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If an employee is demoted during a period of accepted incapacity for work, does that employee's NWE change accordingly?

Hobday v Comcare [2016] AATA 504

Key Points

- The Tribunal found that, although Mr Hobday's NWE was calculated at one rate at the time of his accepted injury, as a result of changes in his classification of employment, his NWE should be altered to correctly reflect the change in classification.

Background

Mr Hobday was employed as a CL3 Supervising Instructor with the Australian Customs and Border Protection Service. On 16 December 2013, Mr Hobday lodged a claim for workers' compensation for psychological distress sustained in August 2013. Liability for *"adjustment reaction with mixed emotional features"* was accepted on 21 March 2014, and his Normal Weekly Earnings (NWE) were calculated to be $1,996.45.

On 4 April 2014, Mr Hobday was advised that he had breached his employer's Code of Conduct and as a result, on 19 May 2014, his work classification was reduced from CL3 to CL2. Accordingly, his NWE was reduced to that of a CL2 classification, being $1,395.64. Mr Hobday disputed the reduction and the matter came before the Administrative Appeals Tribunal.

The Law

Section 19 of the *Safety Rehabilitation and Compensation Act* 1988 (Cth) (**the SRC Act**) applies to an employee who is incapacitated for work as a result of an accepted injury. Pursuant to section 19, an employer is liable to pay the employee for each week they are incapacitated. The amount of compensation the employee receives per week is calculated with reference to sections 8 and 9.

The purpose of section 8 is that the injured employee should not be worse off during their period of incapacity as a result of an accepted work injury and conversely, they should not be better off: *Bortolazzo & Anor v Comcare* (1997) 75 FCR 385.

Section 8(10)(a) of the SRC Act provides that, if an employee's NWE has been calculated (as at the time of the injury) and that amount exceeds the amount the employee would have been earning had he or she continued to be employed as normal, then the employee's NWE should be reduced to reflect the amount the employee would have been earning if he or she was not incapacitated for work. That is, but for the injury, the employee would have remained in their role, working normal duties and hours.

The correct test under section 8(10)(a) is whether an incapacitated employee's NWE after the injury exceeds the weekly earnings that he or she would have received if they had continued working as normal: *ACT v Comcare & Anor* (2011) FCR 287 at 34.

Conclusion

The purpose of the Scheme under the SRC Act is to place an employee in the position they would have been in, but for the accepted work injury. The employee is to be placed in a position that is neither better nor worse than the position which he or she would have been in, had they not been incapacitated for work.

The Tribunal found that, after 19 May 2014, had Mr Hobday not been incapacitated, then he would have been earning $1,395.64 per week as a result of his reclassification. Accordingly, the decision under review was affirmed.

Lessons Learnt

In the present case, Mr Hobday, had he not been incapacitated, would still have been reduced in classification from CL3 to CL2 as a result of his breach of the Code of Conduct.

The case illustrates the importance to employers of conducting regular reviews of NWE calculations, to ensure that they are correct and compliant with the legislation. In this case, a failure to reduce Mr Hobday's NWE in accordance with his reclassification would have resulted in a significant overpayment to him, which the employer may have had difficulty recouping at a later stage.

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