

Gun & Davey **Covered**



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WELCOME

Welcome to the new look 25th issue of **Gun & Davey Covered** for August 2001.

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In this issue, we report on three separate decisions addressing the issue of rehabilitation and in particular, re-training. We also report on a number of decisions addressing stays of execution when a matter is on appeal, an interesting reconsideration issue, the calculation of AWE's, mutuality, Section 32 expenses and what constitutes "cohabitation" in a death claim.

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Regards

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REHABILITATION – YOUR OBLIGATIONS

Three recent decisions of the Workers Compensation Tribunal have addressed the obligation to provide rehabilitation and what this means in different cases.

In [Nelson v WorkCover \(Adelaide Electrical Services Pty Ltd\) \[2001\] SAWCT 78](#) the issue was whether, after agreeing to finance the worker's university studies as part of his rehabilitation, the compensating authority should be required to continue to finance these studies to conclusion. The worker, an electrician prior to his disability, was permanently incapacitated from returning to

that work by reason of his left knee disability. Rehabilitation was instituted with the focus upon returning him to alternative employment. The worker, who had no post school training or qualifications, sat for mature entry exams and was accepted into a Bachelor of Arts course at the Adelaide University.

The compensating authority agreed to him commencing the course and reimbursed his fees for first year. His results then led to him being accepted into a Bachelor of Laws degree in the subsequent year. The compensating authority refused to further subsidise his studies.

Deputy President Judge McCusker held that after initially agreeing to finance the worker's university course it was bound to do so until conclusion. Furthermore, as these costs had been "authorised" by the compensating authority, they could be recovered by the worker under Section 32. (This decision has been appealed to the Full Tribunal).

In [Miller v WorkCover \(Hotel Royal\) \[2001\] SAWCT 57](#) it was held that retraining a worker into a new field as part of rehabilitation can involve more than short-term courses. In some circumstances university degrees may be compensable.

The worker sustained a right knee disability in 1995, which ultimately led to a permanent partial incapacity. The worker was afforded extensive rehabilitation and return to work assistance directed towards a return to work in the hospitality industry where he had 20 years pre-injury experience. Despite substantial efforts by both the rehabilitation consultant and the worker, he was unable to secure such work.

A report dated 11th December 1998 by the rehabilitation consultant referred to a proposal whereby the worker be re-trained as an accountant. Further Rehabilitation and Return to Work Plans were drawn up but the accounting course was not included. The worker disputed these plans but continued to apply for jobs in the hospitality industry.

The worker then sought to have retraining as an accountant included in a Rehabilitation and Return to Work Plan. Deputy President McCouaig found no legal impediment to having such a provision incorporated in a Rehabilitation Program or Rehabilitation and Return to Work Plan.

The question was one of reasonableness. In these circumstances both the worker and the rehabilitation consultant had unsuccessfully invested substantial effort into retraining the worker and attempting to secure employment in the hospitality industry. Incorporating the accounting course would increase the worker's "basket of skills" thus improving his employment prospects. The Deputy President saw this as fulfilling the objectives of the Act. It was therefore reasonable in these circumstances to change the direction of the rehabilitation.

However Deputy President McCouaig went on to state that it does not follow that the worker will be assured of continuing income maintenance, much less continuing income maintenance at the current rate for the duration of the course. Like all workers he will be subject to periodic reviews of his progress and ability to undertake some work as are all workers receiving compensation. (This decision has also been appealed to the Full Tribunal).

[West v WorkCover \(BCC Constructions Pty Ltd\) \[2001\] SAWCT 60](#) goes beyond the question of whether retraining should be provided and considers what *assistance* a worker should be provided with to complete this retraining.

The worker sustained a compensable disability to his left knee and had been partially incapacitated for work and in receipt of weekly payments of income maintenance for some three years. At the time of his injury the worker's employment history consisted mainly of manual work.

In early 2000 the worker enrolled in the first year of an Advance Diploma of Management at the Regency Institute of TAFE. The

claims agent paid the fees for the first year of the course as part of a Rehabilitation and Return to Work Plan. The worker requested that the respondent also establish a rehabilitation program to provide him with a hearing aid as he suffered from a congenital hearing loss, which made it difficult for him to participate in lectures. The request was rejected on the basis that there was no obligation to provide a hearing aid pursuant to a rehabilitation program.

The worker objected stating that the Corporation had already paid for him to attend the TAFE course as part of his rehabilitation and to effectively participate in the course he required the hearing aid. He further argued that the hearing aid would also assist him in returning to work, as it would open up further positions such as sales, store or administrative duties otherwise not available to him.

The Tribunal agreed with both arguments.

It found that the worker's usual field of manual employment had been significantly reduced as a result of the compensable disability. Further the Tribunal noted that there were other forms of employment which were suitable to the worker but for the existence of the hearing impairment.

The provision of the hearing aid was a measure which had a reasonable prospect of ameliorating the effects of the non-compensable disability so as to improve the worker's ability to obtain work and the request was therefore reasonable.

The Tribunal noted that the purposes of rehabilitation programs as provided in Section 26(3) of the Act is both the recovery from the compensable disability and restoration to the work force. The Tribunal stated that the Corporation's power to establish rehabilitation programs was intended to be flexible and unrestricted and need only be consistent with these two objectives. The Section permitted the Corporation to establish a rehabilitation program, the focus of which may be an additional, ancillary or coincidental problem,

which in combination with the compensable disability may influence the worker's restoration to the work force. The argument that a hearing aid would affect other aspects of the worker's life was irrelevant.

The Tribunal concluded that any measure which has a reasonable prospect of extending the categories of work commonly available to a person in the worker's position will meet the rehabilitative objective of assisting in restoring him to the work force. (This decision has been appealed to the Full Tribunal).

Commentary:

The above three decisions will have wide ranging effect on how to implement rehabilitation. Injured workers who have no prospect of returning to pre-injury employment will require some form of retraining. If the rehabilitation consultant identifies a university course it may be compensable until completion, unless special reasons are established such as:

- The worker's academic record suggests he/she would have difficulty studying.
- The worker has repeatedly failed subjects in the chosen course and the future likelihood of passing is therefore remote.
- The worker's attitude for a variety of reasons is inappropriate.
- We suggest a common sense approach.

The aim of the Act is to rehabilitate a worker back into the work force. A labourer need not necessarily be retrained into labouring/physical type work. It may be feasible to retrain the worker into a completely new occupation to which he is suited.

Where such retraining is provided always bear in mind that the two-year review provisions may still be applied. After one or two years of the course, a worker studying to be an accountant may

become suited to employment as an accounts clerk.

We will review these recommendations as and when we receive the decisions of the Full Tribunal.

SHOULD YOU PAY PENDING AN APPEAL TO THE FULL BENCH?

Quite often the situation arises where a party to a dispute is dissatisfied with a decision of a Deputy President and wishes to appeal the matter to the Full Bench.

Where these cases involve cessation or reduction of payments to a worker, the aggrieved party may not wish to continue payments until the outcome of the Appeal is known. However, unless there is a “stay of execution” payments must continue. The number of disputants seeking *stay* orders has therefore increased. The following recent decisions of the Full Bench do however indicate that the chances of a stay order being made are limited.

In [Arnett's Biscuits Limited -v- Anderson \[2001\] SAWCT 49](#) the exempt employer had applied to have a decision of the Trial Judge stayed pending an Appeal to the Full Bench (for details regarding this dispute see *Covered Volume 1, Issue 24*).

The Full Bench held that the Tribunal only has the powers granted to it by legislation.

There is however no provision in the Workers Rehabilitation and Compensation Act, 1986 which grants the Full Bench of the Workers Compensation Tribunal the power to grant a stay of execution against an Order of a Presidential Member of the Tribunal for the payment of money.

Consequently the Full Bench held that they did not possess the jurisdiction and denied the exempt employer's request. They did leave open the possibility that they may have the relevant power in other circumstances. It

was also stated that there may be occasions where an application may be made to the Trial Judge who could decide to amend the orders made so that they do not take effect until after the Appeal is heard.

A similar application was made by the worker in [Moore-McQuillan -v- WorkCover \(Wolf Air Dive Shop\) \[2001\] SAWCT 52](#) to stay an order of the Deputy President pending an Appeal. The Deputy President had confirmed a determination to discontinue the worker's weekly payments on the basis that the worker had the capacity to earn more than his notional weekly earnings in suitable employment. In considering the worker's application, the Full Bench decided that the actual relief sought by the worker is a further suspension of the Corporation's determination, pending the outcome of the Appeal, ie a Section 36(4)(b) Order. However the Full Bench held that Section 36(4)(b) only provides for a suspension up to and including Judicial Determination but not beyond. Consequently the power to suspend the operation of such determination ends at the conclusion of the Judicial Determination.

COVERED CASES

WEAR -v- WORKCOVER (GREYHOUND PIONEER AUSTRALIA LTD)

[2001] SAWCT 77

Catchwords:

Reconsideration, Appeal Proceedings, Locus Standi

Facts:

The worker lodged a claim for compensation for noise induced hearing loss, which was rejected. After receiving the worker's Notice of Dispute the compensating authority reconsidered its position and accepted it.

The worker's employer then disputed the acceptance and lodged a dispute.

At Arbitration the original rejection of the claim was upheld. The worker then sought a Judicial Determination.

The employer subsequently went into receivership and declined to take part in the Judicial Determination. The compensating authority proceeded in lieu and notwithstanding its reconsideration to accept the claim, sought to maintain its original rejection!

Issues:

1. Whether the Corporation, having originally determined the claim (on reconsideration) in favour of the worker, is bound by that determination and all subsequent proceedings in the Tribunal. (Yes!)
2. Where another party, ie. The employer, at Arbitration successfully disputes the Corporation's determination, does the Corporation have locus standi at Judicial Determination, and if it has, is it entitled to take a position contrary to its own re-determination.

Held:

1. The judicial process provided in the Act (Division IV) contemplates that the matter will be dealt with in a judicial manner. There must be no abuse of process. The Corporation should be kept to its determination unless just cause is shown, eg. Fraud or obvious mistake.
2. The Corporation does have locus standi but only to reiterate its position unless just cause is shown which entitles it to depart from its prior determination.

Commentary:

The effect of this decision is clear: extreme care must be taken in the re-consideration process. Unless obvious mistake or fraud can be shown you will be bound by this position in future proceedings.

CASE SNIPPETS

ARMSTRONG -v- WORKCOVER (SYMONS & CLARK TRANSPORT PTY LTD)

[2000] SAWCT 147

The worker worked 40 ordinary hours per week, 38 of which were paid at the sum of \$466.77 per week. The remaining 2 hours were credited to the worker to be drawn as an RDO once every four weeks. On the RDO day the worker did not work and accordingly in the week in which it occurred, the worker only worked 32 hours but was paid for 38 hours.

The issue was "whether in calculating the applicant's rate of average weekly earnings the worker is entitled to have incorporated therein an amount to compensate him for the non-cash benefit of his RDO and if so, in what amount."

Deputy President Thompson held that the worker at no time earned more than \$466.67 per week. He did not earn \$491.23 per week (ie. \$466.67 plus a day off). His average weekly earnings were therefore \$466.67. The RDO could not be characterised as a benefit in "substitution" for wages, as there had been no substitution, as wages were paid. To characterise the worker's RDO as an unpaid benefit in substitution for wages was a fundamental misconception, as the worker was not accumulating RDOs when he was on compensation, because each day was a paid day off!

DUTTON -v- MITSUBISHI MOTORS AUSTRALIA LTD

[2001] SAWCT 45

This concerned a disputed determination to discontinue the worker's weekly payments due to a failure to participate in a rehabilitation programme. It arose out of the worker's failure to attend work as required on 19 April 1999 as he was interstate.

The worker claimed that he was unable to attend work on 19 April 1999, as he was suffering from gastroenteritis and unable to return to Adelaide. The worker's credibility was questioned by the Trial Judge and it was held that the discontinuance should be upheld.

The worker then submitted that by lodging a Notice of Dispute and writing to his employer he had revived mutuality. His Honour first considered the letter written by the worker's representative but formed the view that it was confrontational, expressed no contrition or regret nor an undertaking to refrain from unacceptable behaviour. In light of the worker's subsequent Industrial Relations Commission proceedings, His Honour stated that the letter was hardly likely to generate a sympathetic response.

He held that to be a true restoration of mutuality there must be a genuine attempt. For example, a genuine expression of regret and a truthful explanation of the reasons behind his failure to attend may have been sufficient.

In other words, the restoration of mutuality must be commensurate with the breach. A minor breach will not require much on the part of the worker to revive mutuality. A significant breach will require more of the worker as in this example.

HUAK v WORKCOVER (HARDMART BANNER)

[2001] SAWCT 54

In this matter the WCT held that Nike Air Shoes were an expense, which fell within Section 32. It was not relevant that the shoes had not been manufactured or designed for the purposes of being a therapeutic appliance. It was noted that the nature of the worker's disability (a heel injury) and the recommendations of his doctors warranted such a finding.

Nike Air Shoes will not be considered a therapeutic appliance in every case. It must be an aid "for reducing the extent of a

disability or enabling a person to overcome in whole or part the effects of a disability." In this case the shoes enabled the worker to perform his work without significant restrictions

A further interesting point is that the Tribunal rejected the Corporation's submission that as the worker would have been required to purchase shoes regardless of his disability he should only be reimbursed for a percentage of their cost. The Tribunal held that as the cost of the shoes had been incurred reasonably, there was no reason why Section 32 should not be applied and the worker be compensated for the whole cost of the shoes.

LOCKLEY -v- WORKCOVER CORPORATION (CONSOLIDATED WASTE DISPOSAL)

[2001] SAWCT 75

Here the issue was what constitutes "cohabiting as at the date of death." There was no issue as to the worker's death being work related.

The deceased worker ("worker") and applicant were in a defacto relationship off and on since 1990 and were married in 1993. Throughout the relationship the worker exhibited violent behaviour towards the applicant. The applicant and the worker developed a lifestyle whereby after a normal period together the worker would become violent towards the applicant she then leaving him to return once things settled down.

In January 1995 the worker and applicant separated. The worker made an application for sole parent assistance for their son who remained with him. Whether the parties actually separated was a subject of conflicting evidence.

The applicant stated that she would still stay at the marital home on weekends, and sometimes longer, would sleep in the marital bed and would leave all of her belongings at the house. However she had made a number of inconsistent statements prior to giving

evidence, which led to her credibility being in issue. The evidence of the worker's treating psychologist was admitted. This confirmed that the applicant had returned home for at least some periods before the worker's death.

His Honour Deputy President Judge Gilchrist held that despite the periods of separation the applicant and the worker were in a close albeit dysfunctional relationship. His Honour stated that the focus of his inquiry was whether the applicant and the worker were residing together at the time of the worker's death. His Honour held that having regard to all of the evidence he could only conclude that they were. (Given the history, we think she deserved to succeed anyway!)

TID BIT

SCHNEEBICHLER -v- STATE OF SOUTH AUSTRALIA

[2001] SAWCT 62

The Full Bench of the Workers Compensation Tribunal has confirmed that if a supplementary benefit is to be paid to a particular worker where the entitlement arises due to a number of

Section 43 entitlements arising out of various disabilities with different prescribed sums, the prescribed sum to be applied when calculating the supplementary benefit is the prescribed sum that applies to the compensable disability that attracted the entitlement to a supplementary benefit.

In other words *the prescribed sum that should be applied is that which applies to the compensable disability, which "pushed" the aggregate compensation over the 55% threshold!*

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