



# Job Seeking Obligations Whilst Receiving Section 40 Payments

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## Overview: The Legal Position

Although one of the “*system objectives*” set out in s.3 of the 1998 Act is to provide treatment, proactive management of injuries and vocational rehabilitation “*in order to assist injured workers and to promote their return to work as soon as possible*”, there is in fact no obligation expressly imposed on partially incapacitated workers to seek suitable employment while receiving benefits under s.40.

In *Pikus Pty Limited t/as Banjo's Bakery v Bradica* (2009) NSWWC PD 120, Deputy President Roche stated that an employer's submissions that the worker had a statutory obligation to seek suitable employment which had to be taken into account for the purposes of determining the s.40 entitlement were “*misguided, unhelpful and/or fundamentally wrong*”. The Deputy President went on to find that the failure of a partially incapacitated worker to seek suitable employment was not relevant to the assessment of the ability to earn in some suitable employment or to the exercise of the discretion under s.40 to award an amount which bears “*such relation to the amount of that reduction (i.e. in earning capacity assessed in accordance with s.40(2) as may appear proper in the circumstances of the case*”.

The rationale for this conclusion was that the entitlement under s.40 for a worker who is not suitably employed is to be determined by assessing a hypothetical ability to earn in suitable employment regardless of whether the worker is in fact taking steps to turn such capacity to earn into an actuality. Because the worker is, in effect, being assessed on the basis of an assumption that they are in suitable employment, the Deputy President did not consider there to be any basis for further reducing the assessed entitlement merely because the worker was doing nothing to obtain the suitable employment in question.

It follows, of course, that if a failure to seek suitable employment is not relevant to the assessment of the entitlement under s.40, then such failure has no impact on the entitlement to receive such benefits and there is no basis upon which an insurer can terminate or suspend weekly benefits under the section by reason of a failure to job seek.

## When a worker is required to job seek

A failure by a partially incapacitated worker to seek suitable employment does, however, have two consequences of significance, they being:

- The worker would not be entitled to benefits under s.38 as he or she would not be seeking suitable employment as required by ss.(4) and defined by s.38A; and
- If the worker has received benefits in respect of partial incapacity for a period of two years and is not, at the relevant time (being the time at which a s.54 Notice terminating benefits is issued), suitably employed or seeking suitable employment, then no further weekly benefits are payable in respect of any future period of partial incapacity by operation of s.52A(1)(a).

Section 38A *"provides for the determination of whether a worker is seeking suitable employment"* only for the purposes of s.38 and s.52A and the requirement that a worker be taking reasonable steps to obtain suitable employment from someone other than the employer applies only where the worker has been notified of that requirement in writing. It is mandatory that the Notice advise the worker that they are required to take reasonable steps to obtain suitable employment from someone other than the employer in order to remain entitled to compensation under s.38 and the Notice *"may set out reasonable steps that can be taken by the worker in order to satisfy that general requirement"*.

## Rejection of suitable employment

Brief reference should be made to s.40(2A), which provides that the entitlement of a worker who has unreasonably rejected suitable employment *"offered ... by any person"* shall be determined by a comparison between the current weekly wage rate for the worker's pre-injury employment and the current weekly wage rate for some suitable employment, rather than by a comparison between probable earnings and ability to earn inclusive of such things as overtime and penalty rates. It seems unlikely that the legislature would have intended that a worker remain entitled to modified benefits under s.40 where they have unreasonably rejected an actual offer of suitable employment but that a worker taking no steps to obtain such suitable employment would not be entitled to any benefits.

## Summary

In summary, while a failure to seek suitable employment will preclude a partially incapacitated worker from receiving benefits under s.38 and will place that worker at risk of losing all benefits by operation of s.52A once payments in respect of partial incapacity have been made for at least two years, there is no express provision in the legislation which obliges a partially incapacitated worker to seek suitable employment in order to be entitled to benefits under s.40.

## Power of insurers to require a worker to job seek and to provide evidence of job seeking

It follows from this that an insurer's entitlement to require a partially incapacitated worker to seek suitable employment and to provide evidence of such efforts also falls into something of a grey area and it is necessary to look elsewhere in the legislation to find a source for such a right.

Section 71 of the 1998 Act imposes an obligation on a claimant to cooperate fully with the insurer in respect of the claim and, in particular, to *"comply with any reasonable request by the insurer to furnish specified information"*. The generality of this provision could be invoked as a basis for requiring a partially incapacitated worker to cooperate with a request that they seek suitable employment and to provide information in relation to job seeking efforts, although a question could arise as to whether it is *"reasonable"* for an insurer to require these things of a worker in circumstances where there is no obligation to job seek save in the circumstances envisaged by s.38 and s.52A.

Further, the obligation to cooperate and provide information applies only until proceedings are commenced in the Commission but a claimant who fails without reasonable excuse to comply with the section is not allowed to commence proceedings before the Commission while the failure continues.

This section may provide a basis on which an insurer can require a worker to provide evidence of job seeking, at least where s.40 benefits have been paid for at least two years and may be of assistance where payments have been terminated under s.52A and the worker seeks to commence proceedings for the reinstatement of such payments to preclude the commencement of those proceedings until evidence of job seeking is provided.

The only other possible basis upon which a partially incapacitated worker could be required to job seek and to provide evidence of such job seeking efforts while being paid pursuant to s.40 would be under Chapter 3 of the 1998 Act. Section 47(2) provides that a worker must comply with obligations imposed by or under an Injury Management Plan and s.57(1) provides that a worker has no entitlement to weekly benefits in respect of any period during which that worker *"fails unreasonably to comply with a requirement of this Chapter after being requested to do so by the insurer"*. Section 57(2) provides that a suspension of benefits under ss.(1) cannot be initiated until the insurer has given the worker written notice to that effect, such notice including a statement of the reasons for the entitlement being suspended and identifying the action that the insurer considers the worker must take to be entitled to the resumption of such payments.

It is arguable that these provisions could be invoked to suspend benefits where a partially incapacitated worker is required under an Injury Management Plan to job seek and to provide evidence of job seeking efforts and fails to do so.

There is no case law which directly deals with this complex issue. Difficulties may arise in relation to an insurer seeking to rely upon Chapter 3 in seeking to uphold a suspension of benefits based upon a failure by a worker to comply with a requirement under an IMP to seek suitable employment and to provide evidence of job seeking efforts. There are two reasons for this.

First, if the specific provisions of s.40 do not impose any obligation to job seek on a partially incapacitated worker, it is difficult to see how a worker can be unreasonable in failing to do something which he or she is not otherwise obliged to do simply because the requirement is included in an IMP.

Second, the scope of the matters which may properly be included in an IMP may not include an obligation to independently job seek. Section 42 defines *"injury management"* as *"the process that comprises activities and procedures that are undertaken or established for the purposes of achieving a timely, safe and durable return to work"*, while an *"Injury Management Plan"* is *"a plan for ... managing those aspects of injury management that concern the treatment, rehabilitation and retraining of an injured worker for the purposes of achieving a timely, safe and durable return to work"*.

*"Rehabilitation"* is, surprisingly, not defined in the legislation generally or in Chapter 3 in particular, although s.59 of the 1987 Act defines an *"occupational rehabilitation service"* to encompass a number of proactive services designed to assist workers in identifying suitable work or preparing them to undertake such work and includes *"advice or assistance concerning job seeking"*. Generally speaking, the concept of rehabilitation involves assistance being provided by others to a person in order to achieve a particular outcome. Doubts may, therefore, arise in relation to whether a requirement that a worker job seek without assistance would fall within the relevant definition. The position, may, however, be different if such job seeking were being undertaken under the supervision and with the assistance of a rehabilitation provider or, possibly, if a rehabilitation provider had offered the opinion that job seeking would be beneficial to the psychological welfare of the injured worker.

## A practical approach

On a practical level, however, it is relatively rare for an injured worker in receipt of s.40 benefits to refuse to job seek or to provide evidence of job seeking efforts and, in these circumstances, it seems appropriate for insurers to continue to request partially incapacitated workers to make efforts to independently seek suitable employment and to provide evidence of such efforts.

For the sake of abundant caution, it is recommended that the requirement to job seek and provide evidence of such efforts be included as obligations in ongoing Injury Management Plans. This will at least provide the potential for benefits to be suspended pursuant to s.57 should job seeking requests not be complied with.

Further, the power to suspend benefits under s.57 will be enhanced where a requirement to job seek is issued at the same time that a worker is receiving the assistance of and is under the supervision of an accredited rehabilitation provider because, in those circumstances, the worker's job seeking efforts might be more readily regarded as forming part of the "rehabilitation" process and therefore coming under the umbrella of Chapter 3.

## When job seeking requirements become most effective

A requirement that a partially incapacitated worker job seek and provide evidence of job seeking efforts becomes most effective as the time s.52A becomes operative approaches. That section has significant consequences for a worker who is not seeking suitable employment as the insurer is entitled to terminate weekly benefits (regardless of whether an award of the Commission is on foot) and once payments for partial incapacity have been terminated they cannot under any circumstances be reinstated in the future.

The power to terminate payments under s.52A arises where a partially incapacitated worker who has received weekly benefits for partial incapacity for at least two years is not suitably employed and is not seeking suitable employment at the "relevant time", that being the time at which the s.54 Notice terminating benefits is issued.

A failure to provide evidence of job seeking is not necessarily evidence that the worker is seeking suitable employment, although a powerful inference can arise from the failure of a worker to provide evidence of job seeking after being requested to do so and, arguably, s.71 could be invoked to stop a worker commencing Commission proceedings challenging a decision to terminate payments under s.52A until such time as evidence of job seeking has been provided.

It is, therefore, appropriate to conclude with some suggestions regarding the gathering of evidence to found a termination of benefits under s.52A. The following steps are recommended:

- The worker should be provided with the notice under s.38A advising of the obligation to seek suitable employment from someone other than the employer;
- Letters reminding the worker of the obligation to job seek should be sent at regular intervals (say every two months);

- Letters advising the worker that they have failed to provide evidence of job seeking should be sent on a monthly basis, particularly where payments in respect of partial incapacity have been made for about 18 months;
- It is imperative that some evidence that the worker is not seeking suitable employment at or about two years after payments for partial incapacity commenced be obtained. The best evidence of this is by way of an admission by the worker to an IME, an IMC or a rehabilitation provider that they are not seeking suitable employment;
- An admission by the worker to a Claims Officer that they are not seeking suitable employment may suffice, but only if such admission is carefully documented and file noted;
- If evidence that the worker is not job seeking is obtained, the decision to terminate benefits pursuant to s.52A should be implemented immediately in order that there is a close relationship in time between the evidence and the "relevant time", being when the s.54 Notice is issued.

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