RECENT DECISIONS

When relocation is a reasonable thing to do

Cross v Secretary, Department of Education (2019) NSWWCCPD 20 (14 May 2019)

Link to decision

Summary

Under section 48A of the *Workplace Injury Management and Workers Compensation Act 1998* weekly payments can be terminated if the worker does not comply with return to work in suitable employment.

In this matter, Deputy President Snell found that the Arbitrator had erred in finding that the employer had not acted unreasonably. DP Snell found that this was the wrong test under section 48A. The correct test is whether the worker has made reasonable efforts to return to work in suitable employment. The onus is on the employer to prove that the worker acted unreasonably.

Background

The worker suffered injury to the lumbar spine and left shoulder while working at Orange High School. The claim was accepted and the worker was paid weekly compensation.

She underwent surgery on 30 July 2015 and did not resume work thereafter. On 16 August 2015, the worker moved to Melbourne to live with her fiancé, whom she married on 21 November 2015. She also sold her home in Orange during this period.

On 10 November 2015, the insurer informed the worker that she should commence suitable duties at Orange High School on 16 November 2015. The worker said she could not as she had no accommodation. On 22 February 2016, the insurer issued a Return to Work Plan requesting that she perform suitable duties at Orange High School. The worker was unable to do this and ultimately the insurer terminated her weekly entitlements under section 48A of the 1998 Act on the basis that she did not make reasonable efforts to return to work at her place of employment (Orange High School).

Arbitrator' Decision

The worker made a claim for weekly compensation payments in the Workers Compensation Commission.

There was evidence from the worker that, even though she had relocated to Victoria, she was prepared to work at Orange High School once certified fit to do so. That was until she found employment in Victoria. In the circumstances, the Arbitrator found that the respondent was not acting unreasonably in offering the worker suitable duties in Orange.

Decision of the Deputy President

The worker appealed the decision.

DP Snell found that the Arbitrator had erred in finding that the employer had not acted unreasonably. DP Snell found that this was the wrong test under section 48A. The correct test is whether the worker has made reasonable efforts to return to work in suitable employment. The onus is on the employer to prove that the worker acted unreasonably.

He then turned to consider whether, based on the facts, the worker had acted reasonably. He found:

- When the worker decided to sell her house in Orange and be with her fiancé, she sought and received assurances from claims officers of the insurer that it would not affect her benefits.
- In November 2015 when the insurer requested the worker take up suitable duties in Orange, the worker was already living in Melbourne. Despite this the insurer gave the worker a matter of days to travel to Orange and find accommodation in the context of having to drive from Melbourne with a frozen shoulder. He found her failure to go to Orange was reasonable.
- When the Return to Work Plan was issued in February 2016, the worker was living in Melbourne on a permanent basis. Relocating to Orange would have required her to leave her husband, who was also assisting her with her personal care. The worker refused to relocate and this was considered reasonable.

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