

*Gun & Davey*

***Covered***



---

**Vol 1, Issue 19 – April 2000**

---

## **COVERED CASES**

*DANIELLO INGELSE -v- EASTERN COMMUNITY MENTAL HEALTH SERVICE*

*Decision of the Full Bench of the Workers Compensation Tribunal*

*([2000] SAWCT 15)*

### **Catchwords:**

Capacity to invoke Section 36(1)(c) and Section 36(1)(d) - varying levels of remuneration. Incapacity for work persists.

### **Facts:**

During the course of the worker's employment as an enrolled nurse (EN) she sustained a number of back disabilities for which she sought and obtained compensation.

Sometime thereafter, namely on the 21<sup>st</sup> June 1997, the worker's terms of employment were varied by consent. She was thereafter employed as an Administrative Services Officer - Level One (ASO).

This new employment attracted penalty rates and overtime and while her base weekly rate was \$488.74, she had in fact during the 1997/1998 financial year earned \$34,037.21 the equivalent to \$654.56 per week.

The worker's original notional weekly earnings as an EN (for which she remained incapacitated) were lower at \$639.25.

The issue that came to be determined by the Full Bench was whether in light of the above, the employer was entitled to discontinue the worker's weekly payments pursuant

This newsletter has been printed by Gun & Davey as a service to clients. All information was accurate at the time of printing and comments made are of a general nature and intended to be for guidance only. No person should rely on the contents of the newsletter without first obtaining advice from an appropriately qualified person.

to Sections 36(1)(c) and 36 (1)(d) on the basis that her notional weekly earnings as an ASO exceeded her notional weekly earnings as an EN.

**Issues:**

1. For the purposes of calculating the amount of weekly payments to be paid to the applicant in accordance with Section 35(1)(b)(ii), whether the amount of weekly earnings that the worker is earning should be calculated by reference to the amount actually earned for the week or by reference to an average for the previous financial year to take into account penalty and overtime payments earned as an ASO.

**Held:**

1. The expression “*that is providing remuneration*” in Section 36(1)(d) is a broader concept than weekly earnings. It was permissible for the employer to have regard to the yearly income of the worker.
2. Whilst the level of the worker’s remuneration, when looked at from this perspective, remains equal to or greater than the worker’s notional weekly earnings, there has been no relevant change of circumstances that would permit the pursuit of a further claim for weekly payments.
3. A 12-month period is not necessarily applicable in every case, however it was appropriate here.

**Commentary:**

In situations where a worker has returned to alternate employment and earnings fluctuate depending upon penalty rates and overtime, be alert to the possibility that an aggregate of the worker’s earnings may provide you with a basis upon which you can discontinue weekly payments.

Keep in mind however that this decision does not necessarily apply to the situation where a worker’s average weekly earnings exclude overtime worked (as it does not comply with Section 4(8)). In this case, there was no suggestion that the worker’s notional weekly earnings excluded penalties or overtime rates. The Full Bench expressed no concluded view about whether this reasoning would apply where notional weekly earnings excluded penalties and/or overtime.