

Gilbert and Australia Postal Corporation [2014] AATA 483 (17 July 2014)

Key Points

- Whether the applicant's current duties accurately reflect his current working capacity.
- Whether the duties that the applicant performed were duties that he was able to perform on a full-time basis.

Background

Mr Gilbert was employed by Australian Postal Corporation (Australia Post), when he suffered a number of work-related medical conditions. Australia Post accepted compensation liability for "*bilateral plantar fasciitis*" and a condition affecting the applicant's left knee.

Mr Gilbert was certified to work on restricted duties however, on 3 July 2012, Australia Post issued a determination which found Mr Gilbert was able to work full-time duties and had no ongoing entitlement to incapacity payments. This decision was affirmed on reconsideration, and Mr Gilbert sought review at the Tribunal.

The issues that the Tribunal was to consider related to both the hours Mr Gilbert was able to work, and the duties which were available to him.

The Law

The SRC Act provides that an employee's entitlement to incapacity payments by way of compensation is determined by reference to their normal weekly earnings before the relevant injury, less their ability to earn in suitable employment.

Section 19(4) of the SRC Act allows for an employee's incapacity payments to be reduced in circumstances where they have failed to accept an offer of suitable employment (s 19(4)(b)) or failed to engage or continue to engage in an accepted offer of suitable employment (s 19(4)(c)).

Conclusion

Dr Chase and Dr Tschirn, both Occupational Physicians, gave evidence concurrently before the Tribunal. Dr Tschirn's evidence was supportive of Mr Gilbert. Dr Tschirn stated that he did not "*see Mr Gilbert being able to increase his hours of working*" in the near future.

Dr Chase accepted that Mr Gilbert had pain in his left knee which caused limitation on what he could do at work. However, he considered that if Mr Gilbert was provided with suitable duties which allowed him to sit and stand, he could work full-time.

In a joint report, Associate Professor Bauze and Dr Marshall, Orthopedic Surgeons, indicated that neither of them saw any sign that Mr Gilbert was exaggerating his symptoms. They further stated that Mr Gilbert was fit to work full-time in a sedentary job with no heavy lifting, squatting or kneeling.

The Tribunal considered whether the duties which could be made available to Mr Gilbert, if he was to work full-time, would amount to an “offer of suitable employment” to which the Tribunal could have regard in applying s 19(4) of the SRC ACT.

The Tribunal determined that there was no evidence before it which would allow it to conclude that, if Mr Gilbert was to work full-time, steps would be taken by Australia Post to ensure that Mr Gilbert’s additional hours were comprised only of sedentary duties.

The Tribunal determined that Mr Gilbert could work full-time if the additional hours were comprised of administrative or clerical duties, however both parties agreed that those duties had not been offered to him and therefore could not amount to an offer of suitable duties which Mr Gilbert failed to accept (s19(4)(b)) or failed to engage in (s19(4)(c)). The Tribunal therefore concluded that Mr Gilbert was entitled to continue to receive incapacity payments.

Lessons Learnt

This case makes it clear that the respondent must submit evidence to the Tribunal that an offer of suitable employment has been made to the applicant in order to be successful pursuant to sections 19(4)(b) or 19(4)(c).

For more information on this article, please contact:

Nathan Hepple | Partner

D: (02) 9376 1188

F: (02) 9376 1111

E: nathan.hepple@hbalegal.com