

Gun & Davey **Covered**



Volume 2, Issue 28 - October 2002

WELCOME

Welcome to the 28th issue of **Gun & Davey Covered**.

This issue contains an interesting review of circumstances in which travelling expenses incurred to attend medical services are compensable. The decisions of [Attenborough](#) and [Kakoshke](#) are compared and the commentary should provide considerable assistance to case managers when considering claims of this type.

Equally, the discussion on the decision of [Steggall](#), addresses the interaction between serious and wilful misconduct and the breach and restoration of mutuality of employment.

Amongst other cases, there is a lengthy consideration of the decision known as [Tsimpinos No 2](#) looking at the operation of Section 35(6a) of the Act.

We also take this opportunity to welcome Margaret Kaukas to **Gun & Davey**. Margaret has previously worked at Duncan & Hannon and more recently headed up WorkCover's Employee Advocate Unit.

With that background Margaret is obviously a very capable and experienced workers compensation lawyer and we are delighted to have her as part of our team.

Our final issue for the year will be out in early December.

Regards

Michael Ricketts

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TRAVEL EXPENSES FOR MEDICAL TREATMENT

Occasionally claims managers are confronted with claims for travel expenses by workers who have travelled unreasonable distances to attend a medical service provider.

Such a situation was considered by the WCAT in [Royal Adelaide Hospital v Ryan A44/1997](#) where the Tribunal was asked to rule on a claim for reimbursement of travel expenses by a worker who had travelled from Moonta to Adelaide to visit his specialist.

In considering the compensability issue, the Tribunal made two significant points:

1. If it is *reasonable* for the worker to attend the medical specialist, then any consequent claim for travel expenses (by the cheapest most convenient means) will also be *reasonably incurred*. This means that a compensating authority wishing to reject such a claim on the ground that the distance travelled is unreasonable **must** also reject the claim for payment of the treatment itself.

In the [Ryan](#) case the compensating authority had paid for the consultation with the specialist on the date in question and therefore could not argue that the

travel expenses arising from that consultation were unreasonable.

2. The onus is on the worker to establish on the balance of probabilities that he/she acted reasonably in securing the medical services in question.

The Tribunal indicated that the question of reasonableness is to be decided on the facts of each case. Although it was unnecessary to do so, given its findings in this case, the Tribunal also considered the reasonableness of the worker's decision to consult the specialist in Adelaide.

The Tribunal found that in the circumstances, where the worker had been treated by the specialist for some considerable time before he moved to Moonta, it was reasonable for the worker to continue to be treated by the same specialist and, therefore, the medical expense and associated travel expense were reasonably incurred.

When case managers come to consider whether a particular medical expense (and, by implication, the consequent travel expense) is reasonably incurred, the following issues should also be considered:

1. The length of the worker's relationship with the particular medical provider and, in particular, whether it predates the compensable disability.
2. The existence of suitable alternative medical providers closer to the workers' residence.
3. The option for choice amongst medical providers at a closer location. (For example, is there only one GP available locally or does the worker potentially have a choice from a number of local GPs?).
4. The relative distances involved.
5. Whether there are any circumstances or matters particular to the worker, which would account for a preference for that particular medical provider.

If after making this assessment, if it is a case manager's view that the distance travelled to consult the medical provider is unreasonable, then, in order to support the view that the travel expenses were unreasonably incurred, it is necessary to maintain that the medical expense itself was unreasonably incurred - because an equivalent medical service was available at a closer location.

This would not apply in circumstances where the dispute as to the travel expenses relates to: the accuracy of the kilometres claimed; or the mode of the transport utilised by the worker.

In a more recent decision concerning travel expenses – [Attenborough v General Motors Holden Automotive \[2000\] SAWCT 52](#) a worker claimed travel expenses in respect of attendances for physiotherapy.

The worker usually drove himself to the physiotherapy appointment immediately after work.

The physiotherapist was located more distant from the worker's home than his place of employment, and the worker travelled past his place of employment in the course of his journey to and from the physiotherapist. The exempt employer disallowed part of the travel expenses claim, agreeing to pay only for the distance travelled from the work place to the physiotherapist and return. The Tribunal accepted the exempt employer's position and confirmed their determination. The Tribunal stated:

"It is logical and fair that the worker here should be reimbursed for the travelling costs to and from (the physiotherapist) but it is difficult to concede why he should under the guise of being compensated for this expense also be financially advantaged over other workers who bear their own costs of travelling home from work".

Central to the Tribunal's decision was the fact that the worker was attending at work on the days in question, and therefore was required to travel from his home to the work place and

return regardless of the physiotherapy appointment. Also, the route the worker drove to and from the physiotherapist took him directly past his work place.

In an earlier decision of the [WCAT-Bridgestone Australia Ltd v Kakoshke A40/1990](#), the worker who was fully incapacitated for work travelled from his home to physiotherapy and return.

The exempt employer refused to pay for the entire cost of each journey, taking the view that the worker should only be compensated for the difference between the distance he travelled to receive treatment and the distance he would normally travel to and from work. The exempt employer's determination was overturned by a Review Officer and the subsequent appeal to the WCAT dismissed.

The obvious difference between Kakoshke and Attenborough is that in the latter, the worker went for treatment after concluding his work for the day. Therefore, the worker was responsible for travelling to and from work independent of any treatment needs. In the Kakoshke case the worker was not working. His travel to and from the physiotherapist was solely for the purpose of treatment and did not involve any component relating to travel to the work place to perform his contract of employment.

We do not think that the Attenborough decision necessarily means that any worker who attends for treatment immediately before or after work is only entitled to reimbursement for part of the distance travelled. However, if a worker does attend for treatment immediately before or after work and the workplace is located on a reasonably direct route between the worker's home and place of treatment, - so that the worker "passes by" the workplace on the way to and from treatment - reimbursement for the distance from work to treatment and only return would be justified.

SUMMARY

In many instances the case manager may not have sufficient information to make the above assessments.

However if the necessary information - whether the medical appointment was directly before or after work, and the relative locations of the worker's home, work place and medical provider - is available you may wish to consider whether the reasoning in the Attenborough applies.

COVERED CASES

OWEN v DEPARTMENT OF EDUCATION TRAINING AND EMPLOYMENT

[2001] SAWCT 104

Journey Injury

The Assistant Principal of a girls' high school was injured whilst riding her bicycle from the school to her home at the end of the school day. It had been her intention to collect her car and then return to the school to collect folders and files to work on over the weekend.

His Honour Deputy President Judge Cawthorne, found that in undertaking the bicycle journey from school to home the worker was doing something *reasonably incidental to the performance of her duties*, and therefore, that the journey was undertaken in the course of carrying out her duties of employment – Section 30(5)(a). Accordingly the injury was compensable.

Of significance to the Tribunal were the following facts:

- The employer acknowledged that her work was not confined to formal school hours and that working at home was a normal part of her employment; and
- The employer was aware of her practice of commuting to and from work by bicycle and returning to school by car in the evening to pick up materials to work on at home.

SUMMARY

As the journey was undertaken in the course of carrying out her duties of employment, the worker did not also need to establish that

there was a real and substantial connection between the employment and the accident pursuant to Section 30(5)(b).

WORKCOVER v STEGGAL

[2002] SAWCT 49 Full Tribunal

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

You may recall discussion of this case at first instance in ***Covered Volume 2, Issue 26*** at pages 5 and 6.

The worker's weekly payments of income maintenance had been discontinued pursuant to Section 36(1)(e) when the worker was dismissed for serious and wilful misconduct after surreptitiously bringing alcohol onto the work site in contravention of the employer's policy. Three months after his dismissal the worker had found himself suitable full time work as a Machine Operator/Labourer, had remained in that job for around 18 months, and was still employed in that capacity at the time of the hearing.

Deputy President McCouaig found that by returning to suitable alternate duties the worker had restored mutuality and revived his entitlement to partial weekly payments from the date of his return to work.

On Appeal, the Corporation argued:

- (a) A termination from employment on the grounds of serious and wilful misconduct relieved the compensating authority for all time from any further duty to make weekly payments.
- (b) The notion of revival operates only in respect of mutuality and not in respect of dismissal for serious and wilful misconduct.

These arguments were rejected by the WCAT and the appeal dismissed.

They noted that each of the grounds of discontinuance outlined in Section 36(1)(a) -

(d) and (f) – (h) involved the opportunity for revival of weekly payments upon certain changes to the situation (for example, the restoration of mutuality or the loss of further employment or work). There was no reason to “single-out” Section 36(1)(e) from the remainder of Section 36(1).

Further, after considering the legislative history, and the obligation upon employers to provide suitable employment as outlined in Section 58(b) of the Act, the Tribunal found that the successful termination by the employer of the contract of employment for serious and wilful misconduct did not end for all time the obligation to provide suitable duties, rehabilitation and/or weekly payments. Rather, the entitlement to receive weekly payments remained in suspension after termination for serious and wilful misconduct until “the requisite elements regarded as needed for employment were restored”.

The Full Tribunal therefore found that a worker can revive an entitlement to weekly payments after discontinuance pursuant to Section 36(1)(e) arising from dismissal for wilful misconduct. Being limited to questions of law, the Full Tribunal was unable to consider whether the worker's actions in this case had done so.

LE v COOPER-STANDARD AUTOMOTIVE (AUSTRALIA) PTY LTD

[2002] SAWCT 55

Determinations made by the Tribunal pursuant to Applications for Expedited Decision – can they be disputed by the compensating authority?

This is the first time the WCT has considered the question of who can dispute the determination by a Conciliation and Arbitration Officer of an Application for Expedited Decision.

The Supreme Court had held previously that a decision made by a Review Officer pursuant to Section 102 (the precursor to Section 97) was not capable of review by the Corporation nor,

possibly, by the worker – [Pashalis v WorkCover \(1994\) 64 SASR 71](#).

The current Section 97B(3) was enacted to address this deficiency. Section 97B(3) provides as follows:

If the Tribunal determines a claim under this Section such decision:

- (a) Is to be treated as a decision of the relevant compensating authority;
- (b) Is a reviewable decision.

In the Le case a Conciliation and Arbitration Officer determined to accept the worker's compensation claim for weekly payments of income maintenance and medical expenses, after the worker had lodged an Application for Expedited Decision. The exempt employer lodged a Notice of Dispute against the Conciliation and Arbitration Officer's decision. The worker then filed an Application for Directions seeking to strike out the Notice of Dispute. The worker argued that pursuant to Section 97B(3)(a), the decision of the Conciliation and Arbitration Officer was to be treated as a decision of the compensating authority. Accordingly, notwithstanding Section 97B(3)(b), the compensating authority could not dispute their own decision. That meant that pursuant to Section 97B(3), a decision made by the Tribunal on an Application for Expedited Decision could only be disputed by the worker or a registered employer.

Deputy President McCouaig rejected the worker's argument. His Honour found that the plain unqualified language of Section 97B(3)(b), and the fact that decisions made by the Tribunal on an Application for Expedited Decision were defined in Section 89A as reviewable, suggested that all parties could dispute a decision made by the Tribunal on an Application for Expedited Decision. His Honour stated that it was appropriate to construe Section 97B(3) in a way that would give the exempt employer an avenue to seek a review of the Tribunal's decision. To do otherwise would be to deny the exempt employer procedural fairness.

SUMMARY

Although this decision concerns an exempt employer, there is nothing in the reasoning of the Tribunal to suggest that it would not apply equally to a claims agent. The decision stands as support for the proposition that a compensating authority is able to lodge a Notice of Dispute against a decision made by a Conciliation and Arbitration Officer pursuant to an Application for Expedited Decision.

However, in most circumstances it should not be necessary for the Tribunal to make a decision pursuant to an Application for Expedited Decision. After receiving such an Application, the compensating authority should, in most circumstances, be able to make a decision to resolve the application.

LUBNER v WORKCOVER

[2002] SAWCT 50

“Suitable” Employment In The Two-Year Review Process

This recent decision of the Tribunal highlights the importance of providing a detailed and exact job description to medical experts when seeking approval of job options for the purpose of second year review decisions.

Mr Lubner had sustained a compensable low back injury and had undergone a spinal fusion at the L4/5 level. The compensating authority conducted a two-year review and attempted to reduce his weekly payments of income maintenance on the basis of an asserted capacity to earn \$202.80 as a Car Park Attendant, working 4 hours per day, 5 days per week.

The compensating authority was supported in their determination by the medical evidence of Dr Meegan, who had indicated that the worker was fit to perform the nominated job for the nominated hours. However, at the hearing the Tribunal, was presented with detailed evidence about the nature of employment as a Car Park Attendant, with particular reference to Car Park Attendant positions at the State Centre Car Park.

The Tribunal noted that on a particular shift in the State Centre Car Park, the number of customers exiting the car park increased significantly and that from 5 – 6 pm the Car Park Attendant would be unable to leave his booth, being engaged in “full on serving”.

The worker gave evidence that he had a sitting tolerance of 30 – 45 minutes at the most and that after this period he needed to walk around for a short time in order to relieve his symptoms. The medical experts generally agreed with these limitations. While Dr Meegan had previously supported the assertion that the worker was fit to work as a Car Park Attendant for 20 hours per week, he agreed under cross examination that the worker may need to walk around and stretch after being seated for some time.

In light of the evidence that there was a period of at least one hour from 5 –6 pm when a Car Park Attendant would be unable to leave the booth and walk around, the Tribunal concluded that the nominated employment was not suitable.

In this case, Dr Meegan’s position was effectively qualified after the provision of more detailed information as to the nature of the duties involved in the position.

SUMMARY

For case managers the important lesson from this decision is that, when requesting approval from treating or independent medical experts for nominated job options, a detailed and exact job description must be provided to the medical advisers. A determination supported by medical approval which is based on a very detailed and exact job description is more likely to withstand the scrutiny of the Tribunal.

TSIMPINOS v WORKCOVER (No 2)

[2002] SAWCT 62

Full Tribunal

In **Covered Volume 2 Issue 27** at page 6 we reported on the history of Tsimpinos matter, which concerns the amount by which income

maintenance payments should be reduced when a worker has previously received a redemption payment. That is, the issue of the “Section 35(6a) figure”.

The worker had appealed a decision of Deputy President Thompson to the WCAT, which remitted it back to the Deputy President for reconsideration. The worker then appealed Deputy President Thompson’s further decision to the WCAT, which recently published its decision.

We will relate the full history of these proceedings, as outlined by the Full Tribunal although some has previously been detailed in our earlier article. Unfortunately it is somewhat heavy going!

In February 1996 the compensating authority determined that the worker was entitled to a Section 42A (LOEC) payment of \$14,962.81. In May 1996 the worker entered into a redemption agreement, which purported to redeem the Corporation’s undischarged liability to make ongoing LOEC payments for the sum of \$46,500.00. The redemption agreement contained an acknowledgment by the worker that for the purposes of Section 35(6a) he was receiving continuing weekly payments of \$287.77 per week.

The worker subsequently lodged another workers’ compensation claim and the compensating authority factored in the figure of \$287.77 per week in setting the new NWE entitlement which decision was considered by Deputy President Thompson in Tsimpinos (No 1).

In those proceedings the worker argued that the Tribunal should itself determine the appropriate Section 35(6a) figure having regard to the quantum of redemption payment made, evidence of the worker’s ongoing incapacity, and the amount of income maintenance payments which the worker would have received for the initial disability but for the redemption payment.

At first instance Deputy President Thompson rejected this argument. He recognised that the parties could set the amount of weekly

payments being redeemed in the redemption agreement itself.

Upon consideration of this matter in Tsimpinos (No 1) the WCAT held:

- That it was a matter for the parties to determine the amount of the redemption payment paid and it was not for the Tribunal to question the fairness or otherwise of the bargain struck.
- A redemption agreement converted the Corporation's liability to pay weekly payments of income maintenance into a lump sum. Therefore it was necessary to identify the quantum of weekly payments redeemed. The redemption agreement itself could not create that liability, and to the degree that Deputy President Thompson found otherwise, he had erred.

As it was understood that the worker had been in receipt of a Section 42A LOEC payment immediately prior to the redemption agreement, there had been no finding made as to what weekly payments would have been paid to the worker if there had not been a LOEC determination. As this was a finding of fact and beyond the scope of an Appeal, the Full Tribunal referred the matter back to Deputy President Thompson to reconsider the issue.

Before Deputy President Thompson for the second time, the worker raised a new but related argument concerning the application of Section 35(6a). The worker argued that redemption agreement had a periodic dimension. That is, that the redemption agreement only redeemed weekly payments for a defined period of time, and that that period could only be determined by the Tribunal after consideration of the quantum of the lump sum and the actuarial evidence.

Deputy President Thompson rejected this argument.

In relation to the amount of the Section 35(6a) figure, the DP noted that the LOEC payment apparently received by the worker in February 1996 when divided by 52 amounted to

\$287.77. This was the Section 35(6a) figure in the redemption agreement, and the figure they Corporation had relied on in its determination. Accordingly, he confirmed the Corporation's determination.

The worker once again appealed to the Full Tribunal. The WCAT in Tsimpinos (No 2) the Full Bench:

1. Rejected the worker's argument concerning the periodic dimension of the redemption agreement. The Full Tribunal found that the redemption agreement itself was perfectly clear in this regard and would have specifically stated if it had been intended to redeem weekly payments for some period other than to the age of 65. There was no basis to assume that some lesser period was agreed. The Tribunal thought it irrelevant that the redemption amount was not the same as the capital sum resulting from an actuarial calculation based upon weekly payments of \$287.77 up to the date of the worker's 65th birthday. They noted that this was one of the issues that had been decided in Tsimpinos (No 1), and that it was not the Tribunal's place to inquire as to the method by which the redemption sum was calculated.
2. In relation to the calculation of the Section 35(6a) figure, the Full Tribunal noted that the worker had in fact not received the LOEC payment, which was determined in February 1999. Accordingly, the focus of the previous decisions on that LOEC payment was mistaken. The evidence presented to the Tribunal in the prior proceedings established that the worker would have been entitled to weekly payments in the sum of \$275.00 for the first disability if not for the redemption agreement. The Full Bench was unable to receive any fresh evidence in this regard and accordingly, the only finding that they could make as to the quantum of weekly payments payable if not for the

redemption agreement was 275.00 per week.

3. The Full Tribunal then considered what ought to be made of the fact that the redemption agreement purported to redeem a liability of \$287.77 per week, which was higher than the amount found to be the quantum of weekly payments payable immediately prior to the redemption agreement - \$275.00. The Full Bench returned to their reasoning in Tsimpinos (No 1) and concluded that, in the absence of a determination or order stipulating that the worker was entitled to be paid a higher amount of weekly payments (as reflected by the redemption agreement) than he was in fact entitled to at the time the redemption agreement was reached, the Corporation was unable to rely upon the higher figure stipulated in the redemption agreement.

In the case at hand, this meant that the Section 35(6a) figure which ought to be applied to the worker's entitlement to weekly payments arising from the second compensable disability was \$275.00 per week.

SUMMARY

For case managers, the lesson to be learnt from Tsimpinos is that if the Section 35(6a) figure recorded in the redemption agreement is different to the amount the worker is actually receiving at the time the redemption agreement is reached, the compensating authority must ensure that the weekly payments being paid to the worker are formally adjusted to reflect the Section 35(6a) figure contained in the redemption agreement.

TID BITS

MASON v WORKCOVER (REMM CONSTRUTIONS PTY LTD)

[2002] SAWCT 84

Extension of Time

In **Covered Volume 2 Issue 27** we reported on this case at first instance before Deputy President Judge Thompson. The worker had sought legal advice about a determination and was advised that a Notice of Dispute would be futile. Some time later the worker's solicitor amended his advice and indicated that a Notice of Dispute might succeed. Deputy President Thompson refused to exercise his discretion to allow an extension of time.

The worker appealed to the Full Tribunal who allowed the appeal and granted the extension of time.

At first instance the Deputy President had held that if there is no sufficient explanation for the delay there is no ground upon which the Tribunal can exercise its discretion.

However the Full Tribunal considered that to be an erroneous statement of the law and noted that the adequacy or otherwise of the explanation for the delay is simply *one* relevant factor to be taken into account in assessing an application for an extension of time.

The Full Tribunal referred to the much cited decision of Ulowski v Miller [1968] SASR 277 in which Chief Justice Bray stated that there were five paramount matters to be considered in any application for an extension of time. These were: the length of the delay; the explanation for the delay; any hardship to the plaintiff if the extension is not granted; any prejudice to the defendant if the extension is granted; and the conduct of the defendant in the litigation.

In the Mason case, the Full Tribunal found that the delay (of 5 months) was reasonably substantial but that no fault lay with the worker for that delay. They noted that, after receiving the determination from the Corporation, the worker *promptly* sought legal advice and had no reason to question the advice he received. Immediately upon becoming aware that that earlier legal advice may have been incorrect, the worker filed the application for an extension of time.

The Full Tribunal noted that the hardship for the worker if an extension of time was denied would be significant, as he would be denied the opportunity to present a case, which was at the very least, arguable. The Corporation would suffer no prejudice in the context of whether or not there could be a fair hearing and the Corporation's conduct was not an issue.

After weighing up all of these factors up, the Full Tribunal resolved to exercise their discretion to grant the extension of time.

WORKCOVER v JAKAS

[2002] SAWCT 87

Here the Full Tribunal Stated a Case for the consideration of the Full Supreme Court. The case involves a claim by a worker's widow for compensation after the worker suffered a brain haemorrhage at work and died.

A previous decision of the Full Supreme Court in Burch had held that a similar injury was a secondary disability and therefore it was necessary to establish a causal connection between the "injury" and work.

In Jakas at first instance, the claimant argued that the Tribunal should not follow Burch as it was inconsistent with a subsequent High Court decision in *Kennedy Cleaning v Petkiska (2002) 200 CLR 286*. The Tribunal accepted this submission and held that the brain haemorrhage suffered by Mr Jakas was *not* a secondary disability.

WorkCover appealed to the Full Tribunal, which in turn stated a Case for the consideration of the Full Supreme Court. We will advise you of the outcome in due course.

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