

Gun & Davey **Covered**



Volume 1, Issue 11 - July 1998

WELCOME

Welcome to this the 11th and perhaps most important Issue of **Gun & Davey Covered** for some time.

You will notice that this issue is crammed full of important recent decisions from the Full Supreme Court and Full Workers Compensation Tribunal as well as single Judges of the WCT.

The long awaited and much anticipated decision in **Warren** was delivered on 10 July 1998 and dispenses with the onus, previously considered to rest on the decision maker, of establishing that employment of the type nominated, is employment that the worker has a reasonable prospect of obtaining.

Although the Corporation's Appeal in **Warren** was in fact dismissed, the decision is without doubt a win for the Corporation and was worth waiting for.

The decisions of single Judges in both **McAvoy** and **Cambridge** are useful in establishing various ground rules in relation to Section 38(3) and (7) notices and together with **Warren**, pave the way for successful Section 35/38 reductions.

The **Alexander** decision provides important guidelines as to discontinuance of weekly payments based on refusal/failure to participate in rehabilitation programs or failure to comply with obligations under rehabilitation and return to work plans.

The "Stop Press" matter of **Dunstan**, which is of almost equal significance to that of **Warren**, resulted in the Full Bench of the WCT both reading down and refusing to follow earlier decisions which previously bound the Corporation in the areas of Section 32 expenses and rehabilitation.

Gun & Davey was involved in **Warren**, **Dunstan** and **Alexander** all of which must be considered successes for the scheme as a whole.

These decisions represent substantial changes in the interpretation of the Act and provide case managers with many opportunities for new approaches to their role.

Gun & Davey can of course assist you in both interpreting and acting upon the consequences of these important developments.

Regards,

Michael Ricketts

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"SECOND YEAR REVIEW" BOMBHELLS – WARREN, McAVOY & CAMBRIDGE

WORKCOVER CORPORATION -v- WARREN

The decision of [*WorkCover Corporation -v- Warren*](#) (unreported decision of the Full Supreme Court) was delivered on 10 July 1998.

We refer to our article on second year reviews in Volume 1, Issue 7 of **Gun & Davey**

Covered, which sets out the three issues the Court was asked to consider. The Full Court's decision may be summarised as follows: -

Burden of Proof

The decision maker carries the burden of proving the assessment made.

Description of Employment

Unfortunately the required specificity with which the nominated employment is described was not considered.

The Court did however imply that the job description did not have to be as specific as proposed by the WCAT in Warren.

Suitability of Employment

Perhaps most importantly the Court disagreed with the majority Full WCT decision of Adams -v- WorkCover (also summarised in Issue 7 of **Gun & Davey Covered**), i.e. the decision maker need no longer prove that the worker has a reasonable prospect of obtaining the nominated employment.

The worker is effectively presumed to be the only applicant for a position of the nominated kind.

Once the decision maker has discharged its onus of proving: -

- Capacity for the nominated employment;
- Suitability for same taking into account the non-exhaustive considerations outlined in Section 42A(3)(c);
- That the particular form of occupation nominated does exist (even if there are no vacancies);
- The average weekly earnings that a worker so employed could earn;

then unless the worker can make out the "odd lot provisions" of Section 42A(3)(d), the worker's entitlement to weekly payments of

compensation must be assessed on the basis that the nominated employment is in fact available to the worker.

What does Warren mean to a Claims Officer?

In relation to burden of proof, this means that a claims officer must have available all evidence which supports the proposed assessment of entitlement to weekly payments of compensation where it is proposed to reduce or discontinue such entitlement *before* a Notice of Intention to Review is even issued to the worker.

With respect to the specificity of the description of nominated employment, we consider the description can be either general or specific depending on the facts of each case.

It is important that the claims officer makes him/herself aware of the full requirements of the nominated employment and perhaps obtains a description of the duties required by same, as not only does this assist medical experts in assessing requisite capacity, it also enables claims officers to determine vocational/non-physical capacity for the nominated employment.

We consider that the reasoning of Warren also applies in relation to Section 35(2)(a) and (c) as the wording in Section 42A(3)(c) and (d) is virtually identical.

McAVOY -v- WORKCOVER

(JD42/1998)

This decision of Deputy President Judge McCusker concerns the validity of a notice required by Section 38(3) of the Act.

The worker was issued with the prescribed notice but only given a period of five days within which to make representations.

It was held that five days was inadequate and not "reasonable" as required by Section 38(3)(b) and that the prescribed notice should have been supplemented with appropriate

information to enable the worker to appreciate the decision that was being proposed and to make specific representations in relation to it.

Failure to give reasonable notice and appropriate information as to the proposed decision had the result of invalidating the Section 35(2) two-year review decision.

In an effort to overcome this result, the Corporation has recommended that 28 days notice be given pursuant to Section 38(3)(b).

Outcome

It is now necessary for claims officers to include sufficient information in the Section 38(3) notices indicating to the worker the proposed Section 35(2) determination. However agents should liaise with or wait for further direction from the Corporation on this issue.

CAMBRIDGE -v- PARADORA PTY LTD

(JD41/1998)

Regulation 17 of General Regulations was held to apply to Schedule 2/Section 38(7) Notices.

Regulation 17 requires that the Notice contain;

- A statement of the decision that has been made;
- Reference to the provisions of the Act upon which the Corporation is relying;
- Reproduction of those provisions in the decision;

And;

- The general basis upon which the decision has been made.

The WCT held that it is arguable that the word “basis” appearing in Regulation 17 requires a more detailed explanation of “grounds” and that it requires at least “reasons”.

It was also decided that the use of the word “general” in Regulation 17 cannot reduce the required information to a level below the notion of “adequate”.

Outcome

Unfortunately, the effect of this decision is to require claims officers to include in a Section 38(7) / Section 36 / Section 35(2) determination much more information than is currently included. Indeed one may conclude that the WCT now almost requires a claims officer to write an “opinion” with a detailed summary of all information/evidence upon which the determination is based.

Again, agents should liaise with or wait for further direction from the Corporation regarding this issue.

AVENUE FOR REVIEW PURSUANT TO SECTION 28B(3) TAKES POLL POSITION

In the useful WCT decision of Deputy President Acting Judge Gilchrist in [*Alexander -v- WorkCover / MMI Workers Compensation \(SA\) Limited \(ADIA Centrecom Health Staff Pty Ltd\) \(JD45/1998\)*](#), the WCT made some very important observations in relation to what arguments are available to a worker to impugn a determination discontinuing weekly payments on the basis of breach of mutuality specifically identified by reference to Sections 36(1A)(e) and Section 36(1A)(f), namely refusal or failure to participate in a Rehabilitation Program or participation in a way that frustrates the objects of that program, or failure to comply with an obligation under a Rehabilitation and Return to Work Plan.

The WCT held: -

- that a worker contesting a determination discontinuing weekly payments pursuant to Section 36(1)(f) and Section 36(1A)(e) and (f) cannot be heard to argue that the terms of the Rehabilitation and Return to

Work Plan or Rehabilitation Program were unreasonable.

- that a worker who wishes to challenge the reasonableness of such terms, can only do so by lodging a Notice of Dispute in relation to the actual plan or program in place in accordance with the provisions of Section 28B(3).
- that where a worker has failed to lodge such a Notice of Dispute, all that the decision maker need prove to have the determination upheld, is that a valid plan or program complying with the mandatory requirements of Sections 28A, 28C and Regulations was in existence and that the worker failed to comply with an obligation under such plan or failed to participate in the program.
- and finally, that a worker is not relieved of his or her obligations imposed by the program or plan simply by virtue of his or her lodging a Notice of Dispute in accordance with the provisions of Section 28B(3), that is, the worker is required to *continue to participate* in the plan or program until same is set aside on the basis of unreasonableness.

The WCT also considered the concept of *reasonableness* of a Rehabilitation and Return to Work Plan.

The worker was employed as a Registered Nurse with the Burnside War Memorial Hospital when she sustained injury. She resigned from her position with her pre-injury employer and undertook photography studies but still undertook extensive casual nursing with ADIA Centrecom Health Staff Pty Ltd, in the course of whose employment she sustained an aggravation of the prior injury. A Rehabilitation and Return to Work Plan was drawn up requiring her to return to work for four hours per day, five days per week undertaking clerical duties. The worker refused to participate in the Plan as she considered that clerical duties were insulting, boring, not in keeping with her new career path in photography and would only leave her with

three and a half days to undertake photography work.

The WCT held that the factors raised by the worker were not determinative of the reasonableness of the plan and whilst it was necessary to take into account the nature of the work offered and the worker's qualifications and work experience in determining whether or not the plan was reasonable;

“A plan is not rendered unreasonable simply because it requires the performance of work duties that the disabled worker does not find stimulating or because it does not accord with his or her career aspirations.”

So there!

CALCULATING OVERTIME

In Volume 1, Issue 6 of *Gun & Davey Covered* we featured the WCAT decision of [WorkCover Corporation \(Pribetic Glass\) -v- Rhett Giles](#), which established the “band of hours” approach to determining whether overtime hours are substantially uniform pursuant to Section 4(8)(a)(ii).

That decision was applied most recently in the WCT decision of [David Murphy -v- Woolworths \(SA\) Pty Ltd \(JD37/1998\)](#), wherein the WCT identified a band of overtime hours per week that the worker generally worked and then calculated the total number of overtime hours per week actually worked that fell within the band and divided this amount by the total number of weeks of wage records considered. Any overtime hours worked above or below this band were rejected.

In addition to confirming the “band of hours” approach, the WCT confirmed that if a pattern of overtime emerges upon examination of a period immediately prior to the commencement of incapacity, even if that pattern is only exhibited for say the last five weeks of twelve months of wages records, there is no need to look any further.

COVERED CASES

RICK GROSS –v- WORKCOVER CORPORATION / NZI WORKERS COMPENSATION (PRESTIGE LININGS)

**Decision of the Workers Compensation
Tribunal
(JD38/1998)**

Catchwords:

Journey provisions – in the course of carrying out duties of employment – place of pick up.

Facts:

The worker was employed as a ceiling fixer by his brothers, Frank & Gary. His usual routine was that he was picked up at home by either brother and driven to the work site. He was then driven home at the end of the day's work.

The worker was injured in the course of such a journey to a work site.

His claim was rejected on the basis that the disability occurred in the course of a journey between his place of residence and his place of work and that there was no real and substantial connection between his employment and the injury.

Issues:

1. Did the worker's place of residence constitute a "place of pick up" such that the worker is deemed to have been in employment at the time of the motor vehicle accident?
2. Was the worker carrying out the duties of his employment at the time of the motor vehicle accident?
3. Was there a real and substantial connection between the worker's employment and the accident?

Held:

1. No. Whilst Section 3 of the Act defines employment to include attendance by a worker at a place of pick up, the expression "place of pick up" had a specific meaning in industrial law, namely, a place at which workers would attend to be selected for work, and this worker's house was not such a place.
2. No. Whilst work was discussed in journeys to and from work, it was not discussed in any different manner than it would have been had it been the worker who was driving the employer to work. Moreover, those discussions were not necessary for the proper conduct of the work relationship and the worker was under no compulsion to use the transport provided by the employer, the main reason he did so being to free up the family car for his wife's use.
3. No. The fact that the car involved in the accident was driven by the employer is not sufficient to establish the required connection between the worker's employment and the accident.

KEEN -v- WORKERS REHABILITATION AND COMPENSATION CORPORATION

**Decision of the Full Court of the Supreme
Court of South Australia
(Unreported, dated 25/02/98)**

Catchwords:

Interpretation of Section 30A(b)(iii).

Facts:

The worker made a claim for compensation for psychiatric or psychological disability arising out of her employment with the employer. She had stopped work on 13 June 1995 her treating psychiatrist diagnosing "an adjustment disorder with mixed anxiety and depressed mood".

The background was that the employer was attempting to introduce a system of nursing competency assessments. The worker had become very upset about the assessment process and the fact that it was being conducted by her supervisor about whom she had some misgivings. The worker claimed that at a social event over Easter which her union representative had attended, her supervisor had said that there were a few older staff that he wanted to get rid of, that her name was mentioned in that regard and that he intended to “get on her work performance”.

The union representative gave a different version of events and said that he had merely said that he wanted to bring some people “up to speed” and that the worker’s name was mentioned along with two others.

He also testified that the worker was told this in a light hearted and jovial fashion.

The worker became upset and agitated about the assessment process and the fact that it was being conducted by her supervisor. Her evidence at the Review Panel was that on 12 June 1995 she decided to ask her supervisor to do her assessment that day in the belief that it may allay her fears. She claimed that her supervisor said he was busy and did not feel like completing the assessment that day. She panicked, became frightened and nauseous and did not return to work after 12 June 1995.

At first instance the Review Officer found the worker’s employment to be a substantial cause of the disability as required by Section 30A(a). She found that the conversation with the union representative and the management style of her supervisor were not administrative actions but that the implementation of the audit process was. The Review Officer found the latter factor the “major or precipitating one” in relation to the disability and that whilst the implementation of the audit process constituted reasonable administrative action, it was not carried out in a reasonable manner by the employer as required by Section 30A(b)(iii).

The Corporation appealed to the Workers Compensation Appeal Tribunal, which allowed

the appeal. Thereafter, the worker appealed to the Full Supreme Court. The majority of the Court dismissed the worker’s appeal.

Issues:

1. When does Section 30A operate?
2. Who bears the onus of proof?
3. What must that party prove?
4. What must that party prove in the context of Section 30A(b)(iii)?

Held:

1. Section 30A will operate where the disability consists of an illness or disorder of the mind. The expression illness or disorder of the mind is not otherwise defined in the Act but no doubt includes a psychiatric condition and any other condition which can be categorised as an illness or disorder of the mind.
2. The onus is upon the worker to establish all of the relevant matters in placita (a) and (b) of Section 30A: *SA Mental Health Services Inc–v- Margush (Unreported, Full Court, 8 September 1995, Judgment Number S5246)*.
3. The worker must prove the affirmative, namely that the employment was a substantial cause of the disability and then must prove the negative, that the disability did not arise wholly or predominantly from any of the relevant matters in Section 30A(b).
4. The worker must establish that the employment was a substantial cause of the disability and that the disability did not arise wholly or predominantly from reasonable administrative action taken in a reasonable manner by the employer in connection with the worker’s employment.

In addressing the second matter it has to be remembered that the worker must have already established that the employment was a substantial cause of the disability.

Justice Lander held that the worker therefore has to proceed upon the premise that whatever it was that caused the disability the employment was a substantial cause. In other words, factors extraneous to the employment must have been insubstantial causes.

Justices Cox and Lander held that it was open for the Review Officer to conclude that the disability arose predominantly from administrative action, namely the events to which she referred apart from the management style of the supervisor.

Justice Bleby came to a different conclusion and on the facts considered that the evidence did not show that any cause was predominant and that as such the worker had discharged the onus of proof that her disability did not arise predominantly from administrative action.

The Tribunal had held that in all the circumstances the appraisal process was carried out in a reasonable manner.

The Full Court found that finding was of the type, which the Tribunal was able to make in substitution for the Review Officer's decision.

Commentary:

This case points the way to a "simpler" approach to assessing such claims, viz: -

- (1) Is the disability an illness or disorder of the mind? if so →
- (2) Was work a substantial cause? if so →
- (3) Was the predominant cause one of the matters set out in Section 30A(b)?
- (4) If so, and if reasonable and carried out in a reasonable manner, the claim should then be rejected.

The decision is an extremely important and complex one for those of you required to determine a "stress" claim. We strongly recommend that you also re-read the article "Stress Claims Made Easy (?)", *Gun & Davey*

Covered, Volume 1, Issue 3, December 1996.

DELLA FLORA -v- WORKERS REHABILITATION AND COMPENSATION CORPORATION OF SOUTH AUSTRALIA

Decision of the Full Court of the Supreme Court of South Australia

(Unreported, dated 26/05/98)

Catchwords:

Section 43 – Enforceability – Interest?

Facts:

The facts are both complicated and convoluted and we will not repeat them here. They are of course included in the judgment.

Issues:

1. When does a determination made under Section 43 of the Act become enforceable by the worker in a civil action?

Held:

The Chief Justice considered specific provisions of the Act and the scheme of the Act as a whole and made the following points:

- A.** The Act is silent about whether and how a determination by the Corporation can be enforced by a worker in whose favour the determination is made. The Act is equally silent, subject to some qualifications with respect to weekly payments, about when such a determination becomes enforceable.
- B.** Once the Corporation makes a determination that is a reviewable decision, the worker and other persons have a right to dispute that decision. The Corporation will have some difficulty knowing when that right has expired, because the time for the exercise of that right runs from the time when notice of the decision is received by the relevant person. Moreover the time for the exercise

of the right to dispute a determination can be extended by the Tribunal: Section 90A(1). The effect is that a determination is open to challenge for one month after notice is given and possibly for a longer time.

- C. There is no express provision (other than some provisions relating to weekly payments) for the recovery of compensation paid under a determination that is set-aside after a Notice of Dispute is lodged.
- D. There is no provision in the Act for staying a determination by the Corporation.
- E. Once a Notice of Dispute is given under Section 90, a determination by the Corporation is liable to be set aside or varied until the dispute is finalised by an order of the Tribunal. That order might be the result of an agreement reached before a Conciliator, the result of a decision by an Arbitrator, or the result of a decision by the Tribunal upon a Judicial Determination. At that point there is clearly an enforceable right in that the Tribunal's decision is enforceable in a similar way to a judgment of the District Court pursuant to Section 87A.
- F. If the Corporation is liable to pay compensation upon making the determination or after a Notice of Dispute has been lodged but before the Tribunal makes an order, it is at risk of later being unable to recover money it is subsequently found not liable to pay.

His Honour referred to the presumption that when a statute creates an obligation or liability to pay money to a particular person, an action will lie for the recovery of that money unless the statute contains a provision to the contrary.

His Honour considered the matter turned upon whether payment could be enforced before the time for lodging a Notice of Dispute had expired or after such a Notice had been lodged.

His Honour (Millhouse and Nyland JJ concurring) concluded that it could not have been the intention of Parliament that a determination should be enforceable by action on the part of a worker before the expiry of the period within which a Notice of Dispute could be lodged, nor after such a Notice had been filed and prior to the dispute being finalised. In other words, the Court concluded that the presumption in favour of the recoverability of payments by action was rebutted in relation to a payment due under a determination in respect of which 30 days from service or deemed service had not elapsed, or in respect of which a Notice of Dispute had been lodged.

The Court made it plain that it did not seek to express any view in relation to the time within which weekly payments must be paid.

The Court upheld the decision of the Judge at first instance. When the proceedings were instituted a Notice of Dispute had been lodged. The effect of that was to defer, until the dispute had been resolved, the time when the payment under the determination could be enforced by action.

Commentary:

A decision maker can no longer be criticised for withholding payment of Section 43 monies until the expiration of 30 days from service of the determination.

It should be noted that where a dispute is not lodged following 30 days from service, the Court commented that the compensating authority was obliged to make payment and could face successful enforcement proceedings if it did not do so.

****STOP PRESS ****

DUNSTAN -v- STATE OF SOUTH AUSTRALIA & WORKCOVER CORPORATION

On 28 July 1998 the Full Bench of the Workers Compensation Tribunal handed down its decision in this matter. The Full Tribunal was asked to reconsider a number of

earlier decisions of both the WCAT and the WCT and it did so, overturning a number of them. The following is a dot point summary of the most important features of the decision.

- The Full WCT read down the effect of its earlier decision in [WorkCover -v- Gerazounis](#). Upon further reflection and with the benefit of argument it was held that “at the conclusion of the Conciliation proceedings” means until the Conciliation process has been completed. Such a reading means that disputes can now be referred to Judicial Determination from either Conciliation or Arbitration. There is still however a need to convince a Presidential Member that there is a very special reason why a party ought to be able to bypass Arbitration after the matter has been referred to an Arbitration Officer.
- The absence of a formal document or determination actually setting out a decision does not necessarily mean that a decision has not been made. It is all the circumstances that surround and lead up to the lodgement of a Notice of Dispute which determine whether a decision has in fact been made.
- The decisions of the WCAT in [State of South Australia -v- Bush](#) and [WorkCover -v- Schulz](#) are not binding on the WCT being decisions of the WCAT. An analysis of the relevant amendments since [Bush](#) and [Schulz](#) indicates that the question of authorising whether a medical or like expense is claimable under Section 32 of the Act is a matter for the relevant compensating authority and that such a decision is subject to review. This is a significant difference to the situation that existed under [Bush](#) and [Schulz](#).
- Notwithstanding the change in relation to the issue of authorisation of medical and like expenses under Section 32, the Full WCT interpreted the phrase “other costs or classes of costs” as being subject to an ejusdem generis interpretation. That means that the phrase, “other costs or classes of costs” is still not to be interpreted as a “catch all” but should be limited to the class of “medical or like expenses”. As a consequence the worker’s claim for the cost of **home help** could not be categorised as a “medical or like expense” and was not recoverable pursuant to Section 32(2)(i) of the Act.
- In relation to the distinction between a rehabilitation program (program) and a rehabilitation and return to work plan (plan) the Full Tribunal confirmed that there are a number of distinctions between the two on the face of the Act and that they ought to be treated as being separate and distinct notwithstanding some similarities.
- The reasoning in the WCAT decisions of [WorkCover -v- Toohey](#) and [WorkCover -v- Pfeiffer](#) has not been followed by the Full WCT. Given the importance of effective rehabilitation under the Act the Full Tribunal held that Parliament would not have intended an arbitrary decision made by a compensating authority not to establish a rehabilitation program not to be susceptible to review. In short, the narrow approach in [Toohey](#) and [Pfeiffer](#) was found to be contrary to the objects of the Act.
- The single Tribunal decision of [Moore-McQuillan -v- WorkCover](#) was upheld insofar as it found a decision to authorise or not authorise an expense pursuant to Section 32(2)(i) of the Act is reviewable but was overturned insofar as it found costs associated with home help to be a medical or like expense within the meaning of Section 32.
- The Full Tribunal also resolved to not follow the single WCT decision of [Bradford -v- WorkCover](#) insofar as it purported to extend the immunity from use in litigation of statements made about a worker in a plan. The Full Tribunal made it plain that statements made about a worker in a plan are not covered by the immunity conferred by Section 28(3) and may therefore be used in proceedings. The immunity only covers programs.

- The Full Bench also resiled from some of its findings in [Short -v- Bridgestone Australia Ltd](#) and in particular the conclusion that Section 28B of the Act permitted a review by workers where the criteria prescribed by Section 28A(2) had not been met. Nonetheless the Full Tribunal confirmed that part of [Short](#), which held that the right to seek rehabilitation exists even after a disabled worker has returned to work.

[Outcome](#)

The decision of [Dunstan](#) has brought a number of significant changes to the treatment of rehabilitation and medical expenses under the Act. There now exists ability for workers to claim expenses pursuant to Section 32 even where the same have not been authorised by the Corporation. That

right is however controlled by the interpretation given to Section 32 which requires that any such authorisation be in keeping with the classes of medical and like expenses already contained in Section 32.

In relation to rehabilitation, the distinction between a plan and a program has been recognised and commented upon. Workers now have the right to review a decision not to implement a program but such a review will take into account all the circumstances of the refusal or rejection. We anticipate that the relevant touchstone will be whether the measures sought are likely to aid in rehabilitation and whether they are reasonable in the circumstances of the individual case.

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