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Workers' Compensation Case Update – s61

Amana Living v Soliven [2013] WADC 118 (23 July 2013)

Hawker Pacific Ltd v Lang [2013] WADC 117 (29 July 2013)

These recent decisions involved separate appeals from decision of the WA Workers' Compensation Arbitration Service Arbitrator to the District Court of Western Australia.

Both decisions deal with s61 of the *Workers' Compensation & Injury Management Act 1981* and highlight the difficulties in calculating the time limit for bringing an application for Arbitration under s61.

Section 61

Section 61 of the Act provides a vehicle for employers to reduce or discontinue a worker's weekly payments of compensation where there is medical certification and the prescribed (Form 5) notice has been served on the worker. A worker may dispute the notice by applying for "an order of an arbitrator "within 21 days.

The issue which arises under s61, is whether it is sufficient for a worker to merely apply for *conciliation* within 21 days, or whether the application must have also been referred to arbitration within this time period.

Amana Living v Soliven

In *Amana,* the employer sought to discontinue or reduce the worker's weekly payments of compensation pursuant to s61 of the Act. The worker was served with the employer's Form 5 notice on 8 November 2012. The worker filed an application for conciliation on 22 November 2012. The worker filed an application for arbitration on 12 January 2013.

At arbitration, the employer submitted that the worker had failed to file an application for arbitration within the 21-day time limit. The arbitrator concluded that the application had been made within time. The arbitrator found that the 21-day time limit is met if the dispute is accepted for conciliation within 21 days.

The employer applied to the District Court for leave to appeal against the arbitrator's decision. The

employer argued that compliance with s61 did not merely require an application for conciliation, but required a worker to apply for *arbitration* within 21 days. The appeal was dismissed by the District Court. His Honour found that the arbitrator's construction of s61 was correct and in keeping with the express purposes of the Act and provided certainty as to the time limit under s61.

Hawker Pacific Ltd v Lang

The District Court had a further opportunity to consider the operation of the time limit imposed by s61 in *Hawker.* On 8 March 2012 the employer issued a Form 5 Notice to discontinue the worker's weekly payments. By application dated 27 March 2012 the worker applied for conciliation. The application was recorded as filed on 3 April 2012.

At arbitration, the employer argued that the worker's application was out of time. The arbitrator dismissed the employer's argument. Ultimately, on 16 November 2012, the application proceeded to arbitration and the arbitrator dismissed the worker's application on its merits.

The employer sought leave to appeal to the District Court against the decision of the arbitrator that the worker's application under s61 was lodged within time. The District Court dismissed the employer's appeal on the basis that the employer was ultimately successful at Arbitration.

His Honour further observed however, in obiter dicta, that there were difficulties in calculating the time limit for bringing an application for Arbitration under s61. His Honour noted that it would be very difficult for a worker to bring an application for Arbitration within 28 days. Whilst reg7(3) and rule 23 attempted to expand on this time limit, this caused difficulties due to inconsistency between the rules and the statutory provision. His Honour declined to ultimately determine these issues of law however.

Conclusion

As the law currently stands, following *Amana Living,* a worker will comply with the time limit imposed by s61 of the Act by filing an application for Conciliation within 21 days of service of the Form 5 Notice. A worker must also file an application for Arbitration within 28 days of the date of issue of the Conciliation certificate (rule 23).

The subsequent decision of *Hawker,* however, raises further doubts as to the correct construction of s61 and opens the possibility of further appeals on this issue.