

Gun & Davey **Covered**



Volume 2, Issue 26 - December 2001

WELCOME

Welcome to this the 26th Issue of **Gun & Davey Covered**.

This, the final issue for 2001, contains useful information for case managers in the growing area of second year reviews. Of the three decisions referred to in the first section, both **Scutcheon** and **Nugent** were prepared and argued by this firm.

Both decisions highlight the importance of the need to properly prepare and present a well conceived and constructed second year review determination for the WCT to consider if a confirmation is ultimately the desired outcome.

As case managers are aware, the consequences of a second year review - either the reduction or discontinuance of income maintenance - have important consequences for workers. Accordingly, the WCT will simply refuse to confirm them unless satisfied that the outcome is just for all - and in particular, for the worker.

It is our experience that there are varied approaches being applied by the decision makers in this State. Some are better than others. The "second year review packages" being prepared by the rehabilitation/vocational specialists also vary in quality.

Gun & Davey is available to assist in the second year review process. Any enquiries may be made through the writer.

Gun & Davey – Industrial Law

We would like to take this opportunity to advise our clients that in the new year of

2002, we will be establishing an industrial law section within the firm.

Those of you familiar with Paul Tanner will be well aware of his experience, expertise and nationally recognised credentials in this area.

In the New Year, we will be announcing some exciting new developments in the industrial section of the firm. It is our hope that those clients comfortable instructing us in the area of workers compensation, will also see the benefit in using us to concurrently advise them in industrial issues. More to follow.

In the meantime, we wish all our clients a safe and happy Christmas and New Year and as always, thank you for your support over the last 12 months.

Michael Ricketts

In This Issue			
Welcome	1	Case Snippets	6
Second Year Review Cases	1	Tid Bits	12
Covered Cases	4	Directory	12

RECENT CASES ON THE APPLICATION OF SECTION 35(2) IN SECTION 38(7) REVIEWS

There have been three important recent decisions in this area.

In two, the WCT has held that it has no jurisdiction to reduce or discontinue a worker's weekly payments to a greater extent than that to which they were reduced in the disputed Section 38 review.

Moore-McQuillan v WorkCover (Wolf Air Dive Shop)

[2001] SAWCT 99

The Full Bench made the following comments:

*"It might be, that in dealing with a case concerning a reduction of weekly payments following a s38 review, that it would be open for the Tribunal to determine that weekly payments should be reduced by some other lesser amount than that stipulated in the noticeit was not (however) permissible in this case for the Tribunal to in effect substitute its own decision to **discontinue** weekly payments just because it is satisfied that the evidence would justify (such) a discontinue of weekly payments".*

This reasoning was also applied by Deputy President Judge Gilchrist in:

Scutcheon v WorkCover (O D & E Pty Ltd)

[2001] SAWCT 115

which raised additional issues highly relevant to the consideration of and application of Section 35(2)(c) of the Act.

The important observations/rulings following from this case are as follows:

- (a) A determination based on a worker's capacity to undertake more than one suitable occupation, although the adjustment is based on only one occupation, does not restrict the compensating authority to relying on the occupation identified for the purposes of reduction of income maintenance – the effect of issuing a determination in such terms does however limit the compensating

authority to seeking a reduction by the *amount* so nominated – refer to paragraph 14.

NB: It is our view that a compensating authority can quite properly and indeed should if it is appropriate; rely on more than one suitable occupation in applying Section 35(2)(c) of the Act. To ensure that there is no limit to the extent of reduction there should be individual/alternate determinations regarding the respective reductions in the rate of income maintenance relevant to each identified occupation.

- (b) Deputy President Judge Gilchrist considered that he was bound by the Full Supreme Court's decision in [WorkCover Corporation v Warren](#) even though it conflicted with the majority decision of the Full Bench of the Tribunal in [Adams v WorkCover](#) – refer to paragraph 72.
- (c) His Honour rejected a submission that it was incumbent upon the compensating authority to place evidence before the Tribunal as to the actual wages payable for the positions identified in the disputed determination – His Honour considered it permissible and desirable that judicial notice be taken of awards and enterprise agreements applying to such positions – refer to paragraphs 73 and 74.
- (d) A determination is not rendered invalid because it fails to identify the actual duties that a worker would be required to perform. Various identified occupations were common and not novel or obscure. The purpose of detailing information in a determination is to enable a worker to understand it, to make an informed decision whether to challenge it, and if it is challenged to know the case that he or she must meet. His Honour did warn that deficiencies would not be overlooked depending on the facts of a particular case and in an appropriate

case a determination may be set aside because of such deficiencies – refer to paragraph 77.

- (e) His Honour stated that the notion of “suitable employment” as considered in Workers Rehabilitation and Compensation Corporation v James namely:

“Suitable employment means employment that the workman can do and which in the total circumstance of that injured workman, will promote his rehabilitation and reintegration into the work force”

no longer applies as a consequence of the observations made by the Full Supreme Court in Warren. His Honour observed that the decision in Warren indicates clearly that the focus of Section 35(2)(c) is not directed towards work that the worker is actually expected to undertake but rather work that is commensurate with a worker’s residual earning capacity as a basis for reducing weekly payments – refer to paragraphs 78 to 81 inclusive.

- (f) His Honour identified the relevant legal principles to be applied as those stated by Cox J in Warren – paragraph 86.
- (g) The focus in such a disputed determination is the date of the disputed determination – in other words the determination of the relevant issues has to be directed to the state of affairs as at the date of the disputed determination. If there have been adverse developments for the worker since that date that render the determination inappropriate the worker’s remedy lies in making an application for a further review pursuant to Section 38 of the Act – paragraph 94.
- (h) The importance of full and accurate task analysis of the identified suitable

occupations is demonstrated by the fact that whilst His Honour identified the occupations of sales assistant and console operator to be vocationally suited to the worker in question, the lack of specificity regarding the extent to which these occupations involved bending and lifting meant he could not conclude that these occupations were within the worker’s physical capacity and accordingly disregarded those occupations as potentially suitable– refer to paragraph 99.

- (i) If a worker is *de-conditioned* due to absence from the work force and requires *work hardening*, he is not capable of being fully productive and working full time and accordingly he is not considered physically capable of undertaking employment – refer to paragraph 101 (this approach is the same as that taken by Acting Deputy President Thompson in Gaertner v WorkCover discussed on page 6 of Volume 1, Issue 24 of **Gun & Davey Covered**).

SUMMARY

From a practical case management approach the important matters emerging from this case are:

- (a) If you rely on multiple suitable occupations, then undertake multiple determinations regarding the extent of reduction of income maintenance to ensure that you are not bound to one reduction only and that you provide to the Tribunal the jurisdiction to make a determination in your favour if eg, one out of four identified suitable occupations is determined to be suitable in all respects reducing a worker’s income maintenance payments by the actual remuneration paid in such suitable occupation.
- (b) The information relied upon for an outcome of review, or when determining to apply Section 35(2)(c)

in any other manner, must be relevant to the date of such decision or in the case of a primary determination the date from which a worker sees to have weekly payments reinstated.

- (c) Ensure that in obtaining evidence regarding the worker's physical capacity to undertake the suitable occupation(s) identified you have provided the doctor so certifying sufficient detail regarding the actual tasks required to allow a confident determination as to physical suitability.
- (d) If a worker has been out of the work force for some time, particularly if the worker also has a moderate to serious disability, albeit with some residual capacity for work, you should assess whether such worker requires work hardening or a work trial – if so, you cannot apply Section 35(2)(c) but rather should facilitate work hardening by an appropriate Rehabilitation and Return to Work Plan or, if this can be assessed in advance ie. Before the date when you would be undertaking a review pursuant to Section 38, then these arrangements can be made to remove this issue from consideration when the dispute arises.

In [Nugent v WorkCover \[2001\] SAWCT 140](#), the Full Tribunal determined that the fact that a worker was already in employment did not represent a barrier to the application of Section 35(2)(c) of the Act.

The Full Tribunal in answer to a submission put by the worker, stated that the wording in Section 35(1)(b) of the Act permitted a compensating authority to take into account either the amount a worker was actually earning in employment or, after the second anniversary of incapacity, the amount which it was determined a worker was deemed capable of earning in suitable employment within the meaning of Section 35(2)(c) of the Act.

Accordingly to the extent that this issue is raised by a worker in disputing a

determination involving the application of Section 35(2)(c), whether pursuant to a Section 38 review process or otherwise, that ground for dispute is now no longer available.

COVERED CASES

STEGGALL v WORKCOVER (O D & E PTY LTD)

(Section 36(1)(e) and Restoring Entitlement to Weekly Payments)

[2001] SAWCT 86

This case concerned a decision to discontinue a worker's weekly payments on the basis that his employment had been terminated for serious and wilful misconduct. The Tribunal also was required to consider the issue of whether the worker had revived his entitlement to weekly payments by his conduct following his dismissal from employment.

The worker's employment was terminated by his employer when he was found to have brought alcohol onto a work site at Jackson in Queensland.

Deputy President McCouaig held that the surreptitious bringing of alcohol onto the campsite for his own consumption, knowing of the employer's prohibition of alcohol, which was contained in the worker's terms and conditions of employment, constituted serious and wilful misconduct. His Honour stated that the worker's misconduct was aggravated by the fact that he had held a supervisory position and was responsible for setting an example to other workers with respect to the observance of company policies generally and the directive concerning alcohol in particular. The worker's misconduct was found to be further aggravated by his dishonest denials and his deceptive last minute action in trying to hide the bottle of alcohol from his employer.

His Honour held that the prohibition against possession and consumption of alcohol at camp sites and the requirement that the worker by reason of his supervisory position

maintain and implement the company's policies were basic and essential conditions of the worker's contract of employment. The blatant breach of these essential terms amounted to a repudiation of the worker's contract of employment so as to entitle his employer to summarily dismiss him for serious and wilful misconduct.

So far so good!

His Honour found however that the worker through his conduct following his dismissal from employment had revived his entitlement to weekly income maintenance payments, and stated that there was ample case authority for the proposition that a discontinuance of weekly payments is not forever and that an incapacitated worker's right to weekly payments may be restored if there had been a relevant change in circumstances.

His Honour stated that there was no good reason why Section 36(1)(e) should be singled out as the lone ground of discontinuance that operates to preclude a worker's right to weekly payments absolutely and for all times; whether there can be shown a change of circumstances sufficient to justify the restoration of a worker's entitlement to weekly payments will depend on the facts of each case and a consideration of the worker's conduct in full including after dismissal, in the context of all the surrounding circumstances and the ramifications for all interested parties.

His Honour acknowledged that the dismissal of the worker for serious and wilful misconduct significantly prejudiced the Corporation's ability to return that worker to the work force and to the community as is required pursuant to its obligations under the Act, and observed that it would be of relevance to know what steps a worker had taken to ameliorate the prejudice suffered by the Corporation in meeting its obligations.

In this case the worker had fairly promptly found himself suitable full time work as a machine operator / labourer and had remained in that job for some 18 months.

His Honour considered that the worker's actions in obtaining and maintaining employment went a long way towards curing the prejudice to the Corporation caused by his earlier misconduct and that this amounted to a change in circumstances which affected all interested parties sufficient to warrant the restoration of the worker's entitlement to weekly payments. He then held that the worker's entitlement to weekly payments operated from the date of his return to work.

His Honour then considered whether the worker had revived his entitlement to weekly payments by way of a letter from the worker's solicitors of 22 March 2000 asserting that he was ready, willing and able to return to work with OD & E Pty Ltd on alternative duties within the worker's capacity. He concluded that the letter did *not* revive the worker's entitlement to weekly income maintenance payments and referred to the lack of reference made in the letter to the worker's earlier misconduct, that there was no mention of any contrition on the worker's part nor any assurance by him that he would in future heed the terms and conditions of his employment. His Honour also commented that there was no evidence that the worker had made any attempt himself to contact the employer.

Note: this decision has been appealed to the Full Tribunal.

KRAFT v WORKCOVER (INTRO MANAGEMENT ADELAIDE PTY LTD)

(Section 30 – Causation)

[2001] SAWCT 92

This case is a good example of the need for thorough investigation of a claim with reference to the clinical notes of the treating practitioner.

The worker experienced a fall at work in April 1997 and sustained bruising and a small haematoma to her buttock. In June 1999 she submitted for the first time a claim relating to this incident alleging that she had

developed low back and left leg disabilities arising from the fall.

Rejection of the worker's claim was confirmed by Deputy President McCouaig on that basis that the worker had failed to establish a relationship between the fall in April 1997 and her back symptoms in 1999!

It was the worker's case that she continued to experience low back symptoms following the fall and in May 1997 decided to consult her doctor about the pain. Her evidence was that at the time of this consultation she was still badly bruised as a result of the fall! The doctor, however, relied upon contemporaneous notes that the visit in May 1997 was at the doctor's instigation regarding an unrelated condition. The doctor confirmed that the worker had made reference at the time to her fall at work by way of a secondary matter but had reported that the bruise had gone away, which was verified on examination. Further, the doctor made no record of any complaint of ongoing pain.

Over the succeeding nine months despite regular attendance on doctors for other matters the worker made no mention of experiencing ongoing pain in the low back/buttock. The first consultation with any doctor prompted by a complaint of low back pain was in March 1998. At that time the worker gave a history of six weeks of low lumbar back pain with radiation of discomfort to both buttocks. The consultation was paid for through the Medicare system and there had been no suggestion that the pain had been present since the original fall.

Subsequently there were a number of other visits to doctors for other matters without reference to any low back pain until June 1998 when the worker first made such a complaint. On that occasion the doctor obtained a history of low back pain on and off for the previous five months. There was no mention of the WorkCover system until April 1999.

In upholding the determination His Honour observed that there was little, if any, support

for the worker's case in the testimony of the medical practitioners, noting that:

- There was no convincing evidence of any complaint by the worker of low back pain for 9 months following the fall despite continuing to consult doctors regularly over that period in relation to other matters; and
- The worker's own account to all of the doctors dated the onset of low back pain in February 1998 with no indication of any such pain before then.

Commentary:

Where there has been delay in lodging a claim it is as important to establish what a worker has *not* reported to treating practitioners, as it is what *has been* reported. In this instance it was largely the absence of any contemporaneous complaints of low back pain by the worker to the various doctors she had consulted for other matters, and which was at odds with her testimony, that resulted in the finding that she had not made out her case.

CASE SNIPPETS

EDCOMBE v WORKCOVER (QUEEN ELIZABETH HOSPITAL RESEARCH FOUNDATION)

(Section 88H – Set Aside Consent Orders)

[2001] SAWCT 88

This case concerns the criteria required to set aside consent orders pursuant to Section 88H of the Act.

The facts of this case are that by determination dated 25th February 1998 the worker's claim for a "bruised knee and crack in his back" occurring on the 10th February 1997 was rejected. Shortly after receipt of the determination the worker instructed the EAU to represent him. Medical evidence was obtained which did not support a causal relationship between the worker's back

disability and the incident on the 10th February 1997.

The EAU advised the worker that his case was not strong and he was unlikely to succeed. It was the EAU's policy that if a worker's case lacked merit they would withdraw their representation. The worker was advised of same on the 31st August 1998. The EAU therefore adjourned a Conciliation Conference listed on the 17th September 1998 to allow the worker to obtain further medical evidence and other representation.

The Workers Compensation Tribunal were advised by the EAU, by letter dated 15th September 1998, that the worker no longer wished to pursue his dispute, and orders were requested confirming the disputed determination. Orders to that effect were made.

The worker continued to consult the EAU until the 10th February 1999 with respect to another dispute, and then instructed solicitors on the 26th March 1999. The worker then sought to set aside the order by application filed on the 13th December 1999 ie. 15 months after the initial determination was made.

Acting Deputy President Thompson stated that the essential criteria to set aside an order is the interests of justice, however this involved a discretion that should be exercised cautiously.

On the evidence it was found that the worker did instruct the EAU to withdraw his dispute, and the worker was not arguing that he had not been properly advised in this regard.

The worker's arguments were as follows:

1. He did not consent in any meaningful sense to the order.
2. To the extent that he did consent, that consent was tainted due to deficiencies in the worker's understanding of its consequences and

there was therefore really no consent at all.

The Corporation's submissions were that there was nothing in the evidence that would justify the intervention of the Tribunal pursuant to Section 88H of the Act.

His Honour held that the worker's first point had no substance.

Looking at the second point it was held that:

- (a) The worker himself did not assert that he failed to understand the consequences of his instructions.
- (b) The worker's evidence was unreliable or at the very least the worker had a very poor memory of what had occurred, and therefore his evidence should not be accepted. (Noting that he continued to use the EAU's services for up to six months after the order was made).

It was therefore concluded that the worker had not established in a persuasive way the facts on which the discretion should be exercised and therefore Acting Deputy President Thompson was not persuaded that the interests of justice required the order to be amended or set aside.

JOHNSON v WORKCOVER (SAMARAS STRUCTURAL ENGINEERS PTY LTD)

(Section 4(8) – Substantially Uniform)

[2001] SAWCT 147

This decision, combined with the previous decision of *Blok [2000] SAWCT 199 (Gun & Davey Covered)* Volume 1, Issue 23 at page 4 and 5), gives a clear indication as to what will be considered when determining whether overtime worked by a worker was "substantially uniform as to the number of hours of overtime worked" – Section 4(8)(a)(ii).

In this case it was agreed between the parties that any overtime component worked by the worker on Monday through to Friday

inclusive was to be disregarded for the purpose of calculating average weekly earnings. Both parties/s agreed that overtime worked by the worker on Saturdays was worked in accordance with a regular and established pattern. It was also agreed that the worker would have continued to work that pattern of overtime on Saturdays if the worker had not suffered his disability.

What was in dispute was whether the overtime worked on Saturdays comprised a pattern of overtime, which was substantially uniform as to the number of hours of overtime worked.

The relevant period were from the pay periods ending the 25th January 2000 to the 21st March 2001. The worker worked the following hours of Saturday overtime on each Saturday in that period:

- 9¼;
- 7;
- 5½;
- 8;
- 7½;
- 8;
- 8½;
- 13;
- 9

Whether overtime meets the criteria set out in Section 4(8) is a question of fact. The facts were that on seven of the nine Saturdays worked in the relevant period (i.e. 78%) the worker worked between seven to nine hours overtime (i.e. the overtime only fluctuated within a range of 20%). This was not a record of dramatically fluctuating overtime. Deputy President Judge Cawthorne held that it was an example of the minor variation anticipated by Section 4(8) of the Act.

His Honour concluded that the pattern of overtime worked on Saturdays was substantially uniform as to the number of hours worked and therefore the worker was entitled to have the overtime worked on Saturdays included when determining his rate of average weekly earnings, this being a

mid-way point of eight Saturday overtime hours per week.

**TZANAKIS v BRIDGESTONE T G
AUSTRALIA PTY LTD**

**(Section 36(4)(b) – Language of
Determinations)**

[2001] SAWCT 116

This case poses a warning in relation to the use of language in determinations.

The facts of this case are as follows:

The worker's claim for an aggravation of a pre-existing arthritic condition of the hand was accepted for six specific days in June/August 2000. In February 2001 the worker was supplied with suitable full time duties. During the period February to June 2001 the worker's duties were in accordance with a Rehabilitation and Return to Work Plan. The worker applied for and was granted annual leave on the 15th March and 17th April 2001. On each occasion the exempt employer required the worker to sign consent to discontinuance of his weekly payments in accordance with Section 36(1)(a) of the Act.

On the 19th June 2001 the worker was handed a letter discontinuing his weekly payments pursuant to Section 36(1)(b) and Section 36(1)(c) of the Act.

He was informed that the duties which he had been undertaking were no longer available. His services were terminated because he was not fit for his usual work. This determination was based on the opinion of the worker's General Practitioner, Dr Zuvela who considered the worker had recovered from his compensable disability.

The worker lodged a Notice of Dispute in respect of the said determination and at the first Conciliation Conference the Conciliation and Arbitration Officer made an order pursuant to Section 36(4)(b) of the Act.

The employer filed an Application for Directions on the 2nd August 2001. In a supporting Affidavit it was stated as follows: *“In issuing the determination I overlooked the fact that the previous determination made in relation of the applicant’s claim on the 21st February 2001 was to accept claims for a closed period only as far as periods of incapacity were concerned”.*

The exempt employer realised that the worker was not actually in receipt of weekly payments at the time of the determination and therefore sought to withdraw same.

The following issues were discussed:

1. *Does the compensating authority have the power to withdraw a determination?*

It was held by Acting Deputy President Thompson that it was possible for a compensating authority to withdraw a determination, however it was dependent on the facts of each case.

2. *If there is power to withdraw the determination can the worker dispute or oppose it.*

It was noted that the parties treated the “withdrawal” as reconsideration at the hearing. The Registry upon receipt of the letter from the exempt employer’s solicitors wrote to the parties and advised that the worker’s Notice of Dispute had been reconsidered and the decision varied. It was however noted that the letter of withdrawal did not purport to be reconsideration. It did not purport to “vary” the original decision. It simply purported to vacate the original decision.

In looking at this issue Acting Deputy President Thompson bore in mind the fact that on two previous occasions ie. The 14th March and the 3rd April 2001 the employer had insisted that the worker consent to a discontinuance of

his weekly payments, however he was not in receipt of weekly payments at that time. This was the same as with the situation in dispute.

Acting Deputy President Thompson looked at the discretion contained in Section 88H(c) and it was noted that if the exempt employer’s determination was withdrawn the worker would have to make a fresh Claim for Compensation and wait for a further determination which would ultimately lead to a rejection, and he would be deprived of a Section 36(4) order. He therefore concluded that the discretion to allow a withdrawal of the determination should be refused and therefore the Section 36(1)(b) and Section 36(1)(c) notice still stood.

3. *Whether in the circumstances a Section 36(4)(b) order should have been made by the Conciliation Officer.*

The exempt employer’s case was that prior to the 19th June 2001 the worker was not receiving “weekly payments” and therefore Section 36(4) of the Act was irrelevant.

Deputy President Thompson held that the purpose of section 36(4) was to preserve the “status quo ante” and that the status at the 19th June 2001 was that the worker was not receiving “weekly payments”. He considered that it was therefore consistent with the purpose of Section 36(4) that such order not be made.

4. *Whether the compensating authority is estopped from denying that income maintenance payments were made.*

As to whether the Conciliation and Arbitration Officer’s order should be discharged Deputy President Thompson noted the following:

- The employer on two previous occasions in 2001 had asserted in its documents that the worker

was in receipt of weekly payments.

- In the 18th June 2001 determination the following words appeared: “*We have determined to discontinue weekly payments of income maintenance*”, with Section 36 being referred to in the text.
- Section 36(1) was used by the employer to legitimise the discharge of the worker from his employment as well as existing compensation rights, and therefore the whole of Section 36 including Section 36(4) is to be invoked. That is, the employer cannot pick and choose what parts of Section 36 it is bound by.
- He therefore considered there was no reason why this should not also be the case in a Section 36(1)(b) notice. The clear purpose of weekly payments was to provide income protection whilst a dispute was being resolved. In relation to the Section 36(1)(c) Acting Deputy President Thompson considered this ground appeared courageous to say the least.
- He also noted that the worker was involved in a Rehabilitation and Return to Work Plan pursuant to Section 28A of the Act. The object of this plan was to return the worker to his pre-injury duties and the plan had not expired. It was therefore binding on the employer.
- The work provided for in the plan was withdrawn by the employer on the 19th June 2001 when the worker was discharged from his employment. There was therefore no work to which the worker could return which was inconsistent with the Section 36(1)(c) notice.

Acting Deputy President Thompson held that he was not prepared to revoke the order made by the Conciliation and Arbitration Officer. He considered that the Section 36(4) order should continue pending the resolution of the dispute or until otherwise altered, modified or dealt with.

Note:

In considering this case, it is noted that some case managers inadvertently use Section 36 of the Act in a primary determination, or where the determination is the last in a sequence of closed periods acceptances. Section 36 is not required in this situation, and if used improperly this case provides an example of what may happen.

**SOMERSET v SCHEFENACKER VISION
SYSTEMS PTY LTD**

(Section 39 – When Does it Apply?)

[2001] SAWCT 124

Whether notional weekly earnings can be adjusted pursuant to Section 39 of the Act for periods when no actual entitlement for compensation exists.

Deputy President Judge Gilchrist left the following outstanding issue unresolved in respect of a dispute between the parties. He had previously determined to set aside the employer's rejection of the worker's claim for income maintenance, medical expenses. He had concluded that the worker had suffered a compensable disability on the 1st May 1991 and had been partially incapacitated from that date. He now needed to consider whether he should calculate the worker's weekly payments simply by reference to the average weekly earnings that the worker was earning as at 1st May 1991, or whether that amount should be adjusted pursuant to Section 39 of the Act to take into account wage movements since that date.

Deputy President Judge Gilchrist found that for a variety of reasons an *entitlement to*

weekly payments might not, at a particular point in time, translate to an actual entitlement to weekly payments.

He considered that the worker's submission was essentially correct that the review provided for by Section 39(1) of the Act was not limited to periods when there was a legal liability to actually pay weekly payments. He considered that the expression "weekly payments are payable" means in effect a *prima facie entitlement* to weekly payments of income maintenance.

His Honour concluded that having found the worker was incapacitated for work from 1st May 1991 the worker had a *prima facie* entitlement to weekly payments of income maintenance at that time. Once the incapacity extended beyond a year the worker was entitled to a review of her weekly payments for every year thereafter that her incapacity persisted.

Deputy President Judge Gilchrist did not consider that the worker should be deprived of the potential benefit of adjustments pursuant to Section 39(2)(a)(i) for the sole reason that the compensating authority did not appreciate that it was necessary to conduct such a review. He therefore concluded that the worker's present entitlement to weekly payments should be calculated as if such adjustments were made.

In saying this Deputy President Judge Gilchrist rejected the calculation of the worker's adjusted weekly payments pursuant to Section 39(2)(a)(ii) as he considered this was not an automatic right of review. In this regard he was handed a schedule, which adjusted the average weekly wage payable to a process worker, ie. The position the worker was in at the time of the commencement of her incapacity. It then made reference to changes in the relevant Award.

His Honour did not consider that he should assume that an application had been made or that there may have been an agreement between the parties in this regard and he

determined that such application had not been made. If there was no such agreement he held that the adjustment should not be made by reference to changes in the relevant Award. Rather the worker's entitlement would be 80% of the difference between the average weekly earnings as at the 1st May 1991 and as *adjusted from year to year by changes in the rates of remuneration payable to workers generally*.

McCARRON v AKPATA; AKPATA v WORKCOVER CORPORATION

(Dishonesty Prosecution)

[2001] SASC 365

Can conduct alone amount to a false statement under Section 120?

One issue that was raised in this appeal was whether the word 'statement' in Section 120(1)(c) can be something that is not said or written?

The worker sustained an injury to his wrist that required surgery. During subsequent consultations with various specialists the worker made statements and gave demonstrations about the state of his wrist and arm. The worker's representations were generally by holding his arm, hand and fingers rigidly with the elbow bent and it was alleged that in doing so the worker was indicating to the doctors that he was unable to move his arm, hand and fingers freely. Although he stated that he could not lift anything or drive, video evidence clearly demonstrated that the worker was able to use his arm, drive a car and carry objects.

While the worker was convicted of a number of offences pursuant to Section 120, the Justice Mullighan had to consider whether charges were made out with respect to counts alleging that the worker had 'made a statement' by reason of his presentation in holding his arm in the manner described. His Honour concluded that there was no reason to give the word 'statement' in Section 120(1)(c) anything other than its plain English meaning, which is that it must

be either written or oral and that mere conduct was not capable of amounting to a statement.

The worker however was sentenced to imprisonment for 12 months. In upholding that penalty Justice Mullighan stated that offending of this nature is a serious breach of the criminal law. His Honour supported the remarks of the sentencing Magistrate that the scheme administered by WorkCover depends upon the honesty of injured and disabled workers in order to be as effective as possible. His Honour observed that fraud is difficult to detect and it was significant that the worker's offending had to be proven with the assistance of surveillance video recordings.

TID BITS

TEBBEY v WORKCOVER (IRONS ENGINEERING PTY LTD)

(Section 6 – Nexus)

[2001] SAWCT 105

You may recall discussion of this issue in Volume 1, Issue 24 at page 7 and 8, which involved the application of Section 6 of the Act. It was held that Section 6(2)(b) and Section 6(3) of the Act did not apply and that the worker had not shown that the Act had any application to his employment in Queensland.

This case was recently considered on appeal by the Full Bench of the Tribunal. The worker's appeal was dismissed on the basis that Section 6 was not capable of invoking the conclusion proposed by the worker on the facts of the case and based on the Deputy President's findings.

Gun & Davey Compensation Team

Michael Ricketts LL.B. – Managing Partner - 8228 5217 – Personal Assistant, Melanie Carroll
Mark Calligeros BA. LL.B. – Partner - 8228 5208 – Personal Assistant, Annabel Irrgang
Tas Carabelas LL.B. – Senior Associate- 8228 5210 – Personal Assistant, Deb Mitchell
Paul Gabrynowicz LL.B-Associate–8407 9211-Personal Assistant, Rosey Weekley
Carmel Preece LL.B – Associate – Personal Assistant, Martine Smyth
Victoria Webster Dip. Physio (AUA) B.A. (Juris) LL.B (Hons) - Associate
Catherine Duncan LL.B – Associate – Personal Assistant, Megan Riley
Paul Tanner LL.B – Senior Consultant – 8407 9213
Sophie Carmen LL.B (Hons) B Com. – Associate – Personal Assistant, Kyla Medlen
Geoff Wark LL.B – Personal Assistant, Megan Riley
Peter Salu LL.B (Hons) PhD – Associate – Personal Assistant, Melanie Carroll
Ken Gluche LL.B (Hons) – Associate – Personal Assistant, Rosey Weekley