



COVERED CASES

NELSON v WORKCOVER **(ADELAIDE ELECTRICAL SERVICES PTY TLD)**

[2001] SAWCT 78

Three recent decisions of the Workers Compensation Tribunal have addressed the obligation to provide rehabilitation and what this means in different cases.

In Nelson v WorkCover (Adelaide Electrical Services Pty Ltd) [2001] SAWCT 78 the issue was whether, after agreeing to finance the worker's university studies as part of his rehabilitation, the compensating authority should be required to continue to finance these studies to conclusion.

The worker, an electrician prior to his disability, was permanently incapacitated from returning to that work by reason of his left knee disability. Rehabilitation was instituted with the focus upon returning him to alternative employment. The worker, who had no post school training or qualifications, sat for mature entry exams and was accepted into a Bachelor of Arts course at the Adelaide University.

The compensating authority agreed to him commencing the course and reimbursed his fees for first year. His results then led to him being accepted into a Bachelor of Laws degree in the subsequent year. The compensating authority refused to further subsidise his studies.

Deputy President Judge McCusker held that after initially agreeing to finance the worker's university course it was bound to do so until conclusion. Furthermore, as these costs had been "authorised" by the compensating authority, they could be recovered by the worker under Section 32. (This decision has been appealed to the Full Tribunal).

In Miller v WorkCover (Hotel Royal) [2001] SAWCT 57 it was held that retraining a worker into a new field as part of rehabilitation can involve more than short term courses. In some circumstances university degrees may be compensable.

The worker sustained a right knee disability in 1995 which ultimately led to a permanent partial incapacity. The worker was afforded extensive rehabilitation and return to work assistance directed towards a return to work in the hospitality industry where he had 20 years pre-injury experience. Despite substantial efforts by both the rehabilitation consultant and the worker, he was unable to secure such work.

A report dated 11th December 1998 by the rehabilitation consultant referred to a proposal whereby the worker be re-trained as an accountant. Further Rehabilitation and Return to Work Plans were drawn up but the accounting course was not included. The worker disputed these plans but continued to apply for jobs in the hospitality industry.

The worker then sought to have retraining as an accountant included in a Rehabilitation and Return to Work Plan. Deputy President McCouaig found no legal impediment to having such a provision incorporated in a Rehabilitation Program or Rehabilitation and Return to Work Plan.

The question was one of reasonableness. In these circumstances both the worker and the rehabilitation consultant had unsuccessfully invested substantial effort into retraining the worker and attempting to secure employment in the hospitality industry. Incorporating the accounting course would increase the worker's "basket of skills" thus improving his employment prospects. The Deputy President saw this as fulfilling the objectives of the Act.

It was therefore reasonable in these circumstances to change the direction of the rehabilitation.

However Deputy President McCouaig went on to state that it does not follow that the worker will be assured of continuing income maintenance, much less continuing income maintenance at the current rate for the duration of the course. Like all workers he will be subject to periodic reviews of his progress and ability to undertake some work as are all workers receiving compensation. (This decision has also been appealed to the Full Tribunal).

West v WorkCover (BCC Constructions Pty Ltd) [2001] SAWCT 60 goes beyond the question of whether retraining should be provided and considers what assistance a worker should be provided with to complete this retraining.

The worker sustained a compensable disability to his left knee and had been partially incapacitated for work and in receipt of weekly payments of income maintenance for some three years. At the time of his injury the worker's employment history consisted mainly of manual work.

In early 2000 the worker enrolled in the first year of an Advance Diploma of Management at the Regency Institute of TAFE. The claims agent paid the fees for the first year of the course as part of a Rehabilitation and Return to Work Plan. The worker requested that the respondent also establish a rehabilitation program to provide him with a hearing aid as he suffered from a congenital hearing loss which made it difficult for him

to participate in lectures. The request was rejected on the basis that there was no obligation to provide a hearing aid pursuant to a rehabilitation program.

The worker objected stating that the Corporation had already paid for him to attend the TAFE course as part of his rehabilitation and to effectively participate in the course he required the hearing aid. He further argued that the hearing aid would also assist him in returning to work as it would open up further positions such as sales, store or administrative duties otherwise not available to him.

The Tribunal agreed with both arguments.

It found that the worker's usual field of manual employment had been significantly reduced as a result of the compensable disability. Further the Tribunal noted that there were other forms of employment which were suitable to the worker but for the existence of the hearing impairment.

The provision of the hearing aid was a measure which had a reasonable prospect of ameliorating the effects of the non-compensable disability so as to improve the worker's ability to obtain work and the request was therefore reasonable.

The Tribunal noted that the purposes of rehabilitation programs as provided in Section 26(3) of the Act is both the recovery from the compensable disability and restoration to the work force. The Tribunal stated that the Corporation's power to establish rehabilitation programs was intended to be flexible and unrestricted and need only be consistent with these two objectives. The Section permitted the Corporation to establish a rehabilitation program, the focus of which may be an additional, ancillary or coincidental problem, which in combination with the compensable disability, may influence the worker's restoration to the work force.

The argument that a hearing aid would affect other aspects of the worker's life was irrelevant.

The Tribunal concluded that any measure which has a reasonable prospect of extending the categories of work commonly available to a person in the worker's position will meet the rehabilitative objective of assisting in restoring him to the work force. (This decision has been appealed to the Full Tribunal).

Commentary:

The above three decisions will have wide ranging effect on how to implement rehabilitation. Injured workers who have no prospect of returning to pre-injury employment will require some form of retraining. If the rehabilitation consultant identifies a university course it may be compensable until completion, unless special reasons are established such as:

- The worker's academic record suggests he/she would have difficulty studying.

- The worker has repeatedly failed subjects in the chosen course and the future likelihood of passing is therefore remote.
- The worker's attitude for a variety of reasons is inappropriate.
- We suggest a common sense approach.

The aim of the Act is to rehabilitate a worker back into the work force. A labourer need not necessarily be retrained into labouring/physical type work. It may be feasible to retrain the worker into a completely new occupation to which he is suited.

Where such retraining is provided always bear in mind that the two year review provisions may still be applied.

After one or two years of the course, a worker studying to be an accountant may become suited to employment as an accounts clerk.

We will review these recommendations as and when we receive the decisions of the Full Tribunal.