

Gun & Davey **Covered**



Volume 1, Issue 13 - December 1998

WELCOME

Welcome to this the lucky 13th edition of **Gun & Davey – Covered**.

Once again this issue contains helpful summaries of several recent decisions of the Workers Compensation Tribunal, which are both useful and relevant to daily case management of claims under the Act.

As these recent decisions confirm, the last twelve months has seen if not a stream then perhaps a trickle of outcomes more favourable to the employer's perspective than may previously have been expected. To us this demonstrates that the system is becoming more "robust" and beginning to provide to case managers greater opportunity to implement proactive case management. It is also pleasing that **Gun & Davey** has been directly involved in many of these successful outcomes.

We provide with this issue the first **Gun & Davey – Covered Index** which has been compiled with Issues 1 to 13 included. We trust you find it useful.

The WorkCover section at **Gun & Davey** takes this opportunity to thank those of you that have supported us throughout 1998 and to wish all our readers a safe and prosperous 1999.

Our tip is that next year will be better – it has to be!

Merry Christmas,

Michael Ricketts

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COVERED CASES

OLSEN -v- WORKCOVER

Decision of a Single Judge of the Workers Compensation Tribunal DP Gilchrist (JD89/1998)

Catchwords:

Ordinary hours or ordinary hours plus overtime. The process of determining whether overtime would have continued.

Facts:

The worker, a carpenter, was advised by his employer prior to commencing that he would be expected to work extended hours of 9.5 hours per day Monday to Friday and 8 hours on Saturdays with the possibility of longer hours and occasional Sundays.

He in fact generally worked 9.5 hours weekdays and 8 hours Saturdays at a Littlehampton site and 10 hours weekdays and 8 hours on Saturdays at a Balhannah site. Occasionally he did not work these hours due to inclement weather, and on such occasions, as well as public holidays, he was paid the base rate of 8 hours per day.

His understanding was that he would be paid pursuant to the Building Trades (SA) Construction Award.

The worker then sustained injury and was incapacitated only three to four weeks before his employment would have normally come to an end (as a result of the employer's inability to secure continuing contracts).

Issues:

1. Whether extended hours worked were ordinary hours or ordinary hours plus overtime?
2. If ordinary hours plus overtime, whether overtime would have continued to be worked in accordance with an established pattern?

Held:

1. Ordinary hours plus overtime.

The worker and the employer intended the Award to form the basis of their relationship; this was reflected in the amounts that the worker received when it was not possible for him to work extended hours due to inclement weather or public holidays. The Award contemplated ordinary hours as comprising a 38-hour week and hours beyond that overtime.

The expectation that extended hours would be undertaken was in keeping with usual practice in the construction industry.

The agreement between the worker and the employer as reflected by the hours actually worked demonstrates a flexibility of hours that is an obvious characteristic of overtime work (see [WorkCover -v- Kent A113/1995](#)).

2. That if a change in the pattern of overtime is "imminent" when the period of incapacity commences, notwithstanding that overtime would have continued to be worked in accordance with the same pattern for

some little time, the requirements of Section 4(8)(a)(iii) will not be met – if the change is not imminent, even though there might be an expectation that the pattern of overtime will change in the not too distant future, overtime, if it otherwise satisfied the relevant criteria, is to be included in the assessment of average weekly earnings (see [Muscara -v- WorkCover JD9/1998](#) and [Pizzorno](#) (supra)).

On the facts of this case, the change in the pattern of overtime was not sufficiently imminent that it ought not be included in the assessment of the worker's average weekly earnings and accordingly the worker can meet the requirements of Section 4(8)(a)(iii) subject to the first two criteria of Section 4(8)(a) being met.

Commentary:

[Ordinary Hours / Overtime Hours](#)

If worker and employer can be shown to accept that the contract of employment is to be determined by the provisions of a particular award, and that is borne out by the facts (usually the pay records), then it is by reference to such award that ordinary hours and overtime hours will be determined for the purposes of applying the provisions of Section 4 and in particular Section 4(8) of the Act, irrespective of the amount of overtime undertaken or the regularity of extended overtime hours being worked.

[Continuation of Overtime](#)

From the Full Supreme Court decision of [Pizzorno](#) we know that changes taking place one day or one week after the first date of incapacity would be taken into account in calculating average weekly earnings. We now know that the Tribunal may consider changes occurring three to four weeks after the first date of incapacity as not being sufficiently imminent to enable those changes to be taken into account in applying the provisions of Section 4(8)(a) of the Act. We sense that this particular case was almost borderline which suggests that

changes which are to take place at approximately two weeks after the first date of incapacity may arguably be imminent and therefore can be taken into account for the purposes of applying the provisions of Section 4(8)(a) of the Act.

**VANDERDOES –v- WORKCOVER
CORPORATION / VACC
(SEANCO PTY LTD)**

**Decision of a Single Judge of the
Workers Compensation Tribunal
DP Gilchrist
JD68/1998**

Catchwords:

Claim for compensation for mental injury based on the conduct of the Corporation in managing the worker's claim.

Facts:

The worker was suffering from an accepted compensable Post Traumatic Stress Disorder. She lodged a claim for aggravation of that condition. She alleged that a lengthy delay by the Corporation in paying her legal costs, disbursements and medical expenses causing her to institute proceedings out of the Adelaide Magistrates Court, when taken in the context of the alleged history of mismanagement of her claim and of unnecessary delays, caused an aggravation.

Issue:

Did the conduct of the Corporation in managing the worker's claim constitute a normal incident of "employment" per Section 30(2)(b)?

Held:

No. Even accepting the worker's allegations as to mismanagement, the Tribunal held that whilst the pursuit of a claim for compensation is generally regarded as a normal incident of employment ([Pete -v- Workers Rehabilitation & Compensation Corporation \(1996\) 66 SASR 474](#)), the connection between the circumstances of the alleged disability and the worker's

employment with the employer was too tenuous to satisfy the criteria in Section 30(2)(b).

Furthermore Section 30A and in particular Section 30A(b)(iv), does not indicate that a claim for compensation based upon the conduct of the Corporation can be entertained. The Tribunal found that Section 30A(b)(iv) was directed towards the conduct of the employer in respect of a worker's claim, not the Corporation.

The Tribunal did highlight that different considerations may arise in the context of an exempt employer. In those circumstances, the employer is in effect wearing two hats, one as employer and one as relevant *compensating authority*. This may mean that conduct undertaken in the employer's capacity as a compensating authority resulting in a disability might more readily be seen as establishing the necessary nexus to employment so as to make the disability compensable.

**CARBONE -v- MMI WORKERS
COMPENSATION (SA) LIMITED
(AUSTRALIAN TIMBERS P/L)**

**Decision of the Workers
Compensation Tribunal
DP Thompson
(JD65/1998)**

Catchwords:

Average Weekly Earnings – inclusion of bonus.

Facts:

The worker was employed by the employer on 7/7/88 as a storeman / truck driver. Each year a "bonus" was paid to employees. The amount of the bonus differed from year to year depending upon the profitability of the company and the worker's performance. The bonus was normally paid in September or October.

It was subsequently found that the bonus was a true gratuity. Employees did not have the *right* to receive the bonus or if they did

receive one, did not have the right to receive a particular amount.

The worker suffered a compensable disability on 14/3/96. He was not paid a bonus in September or October 1996 as his productivity had decreased due to the disability. The employer conceded that had he not been injured, then, on the balance of probabilities, a bonus would have been paid.

The worker's claim for compensation was accepted and his average weekly earnings (awe's) were set at \$500.00 per week. The bonus was *not* factored in.

Issue:

Was the worker was entitled to have the bonus included in his awe's or at one of the Section 38, 39 reviews?

Held:

No. The Deputy President decided that as the bonus was gratuitous and linked to variables such as the profitability of the company and a subjective estimation of the worker's performance, it did not fall within the ambit of Section 4(1). The Deputy President was also persuaded by the fact that the bonus was an annual payment made months after the end of the financial year.

Commentary:

The finding that the bonus was *gratuitous* was decisive. The outcome may well have been different if the bonus was linked solely to productivity!

The worker lodged a Notice of Dispute on the basis his incapacity was ongoing. Rather than re-considering the determination pursuant to Section 91 of the Act, Unisure re-determined the claim as ongoing pursuant to Section 53(7) and (7a) again setting awe's at \$595.50.

Unisure then became aware that the awe's were incorrect as they had included overtime and sought to issue a second *re-determination* varying the awe's to \$464.40 per week. The worker then lodged a second Notice of Dispute in relation to that re-determination.

The Tribunal held that the lodgement of the first Notice of Dispute had the effect of extinguishing any entitlements that the worker might otherwise have been able to enforce. This was so at least until the process of a reconsideration had been finalised. Accordingly, as the original determination was effectively vacated through the lodgement of the first Notice of Dispute, it was not appropriate to make a re-determination until the reconsideration process had been completed. Deputy President Gilchrist held that if re-determination were permissible following lodgement of a Notice of Dispute, the dispute resolution process could be stymied.

The Tribunal further held that the need to re-determine did not arise until at least the re-consideration had been completed. The Tribunal did not go so far as to hold that there was a blanket embargo upon the use of Section 53(7) and (7a) during the entire dispute resolution process, but it appears that there is until a re-consideration has been made.

CASE SNIPPETS

FALIDIS -v- UNISURE PTY LTD

Decision of the Full Workers Compensation Tribunal (JD67/1998)

Unisure originally made a determination to accept a worker's claim for compensation for a *closed period* setting an average weekly earnings (awe's) at \$595.50 per week.

GREWCOCK -v- WORKCOVER CORPORATION

Decision of the Workers Compensation Tribunal (JD83/1998)

The worker lodged a Notice of Dispute in relation to a Section 43 determination assessing 2% loss of function of the lower back. She argued that the assessment was

too low and failed to include an assessment of permanent disability of both legs and disfigurement resulting from an altered gait and muscle wasting.

Upon reconsideration, the compensating authority varied the disputed determination to determine that the worker's Section 43 entitlement was *NIL* as her injury constituted a temporary aggravation of a pre-existing condition.

Adopting the approach set out in [Falidis](#) (above), the Tribunal held that there was no restriction on reconsideration from determining a worker's entitlements in terms more adverse than those appearing in the disputed decision.

It found by way of dicta that whilst a compensating authority, upon reconsideration, must take into account matters raised in a Notice of Dispute, it is not restricted to reconsidering only those issues raised in the Notice of Dispute and can, in effect, revisit any of the issues appearing in the disputed decision.

This decision has however been appealed to the Full Bench of the Tribunal. We will report on the decision reached at that level.

O'CONNOR -v- WORKCOVER CORPORATION

Decision of the Workers Compensation Tribunal (JD69/1998)

In [O'Connor -v- WorkCover Corporation](#) the worker was an interstate trucker driver. He suffered disability to his lower back on 28/12/92 during a trip to Perth. He underwent two surgical procedures and was advised that he should not return to his previous occupation as a truck driver. Eventually, he agreed to redeem his future entitlement to weekly payments and Section 32 expenses.

Following the redemption the worker sought and obtained employment as an interstate

truck driver with another employer. In the course of his employment whilst approximately 1000kms east of Perth both front steering tyres required changing. In the course of so doing he suffered a further disability to his lower back whilst lifting tyres.

The worker claimed compensation but his claim was rejected. At Judicial Determination it was argued that the worker's conduct in undertaking the activities that led to the further injury constituted *serious and wilful misconduct*.

The Corporation argued that the worker's undertaking of the heavy duties of truck driving knowing that he had a serious injury to his back and against the advice of his treating neurosurgeon constituted misconduct. The Corporation further argued that the worker must have known that truck driving carried with it a significant risk of injury and that misconduct was both serious and wilful. The Deputy President expressed the view that had the worker deliberately embarked upon this activity in the knowledge that it would cause him injury then the resultant disability could be said to have been attributable to his serious and wilful misconduct. The same would be true if he had embarked upon the activity with a reckless indifference to the possibility of further injury. However, the Deputy President found that the worker genuinely believed that he could perform the duties of a truck driver despite his medical advice and that the injury was not a result that he had either planned or expected. His Honour then made further useful comments too involved to elaborate on here.

The Deputy President also dealt with Section 30B(3) which states that subsection (2)(b) does not apply in the case of death or serious and permanent disability. He found that the worker's disability was worse as a result of the further disability. He found that the further disability constituted a serious and permanent disablement. As a consequence, even if the further injury had been attributable to the serious and wilful misconduct, Section 30B(3) prevented that from barring the worker's claim.

FOLLOWING UP...

Revisiting Territorial Application – Supreme Court Decision of Smith

In the 10th issue of **Gun & Davey – Covered** we featured the Workers Compensation Appeal Tribunal decision of Smith and advised that that decision had been appealed to the Full Bench of the Supreme Court.

The Full Supreme Court has now delivered its decision in an unreported judgment (Judgment Number S6878, on 2 October 1998) and allowed the appeal by the Corporation.

The Court rejected the approach of Deputy President Thompson that Section 6(2) and Section 6(3) simply served either as an expansion or explanation of Section 6(1).

It held that in order for there to exist the nexus provided for in Section 6(1), one of the relevant matters in Section 6(2) and Section 6(3) must be established.

It found that the deceased worker did not satisfy Section 6(2)(a) as his duties employed him not only in South Australia but also in New South Wales. He spent more than 10% of his working time in employment in both South Australia and New South Wales and therefore was not usually employed in South Australia and/or in any other state.

Nor did he come within Section 6(2)(b), because whilst he was usually employed in two or more states, he was not based in South Australia as his usual place of residence was in New South Wales. Nor could it be said that he regularly travelled between a port and other point of embarkation in South Australia and the place of employment.

This decision serves as a warning to any employer who sends its employees interstate. We recommend such employers seek advice to ascertain whether or not its employees satisfy the requirements of Section 6, and if not, we recommend employers obtain coverage with interstate compensation schemes.

Gun & Davey Compensation Team

Michael Ricketts LL.B. – Managing Partner - 8228 5217 – *Personal Assistant, Rommi Gabel*

Mark Calligeros BA. LL.B. – Partner - 8228 5208 – *Personal Assistant, Mary-Anne Moffat*

Simon Harvey LL.B (Hons) – Associate

Tas Carabelas LL.B. – Senior Associate - 8228 5210 – *Personal Assistant, Deb Mitchell*

Paul Gabrynowicz LL.B-Associate – 8407 9211 - *Personal Assistant, Kristina Stefani*

Paul Tanner LL.B – Senior Consultant – 8407 9213

Dana Cirelli LL.B (Hons) B Com. - Associate