

# Gun & Davey **Covered**



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## WELCOME

Welcome to this the 15<sup>th</sup> Issue of **Gun & Davey – Covered**.

In this issue we provide a detailed Section 43 Checklist, which we trust you will find useful in making Section 43 determinations. It is aimed at assisting decision-makers in coming to sustainable Section 43 determinations which given the complex nature of the law in this area is not always easy.

Some of the issues involved in making Section 43 determinations vary depending on the facts giving rise to them and we consider that a careful consideration of the facts in each case combined with this checklist should provide for better outcomes.

We are also pleased to announce that commencing from mid July 1999, this firm will be joined by **Michael Doyle** formerly of Jervis Thomas & Doyle. Michael will join the firm as a Senior Consultant practising exclusively in the WorkCover jurisdiction.

As a partner in his former firm, which is a member of the WorkCover Legal Panel, Michael will already be known to many of you as a solicitor of great experience and knowledge in WorkCover matters.

Michael's arrival will further entrench **Gun & Davey** as a leading provider of legal services to registered, self-managed and exempt employers in the WorkCover field.

We trust you find this issue of interest and benefit in your daily claims handling activities.

Regards,  
Michael Ricketts

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## SECTION 43 CHECKLIST

Below is a checklist of issues to consider before a Section 43 determination is made (some obvious, others not so).

1. Only impairments arising from *accepted disabilities or sequelae* are assessable – otherwise a fresh claim for compensation is required.
2. Ensure the condition is *stable*.
3. Ensure the loss is *permanent*. i.e. “an enduring or persistent condition”, “for a long and indeterminate time but not necessarily forever”: Refer to Howe (1992) 58 SASR 310.
4. A percentage assessment must comply either with the Third Schedule or the AMA Guidelines.
  - (a) AMA Guideline assessments: -
    - (i) The loss must not appear on the Third Schedule.
    - (ii) The three step criteria set out in the “introduction” of each chapter must be addressed in the medical reports relied upon i.e.:

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- Medical Evaluation
  - Analysis of Findings
- (c) Comparison of Results of Analysis with Impairment Criteria
- (b) Third Schedule assessments: -
- (i) A bodily part is taken to be lost if rendered “permanently and wholly useless” – a finger is taken to be lost “if two joints are severed from the hand or rendered permanently and wholly useless”: see footnote 1.
  - (ii) Hearing loss must exceed 5%: see footnote 2.
  - (iii) The effect of “an external removable aid or appliance”, e.g. hearing aid, spectacles, crutches etc., is disregarded: see footnote 3.
  - (iv) A worker can elect the method of assessment where a loss may be categorised by more than one stipulated impairment: [Curran 97/1997](#).
5. Ensure the prescribed sum is *consistent with the date of disability*.
- Refer to Section 113(1) re disabilities that develop gradually and Section 113(2) and (2a) re hearing loss.
- If more than one injury is sustained in different years causing permanent loss to the same bodily part, [Sutton A28/1997](#) suggests a medical opinion is required to apportion the loss into what percentage of the total assessment was sustained in each year - we do not necessarily agree with this approach.
6. Correct percentage of the prescribed sum.
7. Conduct Industrial Court Check and (previous claims check (by surname not claim number));
- (a) Apply Regulation 16a where there is a previous payment under this Act, even if in respect of a different injury: [Collings \(unreported\)](#) and [Mitchell JD60/1998](#).
- Apply the resultant percentage, namely P1, P2 etc of the formula to the relevant prescribed sum, irrespective of whether or not Regulation 16a was applied in respect of previous lump sum payments: [Griffin JD58/1998](#).
- (b) Where there is a previous payment for the same bodily part/impairment, reduce the lump sum amount representing total percentage loss by the amount of the previous lump sum: refer to Section 43(6). Perhaps seek legal advice at this juncture if this process becomes tricky.
- Also, look out for the Full WCT decision of [Anglicare \(MMI\) -v- Reilly](#) examining the interplay between Section 43(6) and Regulation 16a.
- (c) Be alert to double compensation. Assessment of loss of function of the leg/arm at or above the knee/elbow etc require an assessment of the extent to which the entire limb below the uppermost point of its affection was lost or its use was lost: [K R Hutcherson Pty Ltd -v- Correia 128 ALR 75](#).
8. Supplementary benefit i.e. 1.5 times the amount by which the sum of percentage losses exceeds 55% of the prescribed sum: Section 43(7a).
- Where there are a number of disabilities with different prescribed sums, we maintain that the prescribed sum of the last loss assessed is to be used, however there is no case authority on this point.

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9. Maximum compensation for two or more disabilities arising from the same trauma is the prescribed sum: Section 43(7).
  10. If the determination is disputed, attempt to procure an order at the Tribunal that the worker has sustained no other permanent loss of function arising from the injury sustained on the relevant date and any sequelae thereof by lodging a Form 15 application extending the Tribunal's jurisdiction to consider, what, if any, loss of function the worker has sustained arising from the injury sustained on the relevant date and any sequelae thereof i.e. "nil all else".
  11. Check whether an allowance was made for the loss of function in question in a previous judgment for common law damages in respect of an action against the employer. The allowance may be taken into account: refer to [Fisken A130/1995](#), [Ktisti A34/1996](#) and [Fowler A103/1996](#).
  12. Deduct from a percentage assessment of total loss of function the percentage of pre-existing non-compensable **loss of function**: [Reavill A29/1994](#). Even if symptomatic, the pre-existing condition must cause loss of function.
  13. Where a worker suffers from a stable and permanent compensable mental injury which permanently worsens the percentage of loss of function of a physical or sensory faculty, then the increased percentage assessment is payable: [Lu](#).
  14. For a further lump sum in respect of impairment previously assessed there must be an "aggravation, acceleration, exacerbation, deterioration or recurrence of a prior compensable disability" (refer Section 43(6)(a)), not simply a worsening that is the natural consequence of the compensable disability.
  15. If a worker sustained a 1971 Act injury but did not claim a lump sum for same suffers an aggravation of the same injury under the current Act, he/she is entitled to have the whole of total loss of function flowing from both injuries assessed under this Act i.e. transitional disability: [STA -v- Hawkins \(1995\) 181 LSJS 485](#).
  16. Loss of capacity to engage in sexual intercourse is no longer compensable pursuant to the Third Schedule unless an "application or request for such compensation" was made prior to the 12 April 1995: refer to [Lemura; Sutcliffe; and Brown](#).
  17. Compensation is not payable after the death of the worker nor where a worker dies after the expiration of 28 days from the date of injury: Section 43(8).
  18. Employer consultation (check whether any levy impact).
  19. Check for recoveries interest and arrange for a "set-off".
  20. If the worker is legally represented, obtain worker's signed authority authorising payment to solicitor's trust account.

## COVERED CASES

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**WORKCOVER CORPORATION / MMI  
WORKERS COMPENSATION (SA) LTD  
(STRATHALBYN RACING CLUB)  
-v- NOLAN**

**Decision of the Full Bench of the  
Workers Compensation Tribunal  
(JD20/1999)**

**Catchwords:**

Sections 4(2)(1) and (a) – interpretation of “earned for a week’s work” where worker was employed by more than one employer.

**Facts:**

The worker sustained an injury to his right knee on 6 September 1995 whilst moving a horse in the course of his employment with the Strathalbyn Racing Club.

At the time he was deriving income from a number of other sources including work as a self-employed farrier.

The worker submitted a claim for compensation and a dispute arose as to whether the earnings from other sources should be included in his average weekly earnings.

At first instance the WCT held that they should. On appeal to the Full Bench that decision was overturned.

**Issue:**

Should earnings from self-employment be included in the calculation of notional weekly earnings?

**Held:**

No. In the context of Section 4 and the definitions of “worker” and “employment”, the expression “a week’s work” appearing in Section 4(1) is based on the assumption that the earnings for a week’s work will be earned in the capacity as a worker pursuant to the Act.

Section 4(2)(a) is only concerned with earnings from employment (be that employment at common law or as deemed pursuant to the Act) and does not include earnings from self-employment that are not otherwise specifically provided for by the Act.

The worker’s income as a self-employed farrier should not have been taken into account in the calculation of his average weekly earnings.

**Commentary:**

The Full Bench of the WCT has left open the possibility that a worker whose second source of income is from self-employment of a type which falls within the deeming provisions in the Regulations may be entitled to have his or her earnings from this employment included in the calculation of notional weekly earnings.

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**PERRE -v- WORKCOVER / ROYAL & SUN  
ALLIANCE (SA) LIMITED (PENNA  
CONCRETE CONSTRUCTION SERVICE  
P/L)**

**Decision of the Workers Compensation  
Appeal Tribunal**

**(A2/1999)**

**Catchwords:**

Noise induced hearing loss. Interpretation of and operation of Section 31(2).

**Facts:**

By virtue of the Claims and Registration Regulations the worker was a deemed worker for the purposes of the Act. From January 1995 to October 1995 he subcontracted his skills to Penna Concrete Construction Service Pty Ltd (“Penna”). Prior to that he had worked for various employers in the building industry. The evidence of the worker was that he was exposed to noise whilst at Penna.

At first instance the Corporation relied on noise level testing of machinery allegedly used by the worker. The tests took place some 10 months after the worker had ceased performing work with Penna. Dr Tomich expressed the view that based on the results of the noise level reports; the

worker's noise induced hearing loss was due to his "industrial history".

At first instance the Review Officer found that the worker suffered a high tone neuro-sensory hearing loss and held that the worker was not exposed to noise capable of causing noise induced hearing loss. Furthermore, based on the noise level reports and Dr Tomich, the Review Officer held that the Corporation had provided proof to the contrary within the meaning of Section 31(2) of the Act. The Review Officer confirmed the Corporation's decision to reject the worker's claim for noise induced hearing loss.

The worker appealed to the Workers Compensation Appeal Tribunal.

#### Issues:

1. What is the proper interpretation of the evidentiary presumption in Section 31(2) of the Act and when is a worker entitled to the benefit of it?
2. Given 1, was the worker entitled to the benefit of the presumption in this case? (Yes!)
3. Assuming an answer in the affirmative was the evidence tendered at the Review hearing sufficient to displace the presumption? (No!)

#### Held:

1. The word "that" in "that employment" in Section 31(2) refers to the work referred to in the second column of Schedule 2, namely any work involving exposure to noise. It follows that if a worker suffers from noise induced hearing loss and was exposed to noise in employment and did not retire from employment on account of age or ill health at least two years prior to the date a claim for compensation is made, then he or she gains the benefit of the evidentiary presumption and the claim for

compensation will succeed unless the compensating authority is able to provide proof to the contrary.

2. Yes.
3. No. Noise level testing was not conducted at the location where the worker was exposed to noise and there was no evidence to show that the location at which the noise level testing was undertaken was sufficiently similar to the location where the worker was exposed to noise. There was no evidence to show that the machines tested were the same machines the worker used or if they were the same machines that they were in either the same condition or substantially the same condition as when used by the worker. Further, the conclusions in the report were based on hearsay material from Mr Penne and documents in his possession. Mr Penne was not called to give evidence at the Review Hearing. There were other defects in the report. Dr Tomich's opinion was based on the correctness of the noise level reports and as such his report could not be relied upon either.

Given all of the above the evidence tendered by the Corporation did not displace the evidentiary presumption in Section 31(2). The Review Officer's decision was set aside and the worker was awarded lump sum compensation pursuant to Section 43 of the Act for noise induced hearing loss.

#### Commentary:

We refer to our article on noise induced hearing loss appearing in Issue 1 of ***Gun & Davey – Covered***. In that article we referred to the decision of Deputy President Thompson in [Stead -v- BHAS Pasmenco Metals Limited](#). In [Stead](#) His Honour held that the second schedule contemplated not just noise but noise "capable of causing noise induced hearing loss" and that in order to have the benefit of the presumption the

worker must say that he not only suffers noise induced hearing loss but that he has been employed in work involving noise capable of causing noise induced hearing loss. In Penne His Honour concedes that he was in fact wrong in Stead. As a consequence now the worker need only show that he has been exposed to noise in order to have the benefit of the evidentiary presumption and not noise capable of causing noise induced hearing loss. The change is a material one and makes it much easier for a worker to gain the benefit of the presumption.

This is a somewhat “messy” area of the law and legal advice may often avoid subsequent problems.

*Impairment, Third Edition* (revised) (“the Guide”) to reach an assessment of 15% of the prescribed sum. The worker was also seen by Mr E Eriksen. He allowed a 7.5% assessment based upon the risk of future trauma but agreed it was a broad value judgment and did not involve any scientific analysis. Mr Eriksen’s view was that the entitlement could only be supported if the worker had an impairment that fell into any of the categories expressly appearing in the Guide. As he did not, no assessment could be made.

In argument the Corporation referred to a number of decisions establishing that pain per se is not compensable pursuant to Section 43 and that lump sum compensation is only payable for permanent disability. The Corporation argued that as the worker did not rely on the Third Schedule and could not satisfy the criteria for impairment in any relevant section of the Guide there was no entitlement. The Corporation argued that Appendix B of the Guide was not part of that criteria but instead provided some guidance to the evaluation of how to account for pain in respect of the set criteria. Finally, the Corporation argued that the three-step process identified by His Honour Justice Stanley in Irons Engineering Pty Ltd -v- W had not been complied with.

## CASE SNIPPETS

### **VARSAMIDIS -v- WORKCOVER CORPORATION / MMI WORKERS COMPENSATION (SA) LTD (TRANS OCEAN TERMINALS)**

**(JD34/1999)**

In this case Deputy President McCusker considered whether the worker could receive a lump sum pursuant to Section 43 of the Act for loss of total bodily function caused by pain.

The compensable disability occurred when the worker was struck in his stomach whilst operating a forklift. A significant haematoma formed within his spleen and a smaller one in the kidneys. From that time on he suffered fluctuating pain affecting his left trunk. The worker’s treating general practitioner provided a report detailing the frequency and intensity of the worker’s pain experience and the medication required to dull it. In evidence he said the cyst in his spleen was the major source of the pain and he explained how he used Appendix B of *The Guides to the Evaluation of Permanent*

Deputy President McCusker held that it was clear that Parliament intended that all compensable disabilities leading to a loss of bodily function due to the impairment of some part of the body are to be compensable save in the case of those due solely to mental responses.

His Honour held that Appendix B of the Guides enabled him to make an assessment of loss of total bodily function for the impairment of organic pain. He held that the worker’s description of his own limitations and the effect of being afflicted by pain matched the figure of Dr Lister. Therefore he assessed the worker as suffering a 15% loss of bodily function.

**Commentary:**

The decision has been appealed to the Full Bench of the Workers Compensation Tribunal and is listed for hearing on 11 June 1999. We will advise you of the outcome.

## HANDY HINTS

A recent case of [Jebb -v- WorkCover Corporation \(Conroy's Smallgoods Pty Ltd\) JD13/1999](#) suggests that the trend towards granting workers extensions of time may be easing.

Some 12 months after the worker was dismissed for serious and wilful misconduct and had his payments discontinued he lodged a Notice of Dispute against the discontinuance seeking an extension of time.

While it was suggested that the dismissal was inappropriate which may in turn have invalidated the discontinuance, the WCT nevertheless found that the Corporation would suffer prejudice if an extension of time were granted. It held that the Corporation's prejudice results from the fact that because it was not given prompt notice of the worker's challenge to the determination it

was deprived of an opportunity to avail itself of strategies that may enable it to reduce its liability to pay compensation to the worker. Had it known of the worker's challenge to the determination the Corporation may well have formed the view that there was some risk in maintaining the determination and would have prevailed upon the employer to reinstate the worker or otherwise have taken steps to facilitate his rehabilitation.

The WCT further noted that while the refusal to grant the extension of time will preclude his right to challenge the determination he would not be permanently precluded from pursuing a claim for weekly payments of income maintenance if at some stage he can establish that he has a relevant incapacity for work.

Another important aspect of this decision is the approach taken by the Tribunal in respect of discontinuances pursuant to Section 36(1)(e) where a worker is dismissed for serious and wilful misconduct. The Tribunal will not simply accept on face value the existence of a dismissal for serious and wilful misconduct but must satisfy itself that the industrial standard for dismissal on those grounds is met.

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