WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1803/17

BEFORE: S. Peckover: Vice-Chair

HEARING: June 9, 2017 at Toronto
Written

DATE OF DECISION: June 20, 2017

NEUTRAL CITATION: 2017 ONWSIAT 1887

DECISION(S) UNDER APPEAL: WSIB Appeals Registrar (AR) decision dated June 30, 2016

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not participating

Interpreter: Not Required

REASONS

(i) Introduction

[1] The worker appeals a decision of the AR dated June 30, 2016, which concluded that he was not entitled to time extensions with respect to decision letters dated January 24, 2012 and June 18, 2012. In the January 24, 2012 decision letter, the Occupational Therapist reduced the worker's Personal Care Allowance (PCA) to $1,050.42 per month, based on a perceived need for general supervision of 1,380 minutes per week. The June 18, 2012 decision letter further reduced the worker's PCA to $593.72 per month, based on a perceived need for general supervision of 780 minutes per week.

[2] In a letter dated March 29, 2016, Mr. Fink provided a Notice of Intent to Object to a number of decisions in the file, including the January 24, 2012 and June 18, 2012 decision letters. In a letter dated March 30, 2016, the Case Manager advised Mr. Fink that the time limit had not been met in these two decisions, and therefore, he would not be able to send these issues for further review. Mr. Fink then requested a time extension with respect to these two decisions.

[3] At the Appeals Services Division, in a decision dated June 30, 2016, the AR noted that both decision letters clearly advised the worker that if he did not agree with the decision, he could call his Case Manager. The letter also noted that the Act imposed time limits on appeals, and in his case, he was required to notify the Board in writing of his objection, by July 24, 2012 with respect to the January 24, 2012 decision letter, and by December 18, 2012 with respect to the June 18, 2012 decision letter. Both decisions had been explained verbally to the worker's mother, as noted in Memo No. 42 dated January 5, 2012 and Memo No. 75 dated June 19, 2012, and in both cases, she had indicated that she understood the decisions. There was no indication that the worker or his mother did not understand the decisions or did not agree with them, verbally or otherwise. No disagreement with the decisions was raised until three years later, when the worker sought formal representation. Further, the worker's mother had been in constant contact with the Case Manager over the period from January to December 2012, discussing various issues, including travel expenses, hearing aids, desks and home modifications. She had clearly identified herself as acting on behalf of her son, and demonstrated the ability to understand the decisions and formulate the necessary paperwork required throughout the early stages of the claim. A time extension therefore was not in order.

[4] The worker appeals from this decision.

[5] In his submissions dated March 7, 2017, Mr. Fink stated that he relies on his submissions dated April 27, 2016 for the ARO hearing. In addition, he relies on the psychiatric report authored by psychiatrist Dr. Jeffries dated August 3, 2016, which indicated that the worker is marginally functional, and was not mentally capable of conducting his affairs. He enclosed *Decision Nos. 366/10*, *2310/15*, and *480/11* in support of his submissions, and argued that those Decisions had thoroughly relied on Dr. Jeffries' opinions on psychological issues, and his opinions should be given great weight. He noted that the worker's mother had written a letter which the worker had signed, seeking access to the Board file, as she wanted to understand what the Board was doing for her son. He enclosed an affidavit from the mother indicating that she was unable to finish reading the file, and did not really understand the contents and meaning of the materials in the file. Further, the worker's mother was not acting as the representative, and there was no-one to safeguard the worker's legal interests.

(ii) Issues

[6] The issue on this application is whether the worker's request to extend the time to appeal should be granted.

(iii) Law and policy

[7] On January 1, 1998, the *Workplace Safety & Insurance Act,* 1997 ("the WSIA") came into effect. Section 120(1) of the WSIA applies to appeals of Board decisions, within the Board. It states:

> **120(1)** A worker, survivor employer, parent or other person acting in the role of a parent under subsection 48(20) or beneficiary designated by the worker under subsection 45(9) who objects to a decision of the Board shall file a notice of objection with the Board,
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> (a) in the case of a decision concerning return to work or a labour market re-entry plan, within 30 days after the decision is made or within such longer period as the Board may permit; and
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> (b) in any other case, within six months after the decision is made or within such longer period as the Board may permit.

[8] Under section 126 of the WSIA, the Board has identified *Operational Policy Manual* (OPM) Document No. 11-01-02 "Decision-Making, OPM Document No. 11-01-03 "Merits and Justice" and OPM Document No. 11-01-03 "Benefit of Doubt."

[9] The Board has provided criteria to be applied in determining time limit extensions, in a document entitled "PRACTICE GUIDELINE: Time limit to Object" The document includes a section entitled "Criteria for Extending Time Limit to Object" which sets out criteria the Board applies in determining time limit extensions at the Board level. These criteria were included in the case materials. The document states, in part:

> **Criteria for Extending Time Limit to Object**
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> Criteria to be considered for objections beyond the statutory time limit include:
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> - Whether there was actual notice of the time limit. This acknowledges that as of January 1, 1998, decisions specifically refer to the time limits but prior to that date, they do not;
> - Serious health problems (experienced by the party or the party's immediate family) or the party leaving the province/country due to the ill health or death of a family member;
> - An organic or non-organic condition that prevents the worker from understanding the time limit and/or meeting the time limit;
> - Whether there are other issues in the appeal that were appealed within the time limit which are so intertwined that the issue being objected to within the time limit cannot reasonably be addressed without waiving the time limit to appeal on the closely related issue.
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> All decisions to extend time limits will be based on the merits and justice of the case.

(iv) Analysis

[10] The following excerpt from ***Decision No. 669/14E*** outlines the Tribunal's current position with respect to appeal deadlines:

> [5] Since January 1, 1998, all decisions emanating from the Board have made specific reference to the time limits in effect. All Tribunal correspondence similarly makes

> reference to the six month time limit. While some leniency was applied in the early transition days when the time limits came into effect and people were not as knowledgeable as they currently are, it is now generally presumed that practitioners in the area of compensation are familiar with both the time limits and the consequences of not meeting them. Accordingly, the presumption at this point should be that compelling reasons must exist not to enforce the time limits. There cannot be a presumption that an extension should be granted as a matter of course.

[11] The purpose and gravity of statutory time limits has been summarized in Tribunal ***Decision No. 972/99E:***

> Time limits are often in legislation for a number of reasons, including the need to ensure appeals are brought in a timely fashion, while the evidence, including the memories of witnesses Involved in the case are fresh, to prevent prejudice to the other parties who may act on the basis of the prior decision, and to generally establish finality and certainty in the appeal system. The Tribunal's decision to extend time therefore must be exercised with a view to also ensuring the effective and consistent application of this provision.
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> …
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> Mr. King has also submitted such a brief delay [it was four days] should not be a bar to proceeding with an appeal. I am not persuaded that this leniency should be applied as a matter of course. The statutory time limit has been in effect for over 15 years and I find that, in general, if an appeal could be filed one or two days after the expiry of the statutory time limit, it could have been filed two days before the deadline. The time limit is not an optional requirement: it was deliberately inserted in the legislation some ten years ago, signalling a profound change in the manner in which appeals can proceed. The gravity of the statutory time limit is not acknowledged if the parties do not abide by it when it is feasible to do so. Even where the delay is minimal there should be consideration given as to whether there was any rational reason for the failure to comply with the deadline. A real difficulty with allowing a few day's grace on a routine basis is that there will still need to be a cut off point (whether one day, or 5 days, or 7 days, or whatever period of time is chosen), beyond which compelling reasons will need to be provided for the Tribunal to grant a time extension. In my view, the cut-off point might reasonably be seen to be the statutory time limit itself. Any other point for a general granting of a time extension could be perceived as arbitrary compared to the one set out in the legislation. There are a number of Tribunal decisions adopting this view and I find them to be persuasive.
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> [Emphasis added]

[12] Thus, since the statutory deadline has been in place for 19 years now, there must be compelling reasons not to enforce the deadline, and grant an extension.

[13] In the case before me, I find that such compelling reasons do exist.

[14] The worker was injured on May 11, 2011, while working as a grocery clerk. He stepped off the elevator platform into the elevator shaft, and fell about 25 feet. He was severely injured in the fall, in which he fractured his skull, collarbone, and several ribs, and has a 39% Non-Economic Loss (NEL) award for permanent impairments resulting from an acquired brain injury, traumatic hearing loss to one ear, venous insufficiency, a low back strain, and a cervical spine strain. He was in several different medical units / facilities in the course of his recuperation, following which he was released home to the care of his parents.

[15] I acknowledge Mr. Fink's submissions that the worker had no-one to safeguard his legal interests, and that Dr. Jeffries' psychiatric report established that the worker was not capable of handling his own affairs. Having reviewed the medical reporting, I agree that the worker, with his closed-head injury and resulting memory and concentration difficulties, was not capable of

handling his own affairs. I note the contents of Board Memo No, 4 dated June 6, 2011. The first portion of that memo reads as follows:

> Spoke to [the worker's mother] today.
>
> She advised she has a letter from hospital advising that her son is unable to act on his own behalf and his parents are representing him in all matters.

[16] Thus, the worker's parents – and, in the case of the Board claim, his mother – were handling the worker's affairs, and had legal authority to do so. In this regard, I note that the Home Safety Assessment dated August 22, 2011 indicates as follows in the psychosocial portion of the report:

> **Psychosocial**
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> [The worker] was pleasant and cooperative during the in-home assessment; he participated in all assessment tasks in a cooperative manner. The client reported feeling bored and sad regarding his current condition. [The worker's] mother reported that her son continues to be nervous and easily frightened. She is experiencing increase [sic] caregiver stress as she is required to take over her son's care since his discharged [sic]. She attempts to involve him in simple daily housekeeping activities, but he continues to require repetitive instructions, frequent supervision and monitoring in order to complete simple tasks.

[17] In another part of that report, it is stated that the worker's mother works part-time as a janitor in a local school, working 4 -5 hours per day, Monday to Friday. She also served in an administrative capacity in her husband's business. The Case Record reveals that she receives the worker's Personal Care Allowance payment for taking care of him, and that she accompanies him on his many medical visits. There were times when she had to take time off work to do so.

[18] I also note that there is a letter on file dated May 21, 2013, addressed to Dr. Marino, which indicates that the Board was sending the worker's mother for a psychological assessment and treatment. It states as follows:

> …As part of the Serious Injury Services [the worker's] mother, [name], is entitled to a maximum of 10 sessions of psychological support to assist with adjustment to his injury and it's [sic] sequelae and she is consequently referred to your service.

[19] While I do not see the resulting assessment or progress reports on file, it is clear that the worker's mother was having difficulty coping with and adjusting to the changes in her son as a result of the workplace accident. It is also clear from the Case Record that she was unfamiliar with the Workers Compensation system, and required assistance, especially in the beginning, with completing forms and understanding what she was being told.

[20] Given all of the above, I find that the worker's mother, who was his legal representative / guardian according to the file, had difficulty understanding the decisions which she was receiving, and also had difficulty adjusting to the additional needs of her son post-accident, and balancing them with the other demands on her time. Reading between the lines, I have the sense that she was psychologically overwhelmed by the situation. Given all of that, and in the context of a lack of familiarity with the compensation system, I find that a time extension therefore is in order for both decision letters. The appeal therefore is allowed with respect to both decisions.

DISPOSITION

[21] The application is allowed. The worker is granted an extension of time under section 120, and the appeal may be heard by The Board.

DATED: June 20, 2017

SIGNED: S. Peckover