

Gun & Davey **Covered**



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WELCOME

Welcome to this the 9th Issue of ***Gun & Davey Covered***.

This issue contains helpful tips and guidance for case managers touching upon the effect of non-compensable incapacity when super imposed on a compensable incapacity, overtime and other related matters. I am sure you will find them of benefit.

The Full Supreme Court of South Australia heard submissions in the matter of **Iltech (NZI) –v- Warren** and has reserved its decision. The outcome is difficult to predict. Of interest is that one member of the Full Bench which heard the matter namely Justice Mulligan handed down the ***James*** decision at first instance which eventually resulted in the amendments which were the subject matter of the appeal in ***Warren***.

By the way!

Apart from our Workers Compensation Section, ***Gun & Davey*** provides cost effective and practical legal advice and representation mainly in the following areas:

- Industrial matters
- Family Law
- Public Liability Claims (non-WorkCover/CTP personal injury claims)
- Motor Vehicle Property Damage Recovery
- Property Law and related matters

If you or your staff need assistance in any of the above matters I would be delighted to hear from you.

Cheers,

Michael Ricketts

In This Issue			
Welcome	1	Case Snippets	5
Case Management Advice	2	Handy Hints	7
		Directory	8
Covered Cases	4		

TOTAL INCAPACITY ARISING OUT OF A SUPERVENING NON-COMPENSABLE CAUSE

A GUIDE FOR DECISION MAKERS

Unfortunately, from time to time a worker who is partially incapacitated by a compensable disability under the Act may become totally incapacitated for work by virtue of a supervening non-compensable cause. One example is where a worker who is partially incapacitated by a compensable back disability becomes totally incapacitated due to the effects of cancer.

In these circumstances action can be taken to discontinue weekly payments pursuant to Section 36(1)(f) of the Act on the basis of a breach of the obligation of mutuality. You should also consider whether the supervening non-compensable cause results in a breach of statutory mutuality as defined by Section 36(1A) (a)-(f) - an example would be where the worker refuses or fails to undertake work which has been offered and which he would otherwise be capable of performing: Section 36(1A)(f)(i).

You should also always consider whether the supervening non-compensable cause results in a breach of the *common law* notion of mutuality: Section 36(1A)(g).

The common law concept of mutuality refers to the co-operation required from both employer and employee in order to enter into and perform their respective obligations under a contract of service.¹

The mutuality required of a worker is that he or she be ready, willing and able to perform suitable work. Where a worker is totally incapacitated for work by a supervening non-compensable cause then even if that worker is ready and willing to undertake suitable work

it cannot be said that he or she is able to perform the same.²

SUMMARY

A worker's weekly payments **can be discontinued** where there is:-

1. A breach of statutory mutuality; or
2. A breach of common law mutuality.

Naturally, such discontinuance will only succeed where the worker is partially incapacitated by the compensable cause and totally incapacitated by the supervening non-compensable cause.

The discontinuance will be found to be **unlawful** where:-

1. The worker is totally incapacitated for work by the compensable cause; or
2. The worker is only partially incapacitated for work by the non-compensable cause.

It is therefore necessary that adequate medical evidence be obtained before proceeding under Section 36(1)(f). Remember that written notice must be given to the worker (S36(3)) and that the notice must be given at least 21 days before the decision is to take effect.

In our view, a discontinuance on the basis that the worker is totally incapacitated for work by a non-compensable cause does not result in a discontinuance for all time as even a breach of mutuality based on the worker's misconduct may be revived in time.³

Conceivably, provided that a worker continues to be incapacitated by the compensable cause he or she may be able to re-assert an entitlement to weekly payments if the effects of the

non-compensable condition abate. If that is the case and a discontinuance has been issued then we recommend that you insist a further claim be lodged.

The provisions in relation to a worker who is receiving compensation for loss of earning capacity under division 4B of the Act are quite different. We refer you in particular to Section 42A(3)(b) of the Act and the decision of the Workers Compensation Appeal Tribunal in Rosella -v- The Corporation. See the last issue of *Gun & Davey – Covered*.

1 - Kelvinator -v- Jezior (1988) 49 SASR 592.

2 – Hartwell -v- Electricity Trust of South Australia (1982) 29 SASR 365.
Jones –v- WorkCover Corporation / Royal & Sun Insurance JD11/1998.

3 – Kanoon -v- Cablemakers of Australia Pty Ltd [1975] WCR (NSW) 268.

4 - Volume 1, Issue 8 - December 1997.

OVERTIME ENTITLEMENTS REVISITED

Section 36(2)(bb)

Many injured workers have a component for overtime included in their weekly payments. Section 36(2)(bb) provides a basis whereby those payments can be reduced:

1. where the worker would not have continued to work overtime.
2. where the pattern of overtime has changed so that the amount of overtime has diminished.

These tests refer to the employment in which the worker was last employed before he/she became incapacitated. See Bee (1993) 173 LSJS 44.

This is consistent with the object of the Act to ensure that a worker receives compensation equivalent to the earnings he would have received had he not been incapacitated but not more – Bee.

It is important to remember that not all payments for work in excess of 8 hours per day or 38/40 hours per week are overtime. The worker may have been a casual. The additional hours may have been the worker’s “ordinary hours” if the contract of employment required that the number of ordinary hours per day or week was greater than normal. See Harle (1994) 61 SASR 507.

Remember:

- (a) When fixing notional weekly earnings, keep a copy of wage time records and your calculations on file.
- (b) Ask the employer to advise of any changes (of significance) in hours worked.
- (c) Regularly investigate the issue e.g. when conducting a Section 39 review.

COVERED CASES

ANTHONY PIGNATARO –V- G H MICHELL & SONS (AUSTRALIA) PTY LTD

Workers Compensation Tribunal JD10/1998

Catchwords:

The ambit of the Tribunal’s jurisdiction when considering determinations pursuant to Section 36(1)(f) and 36(1A).

Interpretation of the word “work” in Section 36(1A)(f)(i).

Facts:

A compensating authority discontinued a worker’s weekly payments on the basis, inter alia, that the worker had breached the obligation of mutuality by failing to undertake work that had been offered to him and that he was capable of performing. i.e. a discontinuance pursuant to Section 36(1)(f) relying on 36(1A)(f)(i).

The compensating authority sought to argue that the decision of Cristea –v- WorkCover (1993) 61 SASR 487 was authority for the proposition that the Tribunal had jurisdiction to consider whether the discontinuance was justified by reference to other breaches of mutuality.

In particular, the compensating authority sought to argue that the worker was capable of undertaking much more work than he represented or was otherwise not making a genuine attempt to be rehabilitated.

The worker sought to argue that as the duties he was offered by the employer were unproductive activities that the employer would not have otherwise employed someone to undertake, the worker was not offered “work” for the purposes of Section 36(1A)(f)(i), and

therefore in failing to undertake same, the worker did not breach the obligation of mutuality.

Issue:

1. Is the Tribunal’s jurisdiction confined to only considering the grounds specified in a determination pursuant to Section 36(1)(f)?
2. Is the reference to “work” in Section 36(1A)(f)(i) work in the nature of a real job as opposed to a manufactured job or alternative duties?

Held:

1. Yes. “[A] compensating authority in seeking to invoke Section 36 of the Act, is confined to the grounds specified within the determination such that the Tribunal is confined in this case to a consideration as to whether or not there has been a breach of mutuality by reference only to Section 36(1A)(f)(i)”.

If the compensating authority wished to obtain a finding that the worker had breached mutuality by misrepresenting his level of capacity or not making genuine attempts at rehabilitation, it had to include Section 36(1A)(d), (e) or (f)(ii) as grounds.

2. All that is contemplated by the expression “work that... has been offered” as the term appears in the subsection, is an opportunity to sell one’s labour and that is an opportunity that the worker was afforded in this case. The word “work” as used in the subsection does not mean work in the context of “a real job” for someone other than the pre-injury employer.

CASE SNIPPETS

MUSCARA –v- MMI/WORKERS COMPENSATION (SA) LTD (BALLESTRIN CONCRETE CONSTRUCTIONS)

Decision of the Full Workers Compensation Tribunal

JD9/1998

The rate of weekly payments was fixed at the base rate as at the date of injury although an Enterprise Bargaining Agreement (EBA) which significantly increased the base rate came into operation *after* the date of injury but prior to the determination which fixed rate.

At first instance the WCT found that it was not appropriate to take into account the rate set out in the EBA when fixing rate of weekly payments relying on the decision of the Full Supreme Court in Pizzorno (1997) 69 SASR 211. The WCT considered that that decision required it to “set the rate of weekly payments as at the relevant date” i.e. the date of commencement of incapacity – in this case being the date of injury. It therefore found that as the EBA was not in operation as at the date of injury, the worker was not entitled to the benefit of the higher rate set by the EBA.

The Full Bench of the Tribunal disagreed with that interpretation of Pizzorno and considered that the decision did not “stand as authority for the proposition that the decision maker must artificially place himself or herself in the restricted state of knowledge available at the date of incapacity and ignore material that comes to light between that date and the date the initial determination is made... (the) wage history and such probative evidence that comes to hand between the date of incapacity and the date of determination should be employed in the fixing

because it will assist in making the best estimate of the wages the worker would have earned during the prospective period of the incapacity”. (Francesce)

As a result the rate of weekly payments was varied to the rate set by the EBA.

KINSLOW –v- BHP COMPANY LTD (Long Products Division)

Decision of the Workers Compensation Appeal Tribunal

A61/1997

In this case Deputy President Cawthorne considered whether the principle in WorkCover –v- Fisken should be applied where the judgment obtained at common law by the worker was not against the employer but against a third party wrongdoer.

Fisken is authority for the proposition that it is open for a worker to prosecute a claim pursuant to Section 43 even after judgment at common law has been obtained but where that judgment is against the employer then the common law judgment must be factored into the worker’s entitlement. The common law judgment constitutes a complete discharge for any injury sustained by the worker in the relevant incident or incidents irrespective of whether the injury was pleaded or known of at the time of the recording of the judgment. The judgment touches upon all and any Section 43 entitlements that the worker may have that arise from the subject incident or incidents whether they were known to exist at the time of the judgment, noted therein or contemplated at that time. Where a Section 43 assessment is made after judgment at common law has been entered the Corporation or exempt employer does not incur any additional liability unless the aggregate of the

worker's Section 43 entitlements exceeds the common law judgment in which case the worker's entitlement will be for the balance.

Deputy President Cawthorne noted that where judgment obtained at common law by the worker was against a third party wrongdoer that the employer has rights of recovery of any compensation paid from the wrongdoer or the injured party: Section 54(7)(d).

His Honour held that the fact that the employer had rights of recovery for compensation paid from the wrongdoer or the injured party distinguished the position from the situation in Fisken. As a consequence the principle in Fisken does not apply if the tortfeasor is other than the employer. Where the tortfeasor is someone other than the employer the worker has the right to have his or her Section 43 entitlements determined in the ordinary manner.

Comment:

We do not consider Deputy President Cawthorne's reasoning to be controversial and respectfully agree with the decision.

**WORKCOVER CORPORATION /
ROYAL & SUN ALLIANCE
WORKERS COMPENSATION (SA)
LTD (MELBAS AUSTRALIA PTY
LTD) –V- THOMSON**

**Decision of the Full Workers
Compensation Tribunal**

JD38/1997

The employer who carries on the business of manufacturing confectionery engaged the worker as a cleaner to perform cleaning work for the purposes of opening a coffee lounge. The worker carried out that work personally, used materials the value of

which did not exceed \$50.00 and did not employ any other person to carry out any part of that work.

The worker argued that he was a "deemed worker" and relied on Section 3(b) of the definition of "contract of service", namely "a contract, arrangement or an understanding under which a person (the worker) works for another (the employer) in prescribed work or work of a prescribed class" and Regulation 4(1)(b) of the Claims and Registration Regulations, which specified as a prescribed class of work, cleaning work.

The Corporation argued that the pre-condition contained in Regulation 4(1)(e) was not met, i.e. that work was not performed *in the course of or for the purposes of a trade or business carried on by another person to the contract*.

In particular the Corporation argued that the employer must be in the same business as the person supplying the labour i.e. the worker, which was here the business of cleaning, in order for work to be of the prescribed class.

This was rejected by the Tribunal –

"It is the work that has to be within the prescribed class, not the trade or business carried on by the other person."

The worker was therefore held to be a "deemed worker".

HANDY HINTS

A compensating authority is not precluded from issuing a further Notice of Discontinuance and relying on that for the purposes of discontinuing weekly payments where an earlier Notice of Discontinuance is thought to be defective - McManus JD52/1997.

This decision may follow the authority of Pitakis –v- SA Spastic Paralysis Welfare Association Inc (Full Supreme Court) 33 SASR 1983 301 wherein the Court held that an employer (compensating authority) could issue a Notice of Discontinuance even though it is not making continuous weekly payments of compensation at the time the notice is given. However differences between the 1971 Act and new Act may mean that Pitakis is distinguishable.

oooOOOooo

The majority of the Full Bench of the Tribunal in the decision of Gerazounis JD57/1997 considered that a worker may withdraw his or her Notice of Dispute, and that there is no requirement that the Tribunal confirm, set aside or vary the disputed determination which is the subject of the dispute in order to properly dispose of that dispute.

The majority relied on the Supreme Court Rules, which apply where the Tribunal Rules are silent: Rule 1 of the Tribunal Rules.

Whilst this is not a unanimous decision and the issue may be decided differently in the future by a Full Bench which is constituted by different members it is binding at least on Conciliation and Arbitration Officers.

We recommend that whenever a worker seeks to withdraw his or her Notice of Dispute that you either request (noting that you cannot require) the worker to sign a memorandum of consent order which confirms the disputed determination or you request the Conciliation Officer to make such an order after consulting with the worker.

This newsletter has been printed by Gun & Davey as a service to clients. All information was accurate at the time of printing and comments made are of a general nature and intended to be for guidance only. No person should rely on the contents of the newsletter without first obtaining advice from an appropriately qualified person.

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