

# Gun & Davey **Covered**



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## WELCOME

Welcome to this the 24<sup>th</sup> issue of **Gun & Davey Covered** for June 2001.

As this Issue happens to fall at the end of the financial year and to coincide with some changes we are now ready to make, this will be our last *hard* copy of **Covered**.

In the future we propose to provide this service electronically by e-mail either directly to your desktop PC or, if that is not possible for you, to a pre-arranged/central e-mail site at work from where it can be forwarded to you.

The service will be delivered in Adobe Acrobat format and accompanied by the Adobe Acrobat Reader, which allows access to the service.

**If you have not yet done so, please contact us ([melanie@gundavey.com.au](mailto:melanie@gundavey.com.au)) with your e-mail address to make the necessary arrangements. Unless you do you will not receive future issues so please take the time - for our Agent clients please note this has already been attended to.**

If you have any queries at all please do not hesitate to contact this office.

In other news, Sophie Carman has announced her pregnancy! She is expecting the baby, her first, in October and will be leaving the firm in September. All at **Gun & Davey** wish her the very best and look forward to her returning to work as a proud Mum.

Finally we announce the appointment of two new senior solicitors to our **Gun & Davey** WorkCover team.

Peter Salu has joined us from Lawson Downs where he practiced in this jurisdiction for many years. Peter will practice in all areas although he will specialise in the field of Section 54 recoveries.

Ken Gluche joins us from the workers' side of the fence namely Moody Rossi. Ken will conduct a general workers' compensation practice with a special interest in fraud matters following his considerable experience as a criminal prosecutor.

We welcome both gentlemen to our **Gun & Davey** team.

Regards

Michael Ricketts

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## CAR ALLOWANCES – HOW ARE THESE CALCULATED?

The question of how to estimate the value of an employer-funded motor vehicle is arising more frequently as more workers incorporate this benefit into salary packages.

The issue was recently considered in [Kearney v WorkCover Corporation \(Hilmore Pty Ltd trading as Gurney's Cheaper Car](#)

[Centre](#) [2001] SAWCT 6 which provides some guidance when calculating the value of average weekly earnings entitlements.

Some of the issues relevant to the question include:

- Who pays for the servicing of the vehicle?
- Who pays for the petrol?
- Who pays for insurance, registration etc?
- What was the permitted level of usage?

Generally the employer is responsible for all of these and the worker effectively obtains free personal use of the vehicle. It is this benefit, which needs to be converted into dollars for the purpose of calculating average weekly earnings.

The calculation is quite simple if the worker's salary package specifically states the value of the motor vehicle, which can then be converted into a weekly average.

Difficulties generally only arise where the value is not specifically stated.

In [Cleggett v Coca Cola Amatil A156/1995](#) it was held that the value of the financial loss should be calculated by reference to the actual cost the worker would have incurred had he provided the benefit to himself/herself.

In [Kearney](#) the worker's representative submitted that the Trial Judge should have regard to three different documents to assist him in making the necessary calculations. These included:

- (a) A copy of a table of operating costs for private vehicles published in SA Motor magazine. This set out the running and other costs (depreciation, registration etc) of various motor vehicles at five years of age.

- (b) A schedule of running costs for business cars and private cars for 1999/2000 published by the RAA.

- (c) A taxation ruling namely a fringe benefit tax calculation ruling entitled the Taxable Value of New Demonstrator Motor Vehicles and Used Car Stock of Motor Vehicle Dealers Available for Private Use of the Employees.

His Honour in considering these three documents placed little weight on the table prepared for SA Motor magazine on the basis that it dealt with motor vehicles of five years of age or with different models not comparable to the type of vehicle supplied to the worker. He did however find the table useful as a guide to the *components* that constitute the cost of a motor vehicle.

Similarly he placed little weight on the schedule of running costs, observing that that document did not refer to any vehicles comparable to the one provided to the worker. His Honour obtained some assistance from that table in that he observed that motor vehicles depreciate at a rate of 13.69% per annum after three years

Finally, His Honour also rejected the approach based upon the taxation ruling, as this was difficult to understand and apply.

He then calculated the value of the motor vehicle as follows:

- The worker's 1991 VN Calais had been advertised for sale in car yards for between \$16,999.00 to \$18,999.00.
- The book valuation of a 1991 VN Calais was between \$10,500.00 and \$14,300.00 (using Glass's Industry Dealers Guide for January 1999).
- A Glass's evaluation of a Falcon GLI was between \$7,200.00 and \$10,000.00.

Using this information His Honour established a retail value of \$13,000.00.

He then proceeded to calculate the worker's entitlement as follows:

- Value of the motor vehicle - \$13,000.00.
- Depreciation at 13.69% - \$1,708.00.
- Lost opportunity cost (the interest the capital would have attracted had the worker not had to purchase a car): 7% of \$13,000.00 - \$910.00.
- Registration - \$500.00.
- Insurance - \$380.00.
- Fuel - \$2,600.00.
- Service and repairs - \$300.00.

This provided a weekly total of \$129.42 or \$0.37 per kilometre. His Honour fixed the value of the motor vehicle at \$130.00 per week.

To summarise, it will be beneficial to obtain as much information as to the cost of registration, insurance, fuel, tyres, service and repairs etc as possible in order to adequately perform these calculations. A valuation of the motor vehicle is essential.

## COVERED CASES

### **CHENOWETH v TRANSADELAIDE**

**[2001] SAWCT 29**

#### **Catchwords:**

Section 39 – variations in the award applicable to the worker.

#### **Facts:**

The worker had been employed as a bus operator since November 1976. He originally sustained an injury to his lower back in the course of his employment in October 1984. He then suffered further similar injuries in October 1987, February 1988 and August 1995 after which he was advised to reduce his driving duties. In January 1997 he was removed from driving duties altogether.

At the time of lodging his claim in 1995 the worker was being paid pursuant to the TransAdelaide Bus and Tram Operators Paid Rates 1995 Commonwealth Award. His notional weekly earnings were based upon the rate of pay for a bus Operator Class 7.

In October 1996 the provisions of the Award changed under a new TransAdelaide St Agnes Depot Appendix 4. This involved new career classification structures, new aggregate rates of pay and revised conditions of employment. There was also the introduction of aggregated fortnightly remuneration.

It was the worker's submission that the changes to the Award including the new classification structure, rates of pay and the aggregated fortnightly remuneration should be taken into account for the purposes of a Section 39 review.

The exempt employer submitted that Section 39 only permits changes in notional weekly earnings, which reflect changes in the rate of notional weekly earnings as originally determined.

#### **Issues:**

Does Section 39 of the Act permit a reassessment of notional weekly earnings to reflect what the worker's earnings would have been had he not been injured by reason of changes in Award application, classification structure, pay rates and methods of payment?

#### **Held (by majority):**

1. Section 39(2)(a)(i) does not permit the re-calculation of average weekly earnings. Once pre-injury earnings have been determined, the determination remains immune from challenge (except as provided by the lodgement of a Notice of Dispute).
2. Section 39(2)(a)(i) is merely a tool to adjust weekly payments to reflect increases or decreases in wages payable to "workers generally" or "to workers engaged in the kind of employment from which the worker's

disability arose”, but only in the hourly rate of remuneration which forms the basis for setting the original notional weekly earnings rate.

#### Comments:

This decision confirms the limit of the changes to a worker's notional weekly earnings. Any Section 39 adjustments must take into account changes in rates of pay payable for the hours that were used when originally calculating average weekly earnings. A change in the work place from one Award to another is irrelevant.

Arguably it follows from this that a worker is only entitled to changes in rates of pay applicable to the position he or she held at the time of the injury.

For example even if the worker was to change from a level 1 to a level 2 at a time after the disability thus attracting a pay rise, the Section 39 adjustment could only reflect changes in the rates of pay applicable to a level 1 worker. This accords with the terms of Section 39 and reflects changes in the rates of pay payable to workers engaged in the kind of employment from which the worker's disability arose. Here the kind of employment from which the disability arose was a level 1.

## CASE SNIPPETS

### ANDERSON -v- ARNOTT'S BISCUITS LTD

[2001] SAWCT 27

#### (Re-Determination)

Here, the issue was what constitutes “new information” for the purpose of a re-determination under Section 53(7a)(c).

In September **2000** the exempt employer re-determined the worker's claim, originally accepted on 17<sup>th</sup> April **1997**, for a left hip injury on the basis of further medical reports by Professor Bauze dated 23 **August 2000** and 27 **October 2000**. In other words, the

re-determination was made **3½years** after the original determination.

The question that fell to be considered by the Tribunal was whether the reports of Professor Bauze could be “new information” for the purposes of applying Section 53(7a)(c).

Acting Deputy President Thompson made it clear that new information refers to “information that exists at the time the original determination is made. It must be available and capable of being discovered”.

His Honour further held that Section 53(7a)(c) has a narrow application. To allow re-determinations to be made many years after the original determination on the basis of a medical opinion *fortuitously discovered* would cause detriment to the proper workings of the workers compensation system.

Further, His Honour was doubtful that a medical opinion could constitute “*information*” new or otherwise. It may be no more than another “*opinion*”.

What this means to a decision maker is that unless the information, particularly medical opinion, was not in existence or could not be sought at the time of the original determination it is not *new information* and cannot be used for the purpose of Section 53(7a)(c).

### SLEE -v- TRANSFIELD CONSTRUCTIONS PTY LTD

[2001] SAWCT 16

#### (Sections 35(2)/38)

This recent decision of the Workers Compensation Tribunal produced a successful outcome to a Section 38/35(2) determination and is an excellent example of the benefits of having a comprehensive job description when deeming a worker capable of performing suitable employment as well as the advantage of relying on employment, which has been previously undertaken by a worker.

The worker had sustained an injury in 1998, which resulted in a permanent partial incapacity. He was certified fit for permanent modified duties. The pre-injury employer supplied him with supernumerary duties as a safety officer within his medical restrictions until his retrenchment. The worker subsequently found work with a labour hire company, being placed on three separate occasions with three different employers. All knew of his medical restrictions.

The worker applied for ongoing income maintenance, which was rejected on the basis he had demonstrated the ability to work as a safety officer. Section 35(2) principles were applied. The worker disputed the determination on the basis that unrestricted work, as a safety officer was not suitable work.

Deputy President Judge Parsons found that although the worker's disability precluded him from performing the full range of duties of a safety officer at Transfield, he nonetheless was able to obtain work within his limitations on the open labour market following retrenchment.

Her Honour restated the views of Cox J in [WorkCover Corporation of South Australia v. Warren \(1998\) 72 SASR 7](#) that "suitable employment" referred to in Section 35 will be appropriately identified if:

*There is evidence of the existence in the workforce of a particular form of occupation in which the worker could be suitably employed.*

"Safety officer" was such an occupation. The worker had not rebutted the statutory presumption pursuant to Section 35(2)(c).

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**GAERTNER -v- WORKCOVER (ALL  
TRANSPORT CRASH REPAIRS)**

**[2001] SAWCT 22**

**(Sections 35(2)/38)**

This case also addressed the relevant requirements for a successful Section 38 review applying Section 35(2).

The facts of this case are as follows:

The worker injured his lower back on the 28<sup>th</sup> October 1997. His claim was accepted. He had not worked more than one or two days since the date of injury. He had been certified unfit for his pre-injury employment, however it was noted that there was a non-organic contribution to his pain perception. The worker did not appear to be having active treatment.

A Section 38 review was undertaken by the Agent, reducing the worker's weekly payments on the basis that he could perform the work of a full-time process worker – light assembly. Due to the worker's pre-injury duties of employment he was considered vocationally suited to this position. A task analysis was obtained of the physical demands of the duties involved in this position.

Mr Fry considered that the worker was medically capable of undertaking the identified position, but that non-medical factors would also come into play, such as motivation, which would in turn impact on the worker's capacity.

Both Drs Blight and Potter considered that the worker was not functionally capable of undertaking the position based on the worker's history reported to them.

Acting Deputy President Thompson noted that the worker had the capacity to run his own business and had superior mechanical skills. His condition appeared not to be improving, perhaps even deteriorating despite the worker not working for four years.

His Honour held that although the worker suffered pain, he had exaggerated his physical disability and was not as incapacitated as he alleged or as he had persuaded Drs Potter and Blight.

However, His Honour nevertheless held that the worker was unfit to work on a full-time basis as he *could not confidently predict the*

*worker's capacity in this regard without some objective functional testing (ie, work trial) in the work place to accurately determine the worker's capacity.*

This case highlights the need for actual evidence of the worker's physical suitability to a particular position before a second year review will be successful.

**A work trial may not be required in each and every case. However the longer the worker has been out of the workforce the more relevant they become.**

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**TEBBEY -v- WORKCOVER (IRONS ENGINEERING PTY LTD)**

**[2001] SAWCT 25**

**(Section 6)**

This involved a consideration of the territorial application of the Act – Section 6.

The rather complicated facts of this case were not in dispute but are relevant to determining whether a “nexus” existed between the worker's employment and South Australia.

The worker initially commenced employment in Adelaide with Irons Engineering Pty Ltd (“Irons”) but resigned in 1965. He was then employed by another Adelaide firm until 1985. After 1985 due to his friendship with the owner of Irons, and at the request of Irons, he once again began to assist that company on special projects.

In 1993 he was asked to re-join the company on a full-time basis as a factory manager, which he did. He then retired in June 1994 undertaking intermittent casual work for Irons over the next four years.

In mid-1998, as a favour to the company, the worker accompanied the owner of Irons and his son on a trip to Melbourne to inspect a cray fishing boat, which they were interested in purchasing. The worker was not paid for this time. The boat was bought by interests associated with Irons and sailed to Cairns QLD. The worker agreed to go to Cairns,

modify the boat and go to sea on the boat to undertake maintenance, engineering and cooking.

The worker remained subject to the directions of Irons whilst working. Irons paid the worker \$500.00 a week plus expenses. This arrangement was confirmed in a handwritten note by the worker, signed by both the worker and Irons. The owner of Irons maintained the associated Queensland company was not paying the worker.

Once the worker was working in Cairns he forwarded weekly invoices to Irons in Adelaide together with receipts for his expenses. Irons would reimburse these amounts direct to his credit union account. No tax was deducted.

The worker was injured on the 23<sup>rd</sup> November 1998 whilst working on the boat and lodged a CCF against Irons. On the 7<sup>th</sup> June 1999 his claim was rejected by the Corporation pursuant to Section 6 of the Act ie, outside of jurisdiction.

The worker maintained that there was a nexus between his employment and the State, that he was based in the State - Section 6(2)(b), and/or that he worked from a base in the State - Section 6(2)(c).

Deputy President McCouaig agreed the Act could only apply if there was a nexus between the worker's employment and SA - Section 6(1).

He stated that the “employment” refers to the work he performed and was to perform in Queensland pursuant to the agreement. None of the work was intended to be performed in SA.

He therefore found that the worker was “usually employed” in Queensland, and not SA (ie, 10% or more of the time the worker was working in Queensland) and the claim was properly denied. The fact that the worker worked 100% of the time in Queensland was relevant to the definition of “usually employed”.

In the alternative the worker had submitted that his entire employment history with Irons should be taken into account, and that Section 6(1) should be interpreted broadly. As his work in Queensland was “relatively brief in the overall scheme of things”, he should be regarded as employed in SA.

This alternative proposition was also rejected by His Honour on the basis that *the worker’s employment is a reference to work that the worker has done, or is to do, pursuant to a contract of service with the employer. This was an agreement for the worker to work in Queensland.*

He considered that Section 6(2)(b) and Section 6(3) did not apply and that the worker had not shown that the Act had any application to his employment in Queensland.

## TID BIT

### SELECT STAFF PTY LTD -v- HANNAGAN

**[2001] SAWCT 37**  
(Full Tribunal)

(Jurisdiction)

**CLIENTS BE WARNED:** Despite the fact no formal order pursuant to Section 88DA was made to expand the original claim, if the facts and behaviour of the parties demonstrate they have consented to the dispute being enlarged and the hearing has proceeded on that basis, the making of an order can be inferred. Form ought not override substance.

Note: this same approach was applied by the Full Tribunal more recently in [Hill v Monroe Australia Pty Ltd \[2001\] SAWCT 51](#).

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