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**COVERED CASES**

**ESTOPPEL – SECTION 43**

**RIDGWAY V MONROE AUSTRALIA PTY LTD**

**[2003] SA WCT 126 (FULL BENCH)**

**Issue**

Whether the worker was estopped from pursuing a claim for lump sum compensation pursuant to Section 43 as a consequence of findings in earlier proceedings between the same parties.

**Facts**

The worker sustained a disability to her right arm, which was compensable, on 16 March 1993. The worker received Section 36 determinations, including a determination that she had ceased to be incapacitated for work in consequence of the compensable disability.

The disputes were heard by Deputy President Judge Parsons. Her Honour made various findings of fact to the effect that she was not satisfied the worker continued to be incapacitated for work as a consequence of the compensable disability and in particular she found that there was no physical basis for the worker's continuing symptoms.

The worker subsequently sought lump sum compensation pursuant to Section 43, which claim was rejected. The worker disputed that decision and the matter came on for hearing before Deputy President McCouaig. The employer submitted that the findings of Deputy President Judge Parsons raised an issue

estoppel and the worker could not pursue a claim for Section 43 lump sum compensation. The worker submitted she could pursue such claim, as the notions of the incapacity and permanent disability were not necessarily the same.

Deputy President McCouaig found "that the worker is estopped from pursuing this claim for lump sum compensation by the clear findings of the learned Member following a comprehensive hearing and consideration of the evidence."

The worker appealed to the Full Bench.

**Decision**

That the factual findings made by Deputy President Judge Parsons were central to her decision and inconsistent with any disability. The decision itself provides conclusive evidence that the effects of the compensable disability had been spent and accordingly the worker was not entitled to Section 43 lump sum compensation.

**Note**

If there has been a past history of litigation in any claim, particularly where litigation relates to the issue of whether or not a worker continues to suffer incapacity in consequence of a compensable disability, it is important to have findings of any previous such hearings in mind when a claim for lump sum compensation is made pursuant to Section 43 as such previous findings may impact upon such claim, as it did in this case.

**VALIDY OF SECTION 36 DETERMINATION WHERE PAYMENTS HAVE CEASED**

**WRIGHT V DEPARTMENT OF EMPLOYMENT, TRAINING AND FURTHER EDUCATION**

**[2003] SA WCT 134 (DP McCouaig)**



**Issue**

Whether a determination issued pursuant to Section 36 of the Act is rendered invalid if at the time of the making of that determination a worker's income maintenance payments have already ceased.

**Facts**

The worker sustained compensable disabilities to her left knee, leg and toes in February 2001. The worker received, inter alia, weekly payments of income maintenance. Those payments continued until 28 September 2001 and ceased without prior notice from that day.

The employer issued two Section 36 determinations on the 28<sup>th</sup> September 2001. The first advised the worker of its intention to discontinue payments based on Section 36(1), sub-sections (b) and (c). That determination did not provide 21 days notice and the worker had not in fact returned to work. The employer conceded that this determination was invalid. The second determination of 28 September 2001 advised the worker of a decision to discontinue her entitlement to weekly payments pursuant to Section 36(1)(b) from 23<sup>rd</sup> October 2001, taking into account the 21 days notice required.

It was noted, and accepted by Deputy President McCouaig, that weekly payments ceased on 28<sup>th</sup> September 2001 as a result of an administrative error arising from the cessation of the worker's teaching contract on that date.

On 23<sup>rd</sup> May 2002 the employer issued a third determination advising of its intention to discontinue weekly payments pursuant to Section 36(1)(b), stated to be "without prejudice to our original notice issued 28<sup>th</sup> September 2001" and advised the worker that her income maintenance payments would be discontinued from 14 June 2002, taking into account the 21 days notice required.

On 19 June 2002 the employer issued a fourth determination giving the worker notice that her

income maintenance payments were to be discontinued pursuant to Section 36(1)(b) of the Act, again stated to be without prejudice to the original Section 36 determination dated 28 September 2001 and advising that weekly payments would be discontinued 21 days after the worker received that determination.

It was noted that the worker's payments had not resumed since 28 September 2001 and the worker had not been in receipt of payments on either 23 May 2002 or 19 June 2002.

**Decision**

Deputy President McCouaig's findings were as follows:

1. The first Section 36 determination dated 28 September 2001 was effected without prior notice to the worker as required and was illegal. Nothing could be done to legitimise the discontinuance of payments on that date.
2. The second Section 36 determination of 28 September 2001 was valid in that it provided the worker with the appropriate notice required by the Act. The explanation for the stoppage of income maintenance payments to the worker i.e. administrative error was plausible and there was no suggestion of mala fides on the part of the employer. The notice also indicates that the employer intended to continue payments to the worker until 23 October 2001. Accordingly there was no unlawful discontinuance of the worker's entitlement to income maintenance.
3. The third and fourth Section 36 determinations were ineffective and invalid for their intended purpose, as the second Section 36 determination was valid.

**Note**

This decision reflects the importance of the Case Manager ensuring that, prior to issuing a Section 36 determination (or for that matter a Section 36(2) notice to reduce income



maintenance payments), the payments are being made to a worker, particularly where income maintenance payments are being paid by the employer to the worker, with reimbursement to the employer at a later date. In the event that an employer incorrectly ceases payments before the appropriate date, it may be difficult to argue administrative error as it is the Corporation's responsibility to ensure the provisions of the Act are complied with and to pay income maintenance payments, not the employer's responsibility. Accordingly, to avoid the possibility of a Section 36 determination being found to be invalid and set aside, irrespective of its merits, ensure payments are ongoing where such a determination is proposed.

## DISCOVERY AND PRODUCTION IN THE CASE OF SURVEILLANCE REPORTS AND SURVEILLANCE FILM

### WORKCOVER V BILAC

#### [2003] SA WCT 135 (FULL BENCH)

##### *Issue*

This decision of the Full Bench of the Workers' Compensation Tribunal clarifies the position regarding discovery and production of surveillance reports and film. For the background facts see our discussion of Bilac in Volume, 2 Issue 31, page 9. It had previously been thought that the issue of discovery and production was only relevant during the period of a dispute to the end of conciliation and that thereafter it was not necessary to even discover the existence of surveillance material to a worker.

The Full Bench concluded that based on the provisions of the Workers Rehabilitation and Compensation Act, and to the extent that the Supreme Court Rules applied, surveillance material if relevant to an issue to be determined by the WCT must be discovered

(but not produced unless there is an Order of the WCT) irrespective of when it is obtained.

##### *Note*

This decision does not weaken in any way the effect of authorities regarding production of surveillance video which state that an order for production of surveillance material to a worker before the end of cross examination will not be made unless there are exceptional circumstances.

However in the event that an Order is made for production of surveillance material by a Conciliation Officer there is no right of appeal to a Deputy President of the WCT – refer to the decision of the Full Bench in **Puckering v WorkCover** [2004] SA WCT 60. The Full Bench in that case considered:

- That a decision of a Conciliation Officer is not "a judgment or order of the Tribunal" for the purpose of Section 88H of the Workers Rehabilitation and Compensation Act, 1986 such as to enable the Tribunal to review such decision.

However a Conciliation Officer who makes a ruling can review his / her position in appropriate circumstances in light of further representations made by the parties or other good reason.



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