

Gun & Davey **Covered**



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WELCOME

It is fitting that this the 16th Issue of **Gun & Davey – Covered** is published on the third anniversary of the service.

The last three years has seen many changes from a legislative point of view and as a consequence of legal authority and precedent. We trust we have assisted case managers and any person interested to remain on terms with the ever-changing WorkCover jurisdiction.

As far as we at **Gun & Davey** are aware, this publication is one of the few in existence that makes any attempt at all to keep interested persons up to date with developments in this area of law. Unfortunately, we are aware that many case managers do not have the time to read and/or absorb the contents of this service.

An indication of the importance we place on **Gun & Davey – Covered** is that any new member of our WorkCover team is immediately referred to it as the only real means of quickly bringing themselves up to date with the present state of the law.

It is therefore perhaps timely that this issue contains an abundance of information for those seeking an easy update on the developments of the last two to three months.

I would also like to point out that we have prepared an updated **“Redemption Checklist”** which is available at no cost to those interested. Please contact either myself or my personal assistant, Rommi Gabel.

Regards,
Michael Ricketts

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BIG NEWS ON OVERTIME

The Full Bench of the Tribunal certainly turned established overtime case law on its head when it handed down the decision of Phillis JD64/1999 on 22 June 1999.

The Full Tribunal paid no heed to abundant precedent on this issue and made clear that this decision was specifically intended to “wipe the slate clean”.

In short, to adopt the language of the Tribunal (at page 8), the outcome of the decision is that **“the wholesale manufacture of patterns of uniformity, by for example, ignoring hours worked beyond a common dominator so as to enable a pattern of uniformity to be found by reference to that common denominator”** is no longer sanctioned.

The Tribunal had regard to Hansard in interpreting what is meant by the words **“substantially uniform as to the number of hours of overtime worked”** in Section 4(8)(a)(ii), and has at long last afforded those words the strict interpretation they were intended to be given.

The Tribunal stated (at page 9) that, “Parliament must have contemplated that there would be cases in which overtime has been a regular feature of a worker’s employment so as to form part of his or her expected income in undertaking particular duties for an employer that does **not** feature in the calculation of average weekly earnings for the purposes of the Act.”

It found that hours of overtime worked must not be unpredictable or fluctuate dramatically.

It would therefore appear that the Tribunal is only prepared to entertain very slight deviations as to number of hours worked within a particular pattern to satisfy the test of *substantially uniform*.

Recommendation:

We strongly recommend that you scrutinise overtime patterns and the number of hours worked within those patterns carefully, throw out the “band of hours” approach postulated by Pribetic [Glass -v- Giles](#) [refer to **Gun & Davey – Covered** Issue 6 (p6)] and insist on hours that bear a close resemblance before you conclude that Section 4(8)(a)(ii) is satisfied.

MORE BIG NEWS AS “SUBSTANCE CONQUERS FORM”

Deputy President Cawthorne in the decision of [Gaeta \(JD80/1999\)](#) has restored the equilibrium in respect of issues of invalidity arising from technicalities of form and the application of the principles of natural justice applicable to Section 38(3) and (7) notices.

In [Gaeta](#) the worker had argued that the two-year review determination was invalid for the following reasons: -

1. The submissions made by the worker in response to the Section 38(3) notice were not referred to in the Section 38(7)

notice as having been relied upon in undertaking the reviews.

2. The Section 38(7) notice did not make reference to Section 36(2)(c) and (3) which the worker argued was a mandatory requirement of Regulation 17; and
3. Some of the material on which the compensating authority had based its decision was not available to the worker prior to him making his submissions.

Held:

1. The Tribunal held that this was not fatal and in particular that it did not necessarily follow that merely because a reference had not been made to the worker’s submissions in the Section 38(7) notice that those submissions had been ignored.
2. The Tribunal held that whilst the requirement to refer to Section 36(2)(c) could be classified as a mandatory requirement of Regulation 17, it was sufficient that there had been *substantial* as opposed to strict compliance with that requirement.

Here, the Section 38(7) notice advised the worker that the review was undertaken pursuant to Section 38 of the Act taking into account the provisions of Section 35(1) and (2) and the worker was informed of the relevant notice requirements of Section 36(3a). The Tribunal concluded that there could be no confusion on the worker’s part as to why the reduction was being effected and that the worker was in a position to make an informed decision about whether or not to seek a review. As a consequence, any failures to refer to relevant statutory provisions were in the context of this case *technical breaches only* falling within the “*de minimis*” principle so as to not render the determination invalid.

3. Deputy President Cawthorne sanctioned the reasoning of Deputy President Parsons in [De Young \(JD47/1998\)](#).

In [De Young](#) following the issue of a Section 38(3) notice, the worker requested details from the compensating authority of functional and vocational assessments, which had been carried out in connection with the review but did not receive such information prior to the date of notification of the outcome of the review. The resultant determination was held to be invalid because the worker had not been given a proper opportunity to be heard on the subject of the review.

Deputy President Cawthorne said that the ratio in [De Young](#) did not represent a *hard and fast rule* that a failure to provide material, upon which a review is ultimately based either at all or within a particular time frame, necessarily results in invalidity. He considered this was a question of *fact and degree*.

In this case, because the worker had a substantial body of material upon which to base his submission to the compensating authority, and the additional material which had not been provided was “up dated” material which did not fundamentally alter the situation, the worker had “a meaningful opportunity” to address the issue related to the review before it was completed.

Recommendation:

Notwithstanding this decision, we would recommend by way of precautionary measures that you ensure you attend to the following as part of the second year review procedures: -

1. Where you have received representations by the worker ensure that in the Section 38(7) notice you mention that you have considered them in carrying out the review.

2. Refer to Sections 35(2), 36(2)(c) and 38 and reproduce these provisions in whole;

3. Provide all abundant material acquired since the issue of the Section 38(3) notice to the worker within sufficient time to enable him/her to consider and make submissions thereon.

COVERED CASES

NEIL GIBSON -v- MMI WORKERS COMPENSATION (SA) LTD (GRIFFIN PRESS PTY LTD)

Decision of the Workers Compensation Tribunal (JD69/1999)

Catchwords:

Section 4(9)(a) – Relevant date. Continuing partial incapacity. [WorkCover Corporation - v- Marina](#) distinguished.

Facts:

The worker suffered disability to his left knee on 27 October 1992 and underwent surgery before returning to work. From 1993 to October 1996 there were further periods off work due to various surgical procedures. In October 1996 the worker accepted a voluntary separation package from Griffin Press.

He then obtained further employment with another company, Protecto-Print where his wages seemed higher than at Griffin Press.

By determination dated 20 August 1997 MMI Workers Compensation (SA) Ltd the agent for Griffin Press, determined to accept a claim for weekly payments of compensation made by the worker for a closed period from 11 February 1997 to 3 March 1997. Weekly payments were fixed at \$390.92. By further determination dated 20 August 1998 what appears to have been a further claim for compensation was accepted on an ongoing basis and weekly payments were again set

at \$390.92. In each instance \$390.92 was 80% of the originally set average weekly earnings.

The worker lodged a Notice of Dispute against both determinations. He sought to have his average weekly earnings increased by reference to his actual earnings in the twelve months immediately proceeding 11 February 1997 and 16 January 1998.

The issue became what was the relevant date according to Section 4(9)(a). Section 4(2)(b)(i) provides that, subject to other subsections, the worker's average weekly earnings may be determined by taking into account the actual weekly earnings of the worker over a period of up to twelve months before the relevant date.

Conciliation was unsuccessful and the matter was referred directly to Judicial Determination.

Issues:

1. Based on the evidence given by the doctors who had examined and treated the worker had he at all relevant times since the original disability in 1992 suffered an ongoing partial incapacity for work within the meaning of the Act? (Yes)
2. If the worker had suffered an ongoing partial incapacity for work since 1992, what was the relevant date according to Section 4(9)(a)(i) on the facts of the case?
3. Should the decision in [WorkCover Corporation -v- Marina](#) be distinguished? If so, why?

Held:

1. Yes the worker had suffered an ongoing partial incapacity for work since 1992. Although at times he was able to cope with his employment with Griffin Press by modifying his work procedures such that at those times he suffered no

economic loss, his ability to sell his labour in the open market was compromised by the physical consequences of the disability: [Arnotts Snack Products Pty Ltd -v- Yacob](#) applied.

2. The Deputy President held that as the worker had made no claim for income maintenance in relation to any period of partial incapacity prior to his retrenchment in 1996 the relevant date for the setting of average weekly earnings for the relevant periods was twelve months immediately proceeding February 1997 and January 1998 respectively.
3. The Deputy President distinguished [Marina](#) on its facts. The worker's claim was limited to various periods of total incapacity since 1992. The Corporation determined those claims from time to time and commenced making weekly payments of income maintenance to the worker. Each of those closed periods of total incapacity came to an end when the worker returned to work authorising the Corporation to discontinue his weekly payments pursuant to Section 36 of the Act. In the meantime when he was performing his usual duties he made no claim for total or partial incapacity and presented no certificates for incapacity. Thus periods of claimed incapacity ended because he ceased to assert incapacity in the appropriate manner. Her Honour distinguished [Marina](#) on the basis that in [Marina](#), although the worker had returned to work, he made a claim of continuing incapacity for work by presentation of medical certificates requiring the Corporation to determine his entitlement and requiring the period of the asserted incapacity to be established. Her Honour therefore placed emphasis not only on the fact of incapacity but also on the requirement for the making of a specific claim for a specific entitlement under the Act.

Commentary:

We understand this matter has been referred to the Full Tribunal.

We have some difficulty reconciling this decision with Marina. We believe the Deputy President may have placed undue emphasis on the fact that the worker in this case did not continue to supply prescribed medical certificates during the entire course of his partial incapacity for work. The issue in Marina was quite different.

However in Marina the Full Supreme Court had declined to decide whether each time a worker claimed that his degree of incapacity for work had altered, or that the amount of the entitlement to weekly payments had altered due to changes in the availability of work, he was required to submit a new claim under Section 52 as submitted by the Corporation.

Here, the Deputy President went on to state that if she was wrong then it would follow that Section 35 could be applied to reduce the worker's weekly payments to 80% after one year of incapacity when a worker had not been in receipt of weekly payments for the claimed period of incapacity but had simply suffered a physical incapacity for work with no consequent loss of earnings. Her Honour stated that such an approach would not be consistent with the purpose of providing income maintenance to workers for **claimed** periods of incapacity.

Whilst these remarks are *obiter dicta* they ignore the decision of the WCAT in Melnitchouk, which is contrary to Gibson but does not appear to have been referred to either by Counsel or by Her Honour.

CASE SNIPPETS

TUCKER -v- MURRAY BRIDGE SOLDIERS MEMORIAL HOSPITAL INC

**Decision of the Workers Compensation
Tribunal - (JD63/1999)**

Weekly payments were not reviewed pursuant to Section 39 in respect of a worker who was injured and in receipt of payments from 1989 until 1997. In January 1998 annual reviews were purportedly conducted for 1992, 1993, 1994, 1995 and 1996. The Tribunal held that the determination was not *ultra vires* in that such reviews could be conducted *retrospectively*.

The Tribunal proceeded to increase nwe's in accordance with the second alternative in Section 39(2)(a)(i) namely on the basis of changes in rates of remuneration payable to workers engaged in the kind of employment from which the worker's disability arose. Interestingly, the Tribunal used the actual earnings of other comparable enrolled nurses at Murray Bridge Hospital to perform the adjustment. We do not consider this approach is necessarily correct.

The Tribunal made a further important observation that where a worker applies pursuant to Section 39(2)(a)(ii) for an adjustment to be made on the basis of changes in rates of remuneration prescribed by an award or enterprise bargaining agreement, a review on that basis is mandatory – there is no discretion.

HANDY HINTS

Deputy President Gilchrist (in Zanini JD60/1999) recently confirmed that even in cases where it is apparent that the pattern of overtime would not have been maintained, only one assessment of average weekly earnings is permissible. This decision has been appealed to the Full Bench of the Workers Compensation Tribunal.

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Deputy President Gilchrist (in Cathro JD22/1999) has also confirmed that a party may make an application for referral to Judicial Determination in respect of a matter that is *part heard* before an Arbitration Officer but only in *exceptional circumstances*.

The Tribunal will however not tolerate applications for referral in matters where for example, a key witness has failed to come up to proof or has performed badly in cross-examination or because the applicant party has detected that the Arbitration Officer was unsympathetic to his or her cause.

TID BIT

Where a compensating authority carried the onus of demonstrating the facts upon which a Section 36 notice depends the compensating authority will be dux litis in a hearing with respect to the validity of the notice unless to do so would be unfair having regard to the circumstances of the given case.

– *Withers (JD53/1999)*.

(Note that this decision has been appealed to the Full Bench. **Gun & Davey** is to intervene on instructions from WorkCover)

NEWS FLASH

We put you on notice that the decision of Perre of the Workers Compensation Appeal Tribunal featured on page 5 of Issue 15 of **Gun & Davey – Covered** has been appealed to the Full Court of the Supreme Court. You may consider putting on hold the determination of or any disputes involving noise induced hearing loss.

The Full Court of the Workers Compensation Tribunal has delivered its decision in

Varsamidis (see **Gun & Davey – Covered** Issue 15 at page 7).

The Full Bench set aside the decision of Deputy President McCusker and found that the current legislation did not provide that all disabilities leading to a loss of bodily function are compensable under Section 43.

The Tribunal held that:

“The plain intention of the legislative scheme comprising Section 43, the Third Schedule, Regulation 16 and the Guides [being the AMA Guides], is that an assessment of permanent disability entitling a worker to a lump sum is dependent upon the disability or impairment of a physical or sensory faculty being measurable in accordance with the method prescribed”.

With particular reference to the facts of this case, the Full Bench held that Appendix B of the Guides does not set out any method of translating the “perception of pain” to a “loss of function of the body” ie. It does not purport to provide a separate and independent evaluative method of reaching an assessment of the loss of bodily function outside the scope of the individual chapters of the Guides.

In short, pain *per se* does not give rise to an entitlement to lump sum compensation unless it satisfies one of the specifically nominated disabilities in the Third Schedule, or, being an impairment of an identified physical or sensory faculty, can be measured in accordance with the method prescribed in the AMA Guides.

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