



This Issue:

Covered Cases	1
Update re Section 43/ Disfigurement	1
Average Weekly Earnings	1
Section 38 2 Year Review Determinations	3
Directory	4

COVERED CASES

WOJCIAK V SA WATER CORPORATION

[2003] SAWCT 12

Here, an exempt employer suspected that a worker with a long-standing back injury was deliberately obstructing his rehabilitation and return to work by irregular attendances at work. The employer was providing suitable duties but the worker frequently failed to attend work, providing a certificate from his GP certifying full incapacity.

On five separate occasions in late 1999, after the worker had called in to say he would not be attending work that day, the employer arranged independent medical appointments for the same afternoon and asked the worker to attend. The worker failed to attend, alleging that he was disabled by back pain and was not given sufficient notice of the appointment.

The exempt employer subsequently rejected the worker's claim for income maintenance payments for those specific days.

The Tribunal found that, in the circumstances, it was reasonable for the exempt employer to request the worker's attendance at the medical appointments and the worker could and should have attended. By refusing to attend, the worker had denied the exempt employer the opportunity of obtaining contemporaneous independent medical assessment of his

condition on the many days he was absent from work. The Tribunal upheld the exempt employer's decision to reject the worker's claim for payment of income maintenance on such days. This is a good example of clever case management!

**UPDATE RE SECTION 43 /
DISFIGUREMENT**

**AMODEO V WORKCOVER CORPORATION
(MONADELPHOUS ENGINEERING
ASSOCIATES PTY LTD)**

**[2003] SAWCT 47
Full Tribunal**

In "Covered" Volume Two Issue 29 we reported on this case at first instance. The issue that went on appeal before the Full Tribunal was whether the wearing of an external removable aid (a splint on the right wrist and lower arm) could constitute an assessable disfigurement for Section 43 purposes.

The Full Tribunal in finding that it could not stated that a worker is not entitled to an assessment for disfigurement as a consequence of the need to wear an external aid. It noted that there was no "permanence" in the necessary sense, even if the worker in question always wore the aid.

AVERAGE WEEKLY EARNINGS

**GUYERS V INTELLECTUAL DISABILITY
SERVICES COUNCIL**

[2003] SAWCT 49

Here, the worker was a casual employee who had initially worked 7 days each fortnight. Due to staffing shortages, she was asked to step into a full time position on a temporary basis. She had been working in the full time position for around 3 months when she suffered the compensable disability. The employer gave



evidence that, had the worker not been injured she would not have continued to work full time on an ongoing basis.

The parties were in dispute as to the calculation of average weekly earnings. The worker argued that average weekly earnings should be based upon the full time wages she was earning at the time of her compensable disability but the compensating authority argued that they should be based upon her average earnings over the preceding 12 months.

The Tribunal concluded that, although a reduction in hours was not imminent at the time the worker sustained her compensable disability, she would not have continued to work those hours for longer than around one month. Therefore, it was appropriate to calculate average weekly earnings based on earnings over the preceding 12 months.

The Tribunal was however careful to limit this case to its facts and said:

“In the end, whether a pattern of earnings at the time of the occurrence of the compensable disability provides a sufficient base upon which to make a fair assessment of the worker’s average weekly earnings or whether one needs to look to the past are matters of judgement and degree”.

**DELFINO V WORKCOVER (JARRETT
SYNERGY PTY LTD)**

[2003] SAWCT 20

Here a Section 36 determination made on 2 November 2001 asserted that the worker had ceased to be incapacitated for work. That matter was disputed. Subsequently on 28 October 2002, Section 38 and Section 39 determinations were made asserting that the worker was totally incapacitated for work. The Tribunal held that the later determination “cut the ground completely from under the (compensating authority’s) case that the worker has not been entitled to compensation ... since 2 November 2001”. The Tribunal

therefore ordered that the determination of 2 November 2001 be set aside. This case highlights the need for Case Managers to consider the history of previous determinations, and in particular, any current disputes, before proceeding to make determinations pursuant to Section 38 and / or Section 39 of the Act.

**HYNES V WORKCOVER CORPORATION
(AUSTRALIAN SUBMARINE
CORPORATION PTY LTD)**

[2003] SAWCT 26

The compensating authority conducted a Section 38 review and purported to reduce weekly payments of income maintenance to the worker on the basis that he was fit and suited for employment as an Accounts Clerk or Clerical Assistant. The worker disputed this determination.

Subsequently the worker’s solicitors requested that a rehabilitation program be established for the purposes of providing either actual employment or a work experience trial prior to the worker performing general clerical duties so as to test the assertion as to the worker’s capacity. The compensating authority declined and the worker lodged a dispute asserting that the Compensating authority had unreasonable declined to provide a rehabilitation program. The Tribunal noted that the worker had disputed the Section 38 determination on the basis that he was neither qualified for nor otherwise suited to the nominated employment. Accordingly, the Tribunal was of the view that it was “untenable and an abuse of the “rehabilitation provisions” for the worker to assert that the compensating authority acted unreasonably by not facilitating the provision of such employment. Accordingly the Tribunal confirmed the compensating authority’s decision to reject the worker’s request for a rehabilitation program.



SECTION 38 (“TWO YEAR REVIEW”) DETERMINATIONS

Recently the Full Tribunal has handed down two decisions considering Section 38 determinations, which may assist Case Managers when conducting “two year

ARNOLD V WORKCOVER CORPORATION (R & CJ KOMAZEC) [2003] SAWCT 34

In the course of rehabilitation the worker had secured employment as a casual factory hand with Company X for a period of around 6 months. Subsequently the compensating authority made a determination pursuant to Section 38(7) of the Act purporting to reduce weekly payments of income maintenance on the basis that the worker had the capacity to work full time as a factory hand.

The matter was disputed and ultimately proceeded to Judicial Determination. The parties then filed a Statement of Issues in which the question to be determined was framed as “whether employment as a full time factory hand at Company X is suitable?”

At the hearing at first instance it became evident that the job which the worker had previously filled at Company X no longer existed. Nevertheless, the Deputy President found that factory jobs of that type were still presently available elsewhere and that the worker was suited to employment as a factory hand.

On appeal before the Full Tribunal the worker argued that he had been denied natural justice as his evidence had specifically been directed towards the issue outlined in the Statement of Issues namely, the suitability of employment as a factory hand at Company X (as opposed to a factory hand in general).

The Full Tribunal rejected this argument and found that it was quite apparent from the determination and confirmation of disputed

decision that the compensating authority’s primary contention was that the worker was fit to work as a factory hand, and that the compensating authority simply relied upon the worker’s employment at Company X as evidence of his capacity. The Full Tribunal found that it was clear that, in the context, the Statement of Issues did not confuse the issue and the worker was well aware of the case that he had to meet.

WORKCOVER CORPORATION V GREDA (HAWKINS ROOFING PTY LTD) [2003] SAWCT 38 Full Tribunal

In this case the Full Tribunal considered the degree of specificity required when detailing “suitable employment” in the context of a two-year review. That is, is it sufficient to describe employment as a “retail sales assistant” or is more specific information required?

The Tribunal indicated that the purpose of identifying “suitable employment” in the Section 38(3) Notice, the Section 38 determination and the other documents provided during the formal dispute process is to enable:

The worker to make appropriate written representations prior to determination;

The worker to make an informed choice as to whether or not to dispute the decision in question;

The worker to properly present their case in dispute proceedings; and

The Tribunal to fairly adjudicate the issues in dispute.

The Tribunal said that the degree of specificity required to achieve those objectives would vary from case to case. For example, in a decision concerning a young, intelligent, well-qualified worker with extensive administrative experience who suffers only minor restrictions, the mere description of suitable duties as “clerical work” might be sufficiently specific.



On the other hand, in a decision concerning an older, uneducated worker of below average intelligence, with limited administrative experience, no demonstrated capacity and significant restrictions, it might be necessary to provide a job description of greater particularity.

Ultimately, what is important is that the process of review be conducted fairly and that the relevant parties are afforded natural justice in their dealings and in the conduct of their litigation. The Tribunal will judge that not just by reference to the relevant documentation but by looking at the conduct of the parties prior to and in the course of the hearing.

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–Personal Assistant, Rosey Weekley
Carmel Preece LL.B – Associate – Personal Assistant, Terina Halliday
Geoff Wark LL.B – Personal Assistant, Jodi Adams
Peter Salu LL.B (Hons) PhD– Associate – Personal Assistant, Rebecca Eadie
Margaret Kaukas BA (Comm.) LL>B (Hons) – Associate – 8228 5232 – PA, Jodi Adams
Karen Porter BA. LL.B – Associate – 8228 5233 – Personal Assistant, Terina Halliday