

# Gun & Davey Covered



Volume 2, Issue 27 - March 2002

## WELCOME

Welcome to this the 27<sup>th</sup> Issue of **Gun & Davey Covered**.

Once again, this issue contains what we hope is important and useful information for decision makers in such diverse areas such as the compensability of death claims as a consequence of suicide, discontinuances pursuant to Section 36 for breaches of mutuality and other decisions of interest.

Perhaps most importantly, one of those decisions is that of **Tsimpinos**, a leading decision on Section 35 (6a) which has been argued before a Deputy President of the WCT, appealed to the Full Tribunal who then referred it back to the same Deputy President and is now once again on appeal! Although somewhat complicated, our Mark Calligeros has represented the Corporation throughout and continues to do so. His summary of developments so far commences at page 5.

This will be the second issue of **Gun & Davey - Covered**, which has been forwarded via email to our clients and friends. We trust that you are finding it a convenient way of receiving and storing the data.

If you're not storing it electronically, then we suggest that you print off copies to be retained in your **Gun & Davey - Covered** folder.

Finally, if any of our readers have any comments as to the content of this publication and improvements that can be made, we would be delighted to hear from you.

Regards, Michael Ricketts

## In This Issue

Welcome	1	Covered Cases	5
Death Claims	1	Tid Bit	7
Rehabilitation Discussion	2	Directory	7

## DEATH CLAIMS. CAN SUICIDE BE COMPENSABLE?

Two recent decisions of **Lavis** and **Potter** deal with this issue.

### **Potter v The State of South Australia (South Australia Police)**

**[2001] SAWCT 123**

Here DP Judge McCusker applied with approval, the reasoning of DP Judge Parsons in [Lavis v WorkCover \(V & P De Vizio Pty Ltd\) \[2001\] SAWCT 120](#).

There DP Judge Parsons had succinctly summarised the critical issues in such cases as follows:

*"The question whether the worker died as a result of the compensable disability is largely one of fact to be determined on the balance of probabilities by applying common sense to the evidence of the causal chain and any relevant expert opinion. There are two aspects to be decided; firstly, whether the worker suffered depression as part of the consequences of his work injury and*

secondly, if he did, whether his death resulted from that depression.”

DP Judge McCusker also agreed with the statement that. *“If it is established on the evidence in a particular case that a psychiatric illness overcomes a person’s reasoning ability and the suicide, although a deliberate act, results, that suicide will be regarded as part of the complex of the illness; it will not be regarded as an act of volition breaking the chain of causation between the injury and the death”.*

DP Judge McCusker found that the worker had suffered compensable disabilities, which over time caused the development of a major depressive disorder. That disorder severely influenced the worker’s state of mind and combined with his work injuries caused him to reach a “state of hopelessness”. His suicide was therefore not an act of volition in which the chain of causation was broken, but a direct result of the compensable disability.

The widow’s claim pursuant to Section 44 succeeded.

## SUMMARY

In suicide cases, the state of mind of a worker is therefore extremely important in determining whether a worker essentially had a “choice” to end his or her life, or in the alternative, the compensable disabilities and sequelae overrode any ability to make such a decision.

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## REHABILITATION DISCUSSION

We refer you to our previous article **Rehabilitation – Your Obligations (Gun & Davey Covered – Volume 2, Issue 25 at pages 2 – 4)**. Two of those decisions, **West** and **Miller** were appealed to the Full Bench. In both decisions the Full Bench confirmed its previous findings on the obligation to provide rehabilitation.

In **West** it was held at first instance that the worker was entitled to the provision of a hearing aid to be included in his Rehabilitation Program. On appeal the Corporation contended that there must be a direct link between the compensable disability and the rehabilitation sought. This submission was rejected.

The Full Bench held that you need to “take each worker as you find them” ie. *“That an employer takes on a worker with all of his or her mental or physical defects or disabilities”.*

In this regard the Full Bench provided the following example:

*“A highly intelligent worker who has had limited education and who has sustained a back injury which will permanently foreclose the possibility of the worker performing unskilled and physical work might be successfully rehabilitated into gaining employment through education. It might be said that the focus of that rehabilitation is not directed at all towards the worker’s physical disabilities but is rather directed towards redressing the worker’s lack of education. Whilst that is undoubtedly true, it seems to us that this falls squarely within the ambit of Section 26 which contains within its provision scope for the Corporation to create a rehabilitation program to: -*

- (c) Assist worker’s in seeking, obtaining or retaining employment;
- (d) Assist in the training or re-training;  
AND
- (l) Do anything else that may assist in the rehabilitation of workers.”

Once this fundamental axiom is accepted there is no basis upon which to read down Section 26 of the Act so as to limit it to only provide rehabilitation that is directly related to the compensable disability that the worker has suffered. The appeal was dismissed.

The Full Bench in **Miller** re-emphasised the principles outlined in the decision of **Dunstan** JD 48/1998 when deciding whether

it was reasonable to include a retraining program in a plan.

It was held that Sections 28A, 28B and 28C were included in the Act to provide for the establishment of Rehabilitation and Return to Work Plans for disabled workers, to provide a right of review of these plans and to require compliance with these plans.

The Corporation is obliged to establish the plans for workers who are receiving weekly payments and are likely to be incapacitated for more than three months and have some prospect of returning to work. Consultation with the worker and the employer is required when establishing the plan as well as considering the worker's medical status and a consultation with the worker's treating medical practitioner(s). The plan is binding on both the worker and the employer with obligations placed on both parties. Failure to comply with the plan and the obligations contained therein may result in a discontinuance of weekly payments pursuant to Section 36(1)(f) of the Act.

Counsel for the Corporation argued that the Act only contemplates one plan for the worker, which will remain in place until the stated objective or time frame is complete. The objective was to return the worker to work in suitable employment for the purposes of a two-year review. Counsel submitted that Parliament would not have intended rehabilitation to undermine the two year review process, which would be the result if the worker was able to request further Rehabilitation and Return to Work Plans with the objective of retraining at a later stage.

The Full Bench agreed that the overall objective of a Section 28A plan was to return the worker to the work force.

It did however hold that sometimes this might be achieved either by one plan, or by numerous plans, each with its own specific objectives and obligations on the parties. The particular plan should meet the needs of the worker and the employer at the particular time it is made and assist the worker in his return to work.

The DP held that it was reasonable to provide for accountancy retraining as part of the Rehabilitation Program, even though it was acknowledged that the job specification for a recruitment consultant, one of the worker's chosen areas of employment, did not suggest the need for more training or qualifications. There was however evidence that an accounting qualification would broaden the scope of potential jobs for the worker in the hotel/hospitality industry.

The Full Bench dismissed the Appeal.

In a more recent case of **Sutton** [2002] SAWCT 6 the DP considered whether a new plan can be implemented *prior* to the completion of a current plan and whether the offer of work under the new plan was valid?

We will not report the facts here, as they are very involved.

DP Judge Parsons held that as at the 1<sup>st</sup> March 2000 the obligations upon the worker were to undertake the duties and hours of work as stated in Plan 10. The employer had the obligation to make such work available to the worker. The employer could not then unilaterally alter the worker's obligations pursuant to a subsequent plan (ie, Plan 11). Therefore the worker's failure to agree to perform the additional hours of Plan 11 during the operation of Plan 10 could not constitute a breach of mutuality.

Plan 11, which purported to commence on 1<sup>st</sup> March 2000 whilst Plan 10 was still current, was invalid as it could not impose different or additional obligations on a worker while he is already subject to obligations of an earlier plan.

This is consistent with the reasoning of DP Judge Gilchrist in **Hines** (*Gun & Davey Covered* Volume 1, Issue 23, pages 8 to 10.) The worker's failure to agree to the terms of a subsequent plan did not constitute a breach of mutuality.

In the DP's view, the application of Section 36(1)(A)(f) of the Act to discontinue the worker's weekly payments would also be

limited by the existence of the current Rehabilitation and Return to Work Plan. If a plan placed obligations upon a worker to perform certain work and the offer of work relied upon as a breach of mutuality differed from the obligations contained in the plan, then it was not a valid offer of work for the purposes of the above Section. It could not be used as a means of overriding a current plan or as a device to discontinue weekly payments. In saying this she noted that all the respondent needed to do was to wait a further few days until the earlier plan was completed and then create a new plan containing different obligations.

#### SUMMARY

The present plan (with the entailing obligations) needs to be completed before one is able to implement or rely on a further plan.

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## SECTION 35(6a) THE SAGA CONTINUES

Section 35(6a) of the Act has a relatively limited operation. It provides that if there is a redemption of weekly payments, then a worker is taken to be receiving the weekly payments that would have been payable had there been no redemption. As such it represents a type of deeming provision. The effect of this deeming provision has been the subject of much conjecture, litigation and disagreement.

Section 35(6a) has a practical effect only if there is a further claim for weekly payments lodged after the redemption.

In **Ryan** (No 1) the Full Bench held that Section 35(6a) did not just operate in relation to a disability, which is redeemed. It also operates in relation to any subsequent disability.

Therefore if a worker is “taken to be receiving” a weekly payment of \$50.00 for a redemption of a back disability and then returns to work and has an arm disability,

the deemed receipt of a weekly payment must be factored into the arm disability claim.

In **Ryan** (No 2) the Full Bench made it plain that one does not simply deduct the Section 35(6a) figure from the weekly payment payable from time to time. That method is correct during the first year of incapacity because then, notional weekly earnings equal the weekly payments. However, in the second year of incapacity when weekly payments reduce to 80% of notional weekly earnings, a more complex calculation is required.

It is in this context that the recent matters of **Blocki** and **Tsimpinos** must be considered. Both of these matters have been discussed in earlier issues of **Gun & Davey Covered**, as both have been the subject of multiple pieces of litigation by this firm.

An earlier decision in **Blocki** (**Gun & Davey Covered**, Volume 1, Issue 19 at page 7) indicated that although the WCT could not give a declaratory judgment about whether or not a redemption was valid, it could and should consider whether a Section 35(6a) figure from a redemption should be factored into the amount of weekly payments payable to a worker upon a subsequent claim. This necessitated the WCT considering whether the earlier redemption was valid and binding.

In the most recent **Blocki decision handed down on 13/12/01 ([2001] SAWCT 144)**, Deputy President Gilchrist held that the fact that the worker had received professional advice about the consequences of redemption which was not competent, did not allow the worker to avoid the effect of the Section 35(6a) figure agreed in an earlier redemption. The reason for this was said to be due to the equitable doctrine of Estoppel. It was said that as the worker had represented to the Corporation that he had received competent professional advice (even though he hadn't) and the Corporation had relied upon that representation, the worker could not be taken to assert a different state of affairs to the Corporation to the Corporation's detriment.

In **Cunningham**, also a decision of Deputy President Gilchrist handed down on 13/12/01, a similar finding was made. In that case the DP was concerned about the financial advice, which a worker received upon redemption. Again due to principles of Estoppel, the DP found that the worker could not avoid the effect of the representation she had made to the Corporation and as a consequence of that, the Corporation was entitled to rely upon the Section 35(6a) figure contained in the earlier redemption.

It should be pointed out that as a result of these decisions, and in particular as a result of **Blocki**, serious professional liability consequences may arise for those who give deficient professional or financial advice.

**Tsimpinos** concerned a different facet of Section 35(6a). When **Tsimpinos** was originally argued before Deputy President Thompson, and later, the Full Bench of the Tribunal, attempts were made by the worker to avoid the effect of **Ryan** (No 1).

It was said that the Tribunal should look at the Section 35(6a) figure and decide what that amount should be itself when a subsequent Claim for Compensation was received. It was also argued that there was no proper basis for agreeing a Section 35(6a) figure as part of the process of redemption. The counter-arguments were that as with any contract, it is not only sensible but imperative to agree its fundamental terms and that the redemption process is a process of contract independent of the Act, albeit established by the Act.

The Full Bench decided **Tsimpinos** on a completely different point. It concerned itself with the apparent discrepancy between the weekly payment made to the worker at the time of redemption and the Section 35(6a) figure agreed as part of the redemption.

The matter was further complicated by the fact that the worker was not in receipt of a weekly payment at the time of redemption, but had received a Section 42A LOEC payment. As a result the Tribunal did not make a final judgment but referred the matter

back to DP Thompson for further consideration. The worker was at liberty to raise such further or other arguments as he saw fit.

Further and alternative arguments were therefore raised by the worker before Deputy President Thompson. In his judgment handed down on 6<sup>th</sup> March 2002 he dismissed all of these arguments. He found that he thought the majority of these arguments were simply different ways of asserting that the Tribunal ought to intervene in the redemption process, albeit in relation to a subsequent claim. He found that the scheme under the Act did not allow for that.

In relation to the point upon which the Full Bench referred the matter back to the DP, he found that there was no need for the Section 35(6a) figure and the weekly payment made at the time of the redemption to be the same. In any event, he found that as a result of considering the figures closely, the LOEC payment payable to the worker at the time of redemption when divided by 52 equalled the Section 35(6a) figure and accordingly any concerns of the Full Bench were addressed.

**Tsimpinos** is on appeal and the final chapter on it will not be written for some time. We will advise you of the eventual outcome.

## COVERED CASES

### Jens –Heij v DEET

#### (Section 35(2) – Whether personal circumstances are relevant?)

#### [2001] SAWCT 146

This decision as well as the previous decision of *Scutcheon [2001] SAWCT 115* (**Gun & Davey Covered** Volume 2, Issue 26, pages 2, 3 and 4) raises further issues that are relevant to the application of Section 35(2)(c) of the Act.

The facts of this case were not in dispute. The worker sustained a compensable disability ie, anxiety in the course of his employment as a teacher on the 15<sup>th</sup> June

1994. At the beginning of 1988 by consent he varied his contract of employment in that his working time was reduced from full-time to 0.8 time (ie, 4 days per week) for personal reasons. These reduced hours of work applied at the time he sustained his compensable disability in 1994. The worker's rate of average weekly earnings reflected same.

After a period of total incapacity for work the worker returned to work performing the role of a School Services Officer ("SSO") pursuant to the recommendations of his psychiatrist.

The worker performed his duties as an SSO based on 0.8 time and received weekly payments equivalent to the difference between his notional weekly earnings as a 0.8 teacher and the amount he earned performing the role of a 0.8 SSO.

During 2001 the worker's duties expanded to include further responsibilities and to meet these responsibilities he changed his working hours so that his 0.8 time was spread over five days instead of four days.

During 1998 the worker was offered employment as a permanent "on line" SSO (ie, full time). The worker declined this offer as it involved terminating his previous position as a teacher and losing entitlements flowing from same, but he indicated that he was prepared to perform the duties of an SSO permanently on 0.8 time.

The worker was served with a Section 36 determination reducing his weekly payments on the basis that he could now work as an SSO on a full-time basis, and was formally offered a permanent on line position in this respect.

Medical evidence supported the worker had the capacity to perform full-time work as an SSO.

The issue to be decided was whether the worker had the capacity as indicated by the determination and whether the employment used for the purpose of the reduction of the

worker's weekly payments was suitable work that the worker had a reasonable prospect of obtaining?

The worker's solicitor conceded that the worker had the capacity to work on a full-time basis as an SSO. He submitted that it was unreasonable to reduce the worker's weekly payments by reference to remuneration at a rate payable to an SSO on a full-time basis (ie, five days a week), when the worker's pre-injury contract of employment as a teacher was only for a four day week due to a "long standing life style choice" (ie, the personal circumstances of the worker).

**HELD** - that the reduction must be consistent with Section 35 of the Act and therefore the amount of the reduction of weekly payments required consideration of what the worker could expect to earn in suitable employment that he had a reasonable prospect of obtaining.

"Suitable employment" depended upon the factors detailed in Section 35(2)(a) of the Act, which do not appear to permit the consideration of other factors relevant to the worker's personal circumstances or life style choices. This was also the view expressed by the Tribunal in **Scutcheon**.

Deputy President Judge Parsons adopted the Tribunal's reasoning in this case when she said:

*"...It is not directed towards work that the worker is actually expected to undertake but rather, its focus is directed towards identifying work commensurate with the worker's residual earning capacity as a basis for reducing the weekly payments that he or she is receiving".*

The work which was commensurate with the worker's residual earning capacity was that of a full-time SSO regardless of the worker's earlier life style choice to work 0.8 ie, it was inferred that personal circumstances are not necessarily relevant to the application of Section 35(2)(a) of the Act.

**NOTE:**

It may also include such matters as the location of a worker, which may impact on reducing the weekly payments of country workers, as you now may be able to deem them into employment in city jobs. This is consistent with what was observed by DP Judge Gilchrist in **Scutcheon**.

**TID BIT**

**Mason v WorkCover  
(Remm Constructions Pty Ltd) (Extension  
of Time)**

**[2002] SAWCT 4**

We refer you to the case of **Edgecombe** (*Gun & Davey Covered* Volume 2, Issue 26 at pages 7 - 8) in which it was argued by the worker that previous consent orders should be set aside.

You may remember that Acting DP Thompson was not persuaded that the interests of justice required the order to be amended or set aside.

In **Mason** the worker elected to not file a Notice of Dispute as his legal practitioner

advised him that the case law at that time did not provide a basis for same. At a later date the same legal practitioner formed the view, based on a subsequent decision of the WCT, that the worker may have a basis for a dispute.

It was held that simply because the law had developed leading to a further legal decision which supported the principle or view that may have led to action being taken within time, does not in itself provide sufficient explanation for a delay in lodging a dispute outside the limitation period. If there is no sufficient explanation for the delay there is no ground on which the Court can exercise its discretion to allow an extension of time.

Considering all relevant matters Deputy President Judge Thompson refused to exercise his discretion to allow an extension of time.

**NOTE:**

The worker may have lodged an Appeal in **Mason** to the Full Bench in relation to this finding – we will provide an update if that is the case.

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