

# Gun & Davey **Covered**



Volume 1, Issue 20 - June 2000

## **WELCOME**

Welcome to this the 20<sup>th</sup> issue of **Gun & Davey – Covered**.

This issue contains several detailed reports on recent decisions of the Workers Compensation Tribunal three of which address the operation of Section 43 and the application of the supplementary benefit pursuant to Section 43(7a). The decision of Whittle is an interesting application of the “journey” provisions of the Act and demonstrates that even the WCT has its limits when asked to extend the coverage of the Act.

**Gun & Davey** would like to welcome Lynne Giles to our WorkCover section.

To those of you who have been practising in this jurisdiction for more than a few years, Lynne will be known to you as a senior litigation solicitor and partner at Stratford & Co. between 1983 and 1992 specialising in workers compensation and general insurance matters both as solicitor and counsel.

After practising interstate, Lynne has now returned to Adelaide where for the last 12 months she has practiced in the personal injury section at Wallmans, Solicitors. She has now accepted our offer to join this firm.

Lynne is a senior practitioner with a well-established background in the workers compensation jurisdiction. She will be a valuable addition to the senior ranks of our WorkCover section enabling us to continue to satisfy the demands made by you, our valued clients.

To those of you that know Lynne we encourage you to contact her and renew your acquaintance. Lynne will bring the total

number of our WorkCover section to 11 solicitors.

Regards, Michael Ricketts

<b>In This Issue</b>			
Welcome	1	Case Snippets	3
Covered Cases	1	Tid Bits	6
		Directory	7

## **COVERED CASES**

### **SANDERSON -v- HOLDEN LIMITED**

#### **Decision of the Workers Compensation Tribunal [2000] SAWCT 29**

##### **Catchwords:**

Section 43 - where a possibility to improve exists.

Section 36(1)(b) - where a definite diagnosis cannot be made.

##### **Facts:**

In 1988 whilst employed as a spray painter, the worker began experiencing symptoms of numbness, tingling and pain in his *right* hand. In June or July 1998 he underwent a carpal tunnel release. The worker recovered and returned to work two weeks later.

In April 1992 the worker obtained employment with Holdens as an assembler. In or about June 1992 he began experiencing symptoms in his *left* hand including pins and needles, numbness and lack of strength. A nerve conduction study confirmed carpal

tunnel syndrome. A carpal tunnel release was performed in June 1992. A full return to work on normal duties occurred two weeks later.

Within two weeks of the return to work the worker began experiencing a “popping” sensation in his *left* hand. He remained off work for one month then returned to work on modified duties.

Despite being transferred to a number of different areas due to his disabilities, his symptoms persisted.

The worker consulted his GP who referred him to Dr Fewings and then Dr Saies who performed a carpal tunnel release in July 1996. Symptoms recurred four days post-operatively. Dr Saies diagnosed “failed endoscopic carpal tunnel release” and referred the worker back to Dr Fewings. Dr Fewings conducted nerve conduction studies, which revealed “a marginally abnormal study”.

The employer referred the worker to Mr Ghan for medico-legal purposes. Mr Ghan was unable to offer an explanation as to why the worker’s complaints had continued and suggested that the worker was fit to return to work. The worker subsequently returned to work in November 1996. He reported difficulties to his employer who then referred him to Mr Randall Sach, a Plastic Surgeon. Mr Sach diagnosed the worker as suffering symptoms of reflex sympathetic dystrophy and suggested further surgery. The employer’s solicitor then referred the worker to Dr Cullum who considered that the worker had suffered a significant disability to his right upper limb below the elbow and was not fit for any work. Dr Cullum agreed with Mr Sach that the worker was suffering from a dysfunction of the median nerve.

Subsequently the worker came to be referred to Mr Philip Griffin a Plastic Surgeon who advised that the worker was suffering from quite severe reflex sympathetic dystrophy. He performed an open right carpal tunnel release in March 1997, however the worker did not experience recovery and complained that following surgery he experienced more pain, numbness, sweating and colour

change than before. He has not worked since.

In total there were 50 medical reports from almost 20 medical experts! Various diagnoses were offered to explain the worker’s continued complaints. These include chronic regional pain syndrome, reflex sympathetic dystrophy, depression and hysterical conversion disorder. Eventually the employer discontinued the worker’s weekly payments on the basis that he had ceased to be incapacitated for work as a consequence of the accepted disability. In support of this the employer stated that none of the medical diagnoses could properly explain the worker’s continued complaints and it was suggested that the worker must have been exaggerating his symptoms.

#### Issues:

1. Whether or not the worker continues to be incapacitated for work as a consequence of a disability that he sustained in the course of his employment with Holden on 3<sup>rd</sup> June 1992. (Yes)
2. What, if any, entitlements he has to compensation pursuant to Section 43 of the Workers Rehabilitation and Compensation Act 1986 (“the Act”) in respect of any permanent disabilities that might have resulted from such disabilities.

#### Held:

1. The lack of a specific diagnosis is not sufficient to discontinue a worker’s weekly payments where there is evidence of a continuing incapacity.
2. It is not necessary for there to be a definitive diagnosis of a worker’s condition nor is it necessary for there to be medical assessments of his permanent impairments for the Tribunal to assess permanent impairment of its own accord. His Honour Deputy President Gilchrist held that the worker had a 90% permanent impairment of the right arm

at or above the elbow and a 5% permanent impairment of the left arm at or above the elbow.

benefits paid out for multiple disabilities exceeds 55% of the prescribed sum?

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**CEDIC -v- WORKCOVER CORPORATION  
(MODULAR FURNITURE PTY LTD)**

**Decision of the Full Bench of the  
Workers Compensation Tribunal  
[2000] SAWCT 54**

**Catchwords:**

Supplementary benefit – application of Section 43 (7a) to compensable disabilities arising out of separate traumas.

**Facts:**

The worker was a carpenter employed by Modular Furniture Pty Ltd, a furniture manufacturer. In May 1993 he sustained an injury to his left hand for which he was awarded a lump sum pursuant to Section 43 of the Act based upon a 40% permanent impairment (1993 prescribed sum).

In May 1995 the worker made a claim for noise induced hearing loss. He was awarded a Section 43 lump sum based on a hearing loss of 18.1% and tinnitus of 8% (1995 prescribed sum).

A claim for surgical scarring was also made and the worker was awarded 3.5% for disfigurement of the chest (1993 prescribed sum) and 2.5% for disfigurement of the thumb (1995 prescribed sum).

The worker's subsequent claim for a supplementary benefit was rejected on the basis that a supplementary benefit is only payable where an entitlement pursuant to Section 43 exceeds 55% of the prescribed sum for a single compensable disability.

The matter was referred directly to the Full Bench.

**Issues:**

1. Is a supplementary benefit payable pursuant to Section 43(7a) where the cumulative total of all Section 43

**Held:**

1. Section 43(7a) can apply to the aggregate of more than one disability.
2. The purpose of Section 43(7a) is to provide additional compensation to workers who have suffered significant permanent impairments as a result of multiple disabilities.
3. That purpose would be frustrated if Section 43(7a) was limited to circumstances where it only applies to permanent disabilities arising out of the one compensable disability.

**Commentary:**

The consideration of past Section 43 entitlements is necessary for more than just the application of Regulation 25. It is also important that the cumulative amount of the entitlements is considered to determine whether a supplementary benefit is payable.

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**CASE SNIPPETS**

**A & R  
[2000] SAWCT 46**

The Workers Compensation Tribunal recently upheld the Corporation's decision to reject a worker's claim for neck, back, internal and emotional injuries suffered during an alleged sexual assault in the course of her employment.

Despite requests by the Corporation, the worker refused to disclose the identity of her assailant. The Corporation rejected her claim pursuant to Section 53(3) of the Act.

The Tribunal held that this was pertinent information as the identity of the alleged assailant may produce evidence capable of establishing that the assault had nothing to do with the worker's employment. Whether or not the worker's decision to refuse to

provide the information was reasonable was not to the point.

His Honour Deputy President Gilchrist held that the wording of Section 53(3) and in particular the word “may” indicates that it is a matter for the discretion of the compensating authority. A decision whether or not to exercise that discretion is a matter for the compensating authority and is not a reviewable decision for the purposes of the Act.

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**WHITTLE -v- WORKCOVER  
CORPORATION (INCOSPEC ASSOC. PTY  
LTD)**

**[2000] SAWCT 45**

In this matter Deputy President Acting Judge Gilchrist was required to consider whether the worker’s motor vehicle accident could be considered as arising out of or occurring in the course of the worker’s employment.

The worker was working at Roxby Downs four weeks on and one week off. He was provided with accommodation on site (“the camp”), a motor vehicle and meals by his employer (through the Western Mining Co.). The camp was situated approximately half way between Olympic Dam and the township of Roxby Downs. The worker’s hours were not regular and he could choose to attend his duties of employment which involved the inspection and examination of painting work undertaken by others at any time providing he fulfilled his required number of hours. He would occasionally attend to his duties in the evenings. These occasions could either be scheduled or unscheduled.

At 11.30 am on a Saturday night the worker was involved in a vehicle collision on the way home from having dinner with friends at the Roxby Downs Club. Although the worker was not able to remember details of the night of the accident, it is alleged that he may have been on his way to his place of employment to fulfil his work duties at the time of the accident!

It was asserted by the worker that due to the nature of his employment he was in effect on

duty for the entire time he was at Roxby Downs and was therefore in the course of his employment at the time of the accident. Alternatively it was contended that whilst travelling from the Roxby Downs Club to the camp he was performing something incidental to his employment and ought to be regarded as having been in the course of his employment at the time of the accident.

The Deputy President concluded that the evidence put before him did not permit him to make any findings in relation to what the worker had intended to do after he left the Roxby Downs Club. The Deputy President held that the worker’s attendance at the Roxby Downs Club on the evening of the accident could be described as a “social event” and could not be characterised as a meal break in the course of his employment.

His Honour acknowledged that the terms of the worker’s employment meant that he had to be in or about Olympic Dam, the camp or Roxby Downs for the duration of the four week stint, however states that it did not follow that the worker was in the course of his employment for this entire period.

It was held that the worker’s accident occurred in the course of a journey between a leisure activity and the camp and therefore did not arise out of or in the course of the worker’s employment.

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**FWLER -v- WORKCOVER  
CORPORATION (TYNCON PTY LTD  
trading as FWLER CLEANING  
SUPPLIES**

**[2000] SAWCT 50**

This decision involved an application for a section 43 assessments for sleep disorder arising out of a compensable lower back injury. There was also a dispute over the payment of a medical report provided by Dr Lushington, a Psychologist.

There were two important findings made by the learned Deputy President:

1. The assessment pursuant to the AMA Guides must be made by a legally

qualified medical practitioner (preferring the reasoning in Corporation -v- Wright (A9 of 1994) and Corporation -v- McLeod (A55 of 1994).

2. The nature of an assessment for sleep disorder requires an organic deficit of the central nervous system. There is a specific procedure for assessment of impairments of this kind within the Guides.

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### **WORKCOVER -v- DAVIDSON**

#### **[2000] SAWCT 32**

This decision involved two Notices of Dispute and an Application for Expedited Decision lodged by the worker. The first Notice of Dispute related to a discontinuance of the worker's weekly payments pursuant to Section 36(1)(g). The second Notice of Dispute related to a decision of the compensating authority to refuse the worker's request to reside outside of the state. The worker also lodged an Application for Expedited Decision seeking to invoke the special jurisdiction to expedite decisions contained within Part 6B of the Act.

By an Application for Directions the worker sought amongst other things to have all proceedings heard together at Judicial Determination. When hearing the Application for Directions, His Honour Deputy President Acting Judge Gilchrist ordered that all matters be heard together and they proceed to immediate Judicial Determination.

The Corporation appealed this order. The focus of the debate became whether or not the Tribunal possessed the jurisdiction to review the Corporation's refusal to consent to the worker residing out of the State or the withholding of such consent.

The Full Bench held that when looking at the underlying scheme of the Act it is clear that Parliament intended for the decisions of compensating authorities to be subjected to painstaking review. Given that the decision

to grant or withhold consent has the potential to significantly affect the rights and entitlements of a disabled worker, it would be surprising if such a decision were immune from review. On this basis the Full Bench held that such a decision can be fairly characterised as "a decision on a claim for compensation" for the purposes of Section 89A(1)(c) and due to the nature of the possible consequences of the decision, is reviewable upon its making.

The decision to apply Section 36(1)(g) is also reviewable. The Tribunal declined to follow earlier decisions of the WCAT to the contrary.

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### **WARR -v- WORKCOVER CORPORATION (RYAN MOVES)**

#### **[2000] SAWCT 30**

The worker sustained injuries to his back and knee on 8<sup>th</sup> December 1998 in a compensable motor vehicle accident. The accident occurred in Mount Gambier South Australia and the worker was provided with medical certificates that were in the prescribed form for the purposes of the South Australian Act.

The worker subsequently advised his employer of his intention to lodge a Claim for Compensation. The employer, being based in Victoria, duly provided the worker with a form titled "Worker's Claim for Compensation". The form was in the format prescribed under the Accident Compensation Act 1985 (Victoria) ("the Victorian Act").

Upon completion of the form it was forwarded by the employer to their Victorian Insurer, Zurich and the worker's claim was accepted.

At a later stage the worker obtained legal advice. He was advised that he had no entitlement under the Victorian Act and that he should have pursued his claim under the South Australian legislation. This was relayed to Zurich who consequently advised the worker of their intention to cease his payments.

The worker lodged a Claim for Compensation in South Australia and this was rejected pursuant to Section 55(3).

The Tribunal held that the bar provided for by Section 55(3) does not operate because of the receipt of compensation. It only operates where compensation has been *recovered*. The word *recovered* contemplates something more than just received. It contemplates a legally enforceable right to retain the moneys received.

Pursuant to Section 114F(1) of the Victorian Act, the Victorian compensating authority has the right to recover the moneys paid. Therefore it cannot be said that the worker has recovered compensation under a foreign law.

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## TID BITS

In [Attenborough -v- GMH \[2000\] SAWCT 52](#) the worker was claiming travelling expenses for travel between his workplace and his physiotherapist and then from the physiotherapist to his home (a route which took him past his workplace). The Tribunal upheld the Corporation's determination to reimburse the worker for travel between the workplace and the physiotherapist only. The worker was held to be liable for the further leg of the journey ie, from the workplace to his home thus confirming that Section 32 travel expenses are only for the travel necessary to obtain treatment not for travel incidental to obtaining treatment.

Acting Deputy President McCouaig is yet another Presidential Member to decide that substantial as opposed to strict compliance

with the notice requirements for Section 36 determinations is sufficient (see [Gaeta Covered Volume 1, Issue 16](#)). In [Vujic -v- WorkCover \(ANI Bradken\) \[2000\] SAWCT 51](#), the Section 36 notice was badly drafted with references to a rehabilitation program instead of a rehabilitation and return to work plan and a number of typographical errors. It was held that despite the obvious deficiencies, the notice had adequately explained the basis on which the compensating authority had discontinued payments and no confusion should have resulted. Therefore the notice was valid.

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In the decision of [Cruse -v- WorkCover Corporation \(OPAL\) \[2000\] SAWCT 58](#) His Honour Deputy President Thompson adopted and applied the decision of Acting Deputy President McCouaig in [Casey JD 110/99](#) (see Covered Vol 1 Issue 17). His Honour held that the Tribunal does not have the power to enforce a decision of an Arbitrator where an application for a Judicial Determination has been lodged within time.

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In [Price -v- WorkCover \(M J Sherrin Pty Ltd\) \[2000\] SAWCT 31](#) of the Full Bench of the Workers Compensation Tribunal held that a previous decision of an Arbitration Officer to award a worker Section 43 entitlements for various disabilities did not create an issue estoppel prohibiting a later finding that a worker is not incapacitated by reason of those disabilities.

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