

Gun & Davey **Covered**



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WELCOME

Welcome to this the final issue of **Gun & Davey – Covered** for not only this decade but also the 20th Century and the second millennium.

On reflecting upon the last ten or so years of this firm's practice in the workers compensation jurisdiction, it is satisfying to observe how successfully this firm and its clients have adapted to the many changes that have occurred during that time. There have been numerous developments in what is after all a fairly basic system and yet there is little doubt that we now have a fairer and more equitable system for both workers and employers without many of the excesses of the past. This is a result of both the successful management and administration of the scheme by the WorkCover Corporation and its Claims Management Agents and in some part at least to the service providers who have remained loyal to and focussed upon the jurisdiction.

As is usual at this time of the year, we at **Gun & Davey** once again thank you our clients for your support over the last twelve months and sincerely trust that you have benefited from our service and advice. **Gun & Davey** remains dedicated to evolving as a firm and takes this opportunity to signal some important new recruitments to our WorkCover Section to be announced in the next millennium!

We wish you a Merry Christmas and a Y2K problem free New Year!

Regards

Michael Ricketts

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TIDE IS TURNING ON EXTENSIONS OF TIME

As reported in **Gun & Davey - Covered** Issue 15 (Handy Hints) it appears that there has been a shift away from earlier trends of almost granting extensions of time as a matter of course. This is illustrated by the recent decisions of [Bainbridge -v- WorkCover Corporation \(Nazag Pty Ltd\) A9/1999](#) - where the WCAT refused the worker's application to extend the time to appeal by five and a half months and [The State of South Australia -v- Matthews A10/1999](#) - where the WCAT refused a similar application by an exempt employer for an extension of four months.

The Full Court of the Supreme Court has now entered the debate with the decision of [Pond -v- WorkCover \(Supreme Court, 22/09/99\)](#).

While the Supreme Court discussions centered around an application to appeal a decision of a Review Officer, the principles governing the grant of an extension of time are generally similar no matter the application involved.

The Full Court held that the WR&C Act 1986 vests the WCT and WCAT with an unfettered discretion to grant extensions of time. The Tribunal must exercise this discretion judicially and this requires a consideration of

whether it would be in the interests of justice to allow the extension.

The Full Court emphasised that the fundamental principle when considering an extension of time is that *the applicant seeking the extension of time bears the responsibility of satisfying the Tribunal that the Tribunal should exercise the discretion to grant an extension of time*. It is not for a respondent to have to make out grounds to *defeat* the application. The applicant must establish that it is in the interests of justice to *grant* it. The exercise should not be approached upon the basis that an extension of time will be granted *unless* the respondent can show injustice.

This is not to say that prejudice to a respondent does not assist in defeating an application to extend time; clearly it does, and the prejudice to the respondent will vary from case to case. But if a respondent is unable to point to *actual* prejudice, that does not mean it does not exist Brisbane [South Regional Health Authority -v- Taylor \(1996\) 186 CLR 541](#).

The Full Court then went on to describe the factors which need to be addressed on an application for an extension of time: -

1. The length of the delay: The longer the delay the stronger the reason required as it is more likely that prejudice will be suffered by the respondent.
2. The reason for the delay: The failure to show a satisfactory reason for the failure to comply with time limits may in itself mean that it is not in the interest of justice to allow the application.
3. Whether there is an arguable case on appeal: If the applicant's prospects on appeal are not good that may be enough to refuse the application.
4. The prejudice, which the respondent might suffer: The respondent has the onus of showing prejudice either actual or potential. Examples of prejudice include: -

- Where a judgment has been in place for a long period of time and the respondent reasonably expects to enjoy the fruits of it, it will be less likely to be in the interests of justice to allow the extension.
- A re-trial may cause prejudice where for example witnesses are no longer available.
- The ability to rehabilitate the worker or otherwise reduce the compensating authority's liability may be lost due to the period of the delay.
- Similarly the ability to obtain contemporaneous medical or other evidence may be lost.

The above principles apply whether it is the compensating authority or the worker applying for the extension of time. It is more common for an application for an extension of time to be brought by a worker and you should be alert to the above principles when faced with such an application, however a compensating authority/decision-maker is subject to the same considerations.

CASE SNIPPETS

Casey -v- WorkCover (Mincin Construction Pty Ltd)

JD110/1999

This decision resulted from an Application for Directions filed by WorkCover seeking a stay of a decision of an Arbitration Officer ("AO") pending the outcome of an Application for Judicial Determination. The AO had, after hearing evidence and submissions from the parties, made orders in relation to the fixing of the worker's notional weekly earnings. Following that decision, WorkCover, through its solicitors, filed a Form 8 Request for Judicial Determination within time. The argument that fell for hearing before the Acting Deputy President was whether the AO's calculation of the worker's notional weekly earnings as contained in his decision should be applied and hence, paid to the worker pending the hearing.

His Honour held that the orders of the AO were not, and had not been since the filing of the Form 8, enforceable orders of the Tribunal. His Honour stated that once a Form 8 is lodged within time the status of the dispute is *unresolved*.

His Honour continued that should he be wrong about the enforceability of the AO's orders it was appropriate to make a stay order suspending the operation of those orders pending the resolution of the matter at Judicial Determination. He did so on the basis of the potential injustice if the payment had to be made when Judicial Determination may produce a quite different outcome.

His Honour's observation of the status of an Arbitration Hearing and decision is similar to the approach taken by Deputy President Judge Parsons in [Armiento -v- WorkCover JD6/1999](#).

**Reilly -v- WorkCover
(Anglicare South Australia)**

JD93/1999

In this matter the Full Tribunal was required to consider whether in the case of a secondary disability and payment of a lump sum pursuant to Section 43 of the Act, the worker's entitlement was affected by both Regulation 16a and Section 43(6) and if so, to what extent.

At this stage the decision delivered remains incomplete, as the parties need to return to the Full Tribunal for further argument. Until the Tribunal quantifies the worker's entitlement it is not entirely clear how it's reasoning will affect the calculation of a worker's entitlement to a Section 43 lump sum payment in these circumstances.

However a preliminary view of the reasons for decision indicates that both Regulation 16a and Section 43(6) *will* apply to reduce a worker's entitlement where the worker is seeking such payment for permanent disability arising from a secondary disability and has previously received a lump sum payment pursuant to Section 43 of the Act.

We will report on the final position in the next issue of ***Gun & Davey – Covered***.

**The State of South Australia (The
Department of Education & Children's
Services) -v- Day**

166/1999

This is a decision of the ***Full Industrial Relations Court*** which whilst involving an underpayment of wages claim has significant impact on a worker's entitlements to, but more importantly an *employer's* liability to pay, actual *wages* to a worker who, whilst not sufficiently recovered from a disability to be able to return to normal duties has recovered sufficient capacity to enable a return to alternate duties being provided by the employer.

This decision indicates that depending on the facts, the work being undertaken by a worker in such circumstances may attract payment of *wages* by the *employer* itself (not income maintenance) in addition to which the worker would then be entitled to a make up component by way of income maintenance if those wages were less than the worker's average weekly earnings or 80% of the difference between such wages and the worker's rate of notional weekly earnings.

We have not outlined the facts as they, as well as the reasoning of the Full Industrial Court, are complex (to say the least!).

We simply wish to put you on notice that in these types of circumstances an employer may be liable to a worker for *wages* with a concurrent reduction in liability on the part of a compensating authority to pay income maintenance and that this may have a significant impact on registered employers – i.e. why offer alternate duties if the position being offered is supernumerary and yet the employer will be liable to pay wages?

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

Michael Doyle LL.B – Senior Associate