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COVERED CASES

SECTION 58B – EMPLOYER’S OBLIGATION TO PROVIDE SUITABLE EMPLOYMENT

TOLL TRANSPORT PTY LTD V WORKCOVER CORPORATION (3)

WORKCOVER LEVY REVIEW PANEL [2003] SA WLRP 3

An interstate truck driver sustained a compensable low back injury in September 1998. A number of Rehabilitation and Return to Work Plans were created pursuant to which yardman duties were provided by the employer. In May 2000, while he was performing these duties the worker’s employment was terminated on the grounds that he was permanently unfit for his pre-injury duties however the WorkCover Corporation took the view that the dismissal constituted a breach of the employer’s obligation to provide suitable employment pursuant to Section 58B of the Act and imposed a supplementary levy.

Following negotiations with WorkCover the employer created a new position of “Customer Service Officer’s Assistant” made up entirely of tasks within the worker’s capacity. The employer offered these duties to the worker on 16 May 2002 and he commenced performing the role on 22 May 2002. As the worker had not worked for over two years and had no experience in that role it was agreed that he would commence pursuant to a work hardening placement. The employer did not pay wages for this period of work hardening and the worker continued to receive income

maintenance payments. The work hardening continued until 1 September 2002 when the employer commenced paying wages to the worker. WorkCover lifted the supplementary levy from 1 September 2002.

The dispute before the Levy Review Panel arose from the employer’s assertion that the supplementary levy should have been lifted on 16 May 2002, when the work was first offered or 22 May 2002, when the worker commenced work hardening. The employer argued that it had complied with its Section 58B obligation from either of those dates.

The Panel found that it was not appropriate to lift levy from 16 May 2002 when the offer of suitable employment was first made. Section 58B required the provision of suitable employment whereas an offer of suitable employment was not sufficient to satisfy this obligation. In any event, it was proper that the worker be allowed a reasonable time to prepare to take up the offer.

The more significant issue before the panel was whether a period of “work hardening” could be said to be a period when the employer “provided suitable employment”.

The Panel remarked that an employer’s Section 58B obligations could be satisfied by the provision of unpaid or partly paid work pursuant to a Rehabilitation and Return to Work Program such as a work hardening program. In this case, the Panel would have been sympathetic to lifting the supplementary levy when the work hardening commenced if not for the fact that the work hardening was only required as a result of the employer’s own actions in dismissing the worker. That is, the work hardening program was required because the worker had been out of the workforce for around two years following the employer’s actions in terminating his employment. Accordingly, the Panel declined to lift the supplementary levy from 22 May 2002.



SECTION 36(4) – SUSPENSION OF A DETERMINATION IN DISPUTE

Section 36(4) of the Act provides that where a worker lodges a Notice of Dispute within one month of a determination to discontinue or reduce weekly payments, the operation of the determination is suspended and weekly payments must continue until the dispute first becomes before a Conciliator (Section 36(4)(a)). Thereafter, the Tribunal may further suspend the operation of the determination to allow for a resolution of the dispute without prejudice to the worker's financial position (Section 36(4)(b)).

In [Scott v SA Police \[2003\] SA WCT 93](#) Deputy President McCouaig noted that previous authorities had established that the Tribunal should ordinarily make an order pursuant to Section 36(4)(b) unless there are compelling reasons not to. It was only in extreme cases, where it is inevitable or almost inevitable that the worker's dispute will fail, that a Section 36(4)(b) Order should be declined. This case happened to fall within that category - there was compelling evidence of dishonesty by the worker who produced no plausible grounds for disputing the Section 36 determination. Accordingly, the Deputy President declined to make a Section 36(4)(b) order.

In [Gardiner v WorkCover / Allianz \(Tip Top Bakeries\) \[2003\] SA WCT 53](#) the worker was in receipt of "top up" weekly payments as he was earning income through alternative duties. The compensating authority had issued a determination indicating that the worker's weekly payments would be paid at the rate of notional weekly earnings minus weekly earnings in suitable employment. That is, the compensating authority did not determine a fixed weekly entitlement, but rather that weekly payments would vary from week to week depending on the worker's actual earnings.

The worker's employment was terminated for misconduct and the compensating authority issued a Section 36 Notice alleging breach of

mutuality. As the worker disputed this determination within one month Section 36(4) applied to suspend the operation of the determination.

The authority argued that Section 36(4) required it to continue paying only the "top up" component previously paid to the worker. The Tribunal rejected this argument and held that Section 36(4) required the compensating authority to continue to pay weekly payments at 80% of notional weekly earnings during the course of the dispute.

The reason for this was that the compensating authority's determination relied on the provision of suitable alternative duties to reduce weekly payments to an unspecified, variable amount lower than notional weekly earnings. As those duties were no longer available to the worker, it followed that weekly payments should be based on the notional weekly earnings figure without reduction.

The outcome may have been different if, prior to the termination of the worker's employment, the compensating authority had determined weekly payments at a specified sum (rather than a variable sum).

In [GH Michell & Sons \(Australia\) Pty Ltd v Golding \[2003\] SA WCT 13](#) the Tribunal held that Section 36(4) of the Act could be relied upon to suspend the operation of a decision made pursuant to Section 38A and / or Section 39 which was disputed within the time allowed by the Act.

This means, for example, that if a worker lodges a Notice of Dispute within time against a determination to reduce weekly payments to 80% of notional weekly earnings at the end of the first year of incapacity, or to cease weekly payments upon the worker reaching 65 years of age, Section 36(4) will apply until the matter first becomes before a Conciliation Officer.

This matter is currently on appeal to the Full Tribunal and we will report on the outcome in due course.



MEDICAL EXAMINATIONS

LUBNER V WORKCOVER / ROYAL & SUN ALLIANCE (GARDEN BUILDERS)

[2003] SA WCT 94

Here the compensating authority was involved in a dispute concerning a “two year review” determination. In the course of that dispute the worker’s solicitors provided a number of very recent medical reports whereas the medical opinion upon which the compensating authority was relying, although current at the time of the determination, was by then some 7 months old. For that reason the compensating authority requested the worker attend a further examination with the medical expert upon whose opinion the original determination was based. The worker refused, asserting that:

- The compensating authority was required to show that the worker’s re-examination was necessary so as to respond to a changed set of facts.
- It was inappropriate for the compensating authority to seek an opinion from the particular medical expert in question, as he had previously been the worker’s treating specialist.

The compensating authority lodged an Application for Directions seeking an Order to compel the worker to submit to a medical examination with the independent expert.

The Tribunal granted the Order and stated that it was not necessary for the compensating authority to point to the emergence of changed circumstances or new facts stating:

“The compensating authority has a legitimate interest and entitlement to obtain an updated opinion for use, as necessary, in any Arbitration or Judicial Determination hearing”.

The Tribunal continued that the fact that the medical expert had previously been the worker’s treating physician was not, in itself, a basis for refusing the application in the absence of any evidence to suggest that the re-examination would compromise the worker’s treatment or otherwise be unfair.

This case is significant as it is not uncommon for a dispute to take some months to reach a hearing by which time the medical evidence upon which the determination is based is out of date. If there was no ability to compel the worker to attend a further medical examination the worker may be advantaged simply by submitting more recent medical evidence.

As a consequence of this decision workers should now more readily submit to re-examination by medical experts upon whom the compensating authority is relying.

TID BITS

“NORMAL RETIREMENT AGE” – SECTION 35(5)

STATE OF SOUTH AUSTRALIA V PALMOS

[2003] SA WCT 51

Here, the Full Tribunal rejected an appeal against the decision of a Deputy President who found that evidence that virtually all police officers retired by age of 60 did not necessarily establish that 60 was the “normal retirement age” for the purpose of Section 35(5)!

His Honour held that “usual” does not automatically equate with “normal” that is, the fact that employees usually retire at a certain age does not establish that that age is the normal retirement age.



USE OF COMPANY MOTOR VEHICLES

MARSCHALL V WORKCOVER CORPORATION / ALLIANZ
(TRANSDUE PTY LTD TRADING AS ADELAIDE PEST CONTROL)

[2003] SA WCT 71

The worker was injured at home trying to push start his company car which had been provided to enable him to drive to and from sites to quote on potential jobs. However on the day in question, the worker was intending to travel to the employer's premises to attend a sales training session. The worker argued that, given the nature of the worker's employment, the company car amounted to his "place of employment".

The Tribunal upheld the compensating authority's determination to reject the claim. Of significance was the fact that he was injured entering the vehicle for a purpose other than to attend upon a customer or potential customer. If that had been the case, the worker may have succeeded in his claim. Rather, the worker was entering the vehicle to travel to the work place, which is a journey excluded from entitlement by Section 30(5) of the Act. The journey and the use of the vehicle was therefore "private".

The Tribunal noted that the proper test in circumstances such as this was the nature of the use of the vehicle at the time the injury was incurred.

REDEMPTION AGREEMENTS AND SECTION 35(6A)

LLOYD V WORKCOVER CORPORATION / ALLIANZ
(BILO PTY LTD)

[2003] SA WCT 68

The worker entered into a redemption agreement. The agreement and the Section 35(6a) figure were based upon a reduced entitlement to weekly payments of income maintenance as the worker had a residual capacity for work and could earn some income.

The worker then secured further employment and sustained a further injury. The compensating authority applied Section 35(6a) and reduced the worker's weekly payments accordingly.

At the time of the second claim the worker was working within the extent of his residual capacity and argued that where a worker has a residual capacity at the time of redemption and continues to work within that residual capacity, Section 35(6a) does not apply.

The Tribunal rejected that submissions and applied Section 35(6a) to reduce the worker's entitlement to weekly payments of income maintenance.

This case is currently on appeal to the Full Tribunal and will be heard in October – see the next edition of "Covered".

BREACH OF MUTUALITY

WORKCOVER CORPORATION / MMI
(AUSTRALIAN FASHION CENTRE PTY LTD)
V POLAK

[2002] SA WCT 124
Full Tribunal

The worker and his wife were working directors of a company. It was alleged that the worker had attempted to deceive a forensic accountant appointed to determine his average weekly earnings and that this amounted to a breach of mutuality enabling the discontinuance of income maintenance.

The Tribunal noted that the alleged deception was not against the employer (as the employer and the worker were one and the same) but,



rather, against the compensating authority. At first instance the Deputy President stated that the alleged deception could not amount to a breach of mutuality as “mutuality in this context deals with the relationship between the worker and his or her employer, not between the worker and the Corporation”.

On appeal to the Full Tribunal, it was argued that the worker owed an obligation of mutuality not only to the employer, but also to the compensating authority. One member of the Tribunal accepted this argument, but found that deceit had not been proven and therefore that mutuality had not been breached. The remaining two members found it unnecessary to decide this question, finding that deceit had not been proven.

This decision provides (limited) authority for the proposition that a worker owes an obligation of mutuality to the compensating authority as well as to the employer.

VIDEO EVIDENCE

**BILAC V WORKCOVER CORPORATION /
ALLIANZ
(SILVER FLEECE KNITTING MILLS PTY
LTD)**

[2003] SA WCT 82

Video surveillance of a worker had been obtained both between the Conciliation and the Arbitration hearing and after the completion of the Arbitration hearing.

The compensating authority had not disclosed the existence of the videotape having received legal advice that as it arose after the conclusion of conciliation, there was no obligation to do so. The decision in [Zienkiewicz and Monash v State of South Australia](#) [1998] SA WCT 98 had established that once the conciliation process has concluded, Section 92 of the Act, which provides that parties should disclose to the Conciliation Officer the existence and nature of

all evidentiary material in their possession, has no application.

The video evidence was not used during the arbitration but at the Judicial Determination, the compensating authority sought to introduce it during cross-examination of the worker. The worker sought to exclude the video evidence on the grounds of the failure to disclose it.

The Tribunal found that the compensating authority was obliged to discover the existence of all of the video evidence (that is, reveal its existence but not necessarily provide it to the worker).

Their failure to do so, albeit based on legal advice, amounted to an abuse of process and improper conduct. The Tribunal noted that, had the tape been disclosed, it may have affected the way the worker presented her case at arbitration and, possibly, the outcome of arbitration. Accordingly, the Tribunal excluded the videotape footage taken prior to the completion of the arbitration hearing. The rest of the videotape, having come into existence after the arbitration hearing concluded, was not excluded, but to protect the worker against prejudice, the matter was adjourned and the worker was given the opportunity of leading further evidence in chief.

This is on appeal to the Full Tribunal and we will report on the outcome in the next edition of “Covered”.

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 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 unreasonably 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 preceded 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 will 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.