



WELCOME

Welcome to Issue No. 7 of **Gun & Davey Covered**.

After a considerable wait, the Full Workers Compensation Tribunal has recently handed down it's decision in the matter of [Adams -v- WorkCover \(Doser\)](#) which is at the present, the most important binding decision on Section 42A(1), (2) and (3) of the Act and by implication, Section 35(2).

In a surprise decision to some of us, the Full Tribunal (Senior Judge Jennings desenting) upheld the appeal and overturned the decision of His Honour Deputy President Gilchrist making several important decisions as to the burden of proof and meaning of the term "suitability of employment" in the Act - for a full summary see page 2.

As there is no longer a right of appeal to the Full Supreme Court even on a question of law, the decision is now binding until a conflicting decision from a higher authority is handed down.

Fortunately the vehicle to obtain such a decision is provided in the matter of [Warren -v- WorkCover \(Iltech\)](#) a decision in the Workers Compensation Appeal Tribunal (not WCT) of Deputy President Thompson which **Gun & Davey** on instructions from WorkCover has now sought and obtained leave to appeal to the Full Supreme Court of South Australia.

In that matter, similar considerations to those decided in [Adams](#) are to be determined and hopefully a more favourable outcome achieved.

Gun & Davey will keep you informed as to developments although a decision in Warren is not likely for three to six months.

An equally or perhaps even more important decision has been handed down by the Full Supreme Court of South Australia in the matter of [Kowalski](#) - see page 5 for our commentary.

Unfortunately, it seems that in the vexed area of workers compensation our problems continue to confront us. As always, we are available to assist you.

Regards,

Michael Ricketts

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COMPLETE TURNAROUND RE “2 YEAR REVIEWS”

A. ADAMS -v- WORKCOVER

The decision of [Adams -v- WorkCover JD24/1997](#) is of importance as it is likely to have a considerable impact on the prospects of reducing future liability for continuing weekly or capital loss payments by applying the provisions of Section 35(2) or Section 42A(3) of the Act.

The significant findings of the Full Tribunal (Senior Judge Jennings dissenting) were as follows: -

- a) The burden of proof with respect to the calculation of the worker's entitlement to a capital sum (and this may apply equally to calculating the rate of income maintenance) and the basis upon which that calculation was made, rests with the compensating authority, not the worker
- b) Suitable employment for the purposes of Section 42A(3)(c) (same provisions as Section 35(2)(c)) is suitable employment which the worker has reasonable prospect of obtaining in accordance with the requirements of Section 42A(2)(b) (same provisions as Section 35(1)(b)(ii)).

Two main reasons were given in relation to the burden of proof aspect of the decision. Firstly as it is the compensating authority, which makes the assessment, the compensating authority must present the evidence to establish the factual basis upon which its assessment is based. The evidentiary onus may then shift to the worker to present evidence to negate such evidence. Secondly, as Parliament had expressly placed the onus upon the worker to establish the facts required to deem partial incapacity as total (re

Section 42A(3)(d)), had it also intended the worker to bear the onus in respect of Section 42A(2) it would have clearly stated such.

Suitability of Employment

On the facts of Adams, the worker was required to possess a certain skill in order to be considered by a prospective employer as a candidate for the nominated suitable employment. The worker did not possess that skill and the training to do so was more than the brief or limited induction process adopted by an employer to ensure that a new employee knows its particular operation or requirements. The Full Tribunal held that as the worker did not possess the necessary skills his prospects of obtaining the employment and his ability to adapt to the new employment will be extremely limited and accordingly the nominated suitable employment was not employment which the worker had a reasonable prospect of obtaining.

What does Adams mean to a Compensating Authority / Case Manager

As the specific provisions contained in Section 42A(3)(c) and Section 35(2)(a) are not exhaustive of the factors which must be considered in determining whether the nominated employment is suitable employment which the worker has a reasonable prospect of obtaining, all relevant information must be considered eg. Pre-existing disabilities which did not prevent the worker from undertaking the work in which the worker was engaged when sustaining the compensable disability in question.

A compensating authority must obtain evidence, which demonstrates that the worker in question would be a suitable candidate for the nominated suitable employment. This necessarily requires the compensating authority to determine what prerequisites a prospective employer would be looking for in an applicant for the nominated suitable employment and to satisfy itself that the

particular worker could meet those requirements in all respects if for example responding to an advertisement for such suitable employment.

There is no longer a right to appeal to the Full Supreme Court from the Full WCT even with leave on a question of law.

B. WARREN -v- WORKCOVER

Fortunately, the WorkCover Corporation has recently sought and obtained leave to appeal a decision of the WCAT in [Warren -v- WorkCover A64/1997](#) (another Section 42A case) ("Warren") to the Full Supreme Court which will present the following issues for consideration; -

- a) Which party carries the burden of proof with respect to the assessment
- b) Whether a compensating authority is required to do more than simply identify the general type of employment nominated as suitable employment and whether a general description of employment is sufficient to identify the amount which the worker is determined to be capable of earning in such suitable employment.
- c) What "suitable employment" means and whether in that regard the principles espoused in [Adams](#) apply.

Burden of Proof

Deputy President Thompson found that if Parliament had intended that the worker carried the burden of proving that the nominated employment was not suitable employment that he had a reasonable prospect of obtaining, it would have said so.

Suitability of Employment

The Deputy President also concluded that the description of a general type of occupation was inadequate as: -

- a) The same general occupation may involve different specific requirements depending on the industry and classification or sub-classification of such occupation thereby requiring different physical capacities and other requirements, which may render the nominated employment as being unsuitable to the worker in question.
- b) The identification of an award rate applying to the nominated suitable employment did no more than demonstrate that a person whose duties fell within the definition in that award was entitled to a minimum award rate of pay. The existence of the award did not show either the content of the occupation or that such occupation existed.

What does Warren mean to a Compensating Authority / Case Manager

The significance of burden of proof aspect on this case is the same as was discussed in relation to the [Adams](#) decision.

Additionally, [Warren](#) requires a more specific description of the nominated suitable employment and proof that such employment exists (albeit not currently available to the worker in question).

SUMMARY

The effect of both decisions is that unless and until the compensating authority produces the evidence required to establish that the assessment of entitlement of either income maintenance or a capital sum meets all the requirements of the relevant statutory provisions with respect to a specific job, the worker is not required to call any evidence. That is not to say that a case manager must have a case which can be proven and accepted by the WCT on the balance of probability, but rather that some evidence is required to support its decision. Then the evidentiary onus shifts

to the worker, as observed by the Full WCT in Adams, to negate such evidence.

The worker still carries the burden of proof if he/she asserts that partial incapacity should be deemed total (in other words that he/she comes within the “odd lot” principle).

Evidence as to whether the nominated employment exists, the pre-requisites thereto and whether the worker would be considered a candidate (which a compensating authority will now need to have on file) would include for instance a statement from a large employer, an appropriate labour placement company or labour hire company (relating to both white collar and blue collar work). Information of this nature obtained from an agency or company, which relies on information not directly known to it, eg. Statistical information will not be sufficient.

These two decisions undoubtedly make the “2 year process” much more difficult and expensive for compensating authorities.

COMPENSABILITY, NOT A DEAD ISSUE - KOWALSKI

The Full Supreme Court of South Australia on 15 July 1997 delivered its decision in Mitsubishi Motors Australia Limited v Harbord & Kowalski (unreported) which reversed a long standing understanding of estoppel arising out of a previously accepted claim for compensation precluding the issue of compensability to be raised in respect of subsequent claims.

In our fourth issue of *Covered* we summarised Kowalski when heard at first instance by the Supreme Court on an Application for Judicial Review. That decision has been upheld by the Full Bench of the Supreme Court on appeal.

Five important principles can be distilled from Kowalski, namely:

1. The making of a payment even as a result of a determination to accept a claim does not give rise to an estoppel - Section 106A.
2. A determination accepting a claim for compensation does not prevent a compensating authority from later putting in issue the compensability of the disability asserted by a worker when determining a subsequent claim for compensation - Section 106A.
3. A compensating authority, quite apart from the making of a determination and/or the making of payments, may also make or be taken to have made representations to a worker that could give rise to an estoppel. However more is required than the making of a determination or the making of a payment.
4. A consent determination can give rise to an issue estoppel. In deciding whether it does so, and if so in what terms, it may be necessary to do more than have regard to the terms in which that determination was expressed.
5. Section 106A does not apply in respect of a Review Officer's decision.

In light of paragraph 3 above, a compensating authority must, if it wishes to preserve the opportunity to put compensability in issue at a later date in relation to a subsequent claim for compensation, take care not to create an estoppel by:

- (a) The conduct of the compensating authority or its case managers;
- (b) The terms of determinations accepting claims for compensation;

- (c) The terms of any consent orders recorded by a Conciliator, Arbitrator or Presidential Member.

The consequences of this decision are both complex and beneficial in certain circumstances and we strongly recommend the benefit of this decision not be overlooked.

COVERED CASES

PIZZORNO V WORKERS REHABILITATION AND COMPENSATION CORP & ANOR

Decision of The Full Court of The
Supreme Court of South Australia

(Unreported, dated 01/07/97)

Catchwords:

Interpretation of Section 4(8)(a)(ii) - fixing AWE as at the time the worker suffered incapacity.

Facts:

The worker sustained injury on 13 October 1994. For two weeks prior thereto he worked at least one hour of overtime each day and eight hours of overtime each Saturday, and would have continued to work that pattern, until mid February 1995 when the employer's operations ceased. The employer's operations were later taken over by another company which would have re-employed the worker in or about mid August of 1995 had he not been injured.

The worker's average weekly earnings (AWE) were set at an amount which excluded overtime.

Issues:

1. Could overtime be excluded from AWE on the basis that due to the cessation of the employer's operations in mid February 1995, the established pattern of overtime would

not have continued pursuant to Section 4(8)(a)(ii)?

2. Were the Review Officer and Tribunal able to take into account the fact that overtime ceased in mid February 1995 to set a lower rate of AWE from that date?

Held:

1. No. The Court held that Section 4(8)(a)(iii) in requiring a worker to show that he or she would have continued to work overtime in accordance with an established pattern, does not imply that the pattern ought to continue indefinitely for overtime to be included in AWE.

Overtime need only to have continued for a "sufficient period of time" (p6). This is a question of fact. The Court indicated that a continuation of the pattern for a week would not however suffice.

In this case, the continuation of the pattern of overtime until mid February (4 months) satisfied the requirement of Section 4(8)(a)(iii), such that overtime was included in AWE.

2. No. The Court found that it was not open for it to set two different rates of AWE in respect of the different periods over which the worker would or would not have worked overtime.

The Court indicated that Section 36(2)(bb) ought to have been used to reduce weekly payments in or about mid February of 1995 due to the employer ceasing operations.

Commentary:

This decision encourages the prompt determination of claims.

When regard is had to the requirement of Section 53(4) that claims for compensation be determined as

expeditiously as reasonably practicable and preferably within 10 business days, the within decision that requires the compensating authority in setting AWE to only take into account the worker's earnings as at or very soon after the time of incapacity, does not seem incongruent.

digit, due to the limitations arising from pain stemming from the neurological problem." (P8)

Note: The Corporation has sought leave to appeal this decision to the High Court.

CASE SNIPPETS

MARANTONIS V WORKERS REHABILITATION AND COMPENSATION CORPORATION

Decision of the Full Court of the Supreme
Court of South Australia
(Unreported, delivered 13/05/97)

Approximately 14mm of the end of the worker's left middle finger was amputated in a work injury which left the worker with fairly constant pain and recurrent cysts over the stump due to damaged nerves.

The worker's evidence at the full hearing was that knocking the tip of the stump caused significant pain down the stump and into the palm of his hand.

On appeal before the Tribunal, the worker abandoned his claim for an assessment in terms of loss of function of the left hand and proceeded on the basis of an entitlement to an assessment for loss of function of the left middle finger or loss of function of the left arm below the shoulder, as well as disfigurement.

The Court held that the worker suffered three quite separate and independent disabilities and was entitled to three lump sum assessments, namely, loss of the distal phalanx of the left middle finger, disfigurement and loss of function of the left middle finger.

The Court specifically found this did not doubly compensate the worker and in particular that compensation for loss of the distal phalanx is "pitched towards a physical situation quite different from the loss of function of the remainder of the

HANDY HINTS

When more than one Notice of Dispute is lodged against one determination by more than one person with a direct interest in the determination, a compensating authority is obliged to conduct separate reconsiderations in response to each and every Notice of Dispute, and is not obliged to produce the same outcome upon each subsequent reconsideration.

So, in a hypothetical example where a compensating authority confirms on reconsideration a determination accepting a worker's claim for back injury for a closed period only which is disputed by the worker on the basis that incapacity is ongoing, the compensating authority may vary the disputed determination on reconsideration in relation to a subsequent Notice of Dispute issued by the employer, rejecting the worker's claim outright after receiving additional new information from the employer, for instance that the worker injured his back falling out of an apple tree at home.

In such a case a redetermination of the disputed determination pursuant to Section 53(7a)(c) rather than conducting a further reconsideration is more appropriate if the information could not have previously been obtained. A redetermination would bring to an end both Notices of Dispute by removing the basis therefore.

Also note that it is the reconsideration, which in taking the place of the disputed determination

determines the nature of the dispute before the Tribunal.

- *letto (preliminary ruling of D P Parsons - Action No. 2036/1996)*

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D P Gilchrist interpreted the transitional provisions of Section 34(1) of the Workers Rehabilitation and Compensation (Miscellaneous Provisions) Amendment Act 1995 as permitting the amendments introduced by that amending Act, which provide for a discontinuance or reduction of weekly payments to be applied to calculating entitlements to income maintenance for periods from the date of operation of those amendments, namely the 25/05/95, even if the disability was sustained prior to that date.

- *Hagean A42/1997*

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NEW DISPUTE RESOLUTION PROCESS PROVES TO BE A SUCCESS

D P Gilchrist presented a paper at a Law Society Continuing Legal Education Seminar addressing the progress made by the new dispute resolution process.

He quoted statistics, which reveal the new system to be a success, producing results comparable to, if not better than, results achieved by interstate systems.

95% of all matters initiated in the new system since its inception have resulted in a negotiated settlement, with 20% settling at the reconsideration stage and 70% at the conciliation stage.

He commended the parties and their legal representatives on their wholehearted participation in the new system, which is reflected in the excellent settlement rate recorded to date!

Is this recognition that we are all actually doing something right?

NEWLY APPOINTED CONCILIATION AND ARBITRATION OFFICERS

After much speculation the Tribunal's new complete team of Conciliation and Arbitration Officers was appointed for a term of five years on 7 August 1997. We list them below:

Mike Duigan
Stephen Georgiadis
David Gribble
Hanno Kohn
Robert Lawton
Robert McCouaig
Nick McShane
Eric Mostowyj
John Palmer
Michelle Player-Brown
Irene Pnevmatikos
Christine Pope
Lydia Richards
Christopher Richer
Jenny Russell

Gun & Davey Compensation Team

Michael Ricketts LL.B. – Managing Partner - 8228 5217 – *Personal Assistant, Rebecca Hage*

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Paul White LL.B. – Associate - 8407 9211 – *Personal Assistant, Linda Saunders*

Tas Carabelas LL.B. – Senior Associate - 8228 5210 – *Personal Assistant, Sarah Underwood*

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