

Gun & Davey **Covered**



Volume 1, Issue 19 - April 2000

WELCOME

Welcome to this the 19th issue of **Gun & Davey – Covered**.

This issue contains summaries on various decisions addressing “journey” claims as well as other relevant decisions to your case management.

We also provide an updated Redemption Agreement Checklist. Feedback from our readers has indicated that this is an invaluable and much appreciated case management tool. As always, a warning is given that each individual case should be treated on its merits and there will always be issues arising, which cannot be anticipated. As a consequence, much care is recommended.

As you can see from the decisions in Ryan and Blocki (pages 6 and 7) redemption agreements are beginning to be challenged in the Tribunal. We anticipate more litigation in this area.

I would also like to welcome Catherine Duncan, the most recent addition to the Gun & Davey WorkCover team. Catherine was admitted to legal practice in June 1999. At that time she also commenced employment with CGU Workers Compensation (SA) Pty Ltd where she specialised in Section 54 recovery matters, also giving advice in claim related matters.

Catherine will be working with Tas Carabelas whose clients in particular will have the opportunity of meeting her.

As always, we trust you find this issue of **Gun & Davey – Covered** both useful and instructive.

Regards, Michael Ricketts

In This Issue

Welcome	1	Covered Cases	4
Journey Claims – 1 Revisited		Tid Bits	5
Redemption Agreement Checklist	2	Directory	6

“JOURNEY” CLAIMS REVISITED

The Workers Compensation Tribunal recently revisited the journey provisions of the Act in [Nebi -v- WorkCover Corporation \(D V & D M Stribing\) \[2000\] SAWCT 27.](#)

The worker, an apprentice mechanic who worked and lived in Strathalbyn, was required by the terms of his employment to attend the O’Halloran Hill TAFE Trade School.

In the week the worker was injured, the employer, who was ill, had provided the worker with a key to his premises and asked the worker to attend there daily to check security, answering machine, facsimile and mail and report as to anything requiring attention.

The worker attended the employer’s premises on 2nd and 3^d August 1999 and intended to do so on the way home from TAFE on Wednesday 4th August 1999. However he was involved in a motor vehicle accident and rendered paraplegic.

It was submitted by the Corporation that the journey from TAFE to Strathalbyn was more

properly characterised as a journey to the residential home of the worker and that anything else was incidental thereto and therefore non-compensable.

Acting Deputy President Thompson however held that by going to the employer's premises as requested, the worker was carrying out the duties of employment. The worker was doing something he was specifically required to do.

Quite importantly for "journey" cases generally, Acting Deputy President Thompson stated there is no warrant for reading down the words of the Act to require that there must be a "primary" purpose to the journey. He stated, *"it is sufficient that a purpose of the journey is to carry out the duties of employment"*.

Acting Deputy President Thompson rejected the process of distinguishing between a "primary" end or a "secondary" end to determine the purpose of the journey. In this case, common sense dictated that the worker could not fulfil the duties of his employment without going to Strathalbyn. The fact that he would have gone there anyway (to go home) was irrelevant.

In [WorkCover Corporation \(S K & A Savas\) - v- Russo \[2000\] SAWCT 23 the Full Bench](#) had reason to consider what constitutes a journey.

In this case the worker, a taxi driver, left his cab to buy lunch with the intention of returning to his cab and attending a call within 10 minutes. While the worker was out of his cab he sustained injury.

The issue was whether the worker had embarked on a journey for the purposes of Section 30(5) when he left his cab to buy lunch.

The Full Bench confirmed the decision of the Deputy President at first instance who had held that it is very much a matter of fact in each case. The learned Deputy President had held that on a common sense and practical approach, this could not be regarded as a journey. The worker had

intended to traverse the distance of approximately 80 metres believing that he would be able to complete the purchase in sufficient time to then drive and collect a customer in under 10 minutes. It was held that the worker was in the course of his employment when his injury was sustained.

As always, it is important to remember that each case must be looked at on its merits. Simply because a worker has left his "place of employment" is not sufficient to establish that the worker was involved in a journey. Common sense should be used to determine whether the worker remains in the course of his employment or alternatively is involved in a journey.

REDEMPTION AGREEMENT CHECKLIST

We previously published a redemption checklist in Volume 1, Issue 4 (pages 1-2) of **Gun & Davey – Covered**. That is now somewhat redundant.

We now publish an updated version for your assistance – obviously some provisions do not apply to Exempt Employers.

1. Ensure the worker has been incapacitated in excess of two years, if not, Corporation authorisation is required.
2. If the period of incapacity exceeds two years, ensure that a "two year review" has been completed.
3. Redeem all claims, including "closed" files. Conduct a claims history check by surname as opposed to claim number.
4. Obtain Corporation authorisation where the redemption amount exceeds the Table amount.
5. Ensure the rate of weekly payments of compensation received by the worker at the date of the redemption corresponds with the Section 35(6a) figure. It may

- be necessary for you to issue a determination reducing the worker's weekly payments pursuant to the provisions of Sections 36(1), 36(2) and/or Section 38 to achieve this.
6. Finalise all outstanding Section 43 entitlements by attending to the following:
 - (a) An Industrial Court Check;
 - (b) A "Mitchell" check ie. Check for previous Section 43 determinations on all claims to determine whether Regulation 16a is to apply (check by surname as opposed to claim number).
 - (c) Attempt to agree as a condition of settlement that the worker will accept a determination that he has sustained no permanent residual disability in respect of bodily parts commonly claimed by way of sequelae to the primary disability. For example, in respect of a lower back injury, try for *nil* Section 43 determinations in respect of both legs at or above the knees and both hips. Do not forget to include a nil assessment for disfigurement if the circumstances do not warrant a percentage assessment, particularly where there has been surgery, muscle wastage, a limp etc. Also include *nil* determinations for sexual incapacity and sleeplessness as a precautionary measure.
 - (d) Refer to our Section 43 Checklist in **Gun & Davey – Covered** Issue 15 (pages 2-4) in respect of percentage assessments agreed to.
 7. Ascertain what, if any, disputes are pending and include these in redemption negotiations. This may require a Tribunal computer check.
 8. Ensure that weekly payments that have been paid in respect of all previous claims included in the redemption agreement were lawfully discontinued at the time of cessation of payments, otherwise you are potentially at risk of a Notice of Dispute lodged out of time for back pay.
 9. Attempt to agree as a condition of settlement that any determinations previously made by the Corporation, an Agent, the Workers Compensation Review Panel, the Workers Compensation Tribunal etc, are correct in fact and in law, and the worker does not intend to dispute same subsequent to the redemption.
 10. Conduct a Centrelink check. Ensure the worker is aware that the Section 42 amount is less any amount payable pursuant to a Centrelink charge.
 11. Complete a HIC Notice of Claim, Notice of Settlement and Section 33A Notice to Claimant and advise the worker that in due course the HIC will refund the amount of any advance payment if there is no charge to be levied.

In the event that there is a charge and the worker seeks to have this reimbursed, the worker will need to present a copy of the charge and proof that it relates to costs reasonably incurred pursuant to Section 32.

In respect of redemptions where the total of the redemption of weekly payments and redemption of Section 32 expenses is less than \$3,000.00, there is no requirement to withhold monies or make an advance payment to the HIC.
 12. Ensure that the worker is made aware of the opportunity of obtaining a private ruling from the ATO.
 13. Consult with your Recoveries Department where appropriate. For example:
 - (a) Where waiver of a recovery is a condition to settlement,

- (b) Or a recovery claims exists against a negligent third party, which is pending,
 - (c) Or where the worker owes money by reason of overpayment which may be agreed will be set off against redemption monies payable as a condition of settlement.
14. Check the ongoing availability of the worker's employment. You cannot require resignation as a condition of the settlement but it may affect your decision as to whether you enter into negotiations to redeem a worker's entitlement.
 15. Ensure the employer is consulted prior to concluding negotiations and is notified upon finalisation of the agreement.
 16. If required, have the worker agree to the terms of settlement being kept confidential as a condition of settlement.
 17. If the worker is in receipt of weekly payments, it may be prudent to impose a time limit for the return of executed redemption agreements to limit the amount of weekly payments paid in the interim.

If you have a dispute pending, then you may achieve many of the conditions recommended above by an order of the Tribunal facilitated by a Form 15, avoiding effort and delay in issuing written determinations.

For instance you may insist as a condition of settlement that the worker consent to an order of the Tribunal:

- (a) That the applicant sustained no other injuries in the course of his/her employment with the various employers against whom s/he has claimed compensation apart from

injuries X, Y and Z as claimed and any sequelae thereof;

- (b) That the applicant sustained no other permanent residual disabilities excluding those already assessed by determination/order dated (# day of # 199#) arising from injuries X, Y and Z and any sequelae thereof;
- (c) That pursuant to the provisions of Section 38, 35(2) and 36(2), the applicant is suited to and capable of performing work as R, earning O, such that his/her weekly payments are reduced to S (*which amount corresponds with a Section 35(6a) figure*) – or a reduction under some other provision of Section 36(2) where appropriate.

COVERED CASES

DANIELLO INGELSE -v- EASTERN COMMUNITY MENTAL HEALTH SERVICE

Decision of the Full Bench of the Workers Compensation Tribunal ([2000] SAWCT 15)

Catchwords:

Capacity to invoke Section 36(1)(c) and Section 36(1)(d) - varying levels of remuneration. Incapacity for work persists.

Facts:

During the course of the worker's employment as an enrolled nurse (EN) she sustained a number of back disabilities for which she sought and obtained compensation.

Sometime thereafter, namely on the 21st June 1997, the worker's terms of employment were varied by consent. She was thereafter employed as an Administrative Services Officer - Level One (ASO).

This new employment attracted penalty rates and overtime and while her base weekly rate was \$488.74 she had in fact during the 1997/1998 financial year earned \$34,037.21 the equivalent to \$654.56 per week.

The worker's original notional weekly earnings as an EN (for which she remained incapacitated) were lower at \$639.25.

The issue that came to be determined by the Full Bench was whether in light of the above, the employer was entitled to discontinue the worker's weekly payments pursuant to Sections 36(1)(c) and 36 (1)(d) on the basis that her notional weekly earnings as an ASO exceeded her notional weekly earnings as an EN.

Issues:

1. For the purposes of calculating the amount of weekly payments to be paid to the applicant in accordance with Section 35(1)(b)(ii), whether the amount of weekly earnings that the worker is earning should be calculated by reference to the amount actually earned for the week or by reference to an average for the previous financial year to take into account penalty and overtime payments earned as an ASO.

Held:

1. The expression "*that is providing remuneration*" in Section 36(1)(d) is a broader concept than weekly earnings. It was permissible for the employer to have regard to the yearly income of the worker.
2. Whilst the level of the worker's remuneration, when looked at from this perspective, remains equal to or greater than the worker's notional weekly earnings, there has been no relevant change of circumstances that would permit the pursuit of a further claim for weekly payments.

3. A 12-month period is not necessarily applicable in every case, however it was appropriate here.

Commentary:

In situations where a worker has returned to alternate employment and earnings fluctuate depending upon penalty rates and overtime, be alert to the possibility that an aggregate of the worker's earnings may provide you with a basis upon which you can discontinue weekly payments.

Keep in mind however that this decision does not necessarily apply to the situation where a worker's average weekly earnings exclude overtime worked (as it does not comply with Section 4(8)). In this case, there was no suggestion that the worker's notional weekly earnings excluded penalties or overtime rates. The Full Bench expressed no concluded view about whether this reasoning would apply where notional weekly earnings excluded penalties and/or overtime.

TID BITS

RYAN -v- WORKCOVER CORPORATION

JD 8/1999

In the decision of Ryan, the Full Tribunal decided that the effect of Section 35(6a) of the Act is precisely what it says, namely that for the purpose of quantifying a worker's entitlement to income maintenance the worker is taken to be receiving the weekly payments that would have been payable if there had been no redemption of a worker's entitlement arising from an earlier disability. In Ryan, the amount involved was minor, namely \$25.73 gross per week. However there is no reason to conclude that the result would be any different even if the amount involved was a substantial sum per week, particularly where a prior redemption is based solely on the full and unreduced entitlement of a worker to be paid a certain rate per week by way of income maintenance.

BLOCKI -v- WORKCOVER CORPORATION

JD 123/1999

However in Blocki Deputy President Acting Judge Gilchrist concluded that the Tribunal did have jurisdiction in considering the application of Section 35(6a) of the Act to look at whether there was a valid redemption agreement in place insofar as such redemption agreement complied with the requirements of Section 42 of the Act.

It remains to be seen what the extent of such inquiry will be keeping in mind that Section 42 requires, inter alia, “competent” professional and financial advice.

SMUKAVIC -v- WORKCOVER CORPORATION

This decision involved a death claim where it was found that the applicant was not cohabiting with nor was she dependent upon the worker at the time of his death.

The WCT confirmed that the discretion held by the Corporation to pay a worker a lump sum regardless of whether the criteria set out in the Act had been met, (Section 44(3)) is a matter for the Corporation alone. The decision not to pay a lump sum is not reviewable by the Tribunal.

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