

Gun & Davey **Covered**



Volume 1, Issue 14 - February 1999

WELCOME

Welcome to Issue No. 14 of **Gun & Davey – Covered**.

This issue coincides with the appointment to our WorkCover team of Sophie Carmen.

Sophie, who previously practised at Donaldson Walsh in their WorkCover Section, will be joining **Gun & Davey** to work with our Paul Gabrynowicz. We welcome her and trust our association will be mutually successful and rewarding.

With Sophie's appointment our WorkCover section expands to seven members making us the largest dedicated WorkCover legal team in Adelaide. It also reflects **Gun & Davey's** commitment to maintain our high standard of service, advice and representation.

Turning to more mundane matters, this issue contains a consideration of the recent decision of Ryan in which the consequences of Section 35(6a) is considered. WorkCover should be pleased with the outcome although we anticipate that further litigation in this area is both likely and necessary to clarify the various issues, which remain outstanding.

Regards,

Michael Ricketts

In This Issue			
Welcome	1	Case Snippets	2
Covered Cases	1	Directory	4

COVERED CASES

RYAN -v- WORKCOVER CORPORATION/ROYAL & SUN ALLIANCE WORKERS COMPENSATION (SA) PTY LTD

Decision of the Full Bench of the Workers Compensation Tribunal (JD8/1999)

Catchwords:

Setting AWE re injury subsequent to a redemption specifically providing for a Section 35(6a) amount.

Facts:

The worker who sustained injury to his right elbow with the first employer lodged a Claim for Compensation, which was accepted. Weekly payments were made and subsequently redeemed for an amount of \$49,500.00, the agreement noting that the worker's future entitlements to weekly payments of income maintenance were \$25.73 per week i.e. the Section 35(6a) figure. Immediately prior to the redemption the worker was in receipt of weekly payments (80% of NWE) of \$458.75 gross.

The worker later found employment with a second employer earning \$681.60 gross per week until he sustained injury affecting his left elbow and aggravating the pre-existing right elbow condition. His claim in relation to same was accepted with the average weekly earnings set at \$655.80 i.e. the Section 35(6a) figure was deducted.

Issue:

In cases where a worker has received a redemption of weekly payments of compensation in relation to which the parties have agreed a Section 35(6a) figure and the worker later becomes entitled to receive weekly payments of compensation in relation to a separate injury, is a compensating authority entitled when setting AWE to deduct the amount of the Section 35(6a) figure agreed?

Held:

Yes.

There can be concurrent partial incapacities for work arising out of separate compensable disabilities, each of which can produce an entitlement to weekly payments. But in those cases, Section 35(6) applies such that the aggregate of those entitlements does not exceed the worker's notional weekly earnings, which according to the Tribunal means the worker is not entitled to receive more than the higher of the notional weekly earning figures to be attributed to one or other of the compensable disabilities.

In this case if the worker's entitlement to weekly payments had not been redeemed, he would have continued to receive them. In respect of any further compensable disability he would only have been entitled to weekly payments set at or made up to the higher of the notional weekly earnings attributable to the first or second disability.

So in a case where a worker has agreed to redeem weekly payments of compensation, Section 35(6a) deems a worker for the purposes of Section 35(6) to be receiving the weekly payments that were in fact redeemed. In this case the quantum of weekly payments that were redeemed was \$25.73.

Commentary:

This case may be considered distinguishable to cases where a Section 35(6a) has not been set at all, or the full rate of notional

weekly earnings is fixed. We expect that there will certainly be further litigation in those areas.

The Tribunal also seemed to infer that a different result might have been reached if evidence was presented that the Section 35(6a) figure was arrived at by artificial means. We shall no doubt hear further!

CASE SNIPPETS

FALIDIS -v- UNISURE (No. 2)

(JD5/1999)

Here the Deputy President was asked to summarily set aside a disputed re-determination of a previous re-determination on the basis that as a matter of law, there cannot be a re-determination of a re-determination!!

Unisure had issued a determination accepting the worker's claim for a closed period and setting AWE's. A Notice of Dispute was lodged in respect of the closed period acceptance and following reconsideration at a Compulsory Conciliation Conference; the parties agreed that the worker was entitled to weekly payments on an ongoing basis. Rather than requesting the Tribunal to issue an order to reflect this agreement, Unisure made a re-determination of the claim pursuant to Section 53(7a)(c) and the Notice of Dispute was presumably dismissed. Subsequent to this however, Unisure determined that the AWE's stipulated in the original determination *and* its re-determination were wrong as they included a component of overtime which did not satisfy the criteria of Section 4(8). So, in purported reliance upon Section 53(7a)(d), i.e. re-determination on account of administrative error, Unisure re-determined the re-determination, setting AWE's at a lower amount.

The Deputy President held that the time limit prescribed by Section 53(7a)(d) (two weeks) runs from the date of the first determination, which is the subject of a re-determination.

As a consequence, Unisure could not rely upon Section 53(7a)(d) outside the two-week period following the making of the first determination (which had been made 10 months prior).

As with [Falidis No.1 \(JD67/1998\)](#) appearing in Volume 1 Issue 13 of **Gun & Davey – Covered** (p5), the Deputy President expressed reservation as to whether Section 53(7a) can be invoked in respect of a matter pending in the Tribunal. However he found that he did not need to resolve that issue here because even if the earlier re-determination was validly made, the subsequent one was not.

CHIRNSIDE -v- STATE OF SOUTH AUSTRALIA (PRIMARY INDUSTRIES & RESOURCES SA)

(JD1/1999)

Further to the views expressed by Deputy President McCusker in [McAvoy -v- WorkCover JD42/1995](#) featured in **Gun & Davey – Covered** Issue 11 (p3), the Deputy President in [Chirnside](#) examined the adequacy of the time limit permitted to a worker to make representations in respect of a Notice of Intention to Review / Section 38(3) Notice.

In this case, the worker was allowed seven days from the date of the Section 38(3) Notice to provide written representations on the subject of the intended review.

The worker brought an application as a consequence of the Notice of Dispute lodged in respect of the associated Section 38(7) Outcome of Review of Weekly Payments Notice, seeking that the last mentioned determination be summarily set aside on the basis that, as a matter of law, seven days within which to respond to a Notice of Pending Review of Weekly Payments wholly

inadequate and thereby renders the associated Section 38(7) Notice invalid.

The Deputy President did not accept the worker's submissions and found that what constitutes "a reasonable time" for the purposes of Section 38(3)(b) is dependent on the circumstances of each particular case. He observed that in cases where there had been a substantial exchange of correspondence and information between the compensating authority and the worker it may be that the requirements of Section 38(3) might be a mere formality. Seven or even five days to respond to a Section 38(3) Notice may in those circumstances be considered reasonable.

He noted however that in other cases where there has been limited correspondence or exchange of information or where the worker is provided with a substantial amount of information that requires his or her consideration before a reply can be given, a time limit of many weeks or even longer may be required for it to be said that the worker has been given a reasonable time within which to make representations.

He then declined the summary relief sought as the parties failed to call evidence on these important issues.

Commentary:

The current standard of four weeks notice should be maintained but consideration should be given in each individual case to determine whether a longer period may be required.

A little bit of commonsense is all that is required to avoid problems such as these!

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-PA's, *Carol Preston/Rosey Weekley*

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

Paul Tanner LL.B – Senior Consultant – 8407 9213

Sophie Carmen LL.B (Hons) B Com. – Associate