

“But I don’t want to go” – a subjective belief of unlawfulness
cannot amount to a reasonable excuse
Hanel and Comcare [2022] AATA 261

Key Points

- A subjective belief alone, as to the unlawfulness of a Notice to undergo a medical examination, cannot amount to a reasonable excuse for the purpose of section 57(2) of the SRC Act.
- A determination made under section 57 of the SRC Act is not included within the listed sections which can be reviewed by the Tribunal.

Background

Mr Hanel filed two applications in the Administrative Appeals Tribunal for workers’ compensation pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act). The first application, filed on 4 September 2020, was in relation to a claim under section 14 of the SRC Act for a psychological condition. The second application filed on 19 February 2021, was in respect of medical treatment expenses under section 16 of the SRC Act.

Prior to filing his applications, the applicant attended an independent medical examination (IME) with Dr Martyn Ewer, psychiatrist, on 12 March 2020.

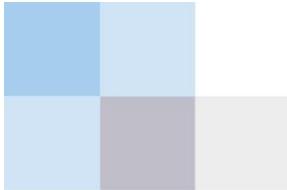
On 22 December 2020, Comcare advised Mr Hanel that an appointment had been made for a further IME with Dr Ewer. Mr Hanel failed to attend the scheduled appointment, as well as two additionally scheduled appointments. Notices pursuant to section 57(1)(b) of the SRC Act, with the details of the examination, were sent to Mr Hanel in respect of each appointment.

Mr Hanel advised Comcare that he did not believe a further IME was necessary and he challenged Comcare’s power to issue the section 57(1) Notices, given the matter was before the Tribunal.

On 21 July 2021, Comcare issued a Notice that suspended the applicant’s claims for compensation under section 57(2) of the SRC Act, for failing to attend the IME.

The Tribunal was required to consider:

- a) the validity of the Notices advising of the IMEs, and

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- b) whether Mr Hanel's rights to continue the Tribunal proceedings were suspended pursuant to s57(2) of the SRC Act.

The Law

Section 57 of the SRC Act provides that:

1. Where:

(a) a notice has been given to a relevant authority under section 53 in relation to an employee; or

(b) an employee has made a claim for compensation under section 54;

the relevant authority may require the employee to undergo an examination by one legally qualified medical practitioner nominated by the relevant authority.

2. Where an employee refuses or fails, without reasonable excuse, to undergo an examination, or in any way obstructs an examination, the employee's rights to compensation under this Act, and to institute or continue any proceedings under this Act in relation to compensation, are suspended until the examination takes place.

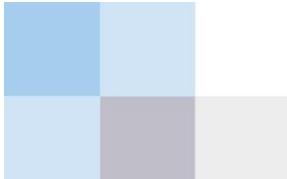
Conclusion

Mr Hanel argued that both the section 57(1) and section 57(2) suspension Notices were invalid.

The Tribunal considered that there was no impediment to Comcare requesting that Mr Hanel attend an IME at a time when proceedings are before the Tribunal and noted that there can be good reasons for that to occur, including when there has been a change in the medical condition, whether the employee has ceased to be incapacitated for work because of that medical condition, whether the condition has worsened, or whether having regard to further evidence a question may arise as to whether employment was the cause of the condition.

The Tribunal held that Mr Hanel's submission that he was not sufficiently advised about the reason for the request for the IME, lacked merit, particularly having regard to the communication between himself and Comcare over the period of time when three valid s 57(1) Notices advising of the IME were sent to him.

The Tribunal agreed with Comcare's contention that Mr Hanel's subjective belief alone as to the unlawfulness of a Notice to undergo an IME cannot amount to a reasonable excuse for the purpose of



s57(2) of the SRC Act. It was also noted that whether or not Mr Hanel had a reasonable excuse was a matter for a merits review which was not within the power of the Tribunal.

The Tribunal ultimately determined that the section 57(1) Notice dated 6 April 2021 directing him to attend an IME on Thursday, 6 May 2021 was a valid and lawful Notice. Mr Hanel failed to attend the medical appointment and as a consequence, the issuing of the Notice of suspension under section 57(2), was properly within the discretion of Comcare and validly and lawfully made. Accordingly, the Tribunal determined that Mr Hanel's rights to continue the Tribunal proceedings were suspended pursuant to s57(2) of the SRC Act.

Lessons Learnt

A subjective belief alone, as to the unlawfulness of a Notice to undergo an IME, cannot amount to a reasonable excuse for the purpose of s57(2) of the SRC Act.

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