

Gun & Davey **Covered**



Volume 1, Issue 18 - February 2000

WELCOME

Welcome to this the 18th issue of **Gun & Davey - Covered** and the first for the Third millennium.

As indicated in issue 17, we have been busy recruiting.

Gun & Davey has always recognised the dedicated and specialist nature of its WorkCover practice. In addition, this area of the law is continuously undergoing change and development. That environment enables the firm to regularly review not only the size but also the skills required of its WorkCover section.

With that in mind, the firm has undertaken a recruitment program targeting the establishment of a multi-disciplined legal team with specialist medical knowledge and experience.

That has resulted in the recruitment of Dr Noel McCleave and Victoria Webster. Whilst Dr McCleave completed his law degree in November 1999, he practiced legal and forensic medicine for 25 years prior to that and is a recognised expert in that and many other related fields. Victoria, who was admitted to legal practice in December 1998, brings with her some 25 years in the field of physiotherapy, Neuro physiotherapy and orthopaedics.

They both know a bad back when they see one!

Their specialist skills are generally available to clients of the firm and to the WorkCover section specifically to assist in the area of causation, informed medical management, the detection of over servicing by providers and the independent assessment and

critique of treating or independent medical opinions or reports.

We have no doubt they will add value to the various services provided by **Gun & Davey** to our WorkCover client base.

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NOISE INDUCED HEARING LOSS - REVISITED

As indicated in previous issues of **Gun & Davey - Covered**, claims for noise induced hearing loss are usually difficult to determine due to the complex nature of both the relevant law and the various provisions of the Act.

The Full Bench of the Supreme Court of South Australia has recently had reason to revisit these issues in [WorkCover Corporation - v - Perre](#).

The facts in [Perre](#) were set out in **Gun & Davey - Covered** Issue 15 and we will not repeat them.

The Full Bench upheld the decision of the WCAT, which awarded the worker lump sum compensation pursuant to Section 43 of the

Act. Of particular importance is the reasoning they provided.

The Full Court dismissed the Corporation's argument that the words "*any work involving exposure to noise*" in Schedule 2 should be construed as meaning any work involving exposure to noise *capable of causing hearing loss*. The Full Court held that such interpretation would create an additional threshold for workers and may in some cases deny the presumption in Section 31(2).

The Full Court continued that the process is as follows:

1. A worker is required to prove that he has noise induced hearing loss and that he has been employed in work involving exposure to noise.
2. The burden of proof then shifts to the Corporation or exempt employer to prove that the hearing loss could not have arisen from the relevant employment.

Step 2 is the most difficult step. Where it cannot be discharged the policy of the legislation is that the worker is to benefit.

In Perre there were a number of inadequacies with the way the noise level testing was conducted at the employer's work site, including:

- ❑ Noise level testing was not conducted at the location where the worker was exposed to and hence 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;

- ❑ The tests relied on hearsay evidence from the employer's representative who was not called to give evidence at the hearing;
- ❑ The report did not consider the noise generated from both machines operating together;
- ❑ The report did not consider evidence from the worker that he was also exposed to noise from machines being operated by others.

The Full Court held that there was no cogent evidence to contradict the evidence of the worker and that the fundamental problem with the Corporation's case was that the factual basis for the assessment was not proved.

This decision highlights the difficulties faced by compensating authorities in rebutting the presumptions of the Act. If noise testing is to be obtained, the following rules of thumb must be followed:

1. Testing must be conducted at the same site as that worked by the worker;
2. Testing should be conducted as soon as possible after the development of the noise induced hearing loss. If the worker has spent a year away from the workplace, the reliability of the testing is reduced due to changes in the workplace;
3. Testing should be conducted on the actual equipment used by the worker. It should be in the same condition or a substantially similar condition to that when it was used by the worker. If the equipment has been replaced since the worker's condition developed, testing will be of little or no use;
4. Equipment should not be tested in isolation. Testing should take into account noise on an overall basis including not only the equipment used

by the worker but also noise emanating from equipment at different workstations.

This list is not exhaustive and will depend on the individual circumstances of each case. Tests must be thorough.

Where the worker has been employed in traditionally quiet employment, such as in a library, the presumption will not be too difficult to rebut. If, on the other hand, the worker was employed in traditionally noisy employment, such as a foundry, strict requirements for testing may make it both impractical and expensive to warrant the testing being carried out. Furthermore, in such a circumstance, the testing may simply assist the claim - prove the worker's case for him!

CASE SNIPPETS

CIAMPI - V- STATE OF SOUTH AUSTRALIA (PORT PIRIE REGIONAL HEALTH SERVICE INCORPORATED)

JD117/1999

A review conducted pursuant to Section 39 of the Act resulted in the worker's weekly payment entitlement being adjusted from \$80.94 to \$37.20 per week. The worker immediately lodged a Notice of Dispute. The matter proceeded to Conciliation. When Conciliation was unable to resolve the dispute the parties applied for the matter to proceed to immediate Judicial Determination.

At no stage had the Conciliator made an order pursuant to Section 36(4)(b) for weekly payments to be maintained at the original level. Nevertheless the employer continued to pay the worker at the higher rate. Upon being made aware of this the worker's solicitor advised the employer that it was under no obligation to continue paying the worker at his higher rate. The employer then advised of its intention to commence paying the worker at the reduced rate. The worker lodged an *Application for Directions* seeking

an order that weekly payments of income maintenance be reinstated to the original amount.

The WCT relied upon the reasoning in [Mitsubishi Motors Australia -v- Sosa](#) to conclude that if a compensating authority is entitled to adjust a worker's weekly payments downward in reliance upon a review conducted in accordance with Section 39 of the Act, the consequential reduction requires the invocation of Section 36. As such the worker is therefore entitled to the benefit of Section 36(4).

The Tribunal made a further important observation about the policy behind Section 36(4)(b). Deputy President Gilchrist stated that the policy is to, if requested; preserve the worker's entitlements pending resolution of the dispute whilst at the same time promoting the expeditious resolution of the dispute. The objects of the Act would be best achieved by enabling the suspension order to be lifted and reinstated, as circumstances require.

However, His Honour refused the worker's application to make the suspension order *retrospective* on the basis that he was not empowered to grant such relief.

It is now clear that an initial failure to order a continuation of weekly payments under Section 36(4)(b) may not necessarily prevent the order being made at a later stage.

SYNNETT - V - WORKCOVER CORPORATION (SGIC - MONASH CONSULTING)

JD87/1999

The worker's earnings at the time of his injury exceeded twice the State average earnings. Pursuant to Section 4(7)(c) his weekly payments were limited to that amount. A Section 38 review in September 1998 revealed that the rates of remuneration to workers in like employment had increased by 5.2%.

The Corporation argued that the worker's average weekly earnings should be limited to 80% of \$1,427.60 being twice the State average at the relevant time. The worker argued that Section 4(7)(c) had done its work with the initial setting of average weekly earnings and no longer had any operation. His Honour Deputy President Acting Judge Gilchrist stated that the clear intention of Section 4(7)(c) is to limit the amount of compensation payment by way of income maintenance. In doing so the Act penalises high-income earners only.

His Honour stated that it was not a strain upon the language of the Act to interpret Section 4(7)(c) to mean that average weekly earnings shall in no case be fixed either at the commencement of incapacity *or anytime*

thereafter at more than twice the State average weekly earnings.

HANDY HINTS

Notwithstanding who bears the onus of proof, a worker should be *dux litis* at a hearing if the contrary position would deny the compensating authority procedural fairness. For example, to require the compensation authority to be *dux litis* where there is video would deny it the opportunity to cross-examine the worker before the video is shown.

- [Woodhouse \(JD71/1999\)](#).

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