

**REVIEW OF DECISION - S.61A - OSH ACT  
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL**

**CITATION** : 2021 WAIRC 00139

**CORAM** : COMMISSIONER T B WALKINGTON

**HEARD** : THURSDAY, 27 AUGUST 2020

**DELIVERED** : THURSDAY, 20 MAY 2021

**FILE NO.** : OSHT 9 OF 2019

**BETWEEN** : MR DANNY RAWLINSON-SHELTON  
Applicant  
  
AND  
  
WORKSAFE  
Respondent

CatchWords : Reviewable decision - restricted asbestos licence - lawfully obtained  
experience - safe and proper manner - properly supervise and  
manage

Legislation : *Occupational Safety and Health Act 1984 (WA)*  
*Occupational Safety and Health Regulations 1996 (WA)*

Result : Decision of WorkSafe Commissioner Affirmed

**Representation:**  
Applicant : Mr P Mullally (as agent)  
Respondent : Ms C Stamp (of counsel) and Ms T Hollaway (of counsel)

**Case(s) referred to in reasons:**

*Waugh v Kippen* (1986) 160 CLR 156

*Shepherd v Murray* [2000] WASCA 281

*Reasons for Decision*

- 1 Mr Danny Rawlinson-Shelton (**Mr Shelton**) applied to the Occupational Safety and Health Tribunal (**Tribunal**) for a review of the WorkSafe Commissioner's decision to not grant him a restricted licence to remove non-friable asbestos. Mr Shelton seeks an order that the Tribunal substitute its decision for that of the WorkSafe Commissioner and he be granted a restricted licence to remove non-friable asbestos.
- 2 The WorkSafe Commissioner opposes the granting of a restricted licence to Mr Shelton on the grounds that he is not satisfied that Mr Shelton is able to undertake asbestos work involving non-friable asbestos in a safe and proper manner. WorkSafe Commissioner contends that Mr Shelton does not have the appropriate training and experience to properly supervise and manage asbestos work involving non-friable asbestos containing material done under the licence. The WorkSafe Commissioner submits that the Tribunal should affirm his decision to not grant Mr Shelton a restricted asbestos licence.

**Background**

- 3 On 10 September 2019, Mr Shelton applied to the WorkSafe Commissioner for a licence to carry out restricted asbestos removal work of more than 10 sqm of non-friable asbestos containing material. Mr Shelton's application included a statement of his experience in which he detailed his experience in four projects involving asbestos removal work.
- 4 On 26 September 2019, an officer of WorkSafe requested further information to consider the application. This information was required by 16 October 2019.
- 5 On 22 October 2019, the asbestos licence application form was revised adding greater detail and guidance on the requirement to demonstrate experience in planning and supervising asbestos removal work.
- 6 On 29 October 2019, an officer of WorkSafe contacted Mr Shelton and advised that his application had lapsed because he had not responded to the request for further information. Mr Shelton requested more time to provide the further information and was granted an extension until 5 November 2019. Mr Shelton was also provided with a copy of the updated application form.
- 7 On 4 November 2019, Mr Shelton provided information for three additional projects in his statement of experience using the updated application form.
- 8 On 29 November 2019, the WorkSafe Commissioner advised Mr Shelton in writing that he had formed a preliminary view to refuse his application and set out the reasons being the experience cited was not lawfully obtained and that he had not provided sufficient evidence that he was able to supervise and manage asbestos removal done under a licence. Mr Shelton was invited to provide further information to address the identified deficiencies.
- 9 On 11 December 2019, Mr Shelton responded and cited his 20 years' experience removing asbestos, the completion of a relevant training course, and advised of his view that the *Occupational Safety and Health Regulations 1996 (WA) (OSH Regulations)* do not refer to where or how experience is obtained.
- 10 On 23 December 2019, the WorkSafe Commissioner notified Mr Shelton of his decision to refuse his application for the reasons set out in his earlier correspondence and that he had formed the view that he was not satisfied Mr Shelton fully understands the regulatory requirements for safe asbestos removal.

## Principles

- 11 The use of asbestos and asbestos-containing material in construction and maintenance of plant and infrastructure is prohibited in Australia. Respirable asbestos fibres inhaled into a person's lungs cause the respiratory diseases mesothelioma and asbestosis. Until its prohibition in 2003 asbestos was used extensively in buildings and for insulation and a variety of different industries. Consequently, removal and disposal of asbestos is strictly controlled.
- 12 Hazards in the workplace are regulated by the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**) and matters concerning the licensing of persons to remove asbestos are contained in the regulations to this Act.
- 13 Section 60(1) of the OSH Act provides the Governor with the power to make regulations necessary or convenient to giving effect to the purposes of the OSH Act. Schedule 1 of the OSH Act provides the matters for which regulations can be made and includes the registration or licensing of any work, plant, process, substance or workplace and any person carrying out any kind of work by the WorkSafe Commissioner or any other prescribed person or authority. In addition, the regulations may prohibit the carrying on of prescribed activities at workplaces or the performance of prescribed work except by or under the supervision of persons with prescribed qualifications, training or experience.
- 14 OSH Regulations at Part 5 of Division 4 – Further requirements in relation to certain hazardous substances at Subdivision 1 – Asbestos, sets out specific duties and obligations in relation to asbestos-containing materials. The OSH Regulations specify two types of asbestos containing materials:
  - friable asbestos-containing materials are those which are asbestos fibres or fibrils that can be broken up and crushed by hand; and
  - non-friable asbestos is asbestos that is normally contained in something else such as asbestos cement, adhesives, embedded in gaskets and vinyl floor tiles. The hazard level of non-friable asbestos is generally low, except in cases where the material is subject to aggressive treatment such as cutting or grinding with power tools or drilling holes through products containing asbestos.
- 15 In 2010 the legislative scheme regulating the removal of asbestos was amended to reflect the different hazard levels of the two types of asbestos. Prior to 2010 a person was required to be licenced to remove asbestos-containing material. Since 2010 the removal of friable asbestos may only be undertaken by an unrestricted licensed removalist. Removal of non-friable asbestos over 10 sqm may only be undertaken by a person who has a restricted licence.
- 16 Regulation 5.45(2A) provides the requirement to be licensed and imposes a duty on persons performing the removal of non-friable asbestos-containing material over 10 sqm to perform this work only where they are licensed to so do or are operating under the employment or other engagement of a person who holds a licence.

### **5.45. Asbestos removal work, duties as to**

...

- (2A) Subject to regulation 5.53A(5), a person who, at a workplace, is an employer, the main contractor, a self-employed person or the person having control of the workplace must ensure that any asbestos work at the workplace involving more than 10m<sup>2</sup> of non-friable asbestos-containing material –

- (a) Is done by –

- (i) the holder of an unrestricted licence or a restricted licence; or
  - (ii) a person employed or otherwise engaged by the holder of an unrestricted licence or a restricted licence;
- and
- (b) is done in accordance with –
    - (i) Part 9 of the *Code of Practice for the Safe Removal of Asbestos 2<sup>nd</sup> Edition* [NOHSC: 2002 (2005)]; and
    - (ii) the unrestricted licence or the restricted licence, as the case requires.
- 17 Regulation 5.45(2A) requires licence holders to ensure that any work completed under their licence is done so in accordance with the *Code of Practice for the Safe Removal of Asbestos 2<sup>nd</sup> Edition* [NOHSC: 2002 (2005)] (**CoP**). Failure to do so is an offence and attracts a penalty.
- 18 The Supreme Court of Western Australia in *Shepherd v Murray* [2000] WASCA 281 has held that the objects of the OSH Act are to secure the safety of persons at the workplace. Consistent with *Waugh v Kippen* (1986) 160 CLR 156 an interpretation which favours a broad construction, and the purpose or objects of an Act should be preferred in the case of workplace safety and health law.
- 19 The purpose of granting a restricted asbestos licence, in keeping with the objects of the OSH Act, is to authorise satisfactorily competent and experienced individuals to perform asbestos removal work in accordance with the OSH Act, OSH Regulations, published Codes of Practices and Australian Standards.

### Granting a Licence

- 20 The WorkSafe Commissioner may grant a restricted asbestos licence, pursuant to reg 5.45B:

#### 5.45B. Restricted asbestos licence, grant of

After receiving an application under regulation 5.44(1)(b) the Commissioner may grant a restricted asbestos licence if the Commissioner is satisfied that —

- (a) if the applicant is an individual –
    - (i) the applicant is able to do asbestos work involving non-friable asbestos-containing material in a safe and proper manner; and
    - (ii) the applicant has the training and experience to properly supervise and manage asbestos work involving non-friable asbestos-containing material done under the licence.
- 21 The WorkSafe Commissioner’s power to grant a restricted asbestos licence under reg 5.45B is discretionary. It requires the assessment of an applicant’s ability to undertake the removal of asbestos in a safe and proper manner and in accordance with the CoP and the applicant’s ability to properly supervise and manage asbestos work. The Worksafe Commissioner must be satisfied of the applicant’s abilities. The Macquarie Dictionary defines ‘satisfy’ in this context as ‘to convince’; similarly, the Shorter Oxford Dictionary defines ‘satisfy’ as to furnish with sufficient proof or information; to set free from doubt or uncertainty; to convince.

### Review of WorkSafe Commissioner’s Decision by the Tribunal

- 22 In respect of this review application before the Tribunal, section 61A of the OSH Act provides:

#### 61A. Review of Commissioner’s decisions under the regulations

- (1) In this section –
- reviewable decision* means –
- (a) a decision made under the regulations by the Commissioner himself or herself; and
  - (b) a determination of the Commissioner on the review, under the regulations, of a decision made under the regulations by a person other than the Commissioner, whether or not the decision was made by that person as a delegate of the Commissioner,
- but does not include a decision made by a person acting as a delegate of the Commissioner.
- (2) A person who is not satisfied with a reviewable decision may, within 14 days of receiving notice of the decision, refer the decision to the Tribunal for review.
- (3) On reference of a decision under subsection (2), the Tribunal is to inquire into the circumstances relevant to the decision and may –
- (a) affirm the decision; or
  - (b) set aside the decision; or
  - (c) substitute for the decision any decision that the Tribunal considers the Commissioner should have made in the first instance.
- (4) Pending the decision on a reference under this section, the operation of the reviewable decision is to continue, subject to any decision to the contrary made by the Tribunal.

### **Nature of the Review**

- 23 The nature of the review under section 61A(3) of the OSH Act conducted by the Tribunal is by way of a rehearing. The powers of the Tribunal are exercisable without having to find error in a decision made by the WorkSafe Commissioner and having regard to material that was not before the WorkSafe Commissioner.
- 24 The Tribunal is required to ‘inquire into the circumstances relevant to the decision’ which requires the Tribunal to inquire for itself the circumstances giving rise to the decision and the validity of the conclusions reached.
- 25 Having inquired into the circumstances, it is then for the Tribunal to determine whether the decision can be affirmed, set aside, or substituted for another decision that the Tribunal considers the WorkSafe Commissioner should have made in the first instance. The Tribunal must approach the facts and circumstances as found by it on its inquiry as if it were determining whether, on those facts and circumstances, it could reasonably reach the decision of the WorkSafe Commissioner to not grant the licence, having regard also to the reasons and matters set out in the decision.
- 26 Accordingly, Mr Shelton must satisfy the Tribunal that, on the evidence and information before it, it would be appropriate to grant the licence. Mr Shelton must demonstrate recent and relevant experience in performing the removal of asbestos and the necessary training and experience in supervising and managing asbestos work performed under a licence. The Tribunal must be convinced that on the evidence and information before it that Mr Shelton is

able to safely and properly do asbestos work involving non-friable asbestos. The Tribunal must also be convinced that on the evidence and information before it Mr Shelton has the training and experience to properly supervise and manage asbestos work involving non-friable asbestos-containing material done under a licence.

### Questions to Be Decided

- 27 The matter to be determined is whether I ought:
- (a) affirm the decision; or
  - (b) set aside the decision; or
  - (c) substitute for the decision another decision that I consider the WorkSafe Commissioner should have made.
- 28 To set aside the WorkSafe Commissioner's decision and substitute another decision to grant a licence I must be satisfied, that is I must be convinced on the evidence and information before me, that Mr Shelton he is able to undertake, supervise and manage asbestos work involving non-friable asbestos containing material in a safe and proper manner.

### Background

- 29 Mr Shelton has run his own construction and landscaping business, Lasting Impressions Construction and Landscaping, since 2006. Prior to this Mr Shelton worked for two employers and has gained a total of over 20 years' experience in removing asbestos.
- 30 Mr Shelton contends that the requirement for a licence was not in effect until 2010 and prior to then he had undertaken asbestos removal, properly wrapping and disposing of the asbestos items. Initially he undertook this work while working in his father's business and then in his own business. The asbestos removal work usually concerned fencing.
- 31 Mr Shelton contends that his overall experience during the 20 years including his work involving removal of asbestos under 10 sqm should be considered and qualify for the issuance of a licence.
- 32 Mr Shelton gave evidence that until recently, he was unaware of the regulatory requirement to hold an asbestos licence and that he was completely unaware of the change in regulations made in 2010. In August 2019, Mr Shelton was prompted to contact WorkSafe after he was asked by a company if he was able to do reports for properties and his considerations of obtaining a building licence. An officer of WorkSafe advised him a licence was required and he would need to undertake training and submit an application.
- 33 Mr Shelton completed the Restricted Asbestos Removal Licence (WSRAL001) WorkSafe (WA) Approved training course in late August 2019.
- 34 In his initial application for a licence dated 2 September 2019, Mr Shelton provided information for four different projects involving fence sheets, wall sheets and eaves sheets. The dates of the projects were not provided and were undertaken by Mr Shelton as project manager in his own business. Details of a person who could verify the experience were not provided.
- 35 On 26 September 2019, an officer of WorkSafe advised Mr Shelton that his statement of experience submitted was insufficient and required greater detail including information about:
1. amount and quantity of non-friable (bonded) asbestos removed in sqm;

2. details of all the projects worked on i.e. the address, project name (if applicable), home land etc;
3. nominated persons role in detail, for example if you were involved in the planning and methodology of the removal, or if you supervised the project etc;
4. restricted asbestos licence number of employers worked under.

A template setting out the required details was provided to Mr Shelton.

- 36 Mr Shelton provided details of a further three projects. The addresses of two of the projects submitted were the same as the projects initially submitted. As such Mr Shelton provided information for five projects.
- 37 Of the five jobs submitted as part of the Statement of Experience, none were completed under the employment of a restricted asbestos licence holder. On 29 November 2019, the WorkSafe Commissioner notified Mr Shelton in writing that this experience would not be considered because it was not obtained lawfully. Mr Shelton was invited to provide further examples of experience under supervision of a licence holder. On 23 December 2019, the WorkSafe Commissioner notified Mr Shelton that his application was refused.
- 38 Mr Shelton contends that his 20 years of experience, including projects of less than 10 sqm, of safely removing and disposing of asbestos ought to be sufficient to demonstrate he can safely and properly remove asbestos. In addition, Mr Shelton says that the OSH Regulations do not prescribe where or how the necessary experience is obtained.
- 39 In his submissions Mr Shelton contends in his evidence, that he has been safely removing asbestos for 20 years, along with his description of how he removes and disposes of asbestos, is sufficient for this Tribunal to substitute a decision to grant a licence and revoke the WorkSafe Commissioner's decision.
- 40 Mr Shelton submits that the legislation and regulations do not prevent the WorkSafe Commissioner, and this Tribunal, from considering experience gained by Mr Shelton not under a licence. I find that the long-established public policy principle that no person should benefit from their wrongdoing applies in this matter. The law requires that the person undertaking the removal of non-friable asbestos exceeding 10 sqm be licenced or to be supervised by a person who is licenced. Accordingly, the experience gained by Mr Shelton contrary to the law will not be considered by the Tribunal. Mr Shelton has not provided details of any projects in which he undertook work involving asbestos removal under the supervision of a person with a licence. Therefore, I do not have any experience to assess. A broad interpretation of the law does not mean that I ought to consider statements of generality with little evidence and detail to substantiate the experience claimed. I find that there is no basis to revoke the WorkSafe Commissioner's decision and conclude that his decision ought to be affirmed.

### **Experience Gained in Projects Under 10 sqm**

- 41 Mr Shelton submits that he may also rely on projects under 10 sqm. Mr Shelton did not provide information of any projects or experience to the Tribunal of any projects under 10 sqm. In the absence of details of any projects under 10 sqm, I am unable to substantiate the experience and assess its compliance with the legislation and CoP. I find that there is no basis to revoke the WorkSafe Commissioner's decision and conclude that his decision ought to be affirmed.

### **Supervision and Management**

- 42 Mr Shelton did not provide any details of any work or projects that demonstrated he has the training and experience to properly supervise and manage asbestos work involving non-friable asbestos-containing material done under a licence. Mr Shelton did not provide any examples of his work involving planning for the removal of asbestos, air monitoring and decontamination processes.
- 43 In the absence of relevant details of any work or projects I am unable to substantiate Mr Shelton's experience in properly supervising and managing asbestos work and assess its compliance with the requirements of the legislation. I find that there is no basis to revoke the WorkSafe Commissioner's decision and conclude that his decision ought to be affirmed.

### **Safely and Properly**

- 44 Mr Shelton submits that he has experience in removing asbestos safely and properly gained during the previous 20 years. The safe and proper removal of asbestos is regulated by a scheme of legislation, regulations, and codes of practice. A knowledge of the requirements of the scheme of regulations concerning the removal of asbestos is necessary to be able to maintain that this task is undertaken safely and properly. One of those requirements is for a person removing non-friable asbestos exceeding 10 sqm to be licenced or to be supervised by a person who is licenced. Mr Shelton gave evidence that he had no knowledge of this requirement until August 2019. At least up until that time Mr Shelton had removed asbestos contrary to the law. Prior to this, Mr Shelton was clearly aware of the existence of licensing for asbestos removal because he gave evidence that his website stated that he was licenced to remove asbestos. Mr Shelton submits that on becoming aware of the requirement for a licence, he removed the website completely as he was not able to access the site to modify its contents. (I would note the Facebook page for Mr Shelton's business, Lasting Impressions WA, continues to state that it is licensed for asbestos removal in the 'About' section, albeit the most recent post was in 2018.) Mr Shelton submits that his knowledge of the OSH Regulations and the requirement of the regulations is not a relevant consideration. I cannot conclude that Mr Shelton is able to safely and properly undertake or supervise asbestos removal when he is either ignorant of the regulations and does not understand the legal requirements or has knowingly acted contrary to the legal requirements.

### **Conclusion**

- 45 On the information and evidence before me I am not satisfied that Mr Shelton is able to meet the requirements of the OSH Regulations and do asbestos work involving non-friable asbestos containing material in a safe and proper manner. In addition, on the information and evidence before me I am not satisfied that Mr Shelton has the training and experience to properly supervise and manage asbestos work involving non-friable asbestos-containing material done under licence. Therefore, I find that the WorkSafe Commissioner's decision ought to be affirmed.