



**WELCOME**

Welcome to Issue No. 5 of **Gun & Davey Covered**.

Firstly, I would like to thank our readers who responded to the recent Covered questionnaire. Although we did not necessarily expect such a positive response it was a delight to receive it all the same. In answer to the most common comment, YES we will ensure that service continues.

In the meantime, this Issue includes some interesting features.

We provide a summary of the decision in **Adams - v- Doser**. The Appeal was heard by the Full Bench of the Workers Compensation Tribunal on Wednesday 14<sup>th</sup> May 1997. An application was made by the worker's representative to "State a Case" to the Supreme Court but this was successfully opposed. We expect a decision within 6-8 weeks.

Recently, **Gun & Davey** was also involved in successfully defending a s42A (3)(c) determination by **MMI Workers Compensation (SA) Ltd in Nicola Rizzotto -v- WorkCover Corporation's (Boral Cyclone Ltd)** reducing a worker's LOEC assessment from \$15,000 to \$674.02 on the basis he was fit for full time duties as a sales assistant.

The whole area of s35/38 and s42A (3) reductions is "heating up" and we will keep you informed as developments occur.

In response to a reader's suggestion we also provide a "Checklist" for those of you facing

S35/38 determinations and finally there is an important discussion on the effect of the Radford decision involving s36 (1)(g) of the Act.

Regards – Michael Ricketts

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**S38 REVIEW  
SUGGESTIONS FOR THE  
CONSCIENTIOUS DECISION MAKER**

We now provide you with some handy pointers for tackling your two-year reviews. Naturally these are subject to your own individual circumstances and policy directions.

Of course, before embarking on this s38 review process, ascertain whether the worker's weekly payments can be discontinued pursuant to s36.

If not, then;

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| <p>1. Ensure the worker has been incapacitated for 2 years.</p> <p>2. Ensure you have current medical evidence certifying the worker as only partially incapacitated. If not, arrange for an up to date medical report.</p> <p>3. Nominate a position(s) as “suitable employment” having regard to s35 (2)(a) and any other relevant factors including literacy skills, English skills, non-compensable disabilities and the remoteness of the worker’s residence etc.</p> <p style="padding-left: 40px;">Revisit your file, PMC’s, medical reports, return to work and rehabilitation plans and case notes, paying particular attention to the worker’s vocational history, If you are still stuck for ideas then arrange for a vocational assessment.</p> <p>Note that employment may constitute “suitable employment” even though a worker requires some training, retraining or experience in order to perform that work. Where a worker is not sufficiently skilled or qualified exercise <i>caution and common sense</i>. A rehabilitation plan to provide such training may be a good idea.</p> <p>4. Ensure you have current medical evidence certifying the worker has the requisite capacity to undertake the nominated employment. If not arrange for an up to date medical report and/or functional capacity evaluation.</p> <p>5. Ask yourself whether the worker would be able to obtain the nominated employment if there was full employment that is if everyone looking for a particular job would find it. If the answer is no, then you should reject that position as constituting suitable employment.</p> <p>By this stage you’ve done your homework and are now ready to draft the notices. Before doing so ensure the s39 review has already been issued.</p> | <p>6. Provide notice to the worker of the intended review in the prescribed form – Schedule 1 of the General Regulations.</p> <p style="padding-left: 40px;">We recommend that you allow the worker 21 days to forward any written representations on the subject of the review.</p> <p style="padding-left: 40px;">We also recommend that you describe the basis on which you intend to reduce the worker’s entitlement or that you state that the worker’s entitlements will remain unchanged.</p> <p>7. Consider any written representations forwarded to you, document the same and make further enquiries where appropriate.</p> <p>8. At the completion of the period allowed for written representations and a further period for service pursuant to s117, carry out the actual review using the prescribed form – Schedule 2 of the General Regulations.</p> <p>9. In respect of the Schedule 2 –</p> <p style="padding-left: 40px;">(i) Ensure that the Corporation’s performance standards, particularly regarding timing of the notice are followed. This is important when completing “date of Completion of Review” section of the Schedule 2.</p> <p style="padding-left: 40px;">(ii) Ensure you specify the provisions of the Act and Regulations relied upon as s35, s36, s38, s90 and Regulations 17 and 18.</p> <p style="padding-left: 40px;">(iii) Ensure you annex a copy of the provision referred to in (ii) above to the Schedule 2.</p> <p>10. Specify whether the nominated employment is full time or part-</p> |
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time, and if the latter, how many hours per week.

11. Specify the applicable award rate(s).
12. Where you consider more than one occupation to be suitable make it clear that you consider that all of the occupations selected form suitable employment within the meaning of the Act and that the occupation you have selected as the basis for the reduction is only identified for the purposes of calculating the worker's dollar entitlement.
13. If you decide that the worker's weekly payments are to remain unchanged then make no reference to s36 (2)(c) as this may prevent a later assertion that the worker has capacity for employment.
14. Allow 21 days in addition to the further period for service pursuant to s117 before you affect the actual reduction in the worker's weekly payment.

Note that where a worker is employed, a s35 (2) reduction cannot apply. Try a s36 (1)(c) or (d) discontinuance or a s36 (2)(b)/s38 review reduction.

### **S36 (1)(g) - DISCONTINUANCE – IS THE HOLIDAY OVER?**

Deputy President Thompson of the Workers Compensation Appeal Tribunal recently delivered a decision in *Radford v. WorkCover Corporation (Spastic Centre of S.A. Inc.) A27/1997* in which it was found that the provisions of s36 (1)(g) of the Workers Rehabilitation & Compensation Act 1986 could be applied to cases where a worker had sustained a compensable disability prior to May 1995 (when the provision was proclaimed) and could also be applied where a worker had already moved and was residing outside of the State of South Australia.

Section 36(1)(g) of the Act provides as follows: -

- 36 (1) Subject to this Act, weekly payments to a worker who has suffered a compensable disability must not be discontinued unless –
  - (g) The worker is, without the Corporation's consent –
    - (i) Resident outside the State; or
    - (ii) Absent from the State for more than two months in any continuous period of twelve months;

In *Radford* the worker had suffered a compensable disability in December 1990 and the claim was accepted. In February 1992 she moved to Canberra, ACT. The relocation not known to the Corporation which continued to meet its statutory obligations.

By letter dated 27<sup>th</sup> June 1995 the Corporation's agent advised the worker of s36 (1)(g) and requested the worker to return to South Australia and remain resident in South Australia and gave the worker two months to do so.

By letter dated the 11<sup>th</sup> August 1995 the worker advised the agent of the reasons for the relocation. Her husband was a member of the Armed Forces and had been transferred.

The agent discontinued payments of income maintenance by determination dated the 26<sup>th</sup> August 1995.

Various issues were decided by the Tribunal. The relevant issues are as follows:

- 1) Based on the facts of *Radford* the Corporation did not "consent" to the worker residing outside the state noting that the concept of "consent" was absent from the legislation prior to 25<sup>th</sup> May 1995.

- 2) That other than establishing the criteria for lack of consent and residence outside the State the exercise of the power in Section 36(1)(g) by the Corporation (through an agent or directly) cannot be reviewed. In other words the discretion whether or not to impose the provisions of Section 36(1)(g) is not reviewable by the Tribunal. By logical extension this reasoning will apply to a Review Officer or Arbitrator.
- 3) S36 (1)(g) can be applied to compensable disabilities occurring prior to May 1995 and to cases where the worker became resident outside the State prior to May 1995. Applying the amended s36 (1)(g) is not “retrospective” as the worker’s past payments and entitlements prior to such a determination are protected and the imposition of the provision only affects future entitlements.

The **Radford** decision supports an agent, which now elects to identify claims that involve a worker who resides outside the State and is in receipt of income maintenance. If the worker does not return to and reside within South Australia, the agent may proceed with a determination to discontinue payments.

Where a worker became resident outside the State prior to May 1995, it would be fair and reasonable for some notice to be provided. The length of notice would need to be assessed and fixed in each individual case, taking into account, for example, personal considerations, distance, etc.

Whilst **Radford** indicates that the decision to enforce or not enforce the provisions of s36 (1)(g) is not reviewable, this worker may yet appeal to the Full Supreme Court or, alternatively, issue proceedings for Judicial Review in the Supreme

Court. In either case, it would be advisable to not enforce the said provisions capriciously and to carefully take into account the worker’s individual personal circumstances. For example a worker who has elected to reside outside the State purely as a choice of lifestyle is a case where you may elect to enforce the provisions. On the other hand, in the case of a seriously injured worker whether the injury is physical or mental and where that worker has moved interstate to reside with family to obtain required family support whether financial or emotional, it may be inappropriate to enforce the provisions. Notice to the worker with a request for representations would enable a Case Manager to discern which cases should or should not be enforced.

Be mindful that a failure to properly apply the provisions of s36 (1)(g) may involve the Corporation in expensive litigation by way of applications for Judicial Review before the Supreme Court.

**COVERED CASES**

**RAYMOND SYDNEY  
HILLIER v.  
WORKCOVER CORPORATION  
(FESTIVAL STATE SECURITY)**

DECISION OF THE FULL  
BENCH OF  
THE WORKERS COMPENSATION  
TRIBUNAL

(J.D. 4/1997)

**Catchwords:**

A medico-legal report constitutes a s32 (2)(a) “medical service”.

**Facts:**

The worker's solicitors sought a report from a psychologist for medico-legal reasons and not for the purpose of, or in connection with the worker's treatment.

**Issues:**

Was the worker entitled to be compensated for the cost of obtaining the report pursuant to s32 (2)(a)?

That is, did the provision of a medico-legal report constitute a "medical service" as that term is defined by s3 of the Act to include "attendance, examination or treatment by a medical expert (including the obtaining from a medical expert of a certificate or a report)"?

**Held:**

Yes. The words "attendance", "examination", "certificate" and "report" are not qualified by the word "treatment" and the definition of "medical services" contained in s3 of the Act.

In so finding, the Full Tribunal overturned the earlier decisions of the Workers Compensation Appeal Tribunal and [Hadjiargiras A168/1996](#) and [Harris A40/1996](#).

The Full Tribunal held the manner in which they interpreted the definition "medical services" was consistent with the correct application of the principles of statutory interpretation and produced a result, which was far more consistent with the objects and the overall philosophy of the Act.

Such costs may however still be disallowed on the basis that they have not been reasonably incurred pursuant to s32 (1) or it is considered the service was inappropriate or unnecessary pursuant to s32 (5).

**Commentary:**

The effect of this decision is that the costs of obtaining medico-legal reports by worker's solicitors from either treating or independent medical practitioners can be claimed as "medical services" pursuant to

s32 (2)(a) of the Act. These costs extend not only to the costs of the report but also associated costs, for example, the consultation.

More importantly, from a worker's perspective, such costs can be sought as and when they are incurred, rather than as part of a costs claim upon finalisation of a dispute.

**CASE SNIPPETS**

**ADAMS -v- WORKCOVER  
CORPORATION (NZI) (WB & SM DOSER  
PTY LTD)**

**JD3/1997**

Deputy President Gilchrist recently delivered his decision in the matter of [John Adams -v- WorkCover/NZI \(WB & SM Doser Pty Ltd\)](#) which featured in the third issue of *Covered*.

As discussed in that issue, the worker disputed a determination making a reduced interim loss of earning capacity assessment on the basis that the worker had a capacity to work as an Invoice Clerk for 15 hours per week.

Deputy President Gilchrist made the following important findings: -

1. Burden of Proof – the worker, by disputing the determination, is the party who carries legal burden of proving that the nominated employment was not "suitable employment"; that he did not have a reasonable prospect of obtaining it; that it was not available to him and that he was in effect unemployable.

The evidentiary burden of proof on these matters may however change during the course of the hearing depending on the nature of the evidence called by either party.

If no evidence is introduced by the worker on any of the abovementioned issues then the compensating authority is not obliged to introduce evidence to support its position.

2. "Suitable employment" – the actual job nominated does not have to be in existence. All that is required is a sufficiently specific identification of a particular occupation.

The nominated employment could constitute suitable employment even though the worker required some training or experience in order to be able to perform that work.

We will keep you posted when the Full Bench of the Tribunal delivers its decision in this matter.

**STATE OF SA -v- BROPHY**

**FULL SUPREME COURT  
(Unreported, delivered 7/3/97)**

A uniformed police officer injured whilst travelling home on his police motor cycle was found by the Full Supreme Court not to have undertaken the said journey "in the course of carrying out duties of employment" pursuant to s30 (5)(a). Even though it was part of the police officer's role to exercise powers such as attending on an emergency, making an arrest etc., if required and even if off duty, as the journey here was not commenced "in the course of carrying out duties of employment", but rather was commenced for a private purpose, and nothing occurred in the course

of the journey that altered that purpose, the journey didn't fall within s30 (5)(a) and the worker's injuries were therefore not compensable.

**HANDY HINTS**

*A Review Authority is entitled to make an award for disbursements in favour of a party to review proceedings, subject to those disbursements being reasonably incurred and subject to the residual discretion of a Registrar regarding the quantum of those disbursements – Holmes A9/1997*

*Reasonably incurred by a witness as a consequence of appearing before the Review Authority, only relate to the reimbursement of expenses actually incurred by a witness, and does not impinge upon a Review Authority's power to include in an order for costs, witness fees associated with the giving of evidence by a particular witness - Rowe A10/1997*

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