

# *Gun & Davey* **Covered**



Volume 1, Issue 1 - August 1996

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## Welcome

On behalf of the WorkCover Section at Gun & Davey I would like to welcome all readers to the first edition of our monthly newsletter and legal update ***Gun & Davey – Covered***.

You will have received this first edition in your personal folder in which you can retain this and following copies.

We envisage that you will use ***Gun & Davey – Covered*** as an aid to your claims management and trust you find it of assistance. In this edition there is a particularly useful checklist for you to refer to when dealing with hearing loss issues. As hearing loss is such a complicated area the checklist is much longer than we would have wished. Unfortunately that is unavoidable.

As always, the team at Gun & Davey is on standby to assist you and with that in mind we have in this edition provided you with an updated directory of our workers compensation team.

I would like to thank Dana Cirekli and Simon Harvey for their work in compiling this our first edition of ***Gun & Davey – Covered***.

Regards,  
Michael Ricketts

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## Introduction

***Gun & Davey takes this opportunity to introduce Anna Moeller as the most recent addition to our firm.***

Anna comes to us with 4 years of Workers Compensation and Third Party Claims experience. She commenced her career at Wallmans, Solicitors in 1992. Anna practised in the above fields representing workers and plaintiffs in insurance and workers compensation claims. Her experience on “the other side of the fence” will bring a broader perspective to her new role at Gun & Davey.

Anna will initially be working under the guidance of Michael whilst acclimatising to the employer's side of things.

We believe that Anna will become a great asset to our firm and therefore to you as our valued client.

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## Affiliation

**We are also pleased to announce that Gun & Davey has affiliated with independent legal firms Rogers + Gaylard in Melbourne, and Bruce & Stewart in Sydney. Both are well-respected leaders in the Workers Compensation and Insurance fields.**

These strategic alliances will allow us to provide our insurer and employer clients with even better service, including:

- Access to information on developments in interstate schemes;

- Servicing the needs of our clients whose activities cross state borders by recommending the use of legal firms
- Who share our views on service, innovation and cost competitiveness;
- Assistance in the development of information technology relating to legal practice.

To find out more about how our affiliate network may be of benefit to you and your organisation, please contact Workers Compensation liaison partners:

Grant Fraser – (03) 9629 6221  
Rogers + Gaylard, 31 Queen Street,  
Melbourne

David Sefton – (02) 9367 7500  
Bruce & Stewart, 50 Bridges Street  
Sydney

## Noise Induced Hearing Loss

**One topical area of Workers Compensation law at present is the determination of claims under the *Workers Rehabilitation and Compensation Act 1986* for noise induced hearing loss. Many claims are being made by workers who have long ceased working for the employer where they claim to have suffered the loss.**

The result is that it is often very difficult on the information or facts before a decision maker to determine whether a worker is entitled to lump sum compensation for noise induced hearing loss and tinnitus pursuant to Section 43 of the Act. A further difficulty arises out of the complex nature of various provisions of the Act and the interpretation of those provisions by the Workers Compensation Appeal Tribunal (WCAT) and the Supreme Court.

The decision of the WCAT in Stead is a useful guide to the assessment of claims for noise induced hearing loss.

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### STEAD -v- BHAS PASMINGO METALS LIMITED

#### DECISION OF THE WORKERS COMPENSATION APPEAL TRIBUNAL (A36/1996)

Deputy President Thompson looked at the proper interpretation of the operation of Section 31(2).

He held that the Second Schedule contemplates not just noise; indeed every occupation has noise in the generic form, but noise “capable of causing noise induced hearing loss”.

In light of this finding it is now clear that in order to have the benefit of the presumption of Section 31(2), the worker must not only prove that he/she suffers noise induced hearing loss but must also prove that he/she had been employed in work involving noise capable of causing noise induced hearing loss.

The decision is also helpful as it clarifies the purpose of Section 31(2) and Section 113(2).

Section 31(2) provides an evidentiary facilitation, and Section 113(2) identifies the employer liable.

Section 113(2) operates in conjunction with Section 31(2) with the words “*subject to proof to the contrary*”, to fix liability on the last noisy employer. It also operates as a defence for a “noisy employer” to escape the deeming provisions by showing that there was a “*subsequent noisy employer*”.

## A checklist for the determination of Hearing Loss Claims

The following is a practical checklist that we believe may be useful for determining a claim for noise induced hearing loss:

### *Hearing Loss Checklist*

#### A. FORMAL REQUIREMENTS

1. The worker must lodge a Notice of Disability and Compensation Claim Form ("CCF") in the prescribed form (Section 52(1)(a)).
2. The CCF must be lodged within 6 months of the date at which the entitlement to make the claim arose (Section 52(1)(b)).
3. The CCF must be supported by a PMC or medical report (Section 52(1)(c)).

#### B. FORMAL REQUIREMENTS (REGULATION 14)

1. An initial audiometric test must be conducted by either a legally qualified medical practitioner registered in the speciality of otorhinolaryngology, an
2. Audiologist or a person who has been adequately trained in audiometry by the National Acoustic Laboratories, the South Australian Health Commission, a legally qualified medical practitioner or an audiologist (Regulation 14(2)(a)).
3. A second audiometric test conducted by either a legally qualified medical practitioner registered in the speciality of otorhinolaryngology or approved by the Corporation, an audiologist acting under the supervision of a legally qualified medical practitioner who is registered or approved, or an audiologist (Regulation 14(2)(b)).

4. A physical examination by a legally qualified medical practitioner registered in the speciality of otorhinolaryngology, or approved by the Corporation to determine:

- i) That the worker's hearing loss is noise induced and is not due in whole or in part to ear diseases or other causes of hearing loss;
- ii) That any noise induced hearing loss is expressed as a binaural noise induced hearing loss taking into account the audiometric test of hearing.

The physical examination may be carried out at the same time as the first or second audiometric tests.

This requirement will be satisfied where an ear, nose and throat specialist has examined the worker.

#### C. PRESUMPTIONS

Generally, a disability is not compensable unless it is established on the balance of probabilities that it arises from employment.

However, a worker who alleges noise induced hearing loss is given the benefit of evidentiary aides by the Act.

1. If a worker suffers from noise induced hearing loss and carries out work involving exposure to noise, then the loss is presumed to have arisen from that employment (Section 31(2)).

However, the worker must still prove that the noise to which he is exposed was capable of causing **noise induced hearing loss** (Stead).

Additionally, the presumption does not apply where the worker has retired from employment due to age or ill health more than 2 years prior to making the claim (Section 31(4)).

- Krizanic (A40 of 1995) deals with the meaning of retirement.
2. Pursuant to Section 113(2) the loss is deemed to have occurred immediately before notice of disability is given. That is important for fixing the relevant prescribed sum.
  3. Where a worker has retired due to age or ill health then pursuant to Section 113(4) the loss is deemed to have occurred at the date of retirement.
  4. In the absence of proof to the contrary, the whole of the hearing loss is presumed to have arisen out of employment in which the person was last exposed to noise capable of causing noise induced hearing loss.

#### D. SECTION 43 ENTITLEMENT

1. Under Schedule 3, the worker is not entitled to lump sum compensation unless the level of noise induced hearing loss suffered exceeds 5%. It has not been tested whether this means the whole of the loss or the loss attributable to a particular employer.

#### E. PRACTICAL HINTS

1. An Industrial Court check should be undertaken to ensure that a worker has not received a prior assessment for noise induced hearing loss.
2. Inquiries should be made to determine whether the worker underwent a pre-employment audiogram.
3. The employer should always be contacted in order to ascertain their opinion and information regarding the worker's work environment.
4. It is important to note the length of employment and the worker's activities both pre and post employment.

5. The area is a technical and difficult one. It is advisable to seek legal advice in relation to any questions or problems concerning noise induced hearing loss.

#### F. TINNITUS

Tinnitus is often associated with noise induced hearing loss. However, tinnitus is not described in the Third Schedule and is only compensable under the AMA Guidelines.

In Gauci (A68 of 1996) the worker was awarded 10% impairment of whole body function for tinnitus. That represents a significant assessment for a serious case. The most useful hint is to see whether the worker has made consistent complaints of tinnitus to the various practitioners who have seen him or her.

## COVERED CASES

### FRANCIS -v- THE WORKCOVER CORPORATION

### WORKCOVER CORPORATION -v- FRANCIS

DECISION OF THE FULL COURT OF SUPREME COURT OF SOUTH AUSTRALIA

(Unreported dated 6 June 1996)

#### CATCHWORDS:

What is required to give a worker "notice" pursuant to Section 95(4) of the Workers Rehabilitation and Compensation Act, 1986 ("the Act")?

#### FACTS:

The worker wrote to the Corporation advising that she was forfeiting her entitlement to continuing income maintenance to enable her to take up full-time studies.

The Corporation discontinued the worker's income maintenance on the basis of Section 36(1)(a).

No notice of discontinuance was issued.

The worker issued a Review Application, which was substantially out of time accompanied by an Extension of Time Application in respect of the Corporation's decision to discontinue weekly payments.

**ISSUE:**

Does the time limitation imposed by Section 95(4) only begin to run once the worker is formally advised of the decision?

**HELD:**

The word "notice" in Section 95 does not necessarily mean a written formal notice containing review rights.

What will amount to "notice" of a decision in any given case will depend on the facts. No special notice or explanation was needed here to bring to the worker's attention the fact that her weekly payments would stop because she already knew this would happen as she had requested this in her letter to the Corporation.

**COMMENTARY:**

Decision makers should therefore ensure thorough file notation of any verbal communication to a worker that may constitute such notice.

Consistent with issue 1. in Moody (below).

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**MOODY -v- THE WORKCOVER CORPORATION**

DECISION OF THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

(Unreported dated 6 June 1996)

**CATCHWORDS:**

The worker sought review of a "decision" to discontinue weekly payments of compensation that the worker claimed had never been made.

**FACTS:**

Worker injured on 25 April 1989.  
 Worker certified unfit from 24 April 1989 to 2 May 1989.  
 Worker resigned on 30 April 1989.  
 The worker submitted CCF and Notice of Disability in relation to the injury sustained on 25 April 1989.  
 WorkCover accepted the claim but left open the issues of incapacity and rate of income maintenance.

The employer paid the worker from 26 April 1989 to 30 April 1989, which the Corporation reimbursed.

The worker lodged an Application for Review alleging that the decision made by the Corporation "in or about May 1989" to discontinue weekly payments of compensation as from 30<sup>th</sup> April 1989 constituted an unlawful discontinuance as no formal Section 36 notice of discontinuance was issued to the worker.

**ISSUE:**

- (1) Had the Corporation given "notice" for the purposes of Section 95(4)?
- (2) Can the worker use Section 95 to review a decision of the Corporation to discontinue weekly payments of compensation for the purposes of asserting that no such decision had ever been made?

**HELD:**

- (1) As to (1) above, applying Francis, that it was enough for the Corporation to make the worker aware of its determination and it did so by simply stopping income maintenance payments. The time limitation imposed by Section 95(4) began to run as from 30 April 1989.
- (2) As to (2) above, no. There is no power under Section 95 to provoke an inquiry before a Review Officer into a non-decision. A Review

- (3) Officer lacks jurisdiction to do so. However, a “decision” for the purposes of Section 95 could be identified here, namely a decision to discontinue weekly payments after 30 April 1989 on the ground that the worker had breached mutuality.
- (4) The Corporation’s decision to discontinue weekly payment of compensation was not defective and void because no formal Section 36 Notice of Discontinuance was given.

**COMMENTARY:**

Follows decision in Francis.

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**LOCAL GOVERNMENT ASSOCIATION OF SOUTH AUSTRALIA -v- DELLE-DONNE**

DECISION OF THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

(Unreported dated 6 June 1996)

**CATCHWORDS:**

A re-determination subsumes the original determination – there is no statutory power to order continuation of weekly payments pending completion of Review where re-determination made.

**FACTS:**

The worker’s claim for work-related injury was accepted on the basis of total incapacity for a closed period and thereafter on the basis of partial incapacity.

Subsequent to this determination, a re-determination was issued rejecting the worker’s claim for the same work-related injury on the basis of Section 53(7a)(b).

The worker lodged an Application for Review in respect to the re-determination alleging that the re-determination was invalid.

The Review Officer made an order pursuant to Section 36(4) that pending completion of the Review, weekly payments were to continue.

**ISSUE:**

- (1) Does a re-determination subsume the original determination?
- (2) Does the power in Section 36(4) extend to re-determinations?

**HELD:**

- (1) As to (1) above, the effect of the re-determination rejecting the claim was to subsume the original determination accepting the claim such that the worker had no entitlement to weekly payments of compensation as of the date of the re-determination.
- (2) As to (2) above, whilst the re-determination stood, the Review Officer had no statutory basis for requiring weekly payments to continue pending completion of the Review because there is no counterpart of Section 36(4) applicable to Section 53(7).

**COMMENTARY:**

This reasoning supports the argument that there is no power to evoke Section 36(4) in any decisions under Section 53(7).

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**WORKCOVER CORP-v-BECKWITH**

DECISION OF THE FULL SUPREME COURT OF SOUTH AUSTRALIA

(Unreported dated 1 August 1996)

**CATCHWORDS:**

Applicability of requirements of Section 30(5) to a claim for compensation of an aggravation of an earlier compensable disability sustained whilst the worker travelling to the workplace on public transport.

**FACTS:**

The worker who had an existing compensable disability sustained an aggravation whilst travelling to work on a bus.

The worker submitted a Notice of Disability and CCF in respect to the aggravation.

The Corporation rejected this claim on the basis that, among other things, the alleged injury occurred in the course of a journey between the worker's residence and his place of employment and there was no "real and substantial connection between the employment and the accident out of which the disability arose"; Section 30(5)(b).

#### ISSUE:

Where an aggravation of an existing compensable disability sustained in the course of a journey, do the requirements of Section 30(5)(b) apply?

#### HELD:

No. Where an existing compensable disability is aggravated in the course of a journey, then the worker can base a claim for compensation on the original injury and disability where as a matter of fact it can be shown that the incapacity suffered by the worker results from the first and second accidents.

The requirements of Section 30(5) are intended to regulate claims for compensation made on the basis of a journey injury not claims for compensation made on the basis of an earlier work-related injury which has been aggravated in the course of a journey.

#### COMMENTARY:

This reasoning is entirely consistent with the decision in [Cumming v Fasson Pty Ltd \(A12 of 1990\)](#).

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### SCOTT -v- THE CORPORATION (TOTAL SCAFFOLDING SERVICES) (NO 2)

DECISION OF THE WORKERS  
COMPENSATION APPEAL TRIBUNAL  
(A84/1996)

#### CATCHWORDS:

Calculation of supplementary benefit – previous Section 43 payment not made in accordance with Regulation 16a made – Subsequent Section 43 payment sought.

#### FACTS:

The worker received Section 43 payments that were not (through disregard or ignorance of Regulation 16a) adjusted per Regulation 16a for an injury sustained in 1992. The payment assessed the worker's loss of full and efficient use of the right arm at or above the elbow at 45%, the right shoulder at 20% and the right hand at 15%.

The worker was then subsequently awarded an assessment pursuant to Section 43 for disfigurement of 25%.

#### ISSUES:

- (1) Does Regulation 16a apply for the purposes of calculating the worker's Section 43 entitlement for the award of 25% for disfigurement?
- (2) What is the method of calculating the worker's entitlements pursuant to Section 43(7)(a) to a supplementary benefit?

#### HELD:

- (1) As to (1) above, Regulation 16a required the earlier assessments to be re-worked according to the Regulation 16a formula for the purposes of calculating the worker's assessment for disfigurement.
  - (2) As to (2) above, the worker became entitled to an assessment of 10.89% of the prescribed sum for disfigurement, ie \$10,051.47, and because the total percentage of the prescribed sum to which the worker was entitled for all Section 43 claims after the application of Regulation 16a amounted to 67.33% of the prescribed sum, the worker was also entitled to a supplementary benefit
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- (3) Of 1.5 times the excess, ie \$17,070.88.

The total amount to which the worker was entitled for all Section 43 payments in addition to the supplementary benefit amounted to \$79,216.47. The amount which the worker was to receive by way of Section 43 payment for disfigurement and supplementary benefit was arrived at by deducting the amount the worker had already been paid for the previous Section 43 payments from the amount of \$79,216.47.

#### COMMENTARY:

This may on occasions result in the worker not being entitled to any further payment.

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## Health & Other Services Compensation Act 1995

### Introduction

**It has now been three months since the inception of the Health & Other Services (Compensation) Act 1995 (“the Act”) which commenced on 1 February 1996.**

The Health Insurance Commission (“the Commission”) has provided most insurers with detailed information in relation to the effects of the Act, together with proforma notices to be used by insurers in order to comply with the Act.

Agents should by now have systems in place to ensure compliance with the Act.

To facilitate notification, the Commission has also developed a system for sending the information electronically on diskette.

### Purpose & Scope Of The Act

The Commission has indicated that the Act has been introduced in order to prevent “double dipping” in Medicare (and nursing home benefits) by people who receive compensation for an injury. The types of compensation covered by the Act include

Common Law damages and payments of compensation either pursuant to an insurance scheme or according to law, except where the claimant has contributed to the scheme.

The Act does not apply to Criminal Injuries Compensation, compensation in respect of fatal injury (unless some part of the compensation relates to medical expenses) or, as previously mentioned, schemes of insurance to which the claimant has contributed.

There is nothing to prevent the claimant from claiming Medicare benefits whilst a compensation claim is in dispute. However, the Commission recovers these if the claim is ultimately successful.

The Act affects any settlement or judgement made on or after 1 February 1996 irrespective of whether the injury occurred, or the Medicare payment was made, before or after 1 February 1996.

### Notice Of Claim

The Act requires insurers to give the Commission written notice of all compensation claims lodged against them. This is known as a “Notice of Claim”. The content of the notice is as follows:

- Name, address and date of birth of the claimant.
- Date of injury.
- Nature of injury.
- Identity of the insurer.

The timetable for providing notice where claims are being disputed is as follows:

- Claims before 1 February 1991: No notice required.
- Claims between 1 February 1991 and 1 February 1996: Notice by 1 February 1997.
- Claims after 1 February 1996: Notice within 6 months of receiving claim.

### **Notification Of Intention To Recover “Eligible Benefit”**

“Eligible benefit” is defined as a Medicare or a nursing home benefit.

The Commission may give to the insurer written notice of its intention to seek reimbursement in respect of any settlement or judgement. This is known as a “Notice of Intention to Recover Payments”.

A copy of this notice must go to the claimant.

The Commission may also give notice to the claimant requiring the claimant to give it information in relation to medical services provided to him or her in relation to the injury the subject of the claim.

A claimant must give the abovementioned information to the Commission within 28 days.

If a claimant does not give the requested information, all medical services provided to the claimant are deemed to be related to the injury the subject of the claim.

The Commission may also give the insurer notice of the total amount of eligible benefits paid in relation to the injury the subject of the claim. This is known as a “Notice of Past

Benefits”. Again, a copy of this notice must go to the claimant.

### **Notice To Claimant Advising Of His/Her Liability To Repay Under The Act**

This notice must be given by the insurer to the claimant prior to settlement.

### **Notice Of Discontinuance/Settlement/Failure Of Claim/Judgement**

Where a claimant discontinues with his or her claim or a court decides that there is no liability, the insurer must give notice to the Commission within 28 days.

Similarly, an insurer is required to give the Commission notice of any settlement or judgement.

The Notice of Judgement or Settlement must be signed by both the insurer and the claimant and also be given within 28 days.

Where the Commission receives a Notice of Judgement or Settlement, save for a certain exception it must give the insurer written notice (known as a “Notice of Charge”) of the amount repayable.

### **Repayment Of Eligible Benefits To The Commission**

Repayment must occur within 28 days of receiving the Notice of Charge from the Commission.

If the settlement or judgement fixes an amount for contributory negligence then the amount repayable to the Commission is reduced by a corresponding percentage.

If the judgement fixes the amount for past medical expenses, then this is in fact the amount repayable to the Commission, even if the Medicare benefit paid was higher.

Where an amount is repayable under the Social Security Act 1991 the amount repayable to the Commission will be limited to the difference between the amount of compensation of the settlement or judgement and the amount repayable under the Social Security Act 1991.

### **Conclusions**

Whilst it is still too early to comment on the effectiveness of the Act, some early concerns expressed by insurers include:

1. Notices which are being sent to claimants in dormant matters may have the unintentional effect of re-activating claims.
2. No provision for a similar reduction where there has been a discount for liability for other reasons.
3. Delays in receiving the Notice of Charge are resulting in a delay in releasing settlement monies to claimants.

Although the Commission has indicated it will look into these concerns, at the same time it has stressed that it is of the utmost importance for the time being for insurers to notify the Commission of claims where settlement or judgement is imminent.

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## CYBERSPACE

Our Melbourne affiliates, Rogers + Gaylard, have internet access and are available to their clients “online” through e-mail. They also have a home page on the internet. Gun & Davey will follow their lead shortly. The following is an extract of some interesting items that they have caught on the “net”:

Workers Compensation is alive and well in the good ol’ U.S. of A. John Miller is a Californian attorney and partner with the firm Miller Folse. Like his six partners and associates, he specialises in Workers Compensation Law. John tells us by e-mail that the method of running a case in California is slightly different – the attorneys are expected to have extensive knowledge of medical issues and each side has an opportunity to “examine” “opponents” witnesses by sworn deposition before they get to Court!

Beware of the peril of e-mail! Whilst some are addicted to this convenient form of communication, a disturbing trend has emerged in litigation in the U.S.A. Messages that were thought to have been deleted from the system are being tracked down and

reproduced by computer experts – to the embarrassment (and financial detriment) of those who thought they were rid of the evidence by a simple keystroke!

The message is clear, be careful what you commit to writing. A “throw away” line may return when you least expect it.

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## CORPORATE CUP

Our staff recently competed in the basketball Corporation Cup at the Clipsal Powerhouse, a knockout event. After a tremendous victory over Mutual Community the “Grunners” were defeated by the Woodville and Hindmarsh City Council.

We’ll be back next year!

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### ***The Gun & Davey Workers Compensation Team Are***

#### **Lawyers:**

**Michael Ricketts** LL.B. – Managing Partner

**Mark Calligeros** BA, LL.B. - Partner

**Paul White** LL.B. – Associate

**Tas Carabelas** LL.B. – Senior Associate

**Paul Gabrynowicz** LL.B.-Associate

**Anna Moeller** BA (Jur) LL.B.-Associate *assisting* Michael Ricketts

**Dara Cirelli** LL.B (Hons) B Com – Associate *assisting* Tas Carabelas

**Simon Harvey** LL.B (Hons) – Associate *assisting* Mark Calligeros

#### **Support Staff:**

Rebecca Hage

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