

Gun & Davey **Covered**



Volume 1, Issue 10 - May 1998

WELCOME

Welcome to this the 10th Issue of **Gun & Davey Covered**.

In this issue you will find a wide range of topics discussed including the unpredictability of the law relating to extensions of time, the lack of permanency following Section 36 discontinuances, further discussion of the issues raised in *Kowalski* and the difficulty in enforcing the six month time limit within which claims can be brought under the Act.

You would have received by now an update issue of the 31 March 1998 **Gun & Davey Covered – Extra** addressing the important decisions of the Workers Compensation Tribunal in the matters of *Drysdale* and *Treleaven*.

In the meantime, we wish the successful and re-appointed/newly appointed WorkCover Agents all the best over the next three years of their contract. We have no doubt that the WorkCover Corporation's decision to introduce these changes will work to the benefit of both employers and workers alike. We sincerely trust that all staff of the unsuccessful Agents find acceptable and suitable alternate employment and thank them for their past support of **Gun & Davey**.

If as a result of these changes any employer presently in regular receipt of

Gun & Davey Covered is concerned that this service may be interrupted please contact the writer.

Industrial Law Appointment

Gun & Davey is pleased to announce that Paul Tanner has joined the firm as a senior consultant. Paul has a national reputation in

Industrial Law particularly in the fields of award and enterprise bargaining and negotiation and strategic industrial relations advice. Together with Paul we continue to offer professional advice in relation to contracts of employment, dismissal of employees for cause or redundancy and to represent clients in wrongful dismissal and other award compliance matters.

We would appreciate an opportunity to prove ourselves to you in this area.

Regards,
Michael Ricketts

In This Issue			
Welcome	1	Late Claims	4
Extension of Time	2	Covered Cases	5
Section 36 - Discontinuance	2	Case Snippets	6
Revisiting Compensability	3	Directory	7

EXTENSION OF TIME – THE ULOWSKI OR TAYLOR APPROACH?

The Full Bench of the Workers Compensation Tribunal in [Santos –v- The Corporation JD 14/1998](#), considered the provisions of Section 54(7)(g)(ii) which prescribe a time limit within which an action for recovery can be brought. In particular, it considered the competing approaches to granting an extension of time taken by the Full Supreme Court of South Australia in the decision of [Ulowski –v- Miller \[1968\] SASR 277](#), and the High Court majority decision of [Brisbane South Regional Health Authority –v- Taylor \(1996\) 186 CLR 541](#).

The Court recognised the underlying reason for a limitation period was to ensure that a potential claimant brings his or her action promptly to avoid the obligation on a defendant to defend any such action becoming unfair or oppressive. It also recognised that discretion to extend time was necessary to avoid injustice, provided that a potential defendant's ability to defend any action is not unduly compromised by the delay.

The Court identified two competing approaches to the exercise of that discretion.

On the one hand, there is the view that “an otherwise perfectly good cause of action should not be defeated by delay, unless there is good cause”. ie: [Ulowski](#) approach.

On the other, there is the view that actions brought outside the prescribed time limit “should only be permitted, if there are good reasons for doing so”. ie: [Taylor](#) approach.

The two approaches can potentially produce quite different outcomes.

The Tribunal was unable to decide which to adopt, and so has now referred the matter on a case stated to the Full Supreme Court.

We will keep you updated!

SECTION 36(1)(b), CEASED TO BE INCAPACITATED – NOT SO SACRED!

Since the 1995 amendments to Section 36, we have waited with baited breath on the Tribunal/Court to decide which, if any, of the grounds for discontinuance pursuant to Section 36 would operate as a discontinuance “for all time” in respect of the disability in question.

We had considered that at least the provisions of:

Section 36(1)(b) – discontinuance on the basis of ceased to be incapacitated;

Section 36(1)(e) – discontinuance on the basis of dismissal for serious and wilful misconduct; and

Section 36(1)(f) – discontinuance for breach of mutuality, where the breach is severe;

were something of a sacred cow. That is, we envisaged that in those instances, it would be extremely difficult for a worker to have weekly payments subsequently reinstated.

There are now three decisions which address this issue, and which have evinced an attitude on the part of the Tribunal at least, to interpret the consequences of discontinuance with some leniency in favour of the worker.

In [Francis \(A68/1995\)](#) the Workers Compensation Appeal Tribunal held that discontinuance pursuant to Section 36(1)(a), on the basis that the worker consents to same, does not forever deprive that worker of weekly payments. The Tribunal decided that consent given could subsequently be withdrawn at any time.

In [Marina A25/1995](#), the Tribunal held that a worker whose weekly payments have been discontinued pursuant to Section 36(1)(c) on the basis of a return to work, is able to reinstate payments by lodging a fresh claim for compensation with proof of incapacity upon termination of the employment even though

there has been no change to the level of his incapacity.

In the Tribunal decision of [Skinner –v- WorkCover Corporation/MMI Compensation \(SA\) Limited \(Tocoda Pty Ltd\) JD16/1998](#), Deputy President Gilchrist held that “a finding that a compensable disability had ceased to be incapacitating at a certain point in time does not result in the issue of incapacity in respect of that disability being closed for all time”.

He envisaged the scenario of a worker subsequently suffering “a spontaneous relapse in the circumstances that have not broken the causal link with the original compensable disability, and which result in a further period of incapacity for work”.

He indicated however “the worker would have to establish that there had been a *change in circumstances* subsequent to [the Section 36(1)(b) discontinuance]” (our emphasis).

It is not quite clear what the Deputy President actually meant by the phrase a “change in circumstances”.

Notwithstanding this, it is difficult to imagine many disabilities, which are subject to *spontaneous relapses*.

As a consequence of that qualification the decision is not as far reaching as it may have first appeared and so we continue to regard a Section 36(1)(b) discontinuance as perhaps the most enduring discontinuance available.

REVISITING COMPENSABILITY - DON'T GET CARRIED AWAY

[John Stamatopoulos and George Stamatopoulos –v- State of South Australia \(Department of Transport\) JD15/1998](#) is a recent decision of Deputy President Gilchrist in the Workers Compensation Tribunal.

The application of the decision in [Mitsubishi Motors Australia Ltd –v- Harbord & Kowalski](#) to an accepted claim for compensation in the

absence of a further claim is considered. You will recall that [Kowalski](#) reversed a long-standing belief that an estoppel arises from a previously accepted claim for compensation precluding the issue of compensability being raised in respect of subsequent claims.

In “Compensability, Not a Dead Issue – [Kowalski](#)” **Gun & Davey Covered** Volume 1, Issue 7, September 1997 - we distilled five important principles from [Kowalski](#), namely:

1. The making of a payment even as a result of the 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 in the making of 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 on 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 Review Officer's decision.

In [Stamatopoulos](#) the applicants performed work for the respondent and during the course of performing that work, both sustained disabilities in respect of which they sought and obtained compensation pursuant to the Act.

On 13 June 1997 a decision was delivered by Justice Von Doussa in [Barry William Paterson –v- State of South Australia](#) in the Industrial

Relations Court of Australia. That case concerned the status of the relationship between Paterson and the respondent, and was found to be that of independent contractor and principal. The respondent contended that the relationship was the same between the applicants, Stamatopoulos' and the respondent.

On the basis of that decision the respondent formed the view that the applicants did not have an entitlement to compensation pursuant to the Act on the basis that they were not workers for the purposes of the Act. They forwarded a letter to the applicants purporting to cease weekly payments upon the expiration of 21 days from the date of the letter. The letter did not refer to Section 36 of the Act but stated that in light of the decision in Paterson's case:

"I have reconsidered the earlier decision made by the Department to make certain payments to you. These payments are now to cease.

The reasons for the Department's decision to cease payments to you was based on the decision in Paterson's case together with Section 30 of the Workers Rehabilitation and Compensation Act, 1986 ("the Act")".

The respondent argued that the decision in Kowalski supported the decision to cease weekly payments. It would logically follow from the respondent's argument that a compensating authority could cease weekly payments by relying upon Section 106A of the Act and the decision in Kowalski.

Not surprisingly, the respondent's submission was rejected by the Deputy President. He found that Section 36 prohibited discontinuance or reduction of weekly payments except on the grounds stipulated in the Section. He referred to what fell from King C J in Mitsubishi Motors Australia Ltd -v- Sosa (Unreported, delivered 8 June 1995 S5084) and the Full Court in Local Government Association of South Australia -v- Delle-Donne (Unreported, delivered 6 June 1996 S5661).

In our view the decision in Stamatopoulos is uncontroversial. Kowalski does not allow you to ignore the requirements of Section 36 of the

Act. Kowalski is beneficial where a further claim for compensation is lodged.

Note – the respondent has lodged an appeal to the Full Tribunal and a case stated is likely to be referred to the Supreme Court.

LATE CLAIMS

SECTION 52(3)(b) – TOOTHLESS TIGER?

The Full Supreme Court considered the meaning of Section 52(3)(b)(ii) in Kleinrahm -v- The South Australian Health Commission - Women's & Children's Hospital (Unreported decision of Supreme Court of South Australia, delivered 26 February 1998. Judgment number S6562).

The Court held that the onus rests upon the worker to establish the matters referred to in sub-paragraph (3)(b). In other words the onus is on the worker to establish that the proper determination of the claim has not been substantially prejudiced or that the failure to make the claim within the prescribed period was occasioned by ignorance, mistake or absence from the State, or other reasonable cause. Those matters if established, will remove the bar.

However, importantly, with respect to ignorance, mistake, absence from the State or other reasonable cause, the relevant period is the prescribed period and not the period until the claim was in fact made.

In Kleinrahm the claim was for weekly payments from the worker's resignation on 6 June 1992. Accordingly, the prescribed period expired on 6 December 1992. The Full Supreme Court held that both the Review Officer at first instance and then the Tribunal erred in not making specific reference to the fact that the prescribed period expired on 6 December 1992.

The Court remitted the matter to the Tribunal for further consideration of the question whether the failure of the worker to make a claim within

the prescribed period was occasioned by her ignorance.

The decision certainly makes it more difficult to maintain a rejection of a worker's claim pursuant to Section 52(3)(b). In order to remove the bar a worker need only establish that the failure to make the claim within the prescribed period was occasioned by ignorance, mistake, and absence from the State or other reasonable cause.

In other words if the prescribed period is from June 1990 to December 1990 and the worker's failure to lodge a claim within the prescribed period was occasioned by her ignorance but from 1993 to the time the worker lodges a claim in 1998 she was perfectly aware of her entitlement to lodge a claim for compensation after receiving legal advice then the worker may nevertheless be able to remove the bar on the basis of the reasoning of the Court in Kleinrahm. Whilst that does in our opinion lead to some unfair results the decision in Kleinrahm is binding and the Court's interpretation of the construction of Section 52(3)(b) is consistent with case law in relation to comparable legislation.

We stress that it is important to determine when the prescribed period of six months begins to run. The period of six months commencing on the day on which the entitlement to make the claim arises means when the worker incurs one or other of the heads of expense or loss for which compensation is payable: [Cristea –v- Workers Rehabilitation and Compensation Corporation \(CCA Snack Foods\) 1993 61 SASR 487](#).

COVERED CASES

BURCH –v- STATE OF SOUTH AUSTRALIA

**Decision of the Full Court of the Supreme Court of South Australia
(Majority 2/1)**

(Unreported, dated 25/02/98)

Catchwords:

Disease and secondary disability – Section 30 – autogenous injury.

Facts:

The worker was born with an arterio-venous malformation (AVM) in the brain, a kind of vascular short circuit, which was symptomless until it ruptured whilst at work. This led to the formation of a haematoma, which raised intracranial pressure, that in turn caused an obstructive hydrocephalus.

The medical evidence was that normal blood flow through the AVM caused it to increase in size or that an AVM might slowly increase in size as a person ages.

It also established that the rupture could have occurred without any precipitating cause such as hypertension, stress or physical activity.

That the worker suffered a “physical injury” within the meaning of the definition of “disability” in Section 3 when the AVM ruptured was accepted.

It was also accepted that the disability did not arise out of employment, and whilst it may be said to have arisen in the course of employment, it was accepted that employment did not contribute to it.

Issues:

Did the rupture of the AVM constitute, “a disease or secondary disability”, such that it was necessary for the worker to show that his employment contributed to his disability pursuant to Section 30(2)(b)(ii), or was the disability a primary injury such that pursuant to Section 30(2)(a), all the worker had to show was that it arose in the course of employment?

Held:

The AVM was held to be a disease as defined, as it was a “physical ... defect ... of ... gradual development” (Section 3).

The rupture, which was in fact the physical injury sustained in the course of employment,

was held to be a disease as it was a “physical ... defect ... of sudden development” (Section 3). The rupture was an autogenous change in the course of the AVM disease and was an inevitable result of that disease.

The rupture could also be defined as a secondary disability. The prior disability suffered by the worker was the AVM, which was of itself a disease, and the rupture was an aggravation, acceleration, exacerbation or deterioration of that disease.

As the AVM rupture was both a disease and a secondary disability, and as the worker could not establish that his employment contributed to that disease or secondary disability, the disability suffered was non-compensable.

Commentary:

The previous Full South Australian Supreme Court decision of Ascione (1989) 52 SASR 122, was distinguished on the basis that amendments to the Act subsequent to that decision meant that it was no longer applicable to the facts of the case in question.

The High Court decision of Zickar (1996) 71 ALJR 3 was also distinguished, on the facts.

A caution was sounded against using previous decisions particular to their own facts and different definitions used in different Acts, to determine whether on the facts of the case at hand, there was a disease or secondary disability.

operating in South Australia but who was resident in New South Wales and spent more than 10% of his time working in South Australia and more than 10% of his time working in New South Wales (his usual haul being Adelaide / Sydney / Adelaide), was in South Australia at the time that he died in compensable circumstances.

The Tribunal held that as the worker died on a trip which had commenced in South Australia and had not yet gone beyond it, the work he was engaged in when his disability occurred was employment within this state, thereby making out the necessary nexus between the worker’s employment and South Australia. It was irrelevant that the worker was resident interstate that he did not regularly travel between a port and any other point of embarkation and a place of employment and was not usually employed in any state.

Deputy President Thompson rejected the argument that Sections 6(2) and 6(3) represented an exclusive code and that Section 6(1) was merely an introductory section to this code. He considered that Section 6(2) and 6(3) simply served either as an expansion of Section 6(1) or as an explanation of Section 6(1).

We do not agree with this interpretation.

Look out for the Full Supreme Court decision in this matter.

CASE SNIPPETS

TERRITORIAL APPLICATION

We recently received a decision of the WCAT in one of our own matters of Smith -v- NZI Workers Compensation (SA) Pty Ltd (A17/1998), interpreting the provisions of

Section 6, which is now to be appealed to the Full Supreme Court.

There, the deceased worker, an interstate trucker driver, employed by a company

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