



**WELCOME**

Welcome to this our final issue of **Gun & Davey Covered** for 1997.

In this issue we provide commentary on two decisions of the WCAT and WCT respectively each of importance and relevance to daily case management and decision-making.

You will be interested to know that the matter of [NZI/Iltech Pty Ltd -v- Warren](#) has been listed for hearing before the Full Supreme Court of South Australia on Tuesday 3 February 1998. We will keep you informed.

For those of you that have not caught up with the news, our **Anna Rau** has left the firm to join **VACC Insurance WorkSafe (SA) Pty Ltd** as their Legal and Technical Advisor. We are sorry to see Anna go but wish her all the best in her new role.

1997 has been another demanding, interesting and somewhat controversial year for those of us involved in the workers compensation jurisdiction.

It is our firm belief that Agents have done and will continue to do an excellent job in the administration of claims under the Act. This is certainly the feedback we have received from employers and even worker's representatives.

As for **Gun & Davey**, we thank you for your support over the last twelve months and trust that our relationship will be an ongoing one.

We will continue our normal services over the Christmas break under the management of Mark Calligeros, Paul Gabrynowicz and Paul White.

On behalf of all the solicitors and staff at **Gun & Davey** we wish you a Merry Christmas and Happy New Year.

Cheers,

Michael Ricketts

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**THE SHERRIFF CONQUERS CUMMING AND FASSON COUNTY**

The consequences of the WCAT decision in [Cumming v Fasson \(A12/1990\)](#) were far reaching.

There, a worker who injured his back at work but did not make a claim sustained a recurrence months later when he bent over to pick up a four-ounce polystyrene esky. The Court held that the recurrence was compensable and "arose out of employment" because "the real, the effective or the proximate" cause of the recurrence was the initial back condition. So was born the test of real, effective or approximate cause.

The Full Supreme Court in [Sherriff](#) (unreported, delivered 1 October 1996) has recently held that whether an injury "arises from employment" is a question of fact "to

be approached by a common sense evaluation of the chain of events", that is "whether on the facts as found the employment was significant enough to be able to say that the proven disability, whether a primary disability, secondary disability or disease, arises from that employment."

The submission that the words "arises from employment" produces a test which requires the worker to prove that the employment was the real, effective or material cause was rejected. To espouse such a test would be to judicially amend the Act.

In the subsequent Full Supreme Court decision of [CSR Limited v Wilson](#) (delivered 29 August 1997), the Court confirmed that the correct approach to the words "arises from employment" is that espoused in [Sherriff](#) and not the test set out in [Cumming v Fasson](#).

In [Sherriff](#), the worker who was working as a machine operator first sustained injury to his back for which he claimed compensation with a prior employer. He then suffered "a progression of traumas" to his back during the course of his employment with the subject employer. Finally he sustained a disc prolapse while getting out of bed whilst on a fishing trip. On appeal to the WCAT, the Tribunal found that the worker's employment with the employer had materially contributed to the worker's disc degeneration and that the prolapse, which resulted from the perfectly normal and natural act of getting out of bed, was the ultimate consequence of that disc degeneration.

The Full Supreme Court held that the test applied by the Tribunal of whether or not the worker's condition was "contributed to by the worker's work" was not the correct test. The correct test was found to be that espoused in [Sherriff](#), namely whether as a matter of fact the injury arises from employment. The Supreme Court remitted this matter to the Tribunal for further consideration.

## THE POWER TO REQUIRE A WORKER TO SUBMIT TO A MEDICAL EXAMINATION - RECENT DEVELOPMENTS

Deputy President Gilchrist of the Workers Compensation Tribunal recently delivered decisions in [Butler v G H Mitchell & Sons \(Australia\) Pty Ltd JD28/1997](#) and [Kampes v WorkCover Corporation JD43/1997](#).

In both cases His Honour found that Section 53(2) of the Act provides a compensating authority with a general power to require a worker to submit to a medical examination. Further, he found that the Workers Compensation Tribunal Rules 1996, namely Rule 1 which provides that the Supreme Court Rules can be adopted and modified by a member of the Tribunal, contain provisions pertaining to a worker's submission to an independent medical examination.

The Deputy President held that the Tribunal, either through the rights afforded to a compensating authority through Section 53(2) or by the Rules themselves, has a right to intervene.

The Deputy President indicated:

- A. That where a compensating authority is endeavouring to seek the intervention of the Tribunal in its endeavours to have a worker submit to an independent medical examination, it is for the authority to establish to the satisfaction of the Tribunal that the examination is reasonably required and that the intervention of the Tribunal is reasonably sought.
- B. That where on the face of it, a particular examination is reasonably required and the intervention of the Tribunal is reasonably sought, it is incumbent upon the worker to establish that in the particular circumstances of the case, the Tribunal ought nonetheless not intervene.

C. That the time and place for the compensating authority to seek the intervention of the Tribunal is prior to setting the matter down for trial. This is so because the Tribunal is entitled to assume that when parties come before it at a listing conference and ask for a date for hearing, the parties are indeed ready for trial.

Subject to the above the power would appear to be a discretionary one.

In Butler the worker lodged a claim for compensation on 17 October 1995. The worker claimed to have suffered disability on 4 October 1995. The compensating authority rejected the worker's claim on 11 October 1996 and did so on the basis of a report provided by Mr Schaeffer, Neurosurgeon, dated 17 April 1996.

The compensating authority sought an order from the Tribunal directing the worker to attend and submit to a medical examination with Mr Schaeffer in connection with proceedings that had been listed for hearing in the Tribunal commencing on 13 October 1997. The compensating authority's solicitors stated that since the worker was last examined by Mr Schaeffer the worker's solicitors had provided copies of several medical specialist reports.

Deputy President Gilchrist refused to make an order directing the worker to attend and submit to a further medical examination with Mr Schaeffer. He noted that two of the worker's reports pre-dated the compensating authority's determination. He stated that if the matters contained in those reports were of importance the compensating authority should have taken appropriate steps to arrange for its own independent medical examinations prior to making its determination. In relation to the latter two reports, he stated that nothing had been put to him to suggest that there were any matters contained within those reports, which had materially changed the case the compensating authority was required to meet.

In Kampes the compensating authority sought a direction that the worker be required to submit to an examination with a psychiatrist. However, at the time the compensating authority sought the order the matter was listed for hearing. Deputy President Gilchrist refused the application in accordance following C above.

Butler and Kampes provide a compensating authority with a basis upon which to obtain a direction from a Presidential Member that a worker submits to a medical examination. Although it is not clear from the above decisions, it would appear that such can only be sought where the matter is actually before a member of the Workers Compensation Tribunal.

Unfortunately, neither decision gives an indication as to when such an application will be deemed reasonable and therefore successful.

The Deputy President's comment with respect to the general power contained in Section 53(2) to compel a worker to submit to a medical examination following the determination of a claim is controversial. It will be interesting to see how the Tribunal interprets that power in the future.

Whilst the decisions in Butler and Kampes are encouraging, in our view decision makers would be wise to continue to obtain all medical information required prior to determining a worker's claim. Doing so inevitably saves both time and money.

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## COVERED CASES

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### **STYLIANOS SELAMIS V WORKCOVER, NZI WORKERS COMPENSATION (SA) PTY LTD (G. & T. GEORGOPOULOS TRANSPORT)**

Decision of the Full Bench of the Workers  
Compensation Tribunal

(JD36/1997)

#### **Catchwords:**

Interpretation of "the worker's usual place of  
residence" - Section 36(2)(b).

#### **Facts:**

The worker migrated to Australia from Greece in April 1992. He lived in various residences for short durations before returning to Greece in June 1993. He returned to Australia in April 1994 and continued to live as he had been. He gained employment as an interstate truck driver and was given his own truck. He ceased renting his accommodation and commenced living in the truck. He obtained employment as a Melbourne to Perth driver with the relevant employer and, as previously, generally slept in his truck. He did not rent or own any property and on occasions, when in Adelaide, "stayed/visited" with his son, ie would rest for a while, shower, have a meal and chat. He used his son's address and another in Perth for correspondence.

The worker was injured in a motor vehicle accident in Western Australia during the course of his employment. The worker's claim was rejected pursuant to Section 6. In proceedings, the parties agreed that the worker "is usually employed in two or more states".

The Tribunal held at Judicial Determination that "place of residence" does not mean a place where a worker routinely sleeps but a "place that might quaintly be described as 'home'", which the worker's son's house was not. The Tribunal required evidence of the

worker's emotional attachment to the son's house.

#### **Issue:**

Was the worker's son's house "the worker's usual place of residence"?

#### **Held:**

1. The word "usual" ensures that a worker can have only one usual place of residence at a particular point in time such that where a person is itinerant there may be no "usual" place of residence at all. Where a worker has more than one residence within one state or in several states, his usual place of residence will be that to which he is "predominantly or more commonly connected".
2. The quality of the worker's connection with a place of residence is important. The place(s) must be regarded by the worker and be objectively regarded, as the worker's "home".

This will be demonstrated by:

- Whether the worker has maintained a continuity of association with the place,
- An intention to return to that place,
- An attitude that the place remains "home",

The Full Bench found that the Deputy President's description of the requisite connection at Judicial Determination as being an emotional attachment to the place of residence was correct and constituted "a short hand way of describing the necessary quality of the connection". The Full Bench held however that the Deputy President had been unduly restrictive in considering the relevant facts. In particular, he failed to have adequate regard to the worker's residential history and lifestyle since immigrating to Australia.

The Full Bench held that as there was no other state, which competed with South

Australia as the worker's usual place of residence, the real issue became whether at the date of injury the worker had his usual place of residence in South Australia or was an itinerant person. It held the worker was an itinerant person as he was travelling from place to place and his passing and brief stays with his son could only be described as visits to his family.

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## ROSELLA V THE CORPORATION

Decision of the Workers Compensation  
Appeal Tribunal

(A79/1997)

### Catchwords:

Section 42A - meaning of "notional working life".

### Facts:

The worker sustained a compensable disability to his right knee on 13 May 1989. He was in receipt of weekly payments of income maintenance for over two years. On 5 March 1994 WorkCover notified the worker of its intention to assess his loss of future earning capacity as a capital sum pursuant to Section 42A of the Act. The first assessment was on an interim basis from 7 March 1994 to 5 March 1995. The assessment was made on the basis of a partial deemed total incapacity for work. The worker suffered a serious stroke on 4 September 1994. It was not disputed that the worker was totally incapacitated as a result of the stroke.

A second interim assessment pursuant to Section 42A was made on 21 March 1995 for the period 6 March 1995 to 3 March 1996. Again the assessment was made on the basis of a partial deemed total incapacity for work.

A third interim assessment was made on 9 February 1996 for the period 4 March 1996 to 2 March 1997. The notice read: -

"On the basis of medical evidence provided by your general practitioner Dr Forte, it is determined pursuant to Section 42(3)(b) of

the Act that your notional working life would now have ceased irrespective of the compensable disability."

The assessment was determined at nil.

At first instance the Review Officer defined the issue as "whether the worker's stroke which now fully incapacitates him means that he has reached the end of his notional working life." She confirmed the interim assessment on the basis that "the worker had suffered one of those vicissitudes of life which had led to the end of his notional working life"...

### Issues:

1. Is the worker's notional working life determined; as at the date of disability or in the case of an interim assessment, must the compensating authority reconsider the worker's notional working life, as defined by Section 42(3)(b), upon each interim assessment?
2. Was the Review Officer's conclusion correct?

### Held:

1. Her Honour referred to the principles relevant to an interim assessment as considered by the Full Supreme Court in [Vlouhakis v The Corporation \(1986\) 185 LSJS 473](#). The focus of the assessment is the nominated portion and in the case of an interim assessment the nominated portion of the worker's notional working life is treated for the purpose of the calculation, as if it were the remainder of the worker's notional working life. The Corporation is permitted to reconsider at the date of the interim assessment the extent of the incapacity and the effect of that incapacity upon the assessment of the capital loss.
2. The Review Officer did err by not confining her comment that "the worker has suffered one of those vicissitudes of life which has led to the end of his

notional working life" to the period 4 March 1996 to 2 March 1997.

**Commentary:**

The decision appears to be consistent with the decision in Vlouhakis.

When you make an interim assessment of loss you must consider at the date of each interim assessment whether the worker would be totally incapacitated for work for the length of the assessment by virtue of the "contingencies or vicissitudes of life".

We recommend that decision makers use the power to obtain information under Section 42B prior to making a decision. If the worker would be prevented from continuing in employment by a non-compensable event (vicissitude/contingency) for the relevant period then you should make a nil capital loss assessment. Providing that decision is correct then it is likely that it will be upheld.

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**CASE SNIPPETS**

**WORKCOVER CORPORATION V VERA SPIEL**

Decision of Workers Compensation Appeal Tribunal

(A80/1997)

In Spiel Judge Parsons adopted Judge Thompson's reasons in Radford. Section 36(1)(g) of the Act can be applied to compensable disabilities which occurred prior to May 1995 (when the provision was proclaimed) and to cases where the worker became resident outside the state prior to May 1995.

For further information regarding Section 36(1)(g) we refer you to a previous article:

"Section 36(1)(g) DISCONTINUANCE - IS THE HOLIDAY OVER?" Covered, Volume 1, Issue 5.

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