therapy was intended to reduce the Applicant's right shoulder pain which, in her case, reduced the incidence of migraine attacks.[13] His opinion was that without access to massage therapy the Applicant would have more sick days, be less functional and may have to give up work completely.

34. It is open to the Tribunal to determine that medical treatment is reasonable if it results in temporary relief, see *Rope and Comcare* [2018] AATA 42 per Deputy President Humphries at paragraphs 35-46:

> *35. A number of decisions, both of the Tribunal and the Federal Court, are pertinent. In Bayani and Australian Postal Corporation [2015] AATA 342 the Tribunal considered the principles found in the Clinical Framework for the Delivery of Health Services (the Framework). It referred to the adoption by most Australian jurisdictions' workers compensation and motor accident compensation agencies of the Framework as principles to guide health care professionals in the treatment of injury. The five principles enunciated by the Framework are:*
>
> > *Measure and demonstrate the effectiveness of treatment*
> >
> > *Adopt a biopsychosocial approach*
> >
> > *Empower the injured person to manage the injury*
> >
> > *Implement goals focused on optimising function, participation and return to work*
> >
> > *Base treatment on the best available research evidence*
>
> *In relation to Principal One of the Framework, Senior Member Handley observed, in relation to the applicant in Bayani at [48]:*
>
> > *I am satisfied that had this principle been observed, it would have been obvious that the physiotherapy treatment was not providing a measurable*

[13] T36.

> *benefit, the applicant's health status had not changed, and functional goals, if ever established, were not being achieved. (Emphasis in original)*

36. On this basis, inter alia, he concluded at [55]:

> *I think because there has been no real benefit to the applicant by the prolonged physiotherapy treatment that she has undertaken, there is considerable benefit in her taking responsibility for self-management of her symptoms, consistent with the Framework. I fear that the applicant has become dependent on physiotherapists who have provided her with symptomatic relief only. For her to undertake self-management will require a refocus of responsibility and a willingness to be instructed and subsequently practice and implement appropriate strategies as determined by a competent physiotherapist.*

37. Similarly, in Popovic and Comcare [2000] AATA 264; (2000) 64 ALD 171 the applicant claimed for physiotherapy which provided short-term relief of his symptoms, including affording better sleep making him less depressed and less irritable on the succeeding day. The Tribunal found at [28]:

> *In relation to the applicant's claim for physiotherapy treatment expenses, in our view there is no role for passive physiotherapy in the applicant's current treatment regime. The physiotherapy he was having could not improve him in the long term, has limited, if any, short term benefit, and may in fact be contra-indicated. Any therapeutic benefit he received was small and short-lived. We accept that pain relief, even short-term relief or reduction in pain, can be therapeutic: Comcare v Watson [1997] FCA 149; (1997) 73 FCR 273 at 276 ; [1997] FCA 149; 46 ALD 481 at 484 ; [1997] FCA 149; 154 ALR 173 at 176 per Finn J. However, in this case any benefit is outweighed by the counter-productive effect of it leading the applicant to a dependent state, inhibiting his ability to learn to cope, and to embark on pain management programs to assist him with that object. Taking into account the whole of the evidence before us, we consider that in the applicant's case it was not in his best interest for passive physiotherapy modalities to have continued beyond 16 September 1997: Re Jorgenson and Commonwealth [1990] AATA 129; (1990) 23 ALD 321.*

38. The Tribunal went on to say at [30] that the applicant's case is one in which, while temporary relief can be reasonable treatment, it has become unreasonable...

39. In Chowdhary and Comcare [1998] AATA 448 the Tribunal commented, with respect to a claim for physiotherapy treatment under s 16 at [53]:

> *In particular, there is no evidence of any plan to have the physiotherapy treatment accompanied by a course of physical exercise such that the applicant might become re-conditioned and better able to cope with pain and manage a return to work. While provision of temporary relief from pain through physiotherapy will in many circumstances qualify as medical treatment which it is reasonable for an employee to obtain, there will in some cases come a point where it is no longer reasonable unless it is part of a plan for permanent improvement in the health of the employee.*

40. In Alamos and Comcare [2014] AATA 629 the Tribunal rejected a claim for physiotherapy on the basis that short-term alleviation of the applicant's symptoms, is not medically indicated and will not provide long-term improvement in [the applicant's] condition (at [39]). On a similar basis, the Tribunal in Durham and

Comcare [2014] AATA 753 rejected a claim for physiotherapy, even though evidence had been led that this treatment, while ineffective in overcoming the applicant's pain, did allow him to continue working.

41. In Comcare v Holt [2007] FCA 405 Mansfield J concluded that a cost/benefit analysis, of the kind recommended in Rope, ought to be undertaken. His Honour decided that there may be circumstances where therapeutic treatment will be unreasonable if alternative treatment is available for potentially similar benefit at a lower cost, and he decided that the extent to which such treatment has been undertaken in the past and the degree of its success may also be relevant (at [26]). His Honour, added, however, that:

> *There may be cases... where treatment ...which in the past has had some therapeutic benefit may no longer be reasonable because the extent of the therapeutic benefit no longer justifies the cost in the light of past experience...(at [26])*

42. In Topping and Comcare [2015] AATA 525 the Tribunal at [47] rejected Ms Topping's claim for massage and osteopathy under s 16, finding that:

> > *...the therapies have become a ritual, fostering a dependence on her part to them which could be inhibiting her ability to self manage her condition and foster future self-reliance.*

43. In another case involving the present applicant, Rope and Comcare [2013] AATA 280 (Rope No2), the Tribunal decided that Mrs Rope was entitled to compensation under s 16 in respect of the costs of attending mindfulness classes as directed by her treating doctor and supported by her psychologist. It determined that the classes fell within the meaning of medical treatment under s 4(1) and for the purposes of s 16 was reasonable treatment. Member Webb commented at [51]:

> *The proposition that a plan for the permanent improvement of an injury is required in order to find that a particular form of medical treatment is reasonable for an injured employee to obtain lacks merit. Medical treatment and therapeutic treatment, for the purposes of the 1988 Act, consistent with the definition of those terms in s 4(1), may include treatment to alleviate the symptoms of an injury and palliative or preventative treatments (Bashar v Comcare Australia [2002] FCA 837 at [9]). Treatments of that kind are unlikely to appear in a plan for the permanent improvement of an injury. Some injuries cannot be permanently improved, and I do not accept that it would not be reasonable for a permanently injured employee to obtain palliative or preventative medical treatment on the basis that the treatment was not part of a plan for permanent improvement.*

44. Finally, in reviewing the relevant case law, Comcare v Watson [1997] FCA 149; 46 ALD 481 should be highlighted. There Finn J observed at 484:

> *A course of treatment designed to, or aimed at, alleviating the pain caused by an injury or disease is, in my view, properly to be regarded as therapeutic treatment.*
>
> *The applicant [Comcare] has submitted that a treatment can only be "therapeutic" if its object is to cure a disease or injury. Though some dictionary definitions do emphasise the "healing or curative" connotation of the words "therapy" and "therapeutic": see eg Shorter OED, 3rd Ed; the latter's use in this context encompasses the alleviation of the pain of an*

> *injury. This view is consistent with the s 4 definition of "therapeutic treatment" which includes "treatment given for the purpose of alleviating an injury": (emphasis added). The Shorter OED, for example, defines "alleviation" as "the action of lightening ... pain". That usage is an appropriate one to apply here given the s 4 definition itself. And it permits a construction which accords with the beneficial purposes of the legislation: see Thiele's case, 380-381.*
>
> *45. Although the principles applied in the above cases occasionally appear to be pulling in slightly different directions, some broad observations can be distilled from them regarding what will or will not be considered reasonable treatment pursuant to s 16. Generally speaking, treatment is more likely to be considered reasonable where:*
>
> - *its benefits are substantial and its cost is low;*
> - *it is effective, i.e. achieves measurable benefits;*
> - *it is active and promotes self-management of the compensable condition;*
> - *it is consistent with the principles in the Framework; and*
> - *it is of limited duration.*
>
> *46. Conversely, treatment is less likely to be considered reasonable where:*
>
> - *its benefits are insubstantial and its cost is high;*
> - *it is passive and promotes dependence on itself; and*
> - *it is ongoing and indeterminate.*

35. In this case the treating doctor has provided written reports setting out the rationale and benefits of the physiotherapy and massage treatment. That evidence, and the evidence of the Applicant with regards to the benefits she says she obtains, was not challenged.

36. I accept that the Applicant obtains temporary relief from her symptoms as a result of the treatment. I also accept Associate Professor Romas' opinion that the massage treatment should not extend to 'simple' massage but could include massage carried out by a physiotherapist.

37. The Tribunal was provided with a copy of The Clinical Framework for the Delivery of Health Services by WorkSafe Victoria (the Framework) and I note it has been referred to by the Tribunal in previous decisions (see, for example, *Rope v Comcare* [2018] AATA 42). The Framework sets out a series of guiding principles for the delivery of health services being:

    (a) measurement and demonstration of the effectiveness of treatment

(b) adoption of a biopsychosocial approach

(c) empowering the injured person to manage their injury

(d) implementing goals focused on optimising function, participation and return to work

(e) base treatment on best available research evidence

38. Dr Cooper's reports were detailed and explained his rationale for recommending the treatment, particularly massage therapy, at length, including noting relevant research based evidence. I am satisfied that his recommendations are consistent with the principles set out in the Framework.

39. I would therefore accept that massage administered by a physiotherapist and physiotherapy treatment to be reasonable treatment if there was a material contribution to the ailment from the Applicant's employment at the ATO.

DECISION

40. The decision under review is affirmed.

I certify that the preceding 40 (forty) paragraphs are a true copy of the reasons for the decision herein of A G Melick AO SC, Deputy President

.....[sgd].....

Associate

Dated: 26 June 2019

Date(s) of hearing: **1 & 2 March 2018**

Date final submissions received: **23 July 2018**

Counsel for the Applicant:	**Mr R Meredith**
Solicitors for the Applicant:	**Wallace Wilkinson & Webster**
Counsel for the Respondent:	**Mr J Wallace**
Solicitors for the Respondent:	**Lehmann Snell Lawyers**