

**REVIEW OF IMPROVEMENT NOTICE - S.51A - OSH ACT
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00996

CORAM : COMMISSIONER T B WALKINGTON

HEARD : WEDNESDAY, 16 DECEMBER 2020

DELIVERED : FRIDAY, 18 DECEMBER 2020

FILE NO. : OSHT 12 OF 2020

BETWEEN : DENAYA NOMINEES PTY LTD
Applicant

AND

WORKSAFE WESTERN AUSTRALIA
Respondent

CatchWords : Review of Worksafe Western Australia Commissioner's decision -
Review of Improvement Notice - Referral to Tribunal made outside
of prescribed time limit - Principles applied - Application dismissed

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

Result : Application dismissed

Representation:

Applicant : Mr S King

Respondent : Mr J Lloyd (of counsel)

Case(s) referred to in reasons:

WorkSafe Western Australia Commissioner v Anthony and Sons Pty Ltd t/a Oceanic Cruises
[2006] WAIRC 05438; (2006) 86 WAIG 2950

Reasons for Decision

- 1 On 30 October 2020 Denaya Nominees Pty Ltd referred this matter to the to the Occupational Safety and Health Tribunal (**Tribunal**) pursuant to s 51A of the *Occupational Safety and Health Act 1984 (OSH Act)*.
- 2 A Worksafe Inspector had issued the Improvement Notice 42500834 on 20 July 2020 to Denaya Nominees Pty Ltd. A request to the Worksafe Commissioner to review the Improvement Notice 42500834 was submitted on 21 August 2020.
- 3 On 20 October 2020 Denaya Nominees Pty Ltd received notification from the Worksafe Commissioner that he had considered the submissions made in support of the review and had decided to affirm the Improvement Notice 42500834 noting that Denaya Nominees Pty Ltd had complied with the Improvement Notice 42500834 and acknowledging the cooperation of Denaya Nominees Pty Ltd.
- 4 Denaya Nominees Pty Ltd now seeks a review of the Worksafe Commissioner's decision to affirm Improvement Notice 42500834.
- 5 The application was listed for a directions hearing before the Tribunal on 16 December 2020.
- 6 On 3 December 2020 the Worksafe Commissioner wrote to the Tribunal to notify that he would be seeking an order to dismiss the matter as Denaya Nominees Pty Ltd had not referred the matter to the Tribunal within the time limit specified in s 51A(2) of the OSH Act. The Worksafe Commissioner cited *WorkSafe Western Australia Commissioner v Anthony and Sons Pty Ltd t/a Oceanic Cruises* [2006] WAIRC 05438; (2006) 86 WAIG 2950 as authority and in support of his submissions. Copies of the correspondence and authority were emailed to Denaya Nominees Pty Ltd.
- 7 At the conclusion of the hearing the Tribunal dismissed the application for the reasons given extemporaneously at the hearing and set out in writing outlined below.

Principles

- 8 Section 51A of the OSH Act provides for a review of a decision by the Worksafe Commissioner concerning Improvement Notices and Prohibition Notices and includes a provision that a referral for review to the Tribunal must be made within seven days:

51A. Review of notices by Tribunal

- (1) A person issued with notice of a decision under section 51(6) may, if not satisfied with the Commissioner's decision, refer the matter in accordance with subsection (2) to the Tribunal for further review.
- (2) A reference under subsection (1) may be made within 7 days of the issue of the notice under section 51(6).
- (3) A review of a decision made under section 51 shall be in the nature of a rehearing.
- (4) The Tribunal shall act as quickly as is practicable in determining a matter referred under this section.
- (5) On a reference under subsection (1) the Tribunal shall inquire into the circumstances relating to the notice and may —
 - (a) affirm the decision of the Commissioner; or

- (b) affirm the decision of the Commissioner with such modifications as seem appropriate; or
- (c) revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,

and the notice shall have effect or, as the case may be, cease to have effect accordingly.

[(6) *deleted*]

- (7) Pending the decision on a reference under this section, irrespective of the decision of the Commissioner under section 51, the operation of the notice in respect of which the reference is made shall —
 - (a) in the case of an improvement notice, be suspended; and
 - (b) in the case of a prohibition notice, continue, subject to any decision to the contrary made by the Tribunal.

- 9 The Full Bench of the Commission in *WorkSafe Western Australia Commissioner v Anthony & Sons Pty Ltd t/a Oceanic Cruises* (2955) concluded that the Tribunal does not have the power to extend the seven day limit observing:

Although s51A(2) of *the OSH Act* is couched in permissive terms, in my opinion it provides for a limited entitlement. It is an entitlement to make a reference limited, with respect to time, to taking this action within the specified 7 day period. Put slightly differently the subsection does not provide for any entitlement upon a person to refer a matter to the Tribunal under s51A(1) of *the OSH Act* outside the 7 day period specified in s51A(2). Accordingly as a matter “under” s51A(1) may only be referred to the Tribunal “for determination” if the reference is made within the 7 day time period specified in s51A(2) of *the OSH Act*, the Tribunal does not have jurisdiction under s51G to hear and determine a matter of this type referred to it outside this time period. As a matter of statutory construction therefore the making of a reference within the 7 day time period is an “essential preliminary to the exercise of the [Tribunal’s] jurisdiction”. (See *Aurion Gold v Bilos* [2004] WASCA 270 per McLure J at [28]; and see also *Berowora Holdings Pty Ltd v Gordon* (2006) 80 ALJR 1214 at [20]).

Application of the Principles to this Matter

- 10 Denaya Nominees Pty Ltd submitted that it had advised officers of the Department of Mines, Industry Regulation and Safety of its intention to seek a review of the Worksafe Commissioner’s decision to affirm the notice within the seven days. Denaya Nominees Pty Ltd had also advised that the principle and addressee for relevant correspondence and emails was on annual leave for part of the period of the seven days.
- 11 It is not in dispute that Denaya Nominees Pty Ltd had sought information from an officer of the Department of Mines, Industry Regulation and Safety concerning the process for a further review of the Worksafe Commissioner’s decision by the Tribunal and that this information had been provided on 29 October 2020, which was outside of the timeframe for referral of this matter. Denaya Nominees Pty Ltd filed its referral with the Tribunal the following day. It ought be noted that the original Improvement Notice 42500834 issued on 20 July 2020 sets out the process, including the seven day time limit, for seeking a review of the Worksafe Commissioner’s decision.
- 12 Denaya Nominees Pty Ltd’s submissions concern the reasons for the delay. However, considering the Full Bench’s conclusion in *WorkSafe Western Australia Commissioner v Anthony & Sons Pty Ltd t/a Oceanic Cruises* that the Tribunal does not have the power to

extend the time limit, it follows that the Tribunal does not have any discretion to consider the reasons for the delay to extend the time limit.

- 13 Accordingly, there being no dispute as to the facts that the referral has been made outside of the seven day time limit prescribed by s 51A(2) of the OSH Act, the Tribunal must dismiss this matter.