

Stephen Tapper v Transpacific Industries Pty Ltd [2012] AATA 870 (11 December 2012)

Key Points

- Relevant period for calculating Normal Weekly Earnings for casual employees
- In this decision of Deputy President Nicholson the Tribunal considered various issues in relation to the proper calculation of a worker's Normal Weekly Earning (**NWE**), including which period should be considered the relevant period where a worker is employed on a casual basis, and whether certain allowances should be included

Background

Stephen Tapper is employed as a Level 3 casual vacuum operator at Transpacific Industries (**TPI**) Shutdown Business Unit at Wagerup. On 14 September 2011, Mr Tapper lodged a workers' compensation claim in respect of "*trauma to right ankle*". The injury was the result of an accident at a worksite on 6 August 2011 when Mr Tapper rolled his ankle on a hose after stepping down from a ladder onto a platform area. TPI accepted liability to pay compensation for medical expenses and incapacity for work in respect of "*sprained right ankle*", pursuant to sections 14, 16 and 19 of the *Safety, Rehabilitation and Compensation Act 1988 (Cth)* (**the SRC Act**).

Mr Tapper disputed a number of determinations made by TPI in respect of the calculation of his incapacity payments. In summary, those determinations calculated Mr Tapper's NWE using the relevant period of 12 weeks prior to the date of injury. As Mr Tapper is a casual employee, his hours were prone to significant variance from week to week, and Mr Tapper disputed the calculation of his NWE on the basis that the period over which it was calculated should have been shorter, to take into account the recent increase in his hours due to TPI winning a new contract. Mr Tapper also disputed that a number of allowances had been excluded from the calculation of his NWE, which he considered should have been included.

The Law

Pursuant to section 8 of the SRC Act, the formula for calculating a worker's NWE is as follows:

$$(NH \times RP) \div A$$

where:

"**NH**" is the average number of hours worked in each week by the [employee](#) in his or her employment during the relevant period;

"**RP**" is the [employee](#)'s average hourly ordinary time rate of pay during that period; and

"**A**" is the average amount of any allowance payable to the [employee](#) in each week in respect of his or her employment during the relevant period, other than an allowance payable in respect of special expenses incurred, or likely to be incurred, by the [employee](#) in respect of that employment.

Section 4 of the SRC Act provides that "normal weekly hours means the average number of hours (including hours of [overtime](#)) worked in each week by the [employee](#) during the [relevant period](#), as calculated for the purpose of applying the formula in section 8.

In addition, section 4 provides that the relevant period is the period calculated under section 9, and section 9 relevantly provides:

9. Relevant period

(1) For the purposes of calculating the normal weekly earnings of an employee before an injury, a reference in section 8 to the relevant period is, subject to this section, a reference to the latest period of 2 weeks before the date of the injury during which the employee was continuously employed by the Commonwealth or a licensed corporation.

...

(4) If, during any part of the period calculated under the preceding subsections, the employee's earnings were reduced, or the employee did not receive any earnings, because of absence from his or her employment for any reason, that part of that period shall be disregarded for the purposes of calculating the relevant period.

However, section 8(5) also provides that, in circumstances where the shortness of the relevant period would result in an NWE which does not represent the worker's earnings, the NWE can be calculated with reference to some other period, to be determined by the employer.

Mr Tapper gave evidence that TPI had recently won a new contract which created an abundance of work. Mr Tapper contended that this would have permanently increased the number of hours he was required to work per week. He suggested two calculations for his Normal Weekly Hours based on a 6 week period (including holidays and sick leave) for a 4 week period (excluding holidays and sick leave). Mr Tapper's NWE based on these hours was 42.5 hours and 43.3 hours respectively.

Mr Tapper's supervisor gave evidence that the new contract would not have affected Mr Tapper's weekly hours of work on a permanent basis. He stated that while there might have been a short term increase of work immediately following the winning of the new contract, it was TPI's practice to increase the workforce, rather than require the existing workers to undertake more hours.

TPI submitted two alternative relevant periods for the calculation of Mr Tapper's NWE. One was based on Mr Tapper's hours of work from the commencement of his employment with TPI, which

yielded the figure of 38.45 hours per week. The second removed the weeks when Mr Tapper was on holiday or sick, which produced a figure of 38.32.

Conclusion

The Tribunal was required to determine the relevant period for the purposes of calculating Mr Tapper's NWE. Notwithstanding TPI's recent winning of a new contract, the Tribunal determined that it was Mr Tapper's past record of earnings from the date of his injury which was relevant to the calculation of his NWE, not the earnings which he may have anticipated in the future, and took a favourable view to TPI's first calculation of 38.45, which was based on the whole period of Mr Tapper's employment with the company.

The Tribunal was also required to consider whether the allowances claimed by Mr Tapper, specifically, meal allowance, travel allowance, leading hand allowance and confined space allowance, should be included in the calculation of his NWE. Deputy President Nicholson considered the case of *Ragg and Military Rehabilitation and Compensation Commission [2012] AATA 18* which found that an allowance payable as compensation for money expended to meet the aspects of hardship arising from work constitutes a special expense. Where an allowance is paid as a reward for work or merit it will not be an expense of that character. Based on *Ragg*, The Tribunal found both meal and travel allowance to be special expenses properly excluded in the calculation of Mr Tapper's NWE. The Tribunal further found that leading hand allowance had already been included in the calculation of the Mr Tapper's NWE, where he had been performing the duties of a leading hand from time to time, and that confined space allowance was not paid to workers at the Wagerup and Pinjarra sites.

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