



COVERED CASES

WORKCOVER CORPORATION (GRIFFIN PRESS PTY LTD) v GIBSON

Decision of the Full Bench of the Workers Compensation Tribunal

([2000] SAWCT 33)

Catchwords:

Period of incapacity, relevant date, Section 4(9) and Section 35.

Facts:

The worker suffered an injury to his left knee in the course of his employment with Griffin Press on 27th October 1992 and his claim was accepted. It was held at first instance that the worker was at all relevant times partially incapacitated with periods of total incapacity (during which he received weekly payments) and periods where he performed modified duties with Griffin Press. The worker accepted a voluntary retrenchment package in October 1996 hoping to return to England. This did not eventuate and in January 1997, he obtained employment with Protectaprint.

Following surgery to his knee the worker was off work between the 11th February 1997 to 3rd March 1997 and then in January and July 1998 underwent further surgery. He did not work thereafter. His claims for weekly payments for these periods were accepted.

For the first period of incapacity (ie, 11th February 1997 to 3rd March 1997) the rate of the worker's weekly payments were set at \$390.92 (80% of the rate set in 1992). The worker asserted that the rate should be \$550.00 representing his average earnings from his latter employment at Protectaprint.

For the second period of incapacity (ie, January 1998 ongoing) the Corporation again set the worker's notional weekly earnings at \$390.92. The worker asserts this should have been \$636.00 gross per week.

It was held at first instance that the relevant date for the setting of average weekly earnings was 12 months immediately preceding February 1997 and January 1998 notwithstanding the fact that the worker had remained partially incapacitated since 1992.

The Corporation submitted that incapacity could continue irrespective of whether there has been any economic loss and that 1992 was the relevant date.

Issues:

1. Was the Corporation, upon lodgement of the worker's further claims, required to make fresh determinations of the worker's average weekly earnings by reference to his earnings at the time his further claims were made?
2. Was there only one or more than one period of incapacity?

Held:

1. Section 4(2)'s reference to "the relevant date" and Section 4(9)'s definition thereof suggests that it was Parliament's intention that average weekly earnings would be calculated at the commencement of the period of the worker's incapacity for work or, where there was more than one separate period of incapacity resulting from a compensable disability, at the commencement of each separate period.
2. The basis upon which Marina's case was distinguished at first instance was not made out.
3. The interpretation of "period of incapacity" as set out in Marina's case was accepted, namely that if the worker remains partially incapacitated for work from the compensable disability through a period of time regardless of whether the worker asserted this incapacity, then the relevant date for calculating weekly payments is the date of the original incapacity (in this case October 1992).

The fact that the worker did not assert an incapacity, eg by not presenting a prescribed medical certificate, does not end a period of incapacity.

Commentary:

The decision of Marina has been confirmed. This reinforces the necessity to ascertain whether a worker's subsequent claim is based on an ongoing disability arising out of an original compensable disability or a different disability eg, aggravation.