



WELCOME

After our “bumper” 11th issue of *Covered*, we have pleasure in publishing the 12th issue, which is back to a more manageable length.

The “Stop Press” decision in Mitchell regarding the application of Regulation 16a to disability suffered as a consequence of separate traumas has provided an unexpected bonus to WorkCover. The outcome was even more surprising in that our Mark Calligeros, who represented the employer by its agent MMI Workers Compensation (SA) Ltd, was instructed by WorkCover to restrict his submissions to the specific facts of this case and not to pursue a wider application. Despite that, the Full Bench has provided a far-reaching decision with important consequences.

Following various comments made in the press shortly after the decision was handed down; WorkCover has now determined to apply Mitchell to its full effect. It will be interesting to observe how the decision effects the application of the supplementary benefit.

I would like to take an opportunity of drawing to our readers’ attention the fact that although *Gun & Davey – Covered* is a team effort from our WorkCover section, much of the initial and more onerous preparatory work is the responsibility of our Dana Cirelli and Simon Harvey.

The excellent response this publication receives is a tribute to them and we thank them. We expect there will be one more issue of *Gun & Davey – Covered* prior to Christmas.

Regards, Michael Ricketts

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**** STOP PRESS ****

MITCHELL -v- WORKCOVER CORPORATION (T W INGHAM & SONS PTY LTD/MMI)

Decision of the Full Bench of the Workers Compensation Tribunal (JD60/1998)

Catchwords:

Application of Regulation 16a.

Facts:

The worker was 57 years of age and commenced work as a plasterer in April 1991.

In discharging his duties he developed pain in the left elbow, which incapacitated him for work. A claim for compensation was submitted and accepted. The relevant date of injury for the purposes of the Act was 21 May 1991.

On 15 April 1994 the Corporation determined his Section 43 lump sum entitlement at 20% loss of function of the left arm at or above the elbow.

The worker returned to work but as a result of his duties and his compensating for the left arm disability, he sustained a similar injury to his right arm. A claim for compensation was submitted and accepted.

The relevant date of injury being 23 September 1993.

It was not in dispute that the worker suffered a 12.5% loss of function of the right arm at or above the elbow as a consequence of the second injury.

Issue:

Does Regulation 16a apply in calculating the worker's Section 43 lump sum payment for the second injury?

Held:

Yes.

"Irrespective of the fact that the disabilities were suffered as a consequence of separate events/trauma,"

Regulation 16a applied.

The purpose of Regulation 16a was stated to be -

"To reduce the amount of money that would otherwise be payable to a disabled worker who is entitled to compensation in respect of two or more disabilities to which the Schedule applies".

If clause 5 of the Third Schedule had intended Regulation 16a to apply only to multiple disabilities arising from the *same* event or trauma, it would have said so.

Commentary:

Regulation 16a is to be applied in the normal way to calculate the *percentage* of the prescribed sum, which each disability, or the disability being assessed, generates. The *dollar value* of that percentage is then calculated by reference to the prescribed

sum for the year in which the disability (resulting in permanent disability) was sustained.

Where a Section 43 assessment is to be made on any claim, the compensating authority must now identify all past Section 43 payments (if any). Where there are multiple claims to be assessed relating to disabilities suffered in different years, we recommend (subject to any direction to the contrary from WorkCover) that the assessments be made chronologically.

This decision, although unexpected, should make the "bean-counters" at WorkCover very happy indeed!

COVERED CASES

ARCIPRESTE -v- EMAIL MAJOR APPLIANCE GROUP (SIMPSON LIMITED)

Decision of the Full Bench of the Workers Compensation Tribunal (JD34/1998)

Catchwords:

Section 42A assessment of loss of earning capacity – requirement to re-evaluate the worker's notional weekly earnings at the time of each interim assessment.

Facts:

The employer issued a determination pursuant to Section 42A making the fourth interim assessment of the worker's loss of future earning capacity. It relied upon the same notional weekly earnings figure it had relied upon in making the earlier (third) interim assessment.

Issue:

Whether in making further interim assessments pursuant to Section 42A, the employer is first required to review the rate of notional weekly earnings?

Held:

Yes. The words “rates of earnings current at the date of the assessment” in Section 42A(3)(a) require the compensating authority to make an assessment of the worker's notional weekly earnings as at the date of the assessment.

The review process provided for by Sections 38 and 39 of the Act only applies in respect of weekly payments of income maintenance being paid pursuant to Section 35.

Commentary:

Whilst the Court indicated that it would have been helpful for Parliament to stipulate how the re-evaluation of the worker's notional weekly earnings was to take place, the Court itself did not assist in doing so!

**WORKCOVER CORPORATION (LE ROX) -
v- THEODOSIOU**

**Decision of the Workers Compensation
Appeal Tribunal
Deputy President Cawthorne
(A22/1998)**

Catchwords:

Interpretation of the former Section 36(1A)(b) i.e. Section 36(1)(c)(ii).

Facts:

The worker's last prescribed medical certificate indicated that he remained incapacitated until 17 March 1995. An independent medical examination was arranged with Dr Patel on 28 March 1998, which did not take place.

On 18 April 1995, the compensating authority wrote to the worker indicating that if it did not receive a certificate within the next 10 days, his weekly payments would be discontinued pursuant to the former Section 36(1)(f) and (1A)(a) (which is in essentially the same terms as the current section).

The compensating authority did not receive a certificate within that time and on the 2 May 1995 gave notice to the worker discontinuing his weekly payments.

Issue:

Is Section 36(1)(f) and (1A)(a) a section of strict liability? i.e. is a compensating authority bound to consider extenuating circumstances such as the certificate being produced one day late or having been lost in the post?

Held:

The section is one of strict liability and a compensating authority need not consider extenuating circumstances.

The compensating authority need only prove that a certificate from a recognised medical expert was not received within the time allowed for same.

Commentary:

We consider that a different result may have been arrived at if the compensating authority had a recent medical report on file certifying incapacity or, if the nature of the disability e.g. amputated arm, made it obvious that the worker continues to be incapacitated (see suggestion by DP *Gilchrist in Smith JD55/1998*).

**SANTOS LIMITED -v- WORKERS
REHABILITATION & COMPENSATION
CORPORATION**

**Decision of the Full Court of the
Supreme Court of South Australia
(Unreported, dated 11/09/98)**

Catchwords:

Extension of Time – Principles.

Facts:

The worker, an employee of Supervising Services Holding Pty Ltd ("SES"), suffered a compensable disability during the course of his employment when he slipped and fell at a work site owned and controlled by Santos Limited ("Santos"). SES had contracted with Santos to provide the worker's labour to the latter. The worker sought and obtained compensation from WorkCover and then settled an action for damages at common law against Santos.

WorkCover subsequently but belatedly instituted proceedings in the Industrial Court against both the worker and Santos pursuant to Section 54(7) of the Act. It sought to recover from Santos all compensation paid and payable to the worker over and above the settlement sum accepted by the worker.

The recovery proceedings were commenced some two years and seven months after the expiry of the statutory time limit of three years stipulated by Section 54(7)(g) of the Act. The Corporation sought an extension of time within which to institute proceedings pursuant to Section 48(1) of the Limitation of Actions Act, 1936.

Deputy President Cawthorne granted the extension of time sought by the Corporation and entered judgment against Santos. Santos appealed to the Full Bench of the Tribunal against that decision.

The Full Bench made a formal order stating a case to the Supreme Court on the issue of extension of time.

Issues:

The questions of law posed by the case stated were formulated in the following terms: -

In the Tribunal's consideration of the respondent's application for an extension pursuant to Section 48(1) of the Limitation of Actions Act, 1936 of the time fixed by Section 54(7)(g)(ii) for the institution of the proceedings against Santos: -

1. Did the respondent have the onus of persuading the Tribunal to exercise its discretion to grant the extension of time? (Yes)

2. Was there an evidential onus on the appellant to adduce any evidence of prejudice to it and if so, what was that onus? (Yes)

3. Was the respondent required to establish that the appellant would not be prejudiced by the grant of the extension of time? (No)

4. Can prejudice to the appellant be presumed by reason of the elapse of the 3-year limitation period? (Yes)

Held:

1. Yes the plaintiff (at first instance) does bear the onus.

2. Yes. If the defendant (at first instance) wished to rely upon actual or specific prejudice resulting from the delay that had occurred, it was incumbent upon the defendant to adduce evidence of the facts that would support such a conclusion. If it did not do so, it was open to the Court to infer that actual or specific prejudice did not arise. It would not follow that the Court should infer that no prejudice at all would be occasioned by the grant of an extension of time. The ultimate onus would remain upon the plaintiff to persuade the Court that an extension of time should be granted.

3. No. The plaintiff had to satisfy the Tribunal that the justice of the case required that an extension of time be granted. Prejudice to the defendant, especially actual or specific prejudice proved by evidence, was an important matter to be considered. Prejudice in the form of an interference with the defendant's ability to have a fair trial, attributable to the delay, was a matter of particular importance. The Tribunal was required to exercise its discretion taking into account any prejudice to the defendant attributable to the delay. The Tribunal could

grant an extension of time even though satisfied that the defendant would be prejudiced. But it could do so only if, considering all the circumstances, the justice of the case so required, notwithstanding the relevant prejudice to the defendant.

4. Yes. The Tribunal was entitled to infer that the defendant would or might suffer prejudice from the delay if an extension of time were granted. However the Tribunal should identify and assess the particular prejudice that might result. The Tribunal was then required to consider what conclusion should be reached about the prejudice issue on all the material before it. In so doing it should consider the significance of the failure of the defendant to adduce evidence of any actual or specific prejudice, if the defendant so failed.

Commentary:

This decision is a reminder to litigants that the party seeking the extension of time carries the onus.

However, there has been no radical change in the principles to be applied by a Court or Tribunal required deciding whether or not to grant an extension of time. Each case will be determined on its own facts, with prejudice to a defendant / respondent representing only one relevant consideration.

The further relevant considerations remain: -

- (a) Length of delay (and compared to limitation period)
- (b) Reason for the delay
- (c) Hardship to the applicant if extension is not granted
- (d) Conduct of the defendant / respondent

The above principles apply with respect to a worker seeking an extension of time within which to lodge a Notice of Dispute in accordance with Section 90A and to those

seeking to lodge an Application for Judicial Determination or Appeal to the Full Bench of the Tribunal outside of the prescribed time limits.

Thought is required in determining whether or not to contest an application made by a worker. If unsure legal advice should generally be sought.

CASE SNIPPETS

PIGNATARO

In Issue 9 of *Gun & Davey Covered Cases*, we featured the Workers Compensation Tribunal decision of [Pignataro \(JD10/1998\)](#).

This matter was appealed to the Full Bench of the Tribunal in [JD43/1998](#).

To recap, the facts were that the worker's weekly payments were discontinued pursuant to Section 36(1)(f) and (1A)(f)(i) due to failure to undertake work that had been offered to him and that he was capable of performing.

The Full Bench considered that the word "work" had been correctly interpreted by the learned Deputy President at first instance as:

"an opportunity to sell one's labour...[and] to come upon the employer's premises to undertake tasks connected with the employer's business and to be paid for doing so", provided that "the provision of duties [were not] calculated to demean or embarrass an injured worker".

It was not necessary to show that the work undertaken by a worker constituted "valuable work" i.e. work of value to the employer. It was therefore irrelevant in the facts of this case that the work offered to the worker by his pre-injury employer was supernumerary in nature.

As an aside, the Tribunal recognised that there is no obligation in Section 36(1A)(f)(i)

to warn a worker of the potential consequences of continued unexplained absences.

PATERSON -v- WORKCOVER CORPORATION

In [Paterson -v- WorkCover Corporation \(JD44/1998\)](#), the Corporation brought an Application for Directions (AFD) before the Deputy President requesting production of certain copy documents from the worker at the Conciliation Conference (CC) stage.

The worker had received the standard type letters sent to all parties to a dispute by Conciliation Officers requiring the parties to provide, at the request of another party, access to the relevant evidentiary materials.

The worker received written requests from the Corporation's representative for production of certain documents. At the CC, the worker's solicitors agreed to provide these but later refused.

The Tribunal held that the power to determine whether or not a party is required to produce materials requested by another party at the CC stage rests wholly with the Conciliation Officer and that it would be an improper exercise of the powers conferred upon a Deputy President at an AFD to make a ruling that a Conciliation Officer is empowered to make. This would usurp the Conciliation Officer's power by fettering the discretion that is otherwise conferred upon him or her by the Act and Rules.

Similar observations were made of Arbitration Officers and the arbitration process.

CONTE -v- WORKCOVER CORPORATION

In [Conte -v- WorkCover Corporation \(JD49/1998\)](#), the worker was a field support engineer employed to repair computers and other such equipment either at the employer's workshop or employer's customer's premises. He was required as a term of his employment to provide his own car for use in the employer's business and

was paid an allowance of approximately \$488.90 per month as well as a further amount calculated by reference to the number of kilometres travelled.

The worker injured himself on his way to work after parking his car in a parking space leased by the employer and allocated to the worker. The parking space was not owned by the employer and was a block away from its premises.

The Tribunal held that the worker had not yet arrived at his place of employment when he entered the carpark, but rather was still undertaking a journey.

The Court further held that one of the worker's duties of employment was to make a car available to the employer for its use during the course of the working day. Therefore, in driving the car to work, parking it in the carpark provided and walking from the carpark to the employer's premises, the worker was discharging his duties of employment!

Note: This decision is to be appealed to the Full Bench of the Tribunal.

HANDY HINTS

Be wary of issuing applications to strike out a worker's Notice of Dispute. They should only be issued when the Notice of Dispute is "patently bad".

As was observed by Deputy President [Gilchrist in Smith \(JD55/1998\)](#), quoting from [Paul -v- Metro Meat \(JD6/1998\)](#) at pp3 and 4-

"applications of this type must be treated with great caution and should only be granted if the relief sought is beyond argument".

TID BIT

The approach taken by Deputy President [Gilchrist in *Treleaven* \(JD17/1998\)](#) reported in our *Gun & Davey Covered – Extra* issued in March of 1998, which concerned the compensating authority's obligation to discover and produce surveillance reports and video investigation reports in defence of its determinations, was confirmed by the Full Bench of the Workers Compensation Tribunal in JD59/1998.

WATCH OUT FOR ...

Watch out for the Full Supreme Court decision of [WorkCover Corporation -v- Smith](#) that was heard on 10 September 1998 and concerns the interpretation of the territoriality provisions of Section 6 of the Act.

Refer to page 7 of *Gun & Davey Covered* Volume 1, Issue 10.

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