

# Gun & Davey **Covered**



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## WELCOME

Welcome to this the 21<sup>st</sup> issue of **Gun & Davey Covered**.

This issue contains reports on three interesting decisions two of which (*Petric* and *Knoop*) were argued in the WCT by **Gun & Davey**.

The most interesting of these is *Petric*, which resulted in an excellent outcome for the scheme creating new law at the same time.

As you will see the outcome confirms that the Tribunal is open to innovative case management and is prepared to support such action when it is consistent with the policy behind the Act.

In other news, we wish Sophie Carman bon voyage. Sophie and her husband David are taking a well-earned break and travelling overseas. We wish her well but also look forward to her returning to work on the 11<sup>th</sup> September 2000.

Regards,

Michael Ricketts

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## COVERED CASES

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### **PETRIC v WORKCOVER CORPORATION (CONSULTING AND DEVELOPMENT ENGINEERS)**

**Decision of the Workers Compensation  
Tribunal – Deputy President Gilchrist  
([2000] SAWCT 108)**

#### **Catchwords:**

Application of Section 35(2) to the initial determination of a claim.

#### **Facts:**

The worker, an engineering estimator, sustained injury to his right knee on 6<sup>th</sup> February 1996. He resumed work the following day but continued to suffer pain being retrenched two weeks later and remaining unemployed until May 1996. Thereafter he was employed with B & R Civil for a couple of months, City of Noarlunga for 13-15 months, City of Mitcham for 11 months and City of Port Adelaide/Enfield for 3 months.

Although undergoing surgery on his knee in December 1996, he continued to experience pain and lodged a Claim for Compensation on 23<sup>rd</sup> September 1998 some 31 months after the initial injury

The Agent (Mercantile Mutual Insurance (SA Workers' Compensation) Limited) rejected the worker's claim on the basis that for the period of incapacity sought, the worker was only entitled to the difference between his notional weekly earnings and that which he could earn in suitable employment. Applying the principles contained within Section 35 it was asserted that the worker was capable of working either as a traffic and

development officer or a works estimator on a full-time basis. His deemed earnings from such employment exceeded his notional weekly earnings thus providing the worker with a nil entitlement.

**Issue:**

Is a compensating authority entitled to reject a worker's claim for income maintenance when such a claim is made more than two years after the commencement of the incapacity on the basis that the worker was capable of working in employment that would produce a higher income than the worker's notional weekly earnings?

**Held:**

The Section 38 review process is directed towards a review of weekly payments actually being made. There is no reason why the principles in Section 35(2) cannot be applied to a claim for compensation made more than two years after the commencement of incapacity.

**Commentary:**

This decision has now paved the way for claims for income maintenance to be rejected or accepted for a lesser amount than 80% of notional weekly earnings on the basis of the two-year provisions. Bear this in mind for any claims lodged more than two years after the commencement of incapacity but be aware that the factual basis must exist before a determination of this type will succeed.

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**WORKCOVER CORPORATION (GRIFFIN PRESS PTY LTD) v GIBSON**

**Decision of the Full Bench of the Workers Compensation Tribunal ([2000] SAWCT 33)**

**Catchwords:**

Period of incapacity, relevant date, Section 4(9) and Section 35.

**Facts:**

The worker suffered an injury to his left knee in the course of his employment with Griffin Press on 27<sup>th</sup> October 1992 and his claim was accepted. It was held at first instance that the worker was at all relevant times partially incapacitated with periods of total incapacity (during which he received weekly payments) and periods where he performed modified duties with Griffin Press. The worker accepted a voluntary retrenchment package in October 1996 hoping to return to England. This did not eventuate and in January 1997 he obtained employment with Protectaprint.

Following surgery to his knee the worker was off work between the 11<sup>th</sup> February 1997 to 3<sup>rd</sup> March 1997 and then in January and July 1998 underwent further surgery. He did not work thereafter. His claims for weekly payments for these periods were accepted.

For the first period of incapacity (ie, 11<sup>th</sup> February 1997 to 3<sup>rd</sup> March 1997) the rate of the worker's weekly payments were set at \$390.92 (80% of the rate set in 1992). The worker asserted that the rate should be \$550.00 representing his average earnings from his latter employment at Protectaprint.

For the second period of incapacity (ie, January 1998 ongoing) the Corporation again set the worker's notional weekly earnings at \$390.92. The worker asserts this should have been \$636.00 gross per week.

It was held at first instance that the relevant date for the setting of average weekly earnings was 12 months immediately preceding February 1997 and January 1998 notwithstanding the fact that the worker had remained partially incapacitated since 1992.

The Corporation submitted that incapacity could continue irrespective of whether there has been any economic loss and that 1992 was the relevant date.

**Issues:**

1. Was the Corporation, upon lodgement of the worker's further claims, required to make fresh determinations of the

worker's average weekly earnings by reference to his earnings at the time his further claims were made?

2. Was there only one or more than one period of incapacity?

**Held:**

1. Section 4(2)'s reference to "the relevant date" and Section 4(9)'s definition thereof suggests that it was Parliament's intention that average weekly earnings would be calculated at the commencement of the period of the worker's incapacity for work or, where there was more than one separate period of incapacity resulting from a compensable disability, at the commencement of each separate period.
2. The basis upon which Marina's case was distinguished at first instance was not made out.
3. The interpretation of "period of incapacity" as set out in Marina's case was accepted, namely that if the worker remains partially incapacitated for work from the compensable disability through a period of time regardless of whether the worker asserted this incapacity, then the relevant date for calculating weekly payments is the date of the original incapacity (in this case October 1992).

The fact that the worker did not assert an incapacity, eg by not presenting a prescribed medical certificate, does not end a period of incapacity.

**Commentary:**

The decision of Marina has been confirmed. This reinforces the necessity to ascertain whether a worker's subsequent claim is based on an ongoing disability arising out of an original compensable disability or a different disability eg, aggravation.

## CASE SNIPPETS

### **KNOOP v WORKCOVER CORPORATION (TITAN BULK HANDLING PTY LTD)**

**[2000] SAWCT 103**

Following the recent decision of Whittle Deputy President Gilchrist has confirmed that whilst attending a social function a worker is not carrying out the duties of employment. Here the worker, temporarily resident in Darwin, was provided with a mobile phone and was required to be on call 24 hours per day. His normal hours of work were 7.30 am to 5.30 pm although he could receive calls as early as 5.30 am or as late as 8.00 pm.

After dining with friends the worker left the restaurant at 11.45 pm. Upon leaving he fell and suffered injuries. The worker lodged a Claim for Compensation!

Deputy President Gilchrist held that by attending the restaurant the worker was not carrying out the duties of his employment nor was he embarking upon an activity incidental to his employment or which he was required, authorised or expected to undertake as part of the duties of his employment. His Honour stated that while the worker was temporarily resident in Darwin, and carried a mobile phone, the *possibility* that he might receive a call that could require him to work or respond as required did not create a sufficient connection with employment to conclude that the circumstances of the worker's disability were compensable. The compensating authority's rejection was confirmed.

### **LEVI v UNISURE**

**(Full Court, Supreme Court [2000] SASC  
167)**

The Full Bench of the Supreme Court has recently handed down its decision in Levi v Unisure. The Supreme Court identified that the worker had been subjected to many stressors or perceived stressors in the

workplace, some of which were administrative actions. They included alleged homophobic comments, a perception that a supervisor was antagonistic and overbearing, a failure to obtain a promotion, a tense atmosphere at the work place, a perceived breach of confidence by his supervisor and an eventual redundancy.

The Full Bench held that in a situation where distrust, dislike and even malice is perceived by one party, subsequent interactions are likely to take on a heightened meaning for that party. In such circumstances the correct approach is to view the nature and circumstances of office practice and the conduct of some co-worker's as perceived by the worker as a course of conduct

causative of the disability. It was a mistake to focus on the few matters, which may have been described as administrative actions. An approach that requires every incident in the workplace to be considered discreetly and assessed as administrative action was rejected.

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