

Gun & Davey

Covered



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COVERED CASES

A ADAMS -v- WORKCOVER

JD24-1997 (FULL BENCH)

COMPLETE TURNAROUND RE “2 YEAR REVIEWS”

The decision of [*Adams -v- WorkCover JD24/1997*](#) is of importance as it is likely to have a considerable impact on the prospects of reducing future liability for continuing weekly or capital loss payments by applying the provisions of Section 35(2) or Section 42A(3) of the Act.

The significant findings of the Full Tribunal (Senior Judge Jennings dissenting) were as follows:-

- a) The burden of proof with respect to the calculation of the worker's entitlement to a capital sum (and this may apply equally to calculating the rate of income maintenance) and the basis upon which that calculation was made, rests with the compensating authority, not the worker
- b) Suitable employment for the purposes of Section 42A(3)(c) (same provisions as Section 35(2)(c)) is suitable employment which the worker has reasonable prospect of obtaining in accordance with the requirements of Section 42A(2)(b) (same provisions as Section 35(1)(b)(ii)).

Two main reasons were given in relation to the burden of proof aspect of the decision. Firstly as it is the compensating authority which makes the assessment, the compensating authority must present the evidence to establish the factual basis upon which its assessment is based. The evidentiary onus may then shift to the worker to present evidence to negate such evidence. Secondly, as Parliament had expressly placed the onus upon the worker to establish the facts required to deem partial incapacity as total (re

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Section 42A(3)(d)), had it also intended the worker to bear the onus in respect of Section 42A(2) it would have clearly stated such.

Suitability of Employment

On the facts of Adams, the worker was required to possess a certain skill in order to be considered by a prospective employer as a candidate for the nominated suitable employment. The worker did not possess that skill and the training to do so was more than the brief or limited induction process adopted by an employer to ensure that a new employee knows its particular operation or requirements. The Full Tribunal held that as the worker did not possess the necessary skills his prospects of obtaining the employment and his ability to adapt to the new employment will be extremely limited and accordingly the nominated suitable employment was not employment which the worker had a reasonable prospect of obtaining.

What does Adams mean to a Compensating Authority / Case Manager

As the specific provisions contained in Section 42A(3)(c) and Section 35(2)(a) are not exhaustive of the factors which must be considered in determining whether the nominated employment is suitable employment which the worker has a reasonable prospect of obtaining, all relevant information must be considered eg. pre-existing disabilities which did not prevent the worker from undertaking the work in which the worker was engaged when sustaining the compensable disability in question.

A compensating authority must obtain evidence which demonstrates that the worker in question would be a suitable candidate for the nominated suitable employment. This necessarily requires the compensating authority to determine what prerequisites a prospective employer would be looking for in an applicant for the nominated suitable employment and to satisfy itself that the particular worker could meet those requirements in all respects if for example responding to an advertisement for such suitable employment.

There is no longer a right to appeal to the Full Supreme Court from the Full WCT even with leave on a question of law.