

RECENT DECISIONS

Respondent acted reasonably suspending weekly benefits pursuant to section 48A

Joanna Cross v Department of Education & Training [2018] NSWCC 275 9 November 2018

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Background

The worker made a claim for weekly benefits in respect of two separate injuries suffered on 13 August 2014 and 2 February 2015 arising out of or in the course of her employment as an administration assistant at Orange High School.

The occurrence of each of the injuries was not disputed although the second injury was characterised as being a recurrence of the initial injury.

The worker underwent surgery on her left shoulder in July 2015 and did not work thereafter. The worker moved to Victoria in August 2015.

The respondent opposed the claim for weekly benefits relying on sections 40 and 48A of the *Workplace Injury Management and Workers Compensation Act 1998* on the basis that the worker did not make reasonable efforts to return work in suitable employment at her place of employment at Orange High School.

Determination of Dispute

The dispute on weekly benefits was referred to an arbitrator for determination and the matter proceeded to arbitration hearing on 2 November 2018.

Based on the evidence and submissions by the parties, the arbitrator found that the worker was not totally incapacitated for work in the period for which she claimed weekly benefits but only that she was not fit to return to her pre-injury role as an administrative assistant.

The arbitrator considered that the worker's entitlement to weekly benefits was for a maximum period of 130 weeks on the

basis that there was a single incapacity for work arising from a single injury (one discrete injury with the same pathology) that stemmed from separate events.

The respondent's insurer had originally issued a 'Notice of Warning to Suspend Weekly Benefits' advising the worker that her weekly benefits may be suspended if she did not meet her obligations under *Chapter 3 of the 1998 Act*.

The notice referred to a Return to Work plan advising that there were duties available at Orange High School and her obligation to make reasonable efforts to return to work in suitable or pre-injury employment at the pre-injury or another place of employment.

The worker contended that it was not reasonable for her to return to work in Orange and that the respondent was made well aware that she intended to move to live in Victoria and had signalled her intention before doing so and was assured that there would be no problem transferring her case to Melbourne.

The arbitrator reviewed communications between the worker and the respondent's case managers and rehabilitation consultants before noting that at the time the notices were issued to the worker she was still employed by the respondent and had previously indicated that she was prepared to travel back to Orange and resume her role until successful in obtaining a position in Victoria.

The arbitrator noted that the worker foreshadowed that this would be difficult as she was not fit to seek a full time position and would not be an attractive candidate for prospective employers.

The arbitrator concluded that in the circumstances, the respondent was not acting unreasonably in offering the applicant suitable employment in Orange.

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The arbitrator noted the definition of 'suitable employment' under section 32A of the *Workers Compensation Act 1987* meaning work for which the worker is currently suited having in particular, having regard 'any plan or document prepared as part of the return to work planning process, including an injury management plan...' - subsection (a)(iii), and that this is to be regardless of 'the worker's place of residence' - subsection (b)(iv).

The arbitrator concluded that having regard to all of the evidence, the worker had not made reasonable efforts to return to work in suitable employment at Orange High School and there was no evidence that she had made any such efforts to find work at another place of employment.

The arbitrator entered an award for the respondent in respect of the claim for weekly benefits.

Implications

The decision underscores the importance of ensuring that steps are taken to formulate an appropriate return to work plan and to notify injured workers of their obligations in terms of injury management and making reasonable efforts to find suitable employment.

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