Gun & Davey

# Covered

**Volume 1, Issue 3 - January 1997**

## WELCOME

Welcome to this our third issue of Covered and first for 1997.

In this issue you will find a helpful guide to the initial management of stress claims written by Paul Gabrynowicz. We also announce our somewhat innovative lease of Chambers at Riverside Centre, the new home of the Worker's Compensation Tribunal.

Finally, Covered Cases provides an interesting cross-section of recent case law in our jurisdiction.

You will note that we have attempted to keep our articles and case summaries shorter following your helpful suggestions that we do so.

All of us at Gun & Davey take this opportunity to wish you a Happy New Year. We look forward to our continuing relationship in 1997.

Happy New Year,

Michael Ricketts

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## STRESS CLAIMS MADE EASY?

**A short guide to Section 30A for Case Managers and Employers**

1. For an illness or disorder of the mind to be compensable employment must be a <u>substantial</u> cause of the disability. That does not mean that employment must be the only cause or the major cause of the disability. The requirement is merely that employment must be a substantial cause. The cause of stress is more often than not multifactorial. As such a determination as to whether employment was a substantial cause requires the weighing of the various stressors in the worker's life to reach a conclusion. In the final analysis whether or not employment was a substantial cause is a question of fact.

2. Even if employment is a substantial cause the disability may not be compensable if it arises <u>wholly</u> or <u>predominantly</u> from one of the "reasonable action/manner" exceptions. The onus lies on workers to prove that their condition does not arise wholly or predominantly from a reasonable action etc. See the decision of the SA Full Court in SA Mental Health Services Inc v Margush.

3. The "reasonable action/manner" exceptions: -



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(a) The term "reasonable" does not impute perfection. It involves a judgment based on

(b) Facts known or which ought to have been known at the time of the "action". It is nevertheless an objective test in the sense that the action/manner is measured against the standard of the hypothetical reasonable employer. Even though the action, with the passage of time, is proved to be the "wrong" course of action that does not necessarily mean that the action was unreasonable.

(c) The meaning of the term "administrative action" taken in connection with the worker's employment is not easily ascertained. In Summers case the Full Court held that those words "include a course of action or a general instructions by the employer or a general approach by an employer to a particular job or a particular situation". Yet the Tribunal stated in Ockenden's case that the term "does operate to exclude stress attributable to a worker's inability to cope with the worker's employment (even) if that stress was attributable to decisions by the employer which were reasonable". Hence in that case a worker who found it difficult to cope with the changing demands of the workplace was compensated.

4. One should not be beguiled by the apparent simplicity of the guide. Stress claims are complicated by the range of experiences we as humans face on a day-to-day basis. They are among the most difficult to manage. Trust between the parties has disintegrated. Strong feelings of right and wrong are involved. Unusual personalities crop up. There are factual disputes all of which leads to distorted perceptions of the events ad personalities involved.

5. In dealing with most stress cases we would recommend that you: -

6. Obtain statements from the "players".

(a) Seek a report from a non-treating psychiatrist (treating psychiatrists are in an invidious position where they have to balance the welfare/treatment of their patients with the expression of their objective views).

(b) Investigate what is going on in the worker's personal life (eg from co-workers).

(c) Investigate whether the worker has previously had psychiatric treatment (eg from the worker's GP).

(d) Consider the statements to identify what is not in contention between the parties. It may be the case the claim should be rejected/accepted on that basis above.

(e) If there is an element of good faith between the parties (eg. the employer acknowledging that the worker had previously given many good years of service) investigate opportunities for the parties, to "self conciliate".

(f) If you are of the view the claim should be accepted discuss that view with the employer. Face to face is



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often better. Emphasise the fact that the legislation is not “fault” based (ie. if the reasonable action/manner exceptions have no application).

(g) Advise the worker and the employer of the complicated nature of the investigatory process and that there is likely to be delay in finally determining the claim.

(h) Consider commencing a rehabilitation program whilst the investigatory process is being undertaken.

Obviously the application of the above recommendations will vary from case to case. Good luck!

## BIBLIOGRAGHY

Price, WCAT A45/1995
Kalogiannidis, WCAT A72/1995

Margush, Supreme Court Judgment No S5246 of 1995

Summers, Supreme Court Judgment No S5278 of 1995

Ockenden, WCAT A49/1996

Filzell, WCAT A130/1996

Farrow, WCAT A139/1996

## GROUND BREAKING DECISION

On 27 September 1996 Arbitration Officer Pope of the Workers' Compensation Tribunal published her decision in the matter of *John Adams v WorkCover/NZI (WB & SM Doser)* confirming the decision of NZI Workers' Compensation (SA) Ltd pursuant to Section 42A(4) of the Act reducing the worker's LOEC entitlement pursuant to Sections 42A(2) and (3) on the ground that he was capable of carrying out work as an invoice clerk for a period of three hours per day, five days per week.

Michael Ricketts conducted the arbitration on behalf of NZI and considers that on the facts, it was an excellent case to run.

An Appeal was promptly instituted by the worker and was argued before the Workers' Compensation Tribunal on Tuesday 10 December 1996: Tas Carabelas conducted the Appeal.

The arguments related not only to the facts but also the meaning of the terms “suitable employment” and “commonly available” in Section 42A(3)(d).

We will keep you posted.

## MOVE TO RIVERSIDE

As you may be aware the Workers' Compensation Tribunal have relocated to the 6th Floor, Riverside Centre, North Terrace, Adelaide.

The Riverside Centre is a modern building with comfortable appointments. No doubt the move will be appreciated by everyone involved in the new system.

*GUN & DAVEY* is pleased to announce that we have leased an office in Riverside Chambers at the Riverside Centre, which is located at the Plaza Level.

We anticipate that the new Chambers will allow Gun & Davey to conduct proceedings at the Workers' Compensation Tribunal with greater efficiency and to confer with you, our major employers and clients prior to and during proceedings at the Tribunal in comfortable and confidential surrounds.



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## COVERED CASES

**"Jingle Balls"**

### Sullivan v. The Corporation (Western Personnel)

DECISION OF THE WORKER'S COMPENSATION APPEAL TRIBUNAL (A24/1996)

**Catchwords:**

Applicability of Section 36 to closed period claims.

**Facts:**

The worker obtained employment as Father Christmas in the John Martins Store Magic Cave for the period 2 November 1991 to 24 December 1991. On 29 November 1991 a mischievous child kicked Santa in the groin causing Santa to become incapacitated. Santa was partially incapacitated until well after 24 December 1991.

Santa received a payment covering the period up to 30 December 1991 from the employer.

By determination dated 7 February 1992 Santa's claim for "kick to the groin" was accepted but the issue of incapacity was left undetermined. The Corporation on 8 March 1994 purported to determine Santa's claim for a closed period up to 24 December 1991. This determination was found to be of no effect and invalid.

Santa argued that his payments had been unlawfully discontinued pursuant to Section 36 and that as a consequence he was entitled to continuing weekly payments until validly terminated.

**Held:**

There had been an unlawful discontinuance as the worker's claim was accepted; he received payments, which were then stopped without regard to Section 36.

**Commentary:**

1. "Payments" does not mean "payment by the Corporation".
2. Unless there is a closed period determination clearly made, Section 36 must be complied with.

**"Christmas Drinks May Spell Trouble For Employers"**

### WorkCover Corporation (Concrete Constructions) v. Butson

DECISION OF THE WORKER'S COMPENSATION APPEAL TRIBUNAL (A17/1996)

**Catchwords:**

Journey injury – real and substantial connection – worker leaving employer hosted social function intoxicated.

**Facts:**

The worker attended an employer hosted social function coinciding with his shift at a hotel where food and complimentary alcoholic beverages were provided. The worker was paid for this shift. The worker became intoxicated and left in his car for home and was injured in an accident. At the time of leaving, the social function had almost wound down.

The worker's claim was rejected on the basis of no real or substantial connection.

**Held:**

The worker's claim was not defeated by reason of his intoxication pursuant to Section 30B(2)(b)(ii) as the injuries sustained were serious and permanent. The hotel constituted a place of



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employment as the worker was paid to attend the function and in doing so performed an activity forming part of his job.

The hotel did not lose its character as a "place of employment" simply because the worker remained at the hotel after the function had concluded in this instance as the Tribunal was unable to determine on the facts when the function actually ended.

There was a real and substantial connection between the journey and the accident out of which the disability arose, as the worker's intoxication was a substantial cause of the accident and the liquor supplied by the employer contributed to that intoxication.

The worker's injuries were compensable.

**Commentary:**

A cab charge issued to employees with a direction that it is used or a direction by the employer that workers are not expected to attend such work related social functions as part of their duties of employment may avoid this scenario.

## JH Michell & Sons (Australia) Pty Ltd v. Richards

DECISION OF THE WORKER'S COMPENSATION APPEAL TRIBUNAL
(A31/1996)

**Catchwords:**

Restoring mutuality by statement that worker is ready, willing and able to undertake suitable duties.

**Facts:**

The worker was filmed and seen undertaking after hours activities incompatible with the physical restrictions specified by the worker's certifying doctor during a period wherein the worker was certified firstly unfit and then partially incapacitated for work.

The worker was summarily dismissed on the basis of this film. The worker sought to revive mutuality by a letter stating he as ready, willing and able to undertake suitable duties.

**Held:**

Mutuality had not been restored. In these circumstances, more was required by the worker to revive mutuality than an assertion that he was ready, willing and able to restore mutuality.

"Had the worker provided real indicia (and they are not very difficult to excogitate) of a change of attitude, he might have laid the proper ground work for success on that ground".

## General Motors – Holdens Automotive Ltd v. Busby

DECISION OF THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA
(Unreported dated 31 October 1996)

**Catchwords:**

Section 30(4) – social or sporting activity.

**Facts:**

The worker injured his eye with a table tennis bat whilst playing table tennis during his lunch break on a table in a games room provided by the employer who permitted its worker's to play table tennis in this way.

On appeal to the Tribunal the worker's disability was found to be compensable. The Tribunal held that whilst a worker is in attendance at the place of employment during an authorised break, subject to the provisions relating to serious and wilful misconduct and intoxication, any injury sustained during that time, is



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compensable even if sustained during the course of a social or sporting activity.

The Tribunal was of the view that Section 30(3) qualified Section 30(4).

**Held:**

Section 30(4) qualifies Section 30(3). The worker was injured whilst involved in a sporting activity that did not form part of the worker's employment and that he was not directed or requested by. Is employer to participate – disability not compensable?

**BHP Pty Ltd v. Mason & Jennings**

DECISION OF A SINGLE JUDGE OF THE SUPREME COURT OF SOUTH AUSTRALIA
(Unreported dated 7 November 1996)

**Catchwords:**

Production of surveillance film.

**Facts:**

The Review Officer directed production to the worker (before the worker had given evidence in chief) of film taken of the worker.

The Review Officer stated that only in unusual cases should the discretion be exercised to deny inspection of film.

**Held:**

This direction and viewpoint were inconsistent with *Robbins v. Harbord (1994) 62SAR229*, which was binding on the Review Officer.

The direction by the Review Officer that the film be produced for inspection had the effect of infringing the right of the employer to present its case and so constituted a breach of requirements of procedural fairness.

**Commentary:**

Pursuant to Section 92(2)(a), on application, a Conciliator may excuse a party from producing film to the other party.

No similar provision exists with respect to an Arbitration Officer's power (see Sections 93 and 93A).

However refer to Rule 4(2)(a) and (b). This provides for discretion in the Arbitration Officer to require production to the Arbitration Officer and to direct inspection by the other party of a document, which includes film and surveillance reports. This power being discretionary also implies the power to refuse an application for inspection by the other party.

The legislation suggests that the order made by a Conciliator excusing production of evidentiary material to the other party is only for the purposes of conciliation. A separate order must be sought from an Arbitration Officer at the pre-arbitration hearing excusing production to the other party of any document (including film) for inspection.

It is therefore necessary for the Corporation and employers to seek orders for non-production at both levels, conciliation and arbitration – an order at conciliation does not flow on beyond the conciliation conference stage.

## TID BITS

*A review Officer, who issues a written determination in relation to a Section 43 dispute quantifying the worker's entitlements in dollar amounts but not making allowance for Regulation 16a cannot subsequently amend his/her decision with an addendum applying Regulation 16a. The Corporation must appeal the Review Officer's initial decision – Neindorf A152/1996.*



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*A Section 35(l)(b) determination issued prior to the date of the first anniversary of incapacity is not void simply because it is issued prematurely, provided the reduction is stated to come into effect and does come into effect on the date of the first anniversary of incapacity – Georgousis A134/1996.*

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