

Gun & Davey **Covered**



Vol 1, Issue 22 - November 2000

WELCOME

Welcome to the 22nd issue of **Gun & Davey - Covered**.

This will be our last issue for the year 2000. We expect the next issue to be published in February 2001. I am tempted to comment upon how quickly this year has passed but will refrain from doing so!

This year has seen the number of Judicial Determinations handed down by the Workers Compensation Tribunal (WCT) increase from 139 in 1999 to an estimated 195 by the end of 2000.

In our view, this tends to confirm the perception that there has been a subtle but real change in the nature of the business being conducted in the WCT. Whilst there has been a marginal reduction in the number of disputes being lodged with the success rate at Conciliation being maintained, it nevertheless appears that more matters are proceeding to Arbitration and then Judicial Determination. The reason for this may be that although the Tribunal is conducting marginally less business, the increased quality of determinations being made by Agents and Exempt Employers results in less flexibility to negotiate at Conciliation and hence more matters running to hearing.

In turn, this has meant a change of focus at **Gun & Davey**. Whilst maintaining the desire to resolve as many matters as possible at Conciliation, there is now a greater need to keep one eye on the possibility that a matter will proceed to Arbitration/Judicial Determination and to conduct negotiations at Conciliation accordingly.

Finally, we would like to be among the first to wish our clients a happy and prosperous

Christmas and New Year and to thank you for your support.

We look forward to seeing you at our Christmas function, which this year will be held on Friday, 15th December 2000. If you do not receive an invitation in early November and would like one, please contact the writer.

Regards

Michael Ricketts

In This Issue			
Welcome	1	Case Snippets	2
Covered Cases	1	Directory	8

COVERED CASES

COCKRUM v WORKCOVER (N & A BIANCO PTY LTD)

[2000] SAWCT 127

In this decision His Honour Deputy President Gilchrist was required to consider when interest becomes payable upon the resolution of disputes involving arrears of income maintenance. Is interest pursuant to Section 47(1)(b) payable from:

- The occurrence of a compensable disability?
- The date the Claim for Compensation is made?
- The date the disputed decision is made?

- The date on which a Notice of Dispute is lodged?

In reaching his decision His Honour acknowledged that the prime purpose of Section 47 is to:

“Encourage the prompt and accurate determination of claims by compensating authorities by providing a penalty for delay”.

Using this rationale His Honour concluded that interest is not payable for periods prior to the lodging of the Claim for Compensation, as prior to that the compensating authority could not have done anything to expedite payment.

He then considered each of the alternatives in turn:

1. Is interest payable from the date the Claim for Compensation is made?

His Honour stated that the Act contemplates a reasonable time within which to investigate claims before making a determination. He acknowledged that the Corporation owes a duty not only to the worker but also to the employer and to the Scheme. It should not be pressured into making hasty determinations and should feel permitted to make proper use of the powers conferred by Section 53 without being penalised for having done so.

2. Is interest payable from the date upon which the erroneous determination is made?

His Honour held that to decide that interest is payable only from this date might unfairly prejudice workers who feel there has been undue delay between the lodgement of the claim and the making of the erroneous determination. He states that a compensating authority should not be able to profit from undue delay.

Deputy President Gilchrist concluded that:

“Interest should run from the day upon which a compensating authority should have determined the claim for weekly payments”

in the worker’s favour.

On occasion this will be the date of the erroneous determination but not necessarily so. Occasionally it may be earlier than this if there has been undue delay by the compensating authority.

CASE SNIPPETS

MARKE v WORKCOVER (E R SILVA PTY LTD

Full Bench of WCT

[2000] SAWCT 138

Has the door been finally closed on worker’s attempting to obtain a lump sum for loss of capacity to engage in sexual intercourse?

In this the worker asserted that the removal of the impairment “loss of capacity to engage in sexual intercourse” from Schedule 3 of the Act did not necessarily mean that such losses do not give rise to an entitlement but rather that they should be assessed in accordance with the AMA Guides!

The Full Bench noted that “permanent loss of capacity to engage in sexual intercourse” had remained within Schedule 3 after the amendments to Section 43 in 1992 and 1993.

These amendments inserted a new list of stipulated impairments (including loss of capacity to engage in sexual intercourse) and provided that the impairment of physical or sensory faculty not otherwise stipulated was to be assessed in accordance with the AMA Guides. It followed then that the subsequent removal of the loss of capacity to engage in sexual intercourse from the stipulated impairments also removed an

entitlement to compensation pursuant to Section 43 for such a loss.

Their Honours continued that in any event the Guides do not allow for a loss of sexual incapacity to be assessed separately but rather require it to be assessed as a by-product of sexual dysfunction arising out of spinal cord disorders or disabilities directly affecting male and female reproductive organs. Loss of genital organs and impairment of the cervical, thoracic and lumbar spine are all impairments stipulated in Schedule 3. Consequently there is no need to refer to the Guides for such losses.

**MILLER v WORKCOVER AND SUN
ALLIANCE WORKERS COMPENSATION
(SA) LTD (ROYAL HOTEL)**

Decision of WCT

[2000] SAWCT 141

His Honour Deputy President McCouaig was required to consider whether a rehabilitation program ("RP") can be implemented at the same time as a rehabilitation and return to work Plan ("RRWP").

The worker in this case had suffered two compensable right knee injuries in 1995. In September 1998 the Claims Agent withdrew vocational rehabilitation, which had been directed towards returning the worker to his pre-injury industry on the basis that the worker's disability was permanent and prospects of a return to work were minimal. A Notice of Dispute was lodged in respect of this decision. Two further RRWP's (numbers 13 and 14) were established but did not include retraining as an accountant – a proposal that had been put forward by the worker's rehabilitation adviser. The worker also disputed these plans.

The worker also sought to have his retraining proposal incorporated into either a RP or a RRWP (in addition to the one already in force).

The Judicial Determination addressed two preliminary questions of law namely:

1. Can a worker require that a RP be established once a RRWP has been created?
2. Can a worker require a RP or RRWP to be established when:
 - (a) There have already been a series of plans; and
 - (b) Previous plans have already identified suitable employment that a worker has a reasonable prospect of obtaining for the purposes of Section 35?

Deputy President McCouaig considered and applied the decision of Dunstan v WorkCover. In that case the Full Bench held that a RP differs from a RRWP. It was noted there that the Tribunal would not be likely to require the establishment of a RRWP where a RP with reasonable conditions is in place. However they did not preclude the possibility of an RP and an RRWP co-existing.

Here, His Honour held that a worker could seek a review of a refusal to establish a RP notwithstanding that a past or present RRWP had been created. Further a worker can seek a review of a refusal to establish an RP or an RRWP notwithstanding that there has already been a series of RRWP's or that a previous RRWP has already identified suitable employment for the purposes of Section 35 of the Act.

**WORKCOVER (REXCO PTY LTD)
-v- SNELL**

WCT Full Bench

[2000] SAWCT 137

On appeal from a decision of a single Deputy President, the Full Bench held that Section 36(1)(f) can be applied to discontinue payments where a worker remains partially incapacitated by reason of the compensable condition even though suitable duties may not be available.

In this case the worker retained a partial incapacity after suffering a compensable

disability in 1997. He developed a psychiatric disability as a consequence of factors unrelated to his disability or relevant employment. He became totally incapacitated by reason of such disability and his weekly payments were discontinued pursuant to Sections 36(1)(f), 36(1A)(e) and 36(1A)(f)(i).

The Full Bench stated that the effect of the enactment of Section 36(1)(f) is that a compensating authority can now discontinue weekly payments of income maintenance if a breach of mutuality is established. The Corporation's decision was upheld.

**HORNHARDT v WORKCOVER
CORPORATION (NTP PTY LTD)**

Decision of WCT

[2000] SAWCT 157

Here, Deputy President Gilchrist takes the decisions of [Petric \[2000\] SAWCT 108](#) and [Adderton \[2000\] SAWCT 119](#) one-step further.

The worker sustained an injury in the course of his employment on 18th April 1997. Although his claim had originally been rejected it was subsequently held by His Honour that his disability was compensable and that the worker had an entitlement to weekly payments of income maintenance from the date of the termination of his employment being 20th September 1997. The parties were left to determine quantum.

The worker's entitlement during the first and second years of incapacity were agreed by the parties. The matter was brought back before Deputy President Gilchrist to determine his entitlement thereafter.

It was the Corporation's assertion that His Honour should take into account the worker's residual earning capacity and his ability to perform suitable employment having regard to the nature and extent of his disability, his age, his level of education and skills, his experience in employment and his ability to adapt to new employment, ie to

take into account the provisions of Section 35(2).

The worker disagreed with this assertion stating that if the Corporation wished to embark upon a review of weekly payments it should follow the procedures provided for by Section 38.

His Honour stated that the effect of the lodging of a Notice of Dispute within time is to render the disputed decision unenforceable and this remains so until the Tribunal makes an order either by consent or after adjudication on the merits. The status quo remains, in that the position is as it was before the disputed decision was made.

Given the status of the disputed decision the nature of the hearing must be a hearing *de novo* at which the Tribunal must arrive at its own decision based upon the evidence presented to it and the law as it is at the time of the hearing. The Tribunal is not constrained by the grounds upon which the determination was made nor is it limited in making its decision to the facts and evidence available at the time when the disputed determination was made.

His Honour went on to state that subject to the rules of natural justice he must base his decision upon the evidence placed before him and if this indicates that the worker's entitlement to weekly payments of income maintenance has ceased then in principle there can be no reason why the Tribunal should not give effect to that evidence and rule accordingly.

His Honour stated with respect to the application of Section 38 that, as no weekly payments were being made, weekly payments themselves are not being reviewed.

What is occurring is an identification of the period of incapacity with a realisation that the period extends beyond two years and an assertion that without the benefit of the deeming provision contained in Section 35(2)(b), no entitlement to weekly payments exists.

His Honour held that given that the worker's incapacity for work extended beyond two years, if the compensating authority is, through evidence, able to persuade the Tribunal that for the period beyond that date the worker has a capacity to earn in suitable employment an amount equal to or greater than his or her notional weekly earnings, the Tribunal is obliged to determine that the liability for weekly payments has ceased as at that date. This is no different than if it determined that the liability to make weekly payments should be limited for a closed period because it was satisfied that the worker's incapacity for work had ceased or that he had returned to work.

PORCARO v BHP INTEGRATED STEEL

Decision of WCT

[2000] SAWCT 113

This decision concerns the rejection of the worker's Claim for Compensation on the grounds that the worker's disability was attributable to serious and wilful misconduct pursuant to Section 30(B)(2)(b)(i) of the Act – a "brave" approach by the decision maker in these circumstances.

The worker suffered a crush injury to his hand when using a guillotine. As a steel plate he was cutting would not fit the worker had removed a section of the guard causing the plate to fling up, crushing his hand. Later it was suggested that a more appropriate method would have been to use an oxyacetylene torch however the worker did not turn his mind to this. It was the worker's assertion that in his role as a maintenance fitter he was regularly required to operate the machinery without guards and believed the safety procedure existed only in relation to production work.

The worker's employment was terminated for breach of safety procedure. The worker's Claim for Compensation was also rejected on the abovementioned basis and on the grounds that the worker had attempted to use the guillotine for a job for which it was not designed.

The Tribunal considered that pursuant to Section 30B(2)(b)(i) the worker's misconduct must be wilful and that the worker's awareness of, or reckless indifference to, the consequences of his action was an ingredient of that "wilful misconduct". The worker's violation of the safety rule therefore needed to demonstrate that he appreciated or was recklessly indifferent to the seriousness of the consequences of his actions.

Deputy President McCouaig noted that the worker had previously been considered a suitable employee producing good quality work in a safe manner. He found that the worse that could be said was that the worker had made an error of judgement, as at the time of the injury, he did not consider that his action presented an undue risk, or that he was acting in contravention of the safety rules.

It was therefore held that the worker's actions fell short of *wilful misconduct* nor did it constitute *serious misconduct*. It was also noted that the worker's disability was not wholly or predominantly attributable to his alleged (serious and wilful) misconduct as there were deficiencies evident with the guillotine that were not attributable to the worker's actions. The worker's error of judgement was therefore a contributing factor but not the predominant cause.

The worker's disability was held to be compensable.

TOOHEY v WORKCOVER (AMS ENGINEERING PTY LTD)

Decision of WCT

[2000] SAWCT 132

Here, the issue was whether the discontinuance of the worker's weekly payments pursuant to Section 36(1)(g) of the Act was warranted.

In 1996 the worker suffered a major depressive illness and his claim was accepted. The worker commenced rehabilitation and returned to work on

modified duties and hours. The return to work was not successful and the worker decided the best way of recovering from his depressive illness was to leave Adelaide and move to Bundaberg, Queensland.

The worker advised the Corporation of his intended move and upon arrival in Queensland consulted with a psychologist and continued to see her on a regular basis. The worker's depression improved and he recovered to the extent that he was able to obtain a position as a welder.

Deputy President Gilchrist was not satisfied that as a result of the worker continuing to reside outside of the State the prospects of the worker obtaining suitable employment were adversely affected or that it would affect the worker's prospects of obtaining suitable medical treatment.

He agreed that the worker's absence from the State meant that the corporation had lost

its capacity to exercise a "hands on" approach to the worker's rehabilitation, or to use its preferred consultants or medical experts, however he considered that these factors were not decisive in themselves.

The evidence did not support the finding that the worker's absences from the State had led to any significant financial consequence for the Corporation or that the Corporation's capacity to monitor the worker's medical and rehabilitative progress was compromised.

Due to the history of the Corporation's previous unsuccessful attempts at returning the worker to work and the abovementioned findings, Deputy President Gilchrist held that the decision to invoke Section 36(1)(g) of the Act was wrongly made and the decision should be set aside.

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