



WELCOME

Welcome to Issue No. 6 of **Gun & Davey Covered**.

In this issue you will find a discussion by Paul White on the use of surveillance reports and videos in the WCT. There has been some doubt and confusion expressed by agents and employers as to the benefit of surveillance as a consequence of s92 (1)(b) and Practice Direction 11 issued on 25 March 1997. If approached properly, you will see from this article that there is no reason why surveillance and video evidence cannot remain a useful case management resource.

We are still waiting for a decision from the Full Bench of the WCT in the [Adams -v- Doser](#) matter that was heard on 14 May 1997. Hopefully a decision is not too far away.

In **Covered Cases** there is a discussion of the recent decisions in **Kelso** and **Hill** both of which concern s42A LOEC payments. In the decision of **Giles** the question of what constituted a substantially uniform *pattern* of overtime was considered.

We trust you will find the above of relevance to your daily case management.

Regards

Michael Ricketts

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“TAKE A LOOK AT THIS”

**USE OF SURVEILLANCE
REPORTS AND VIDEOS
IN THE SA WORKERS
COMPENSATION TRIBUNAL**

The Dispute Resolution procedures impose stringent obligations on employers and agents to disclose evidentiary material, which may be relevant to disputes. "Evidentiary material" means any document, object or substance of evidentiary value in proceedings before the Tribunal and includes any document, object or substance that should, in the opinion of the Tribunal, be produced for the purpose of enabling the Tribunal to determine whether or not it has evidentiary value (s3).

To ensure proper and complete disclosure s92 (1)(b) provides that each party to the dispute must disclose to the Conciliator the existence and nature of all

evidentiary material in the party's possession relevant to the dispute.

Rule 2(13) requires a compensating authority to file copy documents and an index of documents within 7 days after notice that the matter has been referred to a Conciliation Officer.

Traditionally there are two distinct steps in dealing with documents before trial. The first step is "discovery" which means referring to the existence of a document, usually in a list of documents. The second step is "production" which means showing the original document and/or providing a photocopy to other parties.

Until recently, there has been some debate about whether the dispute resolution procedures require discovery of surveillance reports/videos.

On 25 March 1997 Practice Direction 11 was issued, which provides that the index of documents filed by a compensating authority must include reference to any documentation pertaining to any evidentiary material including video evidence. If a party wishes to object to production of it then that objection should be clearly noted in the index.

Practice Direction 11 then leaves production of surveillance material to the discretion of the Conciliation Officer - s92 (2). A party need not produce the evidentiary material if:

- (a) The material is a video tape, photographic material or a report of surveillance; or
- (b) The disclosure of the material could prejudice the investigation of a suspected offence.

It is important to ensure that the index of documents filed under Rule 2(13) refers to the existence of surveillance reports/videos if it is intended to use them.

Unless a direction is made by a Conciliation or Arbitration Officer, it is

probably not necessary to reveal the date of the report or film, which would alert a claimant to the likely period of observation.

It is important to note that if a compensating authority fails to refer to the existence of surveillance reports/videos in the index of documents, and to produce (if so directed) to the Conciliation Officer the surveillance reports/videos, the compensating authority will not be permitted without leave to rely on the surveillance/report video at an arbitration hearing: Rule 4(5).

To comply with the wording of s92 we recommend that in addition to referring to the existence of the surveillance reports/videos in the index of documents, a letter should be sent to the Conciliation Officer requesting the agreement of the Conciliation Officer under s92 (2) to the non-production to the worker (or other parties) of the surveillance reports/videos. This should be sent at the same time as filing the index of documents.

As to the exercise of the discretion in s92 (2) see: [Robbins -v- Harbord \(1994\) 62 SASR 229, 237](#), [WorkCover -v- Saunders & Bawden 21/12/95](#) and [BHP Ltd -v- Mason & Jennings 7/11/96](#).

In most cases the production of surveillance reports/videos will not be ordered until the cross-examination of the claimant.

If a Conciliation Officer proposes to order the production of surveillance videos/reports to a worker prior to the full hearing, the only avenue to challenge the direction would be in the Supreme Court.

Obviously, where surveillance reports/videos refer to clearly inconsistent activities on the part of the claimant, it is unlikely that the matter will be resolved at the conciliation conference. It is almost

inevitable that the dispute will be referred to Arbitration or Judicial Determination. Where surveillance reports/videos refer to highly inconsistent behaviour on the part of the claimant, it is difficult to over emphasise the importance of not revealing the content of the surveillance to the worker prior to cross-examination. A shrewd claimant may readily prepare a range of responses to cross-examination if alerted to the extent of inconsistent activity, which has been detected. If the claimant has a truthful explanation to the surveillance, then that answer can be given during cross examination without prior production of the surveillance video. In that regard, we suggest that special care is needed where a claimant has a twin sibling! It does happen!

A purported reconsideration and variation of the disputed decision was filed by the Corporation on 2/9/1996. It read: -

“REASON WHY DECISION VARIED”

The determination dated 30/7/1996 is withdrawn.

The reasons for withdrawal of the decision are that the examinations and opinions as requested by the employer are reasonably required prior to the making of a determination of this kind.

The file has been returned to the claims officer with a direction that the examinations and reports as requested by the employer be raised as a matter of urgency.”

COVERED CASES

CHRISTINE KELSO v. WORKCOVER CORPORATION AND AMDEL LTD

Decision Of The Workers Compensation
Tribunal

(J.D. 12/1997)

Catchwords:

Confirmation or variation of Disputed
Decision - can you withdraw?

Facts:

Employer lodged a Notice of Dispute against the Corporation’s decision dated 30/7/1996 awarding the worker a full LOEC payment pursuant to s42A of the Act. The employer requested that reports be obtained in order to determine the worker’s capacity for alternative employment and requested that the Corporation make a reconsideration following those investigations.

Issues:

What constitutes a valid reconsideration pursuant to s91 of the Act?

Does Rule 2 of the Workers Compensation Tribunal Rules allow a compensating authority to withdraw a determination?

Was the purported variation valid? If not, what was the status of the purported variation?

Held:

A valid reconsideration pursuant to s91 of the Act requires a two-step process. Firstly there must be reconsideration. Secondly, there must be a confirmation or variation of the disputed decision.

The Workers Compensation Tribunal Rules cannot create a right that the Act does not permit.

S91 does not allow a compensating authority to withdraw a determination. However, in appropriate circumstances a compensating authority may decide not

to proceed with a determination, for instance a section 36 notice. Such would not constitute a 'withdrawal' but instead would constitute a reversal of the disputed determination.

The purported variation did not constitute reconsideration. The purported variation was declared a nullity and struck out by the Deputy President pursuant to Rule 10(1)(e).

Commentary:

Whilst the Deputy President indicated that a reversal may constitute a valid reconsideration what actually constitutes a reversal was not decided. For instance, whether you may reverse an acceptance of a claim was not decided and remains a *live and controversial* issue.

If you are obliged to reconsider a decision in difficult circumstances do not forget that s91 (5) of the Act contemplates that an extension of time within which to reconsider a decision may be required and that Rule 2(7) and Form 2 provide the means by which to obtain it.

HILL

V

WORKCOVER CORPORATION

Decision Of The Full Court Of The
Supreme Court Of South Australia

(Judgement No. S6178)

The Corporation made an interim assessment of the worker's loss of future earning capacity for the period 19 April 1994 to 17 May 1995. On 5 April 1995 the Corporation in anticipation of the further LOEC assessment wrote to the worker and sought the completion of a work questionnaire, medical authority and request for proof of earnings pursuant to s42B (1)(b). The worker lodged an application for review of that decision on 10 April 1995.

On 6 October the Corporation determined to suspend the making of a payment of the worker's loss of future earning capacity. On 10 October the worker sought a review of the determination dated 6 October.

The Review Officer determined that she had no jurisdiction to compel the Corporation to make the interim assessment due on 18 May 1995. She further determined that the Corporation was required to make weekly payments from 18 May to 2 June.

The Review Officer held that the requirements imposed by the Corporation were unreasonable and that the Corporation was required to make weekly payments of income maintenance during the period of the adjournment.

The Supreme Court held: -

1. The worker's entitlement to weekly payments ceases as soon as the worker receives an assessment under s42A because the entitlement to the assessment of a capital loss payment is substituted for that previous entitlement to weekly payments.
2. S42A (9) prevents a worker seeking a review of the decision to make an assessment or the failure to make an assessment whether it be the first interim assessment or any subsequent assessment.
3. If the Corporation failed to make an assessment to which a worker was entitled the worker could seek a declaration of the worker's entitlement and an order in the nature of mandamus by way of an Application for Judicial Review directing the compensating authority to fulfil its statutory obligations.

(NB: This would be in the Supreme Court and expensive to the Corporation!)

4. The provisions of s42B (3) enable a Review Officer to determine whether requirements made under s42B (1) are reasonable.
5. The failure here to either make an assessment under s42A or a determination under s42B (2)(b) meant that the Corporation was required to pay the worker the amount of the assessment relevant to that period.
7. The Review Officer correctly determined that she had no jurisdiction to compel the Corporation to make an interim assessment.
8. The requirements imposed on the worker by the Corporation pursuant to s42B (1) were reasonable, and accordingly the worker's entitlement was suspended until the worker rectified the situation.

Commentary:

The bottom line is be ready to make the assessment on time and save the expense of possible Supreme Court proceedings.

Provided the requirements made of the worker pursuant to s42B (1) are reasonable and the worker does not comply, the Act provides sanctions that can be enforced.

Try to ensure that you write to the worker detailing what you require pursuant to s42B (1) prior to the expiration of the period of the current interim assessment to allow time for a determination suspending entitlements to be made before the due date if warranted.

WORKCOVER CORPORATION (PRIBETIC GLASS) V RHETT GILES

Decision Of The Workers Compensation Appeal Tribunal

A.45/1997

Catchwords:

Overtime - what constitutes "substantially

Facts:

Worker worked overtime which varied depending on the daylight hours and season. The worker worked overtime on Mondays, Tuesdays and Fridays on 41 of a possible 44 occasions, on Wednesdays on 40 occasions and on Thursdays on 43 occasions. Although the range of overtime hours worked on any day varied between .5 hours and 5.75 hours more often than not he worked overtime within a band of one to three hours. On Mondays he worked overtime within that band on 31 of a possible 41 occasions, on Tuesdays on 25 of a possible 41 occasions, on Wednesdays on 28 of a possible 40 occasions, on Thursdays on 24 of a possible 43 occasions and on Fridays on 28 of a possible 41 occasions.

At first instance the Review Officer had used a comparator (another employee at Pribetic Glass) to arrive at the primary decision of whether or not the worker's pattern of overtime was substantially uniform.

Issues:

Was the Review Officer entitled to use the comparator to arrive at the primary decision of whether or not the worker's pattern of overtime was substantially uniform?

What constitutes a pattern of overtime?

Whether the pattern of overtime was substantially uniform as to the number of overtime hours worked so as to allow an overtime component in setting the workers average weekly earnings?

Can a band or range of overtime hours satisfy the requirement of substantial uniformity under s4 (8)(a)(ii) of the Act?

What was the worker's entitlement?

Held:

The Review Officer erred in using a comparator to arrive at the primary decision of whether or not the worker's pattern of overtime was substantially uniform.

A pattern of overtime may take many forms. Patterns may emerge when overtime is considered on a daily, weekly, monthly or yearly basis.

The requirement of substantial uniformity. Decisions in *Mitsubishi Motors Australia Ltd v Love (1992) 59 SASR 339*, *The Corporation v Mario Bellini A.41/1993* and *The Corporation v Haecker A62/1996* considered.

The regular and established pattern was weekdays.
A band of overtime did satisfy the requirement of substantial uniformity in this case.

The worker was entitled to have included in his average weekly earnings a component attributable to overtime namely, the average of the overtime hours worked on a daily basis within the span of overtime hours identified. That average rounded off to the nearest hour = 2hrs on each day totalling 10 hours overtime per week.

Commentary:

Whilst the Workers Compensation Tribunal is not bound by the findings of

the Workers Compensation Appeal Tribunal we anticipate that this approach will be followed.

CASE SNIPPETS

LEMURA; SUTCLIFFE AND BROWN V WORKCOVER CORPORATION

Decision Of The Supreme Court Of South Australia

(Judgement No. S6173)

In our view this decision makes it plain that in order to receive lump sum compensation for non-economic loss pursuant to s43 of the Act for loss of the capacity to engage in sexual intercourse a worker must have notified the compensating authority **before 12 April 1995** that compensation under s43 was being claimed for "permanent loss of capacity to engage in sexual intercourse".

Each appellant had lodged a claim for compensation in the prescribed form. That form does not require a worker to specify what the worker is claiming (ie. s32 expenses, weekly income maintenance payments or a s43 payment). Each appellant was able to point to medical reports compiled prior to 12 April 1995 and sighted by the Corporation prior to 12 April 1995, which included a reference to the capacity to engage in sexual intercourse.

The appellants argued that the lodgement of such a form activated their respective claims for the loss of the capacity to engage in sexual intercourse as soon as the respondent became aware of such losses, even if only as a result of a reference thereto in a medical report. In the alternative the appellants argued that if the law required something more, the "request or application" could be made in a very informal way, even by way of a medical report.

The Supreme Court considered the meaning of sections 33 and 34 of the *Workers Rehabilitation and Compensation (Miscellaneous Provisions) Amendment Act, 1995*.

Justice Matheson with whom Justice Olsson and Justice Williams concurred held that s34 of the *Amendment Act* made it clear that the “Employer or Corporation (as the case may be) must have been notified before 12 April that the worker was claiming compensation under s43 **for permanent loss of capacity to engage in sexual intercourse**”. The Court rejected the two arguments relied upon by the appellants.

However, in the case of Brown, the worker’s solicitors had submitted a letter dated 31/3/1996 headed “WorkCover claim: s43 Sexual Incapacity”. The Court held that that letter did constitute a request satisfying s34 and Brown’s claim succeeded. The other appellants had not lodged such a claim prior to the cut off date. Their appeals were dismissed.

HANDY HINTS

The task of determining a claim is not limited to the description of the disability given by the worker in the Compensation Claim Form and supporting PMC. A compensating authority must have regard to all events and documentation causing or contributing to the condition suffered by the worker as at the date of determining the claim for compensation.

By accepting a claim, in circumstances such as the one herein discussed, a compensating authority can be taken to have accepted a different disability than described in the Compensation Claim Form.

Gomez-Soto - delivered 7/3/97, Full Supreme Court

The Workers Compensation Tribunal has the power to make an award of costs in favour of an applicant notwithstanding a finding that the Tribunal does not have the jurisdiction to entertain the applicant’s notice of dispute. Decision in The Corporation v Nixey not binding upon the Tribunal and not followed.

- Ashforth J.D. 6/1997

An applicant is not entitled to unilaterally withdraw a notice of dispute so as to enable the dispute to be litigated at a later date. Either the party continues to dispute the decision or it does not. If the party continues to dispute the decision, the other parties to the dispute are entitled to have the dispute resolved by the Tribunal. If the party no longer disputes the decision, the other parties are entitled to ask the Tribunal to confirm the decision. If a party continues to dispute the decision, but for whatever reason does not wish to proceed with the resolution of the dispute at this time, then the appropriate course would be to make an application for an adjournment of the proceedings or to make an application before a Presidential Member of the Tribunal pursuant to Rule 10 of the Workers Compensation Tribunal Rules for leave to withdraw.

Gerazounis J.D. 8/1997

The Gun & Davey Workers Compensation Team Are**Lawyers:**

Michael Ricketts LL.B. – Managing Partner
Mark Calligeros BA. LL.B. - Partner
Paul White LL.B. – Associate
Tas Carabelas LL.B. – Senior Associate
Paul Gabrynowicz LL.B-Associate
Anna Rau BA (Jur) LL.B-Associate *assisting* Michael Ricketts
Dara Cirelli LL.B (Hons) B Com – Associate *assisting* Tas Carabelas
Simon Harvey LL.B (Hons) – Associate *assisting* Mark Calligeros

Support Staff:

Cherie Spisso
Mary-Anne Buttrose
Linda Saunders
Deborah Mitchell
Kristina Stefani