



Welcome

Welcome to Issue No. 4 of *Gun & Davey Covered*.

This issue contains the first of several articles examining the operation of Section 36 of the Act providing for the discontinuance of weekly payments as well as a "Redemption Checklist" which we have prepared for your assistance.

Also enclosed with *Gun & Davey Covered* is a questionnaire we have prepared for you to complete if convenient. We believe that your responses will assist us in making *Gun & Davey Covered* more user friendly.

We trust you find this issue of interest and remain available to assist you with any queries you may have.

Michael Ricketts

Redemption Checklist

Negotiating a watertight redemption, which complies with WorkCover redemption guidelines, the Act and other legislative requirements can be tricky!

We now provide a checklist to help you try to cover all bases.

1. Ensure the worker has been incapacitated in excess of two years.
2. Ensure that all claims (even, "closed" files) are redeemed.
3. Ensure income maintenance/LOEC payments are redeemed at the full rate/level or lawfully reduced per Sections 35 and 38 or Section 42A.
4. Ensure the Section 35(6a)/(6b) amount conforms with WorkCover's August 1996 Actuarial Tables.
5. Ascertain what, if any, disputes/reviews are pending and include these in redemption negotiations. This may require a Tribunal or Review Panel computer check.
6. Include as a condition that the worker not dispute previous determinations made, even if out of time.
7. Negotiate outstanding Section 43 entitlements and appropriate NIL determination, eg sexual incapacity and sleeplessness.

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8. Ensure the employer is consulted prior to commencing and concluding negotiations.
9. Where redemption results from a LOEC reduction review/dispute and the full LOEC is to be redeemed, make it clear to the worker (eg. in covering letter enclosing the redemption agreement) that any full LOEC will be paid less any capital and interim sums already paid.
10. Make it clear to the worker (also in a covering letter) that the Section 42 sum is less any amount payable pursuant to a DSS charge.
11. Obtain WorkCover Recoveries approval if waiver of a recovery is involved.
12. Do not refer to any resignation from or termination of employment in the redemption documents.

Although this is by no means a comprehensive list, we hope it assists in avoiding the worker returning unexpectedly in the future to claim further entitlements.

Return to Work

We cannot place enough emphasis on the need for client's to base determinations to discontinue a worker's entitlements to weekly payments on sound grounds. For that reason upcoming issues of *Covered* will examine the various means by which payments of income maintenance may be discontinued pursuant to the provisions of Section 36 of the Act.

In this issue we examine a discontinuance on the basis that a worker has "returned to work" within the meaning of the Section 36(1)(c) of the Act.

What Constitutes a "return to work" within the meaning of the Act?

The Supreme Court considered what constituted a "return to work" pursuant to Section 52 of the Workers compensation Act 1971 – 1979 in *Philmac Pty Ltd v. Asti* [1980] 26 SASR 213. Section 36(1)(c) of the present Act is similar to Section 52(1)(c) of the 1971 Act and the reasoning in *Philmac v. Asti* applies (*Simpson v. Piwinski* A25/89).

In *Philmac v. Asti* the then Chief Justice provided what has become the touchstone in determining whether a worker may be said to have returned to work within the meaning of the Act.

"For return to work to have significance it must be, in my opinion, a return as a settled and established member of the wage earning workforce. A short period of work by way of a trial or experiment or which can fairly be characterised as an unsuccessful attempt to return to the workforce, could not reasonably be regarded, whether or not it results in an entitlement to a small amount of wages, as a sound reason for discontinuing weekly payments..."

The following factors should be taken into account when determining whether there has been a return to work within the meaning of the Act: -

- The nature of duties performed by the worker:
- The temporal span during which such duties are performed:
- The similarity or otherwise of such duties to those performed by the worker before the subject injury:
- A comparison between any such duties and the nature of any restrictions or qualifications which might have been prescribed or recommended by medical advice:
- And especially the precise nature and quantum of any remuneration

received in respect of the work performed.

The reason behind a discontinuance on the basis of a return to work is that the facts disclose that the worker is able to return to work of a meaningful nature and re-establish him/herself as a wage earner who is no longer in need of weekly payments of compensation.

In order to enable discontinuance on the basis of a return to work it is not necessary that the worker resume normal duties.

A worker may return to work within the meaning of the Act by returning to alternative duties or by returning to other duties in another workplace or with another employer. However, there must be a settled and established resumption or return as a member of the wage earning workforce. A return to work by way of trial or experiment such as a short span of work hardening or rehabilitation will not suffice.

Ultimately the test is one of fact and degree.

In *Philmac v Asti* the worker returned to light duties for a period of two and a half hours only. The worker's compensable disability prevented her working beyond that. A majority of the Supreme Court held that that did not constitute a return to work.

However, in *Walker Australia Pty Ltd v Kadziela* the worker did affect a return to work so as to allow discontinuance pursuant to the Act. In that case the worker was a process worker working on a production line. The worker suffered a compensable disability and was totally incapacitated for a time. The worker attempted to return to work and was given light duties to perform on another production line. The worker was advised by her specialist not to lift her right arm above chest level. The worker performed such work, subject to that restriction, for

six consecutive forty-hour weeks. The worker was paid wages at the appropriate rate. Applying the test in *Asti* Deputy President Parsons held that the worker did return to work within the meaning of the Act.

In *The Corporation v Marina* the worker was injured in July 1990 whilst employed as a Concrete Finisher on the Remm site. The worker returned to the site in January 1991 as a Flagman/Spotter. The worker performed such work until May 1991. The work involved directing traffic at the front gate of the project. The worker was advised that he could abandon those duties when he required a rest, as there was another person at the gate. The worker worked an average of 35.75 hours overtime per week up until 25 May 1991 the date that construction ceased at the Remm site and consequently the date the position was terminated. Deputy President Cawthorne held that there had been a return to work within the meaning of Section 36 of the Act so as to allow a discontinuance of income maintenance.

When should a notice be issued?

Section 36(3a) of the Act insofar as relevant provides that:

The notice must be given at least 21 days before the decision is to take effect in any of the following cases:

- (a) *Where a decision to discontinue weekly payments is made, without the consent of the worker, on the ground that:*
 - i) *The Corporation is satisfied that the worker has ceased to be incapacitated for work by the compensable disability (although the worker has not returned to work): or*

- ii) *The worker has failed to submit to an examination by a recognised medical expert or to provide a medical certificate as required by the Corporation: or*
 - iii) *The worker has been dismissed from employment for serious and wilful misconduct: or*
 - iv) *The worker has breached the obligation of mutuality.*
- (b) *Where a decision to reduce weekly payments is made, without the consent of the worker: on the ground that*
- i) *The Corporation is satisfied that there has been a reduction in the extent the worker is incapacitated for work by the compensable disability: or*
 - ii) *The Corporation is satisfied, in the case of the worker whose weekly payments include a component for overtime, that the worker would have continued to work overtime the pattern of overtime would have changed so that the amount of overtime would have diminished or*
- (c) *Where a decision to discontinue or reduce weekly payments is made under Section 38. And in any other case the notice must be given as soon as practicable after the*

decision is made (but not necessarily before it takes effect).

That subsection became operative on 8 April 1991. Before that date written notice was not required.

Recent decisions of the Workers' Compensation Appeal Tribunal suggest that notice of a decision can occur after the decision is put into effect. The period of "grace" that may be allowed is unclear and in circumstances where notice has not been provided we recommend that you seek legal advice.

The failure to issue and serve a Section 36(1)(c) notice as soon as practicable after the decision is made and put into effect as required by Section 36(3a)(c) may constitute an unlawful discontinuance.

Therefore, we recommend that decision makers strictly comply with Section 36(3a).

Does a notice issued on the basis of a return to work allow for discontinuance for all time?

It is clear that where a worker returns to work and suffers an aggravation that the worker may lodge a further claim. Providing that the requirements as to compensability pursuant to the Act are met then the worker will assert a fresh entitlement to income maintenance payments.

The position is less clear where, even without a change in the level of the worker's incapacity, duties are modified or withdrawn following a return to work, and the worker's ongoing physical incapacity results in economic loss. It is our view that if the worker does submit a fresh claim and establishes a continuing incapacity then the worker will asset a

fresh entitlement to income maintenance payments.

1. [Philmac v. Asti \[1980\] 26 SASR 213 per King CJ](#) at 218
2. [Walker Australia Pty Ltd v. Kadziela A52/1990](#). See [Parsons J](#) at p6 [A25/1995](#). The matter was appealed to the Supreme Court on a related issue
3. See [Local Govt Association of South Australia v. Field A96/1996](#) and [Houston v. Walker Australia A15/1997](#)
4. This occurred in [Kadziela](#)
5. See [Marina](#) and [Peter Rose v. WorkCover Corp A168/1996](#).

Serious and Wilful Misconduct – S36(1)(e)

Deputy President Gilchrist in [Smith v. Underdale Metal Processing \(JD3/1996\)](#) considered the meaning of “serious and wilful misconduct” in Section 36(1)(e).

He relied on the Industrial Law interpretation of that term. Where such misconduct justifies summary of dismissal.

In Industrial Law, serious and wilful misconduct is conduct which strikes at the very heart of the employment contract.

This occurs when the worker breaches an important term of the employment contract and has no reasonable excuse or justification. Certain terms of employment have always prima facie been regarded as important, ie. The obligation not to steal, deal dishonestly with or deliberately damage employer property and the obligation to obey an employer’s reasonable and lawful orders.

However the alleged misconduct must always be examined in the light of all the surrounding circumstances.

Single acts of misconduct are usually less likely to amount to serious and wilful misconduct than a persistent pattern of misconduct. However a record of unsatisfactory behaviour may tip the balance in the case of a single act of misconduct.

Moreover, depending on the terms of the employment contract and sometimes on the employee’s position, misconduct outside the workplace or working hours may amount to serious and wilful misconduct. Finally, it is the nature of the misconduct itself and not any resulting serious consequences that is relevant in determining serious and wilful misconduct.

In the case of [Smith](#), the worker threatened the employer with “a bullet in [his] head” if the employer continued to take issue with the worker’s late start and early leaving times in the context of a return to work plan. The worker was summarily dismissed for serious and wilful misconduct and his weekly payments discontinued per Section 36(1)(e).

The threat, examined the context of the worker’s previous failure to abide by employment hours, expressed intention to defy the employer’s right to stipulate hours and warnings for the same, amounted to a breach of the worker’s obligation to obey the reasonable and lawful directions of the employer. This constituted serious and wilful misconduct justifying summary dismissal and Section 36(1)(e) discontinuance.

Covered Cases

Mitsubishi Motors Australia Ltd v. Harbord & Kowalski

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

(Unreported dated 21 November 1996)

Catchwords:

Worker estopped by District Court Judgment from claiming disability compensable.

Whether employer estopped by previous accepted claims from rejecting subsequent claims.

Facts:

The worker slipped on oil at work and submitted a claim, which was accepted by the exempt employer for a closed period. He then issued District Court proceedings for common law damages resulting from the slip.

Subsequently the worker lodged a further claim alleging an aggravation of the earlier compensable disability, which was accepted by Review Officer's determination (made by consent of both parties). The Review Officer's reasons included a statement that the worker did suffer the compensable disability when he slipped on the oil patch. (See Footnote) The common law claim proceeded to trial but was dismissed for failure to provide on the balance of probabilities that he worker slipped in the way claimed.

The worker subsequently lodged further claims regarding the slip, which were rejected on the ground that he District Court findings of fact constituted an issue estoppel.

Issues:

1. Is the worker estopped by the District Court findings of fact from making further claims for injuries arising from the slip?
2. Is the exempt employer estopped from denying that the worker slipped on the relevant date by its conduct in accepting earlier claims?

Held:

1. Yes. The worker was prevented from subsequently claiming injury arising from the slip as the District Court found that the slip had not occurred as alleged.
2. No. Pursuant to Section 106A "a payment by the Corporation or an employer to a worker does not constitute an admission of liability or estop a subsequent denial of liability".

(Footnote – Neither did the Review Officer's determination to accept this particular claim create an issue estoppel. The Review Officer was not required to determine whether the incident alleged to have caused the disability in fact occurred. The statement made by the Review Officer did not constitute a finding on that issue. She did no more than note that the employer had decided to accept the claim and then went on to make a determination reversing the decision denying liability).

Kapsiotis v. WorkCover Corporation (Open House Snack Bar)

DECISION OF THE WORKERS
COMPENSATION APPEAL TRIBUNAL
(A7/1997)

Catchwords:

Application of Regulation 16a.

Facts:

Permanent residual disability to the lower back was determined (prior to the operative date for Regulation 16a) at 25%.

On a subsequent review application, a Review Officer by the parties' joint submission, determined sexual incapacity at 17.5% and found the worker was entitled to \$11,515.00, thereby failing to apply Regulation 16a.

On a further review application, a Review Officer determined on the parties' joint submissions permanent residual disability to the right leg at or above the knee at 6.5% and noted that Regulation 16a applied thereto.

The worker appealed the last determination on the basis that the notation was in error. The worker argued that the application of Regulation 16a to the right leg assessment violated the earlier consent determination in relation to the worker's sexual incapacity, which was not adjusted per Regulation 16a and was not appealed by the Corporation.

The worker also argued that Regulation 16a only applied in cases of multiple assessments made at the same time.

Held:

Both arguments were rejected. The Review Officer, being aware of the earlier Section 43 assessments, was obliged to apply Regulation 16a to arrive at the right leg assessment and determine the actual dollar amount of the worker's entitlement. Previous Section 43 payments, by inference, are not to be factored into the monetary assessment.

Commentary:

This decision is important as it highlights a distinction, which must be drawn with the decision in Scott (reported in our August 1996 issue of *Covered*).

Scott concerns the method of calculating a lump sum payment attracting a supplementary benefit where there are multiple disabilities, some of which have not been adjusted per Regulation 16a.

Kapsiotis concerns the method of calculating a percentage assessment where there are multiple disabilities (some of which may not have been adjusted per Regulation 16a) and where there is no entitlement to a supplementary benefit.

Handy Hints

Where an employer pays a worker sick leave or wages for a period of absence following a rejection of a claim which is later accepted for income maintenance, Section 47 interest is still payable over the said period if the employer is reimbursed and the worker's sick leave entitlements reinstated. Neither the payment of sick leave or wages is intended to be in satisfaction of WorkCover's outstanding liability to make weekly payments. Weekly payments are therefore "in arrears" per Section 47 and interest is payable thereon. (Note: This is not the case with interim payments)

-Gerace A147/1996

The worker's "measure" of disfigurement according to the Deputy President McCusker "must to some degree be affected by the contest i.e. the disfigurement is necessarily influenced in degree by whether it is suffered in a young, attractive person rather than the opposite".

-Lawrence A16/1997

Deputy President Thompson restates in a useful way the test in Karanicos for "a journey undertaken in the course of carrying out duties of employment", as follows:

1. *“Was the worker performing the worker’s job; or*
2. *Was the worker complying with an instruction from the employer given by the employer in the exercise of its control as the employer; or*
3. *Was the worker doing something reasonably incidental to one of those things?”*

-McCourt A1/1997

The Gun & Davey Workers Compensation Team Are		
<u>Lawyers:</u>		<u>Support Staff:</u>
Michael Ricketts LL.B. – Managing Partner	8228 5217	Rommi Gabel
Mark Calligeros BA. LL.B. - Partner	8228 5208	Mary-Anne Buttrose
Paul White LL.B. – Associate	8407 9211	Linda Saunders
Tas Carabelas LL.B. – Senior Associate	8228 5210	Deborah Mitchell
Paul Gabrynowicz LL.B-Associate		Kristina Stefani
Anna Rau BA (Jur) LL.B-Associate <i>assisting</i> Michael Ricketts		
Dara Cirelli LL.B (Hons) B Com – Associate <i>assisting</i> Tas Carabelas		
Simon Harvey LL.B (Hons) – Associate <i>assisting</i> Mark Calligeros		