hba *legal.*

Integrated Fuel Services Pty Ltd v Wilkinson [2015] WADC 140

Key Points

- Definition of "return to work" under s 5 & s 61 of the Act.
- Arbitrator held that although the worker was certified fit for his pre injury duties, the worker did not recover from his injury sufficient to be able to fully carry out his pre-injury duties. The worker was therefore not re-established as a settled member of the wage-earning workforce

Background

Mr Wilkinson was employed by Integrated Fuel Services Pty Ltd (IFS) as a welder/fabricator and on 30 January 2014 he was injured at work when the extensor tendon on his right thumb was severed.

Mr Wilkinson's workers' compensation claim was accepted and payments for total incapacity were made whilst Mr Wilkinson's tendon was repaired.

Mr Wilkinson returned to work in April 2014 and was subject to a number of restrictions prescribed in the medical certificate issued by the plastic surgeon then treating him. Following an 8 week rehabilitation program the closure report stated that Mr Wilkinson demonstrated capacity to undertake his original duties on an unrestricted basis.

On 22 May 2014 Mr Wilkinson was informed by IFS that his employment was terminated and he was retrenched due to lack of work. Weekly payments of compensation were then ceased without notice.

IFS claimed that Mr Wilkinson had returned to work for the purposes of ss 5(1) and 61(1) of the *Workers' Compensation and Injury Management Act 1981* (WA) (the Act).

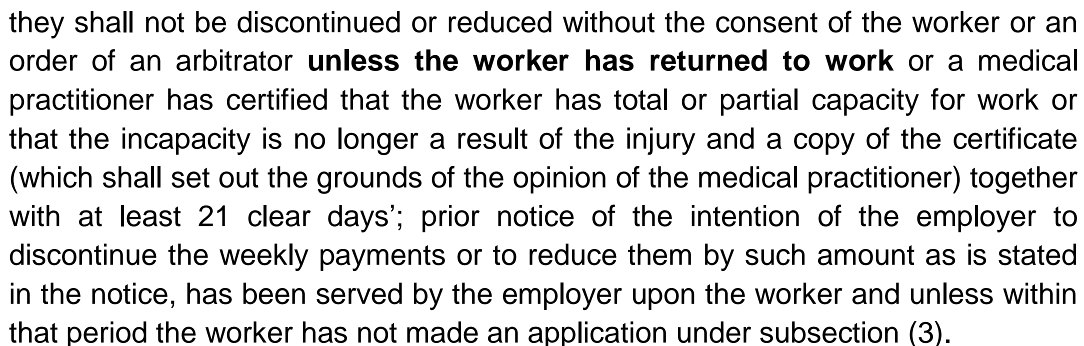
Mr Wilkinson brought an application to reinstate payments alleging that IFS had breached s 61(1) of the Act. His application proceeded to arbitration before Arbitrator Mengler.

On 19 January 2015 the arbitrator found in favour of Mr Wilkinson. The arbitrator found that Mr Wilkinson had not returned to work in the sense required under s 61 of the Act and that accordingly, he was entitled to weekly compensation payments on the basis of total incapacity from 27 May 2014.

The Law

61. Discontinuing or reducing weekly payments without order

> (1) Subject to subsections (7) and (8) and section 84, where weekly payments of compensation for total or partial incapacity are made to a worker under this Act,


they shall not be discontinued or reduced without the consent of the worker or an order of an arbitrator **unless the worker has returned to work** or a medical practitioner has certified that the worker has total or partial capacity for work or that the incapacity is no longer a result of the injury and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with at least 21 clear days'; prior notice of the intention of the employer to discontinue the weekly payments or to reduce them by such amount as is stated in the notice, has been served by the employer upon the worker and unless within that period the worker has not made an application under subsection (3).

5. Return to work, in relation to a worker who has suffered an injury compensable under this Act, means —

a) the worker holding or returning to the position held by the worker immediately before the injury occurred, if it is reasonably practical for the employer who employed the worker at the time the injury occurred to provide that position to the worker; or

b) if the position is not available, or if the worker does not have the capacity to work in that position, the worker taking a position —

   i. for which the worker is qualified; and

   ii. that the worker is capable of performing,

whether with the employer who employed the worker at the time the injury occurred, or another employer; …

A worker continues to have incapacity for work, whether total or partial, for so long as he remains unfit to carry out the full range of his pre-injury duties and hours: ***Arnotts Snack Products Pty Ltd v Yacob***.

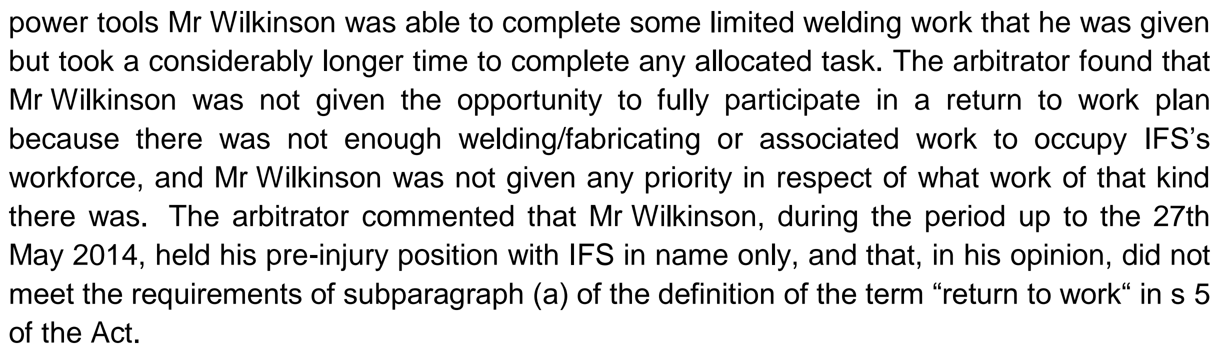
Arbitration

The arbitrator identified that the issue for determination was whether at any time during 28 April and 27 May 2014 Mr Wilkinson had returned to work in the sense required by s 61 of the Act, that is to say, was re-established as a settled member of the wage earning workforce no longer in need of weekly payments of compensation.

The arbitrator correctly identified that the question for him was whether Mr Wilkinson had any injury related work restrictions and the extent of the duties he was performing when his payments were ceased by the applicant.

The arbitrator accepted Mr Wilkinson's evidence that during the period after he had returned to work until he was retrenched he was not given work consistent with the return to work plan then in place. In particular, he was given few jobs that were core tasks to welding or fabricating and generally given tasks such as sweeping and tidying up in the workshop or working in the store and delivering items.

Due to ongoing difficulties with his thumb that impacted upon his capacity to use various



power tools Mr Wilkinson was able to complete some limited welding work that he was given but took a considerably longer time to complete any allocated task. The arbitrator found that Mr Wilkinson was not given the opportunity to fully participate in a return to work plan because there was not enough welding/fabricating or associated work to occupy IFS's workforce, and Mr Wilkinson was not given any priority in respect of what work of that kind there was. The arbitrator commented that Mr Wilkinson, during the period up to the 27th May 2014, held his pre-injury position with IFS in name only, and that, in his opinion, did not meet the requirements of subparagraph (a) of the definition of the term "return to work" in s 5 of the Act.

The arbitrator was not satisfied by IFS's evidence that Mr Wilkinson progressed over an 8 week period to demonstrate capacity to undertake 8 hours per day, 5 days per week, of unrestricted original duties. The arbitrator accepted Mr Wilkinson's evidence that he was not given the opportunity to demonstrate that capacity and, if he had, would probably not have achieved the expected quantity outcome even if he was actually able to work the full hours.

The arbitrator was of the view that the treating plastic surgeon was misinformed that Mr Wilkinson had no work restrictions, or had demonstrated none. The arbitrator inferred that the plastic surgeon's certification was really one that Mr Wilkinson was fit to try a return to normal duties, however, he was not given the opportunity.

Importantly, the arbitrator found that at no material time had Mr Wilkinson recovered from his injury sufficient to be able to fully carry out his pre-injury duties as a welder/fabricator and at no time was he re-established as a settled member of the wage-earning workforce, no longer in need of weekly compensation payments, and nor had he returned to work in the sense required by s 61 of the Act.

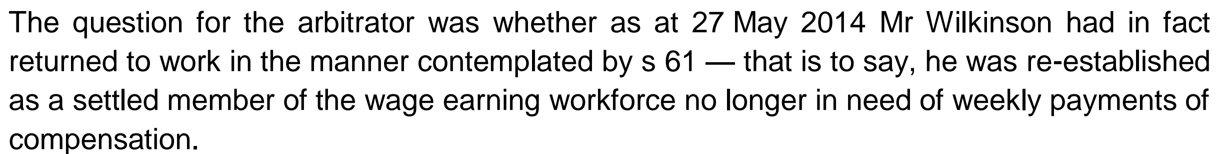
District Court Proceedings

The District Court appeal was heard by District Court Judge Birmingham QC.

DCJ Birmingham found that the medical evidence, when considered in its entirety, supported the inference drawn by the arbitrator, namely that Mr Wilkinson was "fit to try to return to normal duties" as opposed to being fit to resume his pre-accident duties on a full time unrestricted basis.

DCJ Birmingham commented further that the finding by the arbitrator that Mr Wilkinson had resumed his pre-injury position with IFS in name only was supported by the evidence. He stated that the arbitrator's finding was open to him on the evidence and accordingly, no error of law was demonstrated.

DCJ Birmingham commented that consistent with the arbitrator's finding that Mr Wilkinson's plastic surgeon had certified him as being fit to try to resume his pre-injury employment, the extent to which Mr Wilkinson was in fact able to undertake such duties with reference to the requirements in the return to work plan was relevant to the question as to whether Mr Wilkinson had in fact resumed his pre-injury employment.



The question for the arbitrator was whether as at 27 May 2014 Mr Wilkinson had in fact returned to work in the manner contemplated by s 61 — that is to say, he was re-established as a settled member of the wage earning workforce no longer in need of weekly payments of compensation.

DCJ Birmingham held that the arbitrator was not bound by the rules of evidence and was entitled to inform himself on any matter as he thinks fit: s 188(2)(a), s 188(3). The arbitrator was entitled to have regard to all of the available material in the determination of that issue. The determination of that issue was a matter of fact found by the arbitrator that was open on the evidence before him. No error of law was demonstrated.

DCJ Birmingham commented further that section 61 is expressed to be subject to s 84. Section 84 provides that a worker who has been incapacitated by injury and attempts to resume work and is unable to continue on account of the injury is not to be deprived of any entitlement to compensation under the Act. DCJ Birmingham commented that it followed that any attempts to return to work in the manner certified by the plastic surgeon did not operate to extinguish Mr Wilkinson's right to continued compensation.

DCJ Birmingham noted that the arbitrator found that Mr Wilkinson had attempted to return to work subject to the qualified certificate from his plastic surgeon but was unable to undertake the tasks by reason of his incapacity. Such finding was open on the evidence. Therefore, DCJ Birmingham found that no error was demonstrated.

On the basis of the above, leave to appeal was refused.

Conclusion

This decision reinforces the decision of *Glenn v Compass Group (Australia) Pty Ltd* [2014] WADC 86.

In the *Glenn* decision, the claim before the Arbitrator was for weekly payments of compensation. Ms Glenn contended that the prescribed amount had not been reached as during a return to work program the payments she received should not be classified as weekly payments, but wages for work that she had performed.

The Arbitrator made reference to the obligation to continue weekly payments under the Act unless certain circumstances came into existence, one of which was a return to work. The worker submitted that she had returned to work, however, the Arbitrator observed that when Ms Glenn was at work, she was being assisted in accordance with her rehabilitation program.

The Arbitrator considered the definition of "return to work" in section 5(1) of the Act and referred to obiter dicta by King CJ in Philmac Pty Ltd. V. Estee (1980) 26 SASR 213:

> "Return to work … involves the re-establishment of the injured worker as a wage earner who is no longer in need of weekly payments of compensation. For return to work to have significance for this purpose it must be, in my

> opinion, a return as a settled or established member of the wage earning workforce."

The Arbitrator then considered Ms Glenn's progress and concluded that she had not returned to work at any time. She found that Ms Glenn was performing duties that consisted of a combination of tasks from her other roles that were combined together to create a role that she had the capacity to perform within her restrictions. The Arbitrator considered that Ms Glen was not re-established as a settled member of the workforce.

In reaching this conclusion, the Arbitrator considered the arguments that Ms Glenn had significant restrictions in the work that she could do and accepted that Ms Glenn was employed in a role specifically generated for her, noting that at all times Ms Glenn was certified fit for full-time duties with restrictions (e.g. "no use of the right arm, to avoid repetitive use of the left arm and a lifting restriction of under two kilograms"). She expressly noted that Ms Glenn agreed that she had ongoing symptoms and that her symptoms had not abated. Ms Glenn agreed that she was restricted as she was not able to use her right arm, and she was right hand dominant. The Arbitrator found that Ms Glenn was working in a role that comprised of specifically identified duties that were suitable for her restrictions with the aim of assisting her to be rehabilitated back to work.

On appeal before Braddock DCJ, Her Honour concluded that the Arbitrator had correctly applied the law to the relevant facts and that the worker had not made a return to work as defined under the Act.

Contact

For more information on this article, please contact:

Ruth Slater
Partner
T: +61 (0) 8 9265 6014
M: 0408 291 916
ruth.slater@hbalegal.com

Rebecca Pope
Senior Associate
T: +61 (0) 8 9265 6015
M: 0414 946 662
rebecca.pope@hbalegal.com

www.hbalegal.com

Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.