

# *Gun & Davey* **Covered**



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## Welcome

Welcome to this our second issue of *Gun & Davey – Covered*.

We were encouraged by your positive response to the first issue.

In this issue we look at new conciliation and arbitration provisions.

We also provide a commentary on “Journey Disabilities” and new cases impacting upon that area.

In this month’s “Covered Cases” two very important recent decisions stand out. They are [Green -v- Wardleworth](#) and [Currant -v- WorkCover Corporation \(Tivoli Hotel\)](#).

We trust you find Issue 2 of value.

Regards

Michael Ricketts

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In This Issue			
Welcome	1	Handy Hints	8
Journey to..	1	Directory	11
Covered Cases	6		

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## Journey To...?

For a brief moment it appeared as though the most recent amendments to Section 30 of the Act would severely limit the instances where a disability suffered by a worker arising out of or in the course of a journey could be considered “compensable” within the meaning of the Act. However, a number of cases handed down since the decision of the Supreme Court in [Karanicos](#), make it clear that there remain many situations where a *journey disability* is compensable.

The following commentary provides an overview of developments in the law concerning *journey disabilities*. As is often the case with the Act, the sands are shifting.

### Section 30(5)

Section 30(5) provides that:

“(5) A disability that arises out of, or in the course of, a journey arises from employment only if-

- (a) *The journey is undertaken in the course of carrying out duties of employment; or*
- (b) *The journey is between-*
  - (i) *The worker’s place of residence and place of employment; or*
  - (ii) *the worker’s place of residence or place of employment and- an educational institution the worker attends under the terms of an apprenticeship or other legal obligation, or at the employer’s request or with the employer’s approval; or a place the worker attends to receive a medical service, to obtain a medical report or*

certificate (or to be examined for that purpose), to participate in a rehabilitation program, or to apply for, or receive, compensation for a compensable disability.

- (iii) And there is a real and substantial connection between the employment and the accident out of which the disability arises.”

## When Is A Journey Disability Compensable?

The word “journey” has been given a common sense meaning by the courts.

A journey includes travelling by all forms of transport, where the worker is the passenger or driver of a car, truck, motorcycle, bicycle or a passenger in a taxi or bus. The journey must be a journey undertaken by a reasonably direct route. It may include an interruption or deviation, which is insubstantial and does not materially increase the risk of injury to a worker.

The journey must fall within the meaning of Section 30(5)(a) or Section 30(5)(b) of the Act.

In limited circumstances a worker who suffers an aggravation of a prior compensable disability in the course of a journey may claim that the resulting disability resulted from the earlier compensable disability and, in that way, avoid the need to satisfy the requirements of Section 30(5).

### Section 30(5)(a)

Where the journey is in the course of carrying out duties of employment

In [Trans Adelaide -v- Karanicos \(Full Supreme Court – Unreported, delivered 3<sup>d</sup> April 1996\)](#) Chief Justice Doyle outlined the approach that should be taken in interpreting the expression “duties of employment.”

He stated that: - *“...as a matter of ordinary language [the expression] is a reference to the carrying out of tasks under a contract of employment or performance of an activity*

*which is related to that which the worker was employed to do. This is by no means a precise test, and has to be applied in a common sense and practical manner. But to my mind the ordinary meaning of the language suggests that it requires an affirmative answer to the question of whether one would say that in undertaking the journey the worker was performing the worker’s job, complying with an instruction from the employer given by the employer in the exercise of its control as an employer, or doing something reasonably incidental to one of those things. It is also necessary to view the journey in context. By that I mean that one should not look at the journey in isolation but should consider what preceded it and what was going to follow it. Sometimes the link between the journey and the employment will only emerge when the journey is seen in context.”*

The inquiry is not restricted to those things, which a worker is literally or specifically required to do.

In [Karanicos](#), a worker who was suffering from an earlier compensable disability suffered a further and different disability whilst travelling to her treating doctor’s surgery to seek treatment in relation to the earlier compensable disability. The Chief Justice concluded that as a matter of ordinary language, a journey undertaken to obtain treatment for or in connection with a disability would not be regarded as carrying out duties of employment.

It is clear that there is an *overlap* between the expressions “duties of employment” and “in the course of employment”. At present the courts have been reluctant to explain the precise nature of the relationship between the two.

From [Karanicos](#) it is clear that a worker’s discharge of obligations imposed by statute does not in itself constitute duties of employment.

Hence, in [Gerard Industries -v- Armatys \(A121/1996\)](#) Deputy President Thompson decided that the fact that the journey in which the worker was injured was undertaken by the

worker by taxi as part of a return to work plan did not mean the worker could be regarded as carrying out duties of employment within the meaning of Section 35(5)(a). This was so even though the journey was undertaken by the worker in order not to breach the obligation of mutuality owed to the employer and not to contravene Section 36(1A)(e) of the Act.

In accordance with the comments made by the Chief Justice, the expression “duties of employment” is not fixed in meaning nor narrow in application.

Certainly if the worker is being paid and directed by an employer to undertake a journey, then a disability occurring during that journey is likely to fall within the meaning of Section 30(5)(a) of the Act. An example that comes to mind is that of courier driver who is injured whilst making a delivery.

Actions taken in response to the express directions of an employer in connection with or as part of a journey are likely to fall within the meaning of Section 30(5)(a). In [Centofanti -v- The Corporation \(A82/1996\)](#) the worker had a private agreement with another employee to take him to his place of employment but was directed by his employer to take the other employee to a different place of employment, and during that journey the worker was injured. Deputy President Gilchrist held that the journey in which the worker was injured was undertaken in the course of carrying out duties of employment.

In determining whether a journey was undertaken in the course of carrying out duties of employment it may be necessary to consider contemporary employment Values. For instance, in [Natural Resources -v- Wickham \(A126/1996\)](#) a worker was injured when he fell off his bicycle on route from his home to the employer’s car depot where he intended to collect a work vehicle and proceed to a work site. The worker’s usual place of employment was at a head office located in the city. The worker had decided that it would be to waste time to travel to the head office and then return to collect his car. Deputy President Parsons held that the journey in which the worker was injured was undertaken in the course of employment having regard to

important contemporary employment values of “efficiency and productivity”.

Special considerations may also apply where a worker is required to work in a remote area and is injured whilst travelling to that work site. In [State of South Australia -v- Atwell-Gill \(A105/1996\)](#) Deputy President Parsons held the fact that the school teacher worker was required to utilise his first two paid duty days of the school term to travel from his place of residence to the remote school location was an acknowledgment by the employer that such travel was necessarily **incidental** to the performance of his teaching duties and so undertaken in the course of carrying out duties of employment.

Special considerations may apply where a worker is required to travel to a remote location to work for a period of time. In such a case the period of the stay, save for conduct unrelated to employment, may be considered **part of or incidental** to the worker’s duties of employment: [Cavanagh -v- WorkCover Corporation \(A120/1996\)](#).

## Practical Hints – Section 30(5)(a)

This provision is likely to be the subject of constant evolution.

We suggest that agent’s liaise closely with employers when making a determination involving the possible application of the section.

Agents and employers will need to obtain details of a worker’s contract of employment and any directions the worker may have been required to follow.

## Section 30(5)(b)

### Where the journey is between the worker’s place of residence and place of employment

We refer you to the definition of “place of employment” in Section 3 of the Act and highlight that a worker’s place of employment is any place where the worker is required

under the terms of the contract of employment to carry out his or her duties of employment – potentially a very expansive concept.

As to the meaning of a workers place of residence, the word “residence” is statutorily defined by Section 3 of the Act.

Presumably, a place of residence need not be a house but could include a hotel, motel room, caravan etc.

Difficulties arise in certain situations in determining where a worker’s place of residence stops and the journey begins. The Act previously provided that a journey was to be taken as having commenced at a worker’s place of residence once the worker had progressed beyond land appurtenant to the house or other structure in which the worker resides and similarly that a journey would be taken to have terminated at the worker’s residence when the worker reached land appurtenant to the house or other structure in which the worker resides. No such statutory definition now exists. As such, much will fall to be determined on the individual circumstances of each case. To our knowledge there is no case of binding authority yet delivered which pronounces on the amendments to the definition of place of residence.

However, the word “between” as appearing in Section 30(5)(b) does not necessarily exclude injuries that occur purely within the boundaries of the worker’s residence. For instance in [Barton -v- City of Henley & Grange \(A5/1988\)](#) a worker who had left his home and had driven some distance on a public street only to discover a flat tyre and returned to the driveway of his home to change the tyre where he was injured, was found by the majority of the Full Supreme Court to be in the course of a journey between his place of residence and place of employment, notwithstanding that the injury took place within the boundaries of the worker’s place of residence.

**Journey between the worker’s place of residence or place of employment and an educational institution the worker attends under the terms of an apprenticeship or**

**other legal obligation, or at the employer’s request or with the employer’s approval.**

Whether a journey in the course of which the worker is injured is a journey of this nature involves a question of fact and law as to what amounts to “an apprenticeship”, “other legal obligation”, “employer’s request” or “employer’s approval” in the circumstances of each case.

**Journey between the worker’s place of residence or place of employment and a place that the worker attends to receive a medical service, to obtain a medical report or certificate (or be examined for the purpose) to participate in a rehabilitation programme or to apply for, or receive, compensation for a compensable disability.**

The same considerations apply here as for the last two described types of journey.

“Medical services” are defined by Section 3 of the Act as meaning an attendance, examination or treatment by a medical expert (including the obtaining from a medical expert of certificate or report), or any diagnostic examination or tests required for the purposes of treatment by a medical expert.

“Medical expert”, is also in turn defined by Section 3 of the Act as meaning “a legally qualified medical practitioner, a registered dentist, a registered psychologist, a registered optician, a registered physiotherapist, a registered chiropractor, a registered podiatrist, a registered occupational therapist and a registered speech pathologist”.

In [WorkCover -v- Tulloch \(A115/1996\)](#) the worker visited a doctor and was prescribed medication. At the conclusion of her consultation with the doctor the worker left the surgery. She walked through the car park immediately outside the building in which the surgery was situated and then proceeded to walk through the car park of the adjoining block into the chemist shop for the purpose of procuring the medication that had been prescribed for her. Having done so, she walked

out of the chemist shop and whilst walking through that car park was injured.

Deputy President Gilchrist held that the meaning of the word “place” in the phrase “a place that the worker attends to receive medical service [etc]...” would depend upon the circumstances of each case. He concluded that a pharmacist is not a “medical expert” and that the worker’s visit to the chemist shop did not extend the “place” at which she received the medical service provided by her doctor. Therefore, he held that the worker was not still at the place where she received the medical service when she suffered the subject injury despite the fact the car park was proximate to the surgery where the worker received a medical service and prescribed medical certificate.

*It is important to note that the requirements of a “real and substantial connection” and that the journey be by a “reasonably direct route” which may include an interruption or deviation which does not substantially nor materially increase the risk of injury, apply to curtail the applicability of Section 30(5)(b). We now address the first of these requirements.*

**A real and substantial connection must exist between the employment and the accident out of which the disability arises.**

In order to satisfy Section 30(5)(b) this condition must be made out.

It is the accident and not the journey that must be proved to have the connection with employment for the injury arising from the accident to be compensable – Karanicos.

It is not enough to say but for the worker’s employment the accident would not have occurred.

In WorkCover Corporation -v- Butson (A17/1996) the worker attended a social function organised by his employer at a time coinciding with the commencement of the worker’s shift at a hotel where the employer supplied food and some complimentary alcoholic beverages. The worker was paid for the whole of his shift. The worker became drunk and disorderly and set off in his car to

presumably go home and was then injured in a motor vehicle accident. At the time he left the hotel, the social function had almost wound down and there were only a handful of people who remained, mainly hotel staff. Deputy President Gilchrist found that the worker’s state of inebriation was a substantial cause of the accident. Because the liquor in question had been supplied by the employer and because the worker was expected to attend the function during normal working hours and was paid for his attendance, His Honour found that there was a real and substantial connection between the employment and the accident out of which the disability arose.

## Practical Hints – Section 30(5)(B)

The expression “real and substantial connection” does mean that it will be difficult for a worker to satisfy the requirements of Section 30(5)(b).

Advice should be generally sought before determining a claim pursuant to Section 30(5)(b).

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### The Decision In WorkCover Corporation -v- Beckwith

**Full Supreme Court Unreported, delivered 1 August 1996)**

**In this case Chief Justice Doyle indicated that a worker who suffers an aggravation of a prior disability in the course of a journey may claim that the resulting disability resulted from an earlier disability and, in that way, avoid the need to satisfy the requirements of Section 30(5).**

The decision in Beckwith is consistent with the earlier judgment of the Court in Green -v- Wardleworth.

So, where a pre-existing compensable disability is aggravated in the course of a journey, the worker can base the claim for compensation on the original injury and disability, if as a matter of fact it can be shown

that the incapacity suffered by the worker results from both incidents.

It should be noted, that to fall within the exception created by Beckwith the worker must aggravate a pre-existing work related injury. For example, if the worker suffered an earlier compensable disability to his knee but subsequently sustains a disability to his shoulder whilst on a journey not covered by Section 30(5) of the Act, then the worker's claim is not compensable.

## Practical Hint

Before accepting a worker's claim for compensation on the basis of Beckwith's case, agents should first obtain both a loss assessors report and an independent medical report asking the relevant medical expert to comment upon the likely connection between both the earlier and subsequent disabilities.

### Note:

Please note that our commentary is intended to be used as a reference only. The law is complex and legal advice should often be sought once the facts are clearly established.

## COVERED CASES

### GREEN v. WARDLEWORTH

**DECISION OF THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA (Unreported dated 1<sup>st</sup> August 1996)**

### Catchwords:

Liability for income maintenance payments – Incapacity – Action for common law damages for personal injuries – Ability to exclusively attribute incapacity flowing from secondary disability to earlier work related incident.

### Facts:

The worker sustained injuries, including a left knee injury, in a compensable journey accident.

The nature of the left knee injury was instability of the left knee, which had a propensity to collapse.

The worker sustained a further injury to his left knee in a fall in the course of his employment with a subsequent employer.

In relation to this further injury, the Trial Judge in proceedings for damages at common law arising from the compensable journey accident found that but for the existing disability at the time of the fall, the worker would not have sustained the further injury at all or to the same extent to his knee which he did sustain in the fall ie, it was as a result of the predisposition of the injured left knee to suffer injury, that the left knee was further injured/aggravated by the fall.

The Trial Judge further found that the worker's incapacity for work following the fall was worsened as a result of the fall.

Thereafter except for a short interlude, the worker was totally incapacitated for approximately four years.

The Trial Judge found that all of the worker's loss of earning capacity head of damage was attributable to the motor vehicle accident. That is, the Trial Judge concluded that as a matter of fact, the worker's total incapacity for work for the four-year period was attributable to the injury sustained in the motor vehicle accident.

### Issues:

Does the Act require as a matter of law that any incapacity following from a secondary disability be attributed to the earlier compensable disability?

### Held:

No – The question is one of fact and not of law.

The Court relied on a quotation by King J in *Australian Eagle Insurance Company Limited –v- Federation Insurance Limited (1976) 15 SASR 428* -

*“If, at the time of the second accident, the physical consequences of the first accident have stabilised to the degree that they can fairly be regarded as spent and as leaving only a vulnerability to injury from future trauma, the incapacity flowing from the second accident cannot be regarded as a result of the first accident but must be regarded as a result of the second accident only... If, however, the worker’s condition is still unhealed or unstable and the incapacity would not have occurred but for the unhealed or unstable condition, the incapacity must be regarded as resulting from the first accident as well as from the second accident. Moreover, where the second accident is a mere aggravation or recurrence of the injury sustained in the first accident and is brought about by the ordinary and reasonable conduct on the part of the workman, the consequent incapacity must, in my opinion, be regarded as the result of the first accident as well as a result of the second accident.*

Therefore, in the context of this case, as the Trial Judge had found that the fall caused an aggravation of the existing disability suffered by the worker, because the condition of the worker’s knee immediately prior to the fall was such that the worker was predisposed to suffer an aggravation of the condition in the event of a fall, the Full Supreme Court found that the incapacity flowing from the fall could be regarded as a result of the motor vehicle accident and attributed thereto as a matter of fact.

#### **Commentary:**

This decision is consistent with the decisions of *WorkCover Corporation –v- Beckwith (Full Supreme Court of South Australia, unreported dated 1<sup>st</sup> August 1996)*, and *BHP –v- Morley (A83/1994)*

## **CURRAN –v- WORKCOVER CORPORATION (TIVOLI HOTEL)**

### **DECISION OF THE WORKERS COMPENSATION APPEAL TRIBUNAL (A97/1996)**

#### **Catchwords:**

The Third Schedule – worker can elect method of assessment where disability can be characterised by more than one stipulated impairment.

#### **Facts:**

The worker sustained a stab wound to the base of his left thumb, severing the radial digit nerve. The medical evidence supported a finding of loss of function of the left thumb, hand or arm below the elbow.

By determination of the Corporation the worker’s Section 43 entitlements were assessed at 10% loss of full and efficient use of the left thumb.

The worker lodged a Review Application asserting that the subject disability should have been expressed as impairment to his left hand or of his left arm below the elbow.

The Review Officer concluded that as the origin/site of the disability was the worker’s thumb, the thumb was the correct assessment.

#### **Issues:**

1. What is the appropriate method of assessing impairment pursuant to Section 43?
2. Can the worker elect the method of assessment where the disability can be characterised by more than one stipulated impairment?

#### **Held:**

Where a particular disability can be fairly characterised by reference to more than one of the stipulated impairments contained in the Third Schedule it is not for the assessor, ie

the Corporation or a Review Officer, to select which of the stipulated impairments best encapsulates the particular disability and then to make the assessment by reference to that impairment. Rather if a particular disability can be fairly characterised by reference to more than one of the stipulated impairments, it is for the worker to elect how the assessment is to be made.

A worker is entitled to seek an assessment pursuant to Section 43 in any way in which he or she thinks fit, provided that the disability falls within the category that the worker elects.

In this case the worker's disability could conveniently be classified as a percentage loss of function of the left thumb or of the hand. It was open for the worker to have his entitlement to compensation assessed either as a loss of function of the thumb or a loss of function of the hand.

#### **Commentary:**

We do not agree with this decision and we believe there is room to challenge this before another member of the Tribunal.

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### **SOUTHAM –v- TRANS ADELAIDE**

#### **DECISION OF THE WORKERS COMPENSATION APPEAL TRIBUNAL (A70A/1996)**

#### **Catchwords:**

Whether Section 33 of the Workers Rehabilitation and Compensation (Miscellaneous Provisions Act) Amendment Act 1995 removes a worker's entitlement for an assessment pursuant to Section 43 for loss of capacity to engage in sexual intercourse pursuant to the AMA Guides.

#### **Facts:**

In an appeal against the decision of a Review Officer that the worker's claim pursuant to Section 43 for loss of capacity to engage in sexual intercourse was statute barred, the worker submitted, among other things that Section 33 of the amending Act does no more

than remove the item of permanent loss of capacity to engage in sexual intercourse from the table in the Third Schedule and that the worker still has an entitlement to an assessment for loss of capacity to engage in sexual intercourse assessed pursuant to the AMA Guides.

#### **Held:**

That Parliament clearly intended in the amending Act to abolish this type of claim completely.

Had Parliament proposed to retain an assessment under the AMA Guides then one would have expected this to appear in the amending Act.

#### **Commentary:**

We have reservations as to the correctness of this decision. It is our view that the amending Act simply removes the item of permanent loss of capacity to engage in sexual intercourse from the table of the Third Schedule.

Whilst this decision is binding upon Review Officers, it can only be regarded as persuasive amongst Tribunal members.

Our inquiries to date have shown that the worker does not intend to appeal this decision to the Supreme Court.

## **Handy Tips**

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### **Section 47 Interest on Arrears of Weekly Payments**

Section 47(1) provides for interest at the prescribed rate to be paid on any amount in arrears where a weekly payment is not paid as and when required to be paid under the Act or is delayed pending resolution of the dispute under the Act.

Section 47(2) provides however that no interest is payable if the delay is attributable to some fault of the worker.

Deputy President Hardy in the matter of [Dolan \(A116/1996\)](#), interpreted Section 47(2) as mandatory, so that if a worker has even partially contributed to the delay in the receipt of the proper amount of weekly payments to which he or she is entitled then no interest is payable on the arrears.

In that case the worker's own conduct contributed to the delay in resolving the dispute concerning the quantum of his weekly payments as he had lodged his application for review some nine months out of time. It was held that in those circumstances there was no discretion on the part of the Review Officer to award interest.

### Review Officer Jurisdiction – Award Interpretation & Application

Section 4(7)(a) provides that where a worker's remuneration is covered by an Award or an Industrial Agreement then that worker's average weekly earnings cannot be less than the weekly wage which the worker was entitled to under the Award or Industrial Agreement.

Deputy President Hardy in the last mentioned matter of [Dolan](#) held that a Review Officer does have jurisdiction to delve into Award interpretation and its application to the duties undertaken by a worker pursuant to Section 4(7)(a).

Therefore a Review Officer and Conciliator/Arbitration Officer are able to determine which is the appropriate Award and classification under such Award.

### Issue Estoppel

In [Jones -v- SA Health Commission \(Tregenza Avenue Aged Care Centre\) \(A82/1996\)](#), the worker sought to appeal from a Review Officer's determination confirming the exempt employer's assessment of the worker's claim for non-economic loss for lower back disability pursuant to Section 43 at nil.

In a previous review application concerning a Section 36 determination, a Review Officer had made a finding that the worker's compensable disability resulting in a period of temporary incapacity had come to an end on the basis of medical opinion.

On appeal, Deputy President McCusker held that issue estoppel did operate in respect of the second Review Officer's decision and the worker was therefore estopped from contending facts, which contradicted the finding of the first Review Officer. The second Review Officer was bound to adhere to the findings made by the first Review Officer and it followed that there is no scope for an assessment to be made under Section 43 of the lower back.

### Conciliation Officers Power to Make Fresh Determination

There have been doubts expressed over the ability of a Conciliator to make fresh determination to give effect to an agreement reached by the parties to conciliation conference.

There should not be, pursuant to Section 92C(6) of the Act, a Conciliator presiding at a conference may make a determination or order to give effect to a settlement reached at the conference.

### Discovery of Surveillance Material in Conciliation Proceedings

Pursuant to Section 92(1)(b) of the Act each party to a dispute must disclose to the Conciliator the existence and nature of all evidentiary material.

However pursuant to Section 92(2)(a) and (b) of the Act, if the Conciliator agrees, a party need not give the other party access to evidentiary material, if the material is a video tape, photographic material or a report of surveillance or disclosure of the material could prejudice the investigation of a suspected offence.

The obligation to produce such evidentiary material is therefore less stringent than the same obligation in the context of review proceedings established by Section 96(1)(a).

An application for non-production to the other party must however be made at the conciliation stage if Section 92(2)(a) and (b) are relied on. Such an application should be made by letter to the Conciliator before the conciliation conference.

What is important to note is that Section 92(2)(a) only excludes production to the other party of material in the form of a videotape, photographic material or report of surveillance? Section 92(2)(b) is not limited by the categories of documents listed in sub-Section (2)(a). Therefore any other material, which can be regarded as prejudicing the investigation of a suspected offence, for instance, a loss assessor report that contains a witness statement suggesting fraud on the part of the worker, need not be produced. We are of the view that this is the case whether investigations are currently in train with WorkCover Fraud or are not at present but may well be.

Moreover, Section 92(2)(a) and (b) does not generally excuse a party from not discovering the existence of a piece of evidentiary material to the Conciliator or other party. This obligation remains. However, it is now arguable that the existence of material need not be disclosed to another party if the Conciliator agrees the disclosure (“discovery”) of that material could prejudice the investigation of a suspected offence.

## 14 Day Cut Off

It is very easy to forget Rule 4.4 of the Worker’s Compensation Tribunal Rules 1996 which provides that evidence of an expert witness must be produced by documents filed and served at least 14 days prior to the hearing of the arbitration or such later period as the Arbitration Officer may allow pursuant to Rule 4.5. Where a party fails to do so, that party may not rely on that document nor if the document is a witness statement, call the witness without leave, subject to such terms

and conditions as the Arbitration Officer may impose.

A system of diary entries is recommended to ensure that Rule 4.4 is complied with.

## WCT Practice Directions to Date

Three Practice Directions have been issued by His Honour Judge Jennings, President of the Workers’ Compensation Tribunal, dated 25<sup>th</sup> June, 4<sup>th</sup> September and 6<sup>th</sup> September 1996 respectively.

The first of these directions requires that an applicant filing a Notice of Dispute must provide sufficiently detailed reasons as to why the decision is disputed and that a compensating authority, which seeks an extension of time within which to complete reconsideration, stipulates the amount of time required to complete it.

The second practice direction indicates that the purpose of call-overs before the Review Panel is not only to allocate an appropriate hearing date but to also provide an opportunity for the parties to negotiate a resolution of the matter. That practice direction requires that the representatives with conduct of the file attend the call-over together with their client or representative of the compensating authority authorised to negotiate a settlement of the matter.

The third practice direction provides that where a Conciliator needs to make urgent communication with the parties and the parties are represented by a solicitor or agent who cannot be contacted, a Conciliator is at liberty if he/she thinks it necessary to contact the party direct. It also provides that once the matter has been listed for an arbitration hearing it will only be in the most exceptional cases that the hearing date will be changed. The unavailability of preferred counsel is not an exceptional case.

The practice direction provides for the power of Arbitration Officers to convene if they think necessary a pre-arbitration conference. This practice direction also provides for the filing of a statement of witness’ evidence in chief 14

days prior to the arbitration hearing and in the case of a non-expert witness, that such witness must be made available for cross-examination at the hearing unless otherwise agreed between the parties and the Arbitration Officer.

Further, the direction notes that if a party needlessly requires the cross-examination of a witness then that party may be ordered to pay the costs associated with such examination. An Arbitration Officer may also recommend or direct the parties file a Statement of Claim and Statement of Defence.

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