



COVERED CASES

SECTION 35(6a) – THE PRACTICAL EFFECT

TSIMPINOS v WORKCOVER

[2000] SAWCT 201

Two recent decisions have been handed down by the Workers Compensation Tribunal relating to Section 35(6a) and both have wide reaching effect.

In **Tsimpinos v WorkCover** [2000] SAWCT 201, a decision of His Honour Acting Deputy President Thompson, the issue in dispute was whether the Section 35(6a) figure set by consent within a redemption agreement was binding on the worker for a limited period only or until aged 65.

The worker had received a lump sum of \$46,500.00 and had agreed to a Section 35(6a) figure of \$287.77. He was subsequently disabled by reason of a work related injury and the Corporation determined that his notional weekly earnings arising out of the subsequent claim were \$800.00. It was argued by the worker that there were two alternate ways of calculating the actuarial value of the capital sum for the purposes of applying it to the subsequent claim:

1. That a weekly sum of \$287.77 will exhaust the capital sum of \$46,500.00 in 3 years and 17 weeks. Therefore after the expiration of this period the Corporation is not entitled to take into account the Section 35(6a) figure.
2. Or to take an alternative view so that the capital sum of \$46,500.00 produced a weekly payment that would be exhausted upon the worker's 65th birthday, namely \$90.59 per week. The Corporation then only being entitled to reduce notional weekly earnings by \$90.59 per week.

It was submitted by the worker that Section 42 does not provide a basis for the parties to *agree* on a weekly figure that the worker is deemed to have redeemed.

The Corporation submitted that the redemption agreement between the parties is a legitimate contractual document and is binding on both.

His Honour held that the matters about which an agreement can be reached does not have to be prescribed by Section 42. He agreed that there is no express mandate in Section 42 for including a weekly figure but states that there is an implied mandate by the use of the word “agreement”. He rejected the worker’s submission that the inclusion of such a figure amounts to unconscionable conduct by the Corporation stating that the safeguards contained in Section 42(2) should sufficiently protect the worker.

In short, His Honour held that the Section 35(6a) figure is as, stated in the redemption agreement:

“the continuing amount the worker is taken to be receiving”.

Ryan v WorkCover [2000] SAWCT 196, dealt with how the Section 35(6a) figure should be applied following the first anniversary of the second disability. The Corporation had sought to reduce the worker’s weekly payments as follows:

New NWE rate (100%)	\$712.57
x 80%	\$570.06
less S35(6a) (previous redemption)	\$25.73
New Entitlement	\$544.33

It was the Corporation’s position that as a result of Section 35(6a) the worker is taken to be receiving a continuing weekly payment of \$25.73 per week and this amount must be deducted from all determinations concerning the calculation of his entitlement to income maintenance.

The Full Bench of the Workers Compensation Tribunal rejected this submission. It was held that had it been Parliament’s intention to subtract such amount in all circumstances from a later right to income maintenance, there would have been no need to enact Section 35(6). If the weekly payments for the earlier disability were to be deducted in every case the worker could never receive, in respect of two or more disabilities, weekly payments exceeding his or her notional weekly earnings.

It was further stated that:

“a plain reading of the Act suggests that in the case of two or more disabilities which generate entitlements to weekly income maintenance the only relevance of an entitlement in respect of one disability in connection with the other is that their combined sum cannot exceed the worker’s notional weekly earnings. Subject to that qualification, the receipt of payments in respect of one disability has no impact upon their entitlement to weekly payments in respect of another”.

The practical effect of this decision is best seen by considering the following formula and the examples set out below.

Year 1

100% AWE's (disability 2) – Section 35(6a) = weekly payment

Year 2

NWE's (disability 2) x 80% + Section 35(6a) = X

X must not be greater than NWE's (disability 2)

If it is, the amount by which X exceeds notional weekly earnings = Y

NWE's (disability 2) x 80% - Y = weekly payment

Example 1

AWE's for disability 2 amount to \$900.00, the Section 35(6a) figure from the previous redemption is \$320.00

Year 1

\$900.00 - \$320.00 = \$580.00 weekly payment

Year 2

\$923.40 x 80% (\$732.72) + \$320.00 = \$1,058.72 (X)

X (\$1058,72) exceeds notional weekly earnings (\$923.40) by \$135.32 (Y)

Therefore the worker's entitlement to weekly payments of compensation can be calculated as follows:

\$732.72 (notional weekly earnings x 80%) - \$135.32 (Y) = \$603.40

Example 2

AWE from the 2nd disability are \$900.00, the Section 35(6a) figure arising out of the previous redemption is \$100.00.

Year 1

\$900.00 - \$100.00 = \$800.00 weekly payment

Year 2

$$\text{NWE} \times 80\% (\$732.72) + \$100.00 = \$832.72 \text{ (X)}$$

X does not exceed notional weekly earnings.

Therefore the worker's entitlement to income maintenance in the second year of incapacity is \$732.72 (notional weekly earnings by 80%).

In the second year of incapacity the Section 35(6a) figure is only taken into account where the sum total of the Section 35(6a) figure and the otherwise ongoing entitlement to income maintenance (notional weekly earnings x 80%) exceeds the notional weekly earnings figure as adjusted by Section 39.