

**WORKERS REHABILITATION AND COMPENSATION TRIBUNAL**

**HELD AT:** Hobart  
**REFERENCE NO(S):** 127/2012  
**HEARING DATE(S):** 27 September 2012  
**DELIVERED ON:** 12 October 2012  
**REFERRING SECTION(S):** 42  
**DECISION OF:** Chief Commissioner Carey

**CATCHWORDS:**

Proceedings to obtain compensation - Termination of weekly payments - Failure to challenge within time limit, 86(4) - Whether can challenge form of 86(1)(c) certificate upon s42 referral - Waiver and estoppel

*McCarthy v State of Tasmania* (1998) TASSC 124 )  
*Sisters of the Good Shepherd v Stokes* (1998) TASSC 116 ) Referred to  
*Commonwealth v Verwayen* (1990) 170 CLR 394 )

*Workers Rehabilitation and Compensation Act 1988* (Tas), s42, 86

**DETERMINATION:**

Preliminary issue determined in favour of the worker.

**REPRESENTATION:**

***Counsel:***

**Worker:** S Taglieri  
**Employer:** N Munting

***Solicitors:***

**Worker:** Slater & Gordon Lawyers in Association with  
Hilliard & Associates  
**Employer:** Wallace Wilkinson & Webster

## REASONS FOR DETERMINATION

### INTRODUCTION

- 1 The background material is not-contentious and is outlined in order to set the scene for the issue now before the Tribunal. The worker by a claim for compensation dated 27 January 2011 asserted that she had suffered a mental health issue described as "*general anxiety symptoms, recurrent panic attacks, depression*". The applicant was certified incapacitated for work on 13 January 2011 as a result of this condition. The applicant asserts in her claim for compensation that her condition was caused as a result of being bullied, harassed and intimidated by two fellow employees. Apparently the claim for compensation was accepted and workers compensation benefits paid to the worker. By referral to the Tribunal dated 12 September 2011 the employer sought to review the quantum of weekly payments being paid to the worker as a result of this workers compensation claim. Apparently the employer then terminated weekly payments following action taken in accordance with s86(1)(c) of the Act. I infer from the nature of submission made by the parties in this matter that the worker received the appropriate notice as required by s86(3) of the Act. However the worker failed to dispute the action taken by the employer to terminate her weekly payments as required by s86(4) of the Act. In that regard the worker made a referral to the Tribunal pursuant to s42 seeking a determination as to her ongoing entitlement to weekly payments from the date upon which same were terminated. As part of the worker's case in that referral, it is asserted that the s86(1)(c) certificate dated 11 November 2011 provided by Dr Joel Aizenstros did not meet the requirements of the Act and that therefore the purported termination of weekly payments to the worker was invalid.
- 2 The issue now before the Tribunal as a preliminary point is whether or not the worker, having failed to dispute the termination of her weekly payments within the time limited by s86(4) of the Act, is permitted to pursue that point within the s42 referral. A further issue was also raised as to whether or not having failed to meet the time limit imposed by s86(4) of the Act the worker is estopped from challenging the validity and technical requirements that form the basis of the employer's termination of weekly payments pursuant to s86 of the Act.

### SUBMISSIONS

- 3 On behalf of the worker counsel submitted that s42 provides the Tribunal with a relatively unfettered discretion to deal with a claim for compensation, and by reason of the definition of that term it includes;

*".....any matter or question arising in connection with or incidental to such a claim."* (s3).
- 4 Counsel submitted that use of the referral power of s86(4) meant that the employer bore the onus of establishing the validity of any termination, whereas a s42 referral after the 60 day time limit imposes the onus of proof upon the worker.
- 5 As to the issue of estoppel, it was submitted by counsel that such a principle ought not apply to the prejudice of a person unless it is shown that there was a knowing and deliberate abandonment of a statutory entitlement.

6 In summary, counsel submitted that s86(4) was not an exhaustive code as to the circumstances in which action to terminate weekly payments by an employer could be challenged.

7 Counsel for the employer submitted that the legislation initially provided no time limit within s86 for the challenge by workers of action by the employer to terminate weekly payments. It was submitted that the legislative amendment to the Act in 1995, which inserted the 60 day time limit, was indicative of an intention of Parliament to ensure that there was finality to issues arising as a result of the termination of weekly payments pursuant to s86. It was submitted that s86(4) of the Act was a specific provision applying to the termination of weekly payments pursuant to that Section and that to provide for a challenge on similar issues by means of a s42 referral would defeat the purpose of s86(4).

8 Counsel for the employer also submitted that the worker was given notice of the time limit in which to challenge the termination of weekly payments, she failed to afford herself of the benefit of that provision and that this amounted to a statutory waiver.

9 One matter of evidence required clarification subsequent to the hearing of this matter, that being the circumstances in which the worker failed to make her referral pursuant to s86(4) within the time limit provided. At hearing it was asserted on behalf of the worker that she maintained an intention to challenge the employer's action and at no time formed an intention to allow the time limit to expire. Arrangements were made for the taking of evidence in this regard, however subsequent to the hearing advice was received from the solicitors for the employer that;

*".....the employer formally concedes that the worker was not at fault in the delay or failure to lodge a s86(4) referral within the legislative time frame."*

#### DETERMINATION

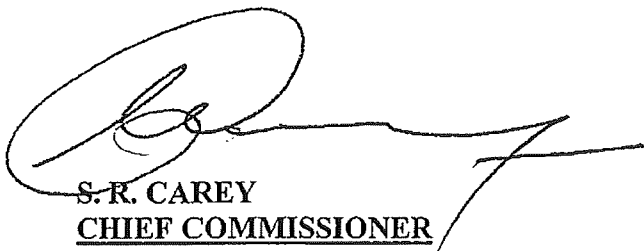
10 I have been referred to the Second Reading Speech of the relevant Minister upon the introduction of the *Workers Rehabilitation and Compensation Reform Bill 1995* that inserted the time limit in s86(4). No reference is made to the intent of that inclusion. To infer that by merely including that provision providing for a time limit, a code was created whereby any challenge to action taken by an employer pursuant to s86 must occur within 60 days cannot be justified. Should Parliament had wished to impose such restriction one would expect it to have provided so in express terms. Additionally, given the nature of the legislation, should that have been the intent one would have expected a discretion to have been included allowing for an extension of time in appropriate circumstances. To provide for a challenge to action taken pursuant to s86 by other means does not rob s86(4) of any utility. It is only action taken within the 60 day time limit that imposes the onus of proof upon the employer. One can readily identify significant prejudice and injustice if the statutory time limit was the only time in which a challenge could be made to a termination carried out purportedly in accordance with s86. Basic and glaring errors such as the accreditation of the medical practitioner, whether the person was a medical practitioner, or a denial concerning an asserted return to work would, on the above submission, not be able to be challenged.

11 I agree that s42 is a provision of general application allowing referral to the Tribunal of any issue arising in connection with or incidental to a claim for compensation. A *"matter or question arising in relation to a claim for compensation"* can clearly include a termination of weekly payments purportedly in accordance with s86 relating to that claim for compensation. The person making such a referral pursuant to s42 is the worker who

thereby bears the onus of proof, thus distinguishing this from a referral made pursuant to s86(4).

- 12 Although I agree that s86(4) provides a substantive right to a worker (McCarthy v State of Tasmania (1998) TASSC 124) and that this right which includes the benefit of the employer having the onus of proof is limited by the 60 day time limit. However, such substantive right within s86(4) does not exclude any other right that a worker may have provided by other provisions of the Act, eg s42.
- 13 The second issue is whether the worker, having an express statutory right to challenge the employer's purported basis for terminating weekly payments pursuant to s86(1)(c), having failed to do so within the time limit provided should now be estopped from challenging the basis of that termination. The judgement of Cox CJ in Sisters of the Good Shepherd v Stokes (1998) TASSC 116 provides an informative summary of the law as it might apply to these circumstances. Before considering the applicable law, I highlight that the employer has conceded that the failure by the worker to initiate a referral pursuant to s86(4) was not occasioned by the fault of the worker. His Honour Cox CJ in Sisters of the Good Shepherd (supra) notes that a statutory provision introduced for the benefit of an individual can be waived by him and that aspects of s86 can be classified as such statutory provisions. The cases referred to, in particular Commonwealth v Verwayen (1990) 170 CLR 394, make it clear that for the purposes of establishing an estoppel the waiver in question must be shown to be as a result of some knowing abstinence from exercising a right or a deliberate act in not relying upon a right. The evidence does not establish either circumstances in this case. There would also seem to be a need for some form of detriment to be suffered by the other party upon reliance of the presumed or actual waiver. This preliminary question was raised during the preliminary stage of the conciliation process within the Tribunal and referred to the Tribunal to be determined as a preliminary issue. There is no indication that the employer has at any time been induced to continue with this referral to their detriment based upon knowledge of a deliberate abandonment of a statutory right by the worker.
- 14 In this regard it was submitted on behalf of the employer that prejudice now flows to the employer because if the termination of weekly payments had been challenged within the time limit, the employer would have had the opportunity to revisit the basis of the action it took and to repeat the process in a form that addressed any perceived statutory flaw. This point was raised in Sisters of the Good Shepherd (supra) and dealt with by Cox CJ as follows;
- "It was submitted in argument that the appellants had suffered a detriment in that they failed to issue a fresh notice incorporating the advice required by s86(3A), but there was no evidence that had they been alerted to the fact they would have adopted such a course and no reason to draw that inference. Indeed, up to the time when the appeal was heard, their grounds of appeal disputed that the original notice did not comply with the requirements of s86 because of the absence of the statement required by s86(3A) and that the notice was valid and effective."*
- 15 A similar situation exists in this case, I note from the Tribunal file that this issue was formally raised between the parties on 6 September 2012 and thereupon referred to the Tribunal for determination as a preliminary issue. There is no evidence that the employer has taken any action subsequent to becoming aware of this issue. The ability of the employer to revisit its termination of weekly payments remains.
- 16 Accordingly I determine that the worker by this s42 referral is able to place before the Tribunal the issue as to whether or not the subject s86(1)(c) medical certificate satisfies

the requirements of the Act to validate a termination of weekly payments. I also determine that there was nothing in the worker's conduct that justifies any bar or estoppel for her to have the Tribunal determine the issue as to the validity of the termination of weekly payments that has occurred.



**S. R. CAREY**  
**CHIEF COMMISSIONER**