

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker* filed a claim with the Board dated June 26, 2006 indicating that he had suffered an injury to his neck/shoulder over a period of time. He also claimed that he had developed stress (breakdown).

A Board Adjudicator, in a decision dated August 14, 2006, determined that the Worker did not suffer a personal injury by accident arising out of and in the course of employment as his neck/shoulder condition could not be related to a work-place injury. She also found that the Worker's stress was not compensable as it was not the result of a traumatic event.

This decision was confirmed on appeal to the Hearing Officer. The Worker seeks to appeal the Hearing Officer decision dated October 31, 2006. He seeks a finding that his current neck and shoulder symptoms arise out of and in the course of his employment and he seeks appropriate benefits.

On March 7, 2007, the Worker's representative, Linda Zambolin from the Workers' Advisers Program, filed a Notice of Appeal with this Tribunal. She also filed a request for an extension of time to file the appeal supported by a statutory declaration signed by the Worker.

The Tribunal, by letter dated March 21, 2007, granted the request for extension of time to file the Notice of Appeal and indicated that the appeal would proceed by way of oral hearing. The Employer objected to the granting of the extension of time by the Tribunal during a conference call held on April 26, 2007.

Although the Notice of Appeal was copied to the Employer, the March 7th letter requesting an extension of time to appeal, together with the statutory declaration, were not copied to the Employer. Furthermore, the Employer was not provided an opportunity to make submissions with regards to the Worker's request.

The Tribunal invited the participants to provide written submissions on the issue of the granting of extension of time to file the appeal.

Written submissions were received from the Employer on May 11, 2007 and written submissions were received from the Worker on May 18, 2007. No submissions were received from the Board.

The *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"] applies to this appeal.

*This decision contains personal information and may be published. For this reason, I have not referred to the participants by name.

ISSUES AND OUTCOME:

Does the Tribunal have authority to reconsider the ruling granting the Worker an extension of time to file Notice of Appeal from the October 31, 2006 Hearing Officer decision?

Yes. The Tribunal has the authority to reconsider the decision in light of the failure to provide the Employer with an opportunity to make submissions prior to making a decision on the request.

On reconsideration, should the Worker's request for an extension of time to file the Notice of Appeal be granted?

Yes. Considering the circumstances of this case, it is just to grant the request pursuant to s.240(2) of the Act.

ANALYSIS:

Does the Tribunal have authority to reconsider the ruling granting the Worker an extension of time to file Notice of Appeal from the October 31, 2006 Hearing Officer Decision?

A previous decision of this Tribunal, *Decision 2003-259-AD* (NSWCAT, April 30, 2004) dealt with the Tribunal's jurisdiction to reconsider a determination regarding a request for an extension of time to appeal.

Applying the analysis outlined in the decision, I adopt the proposition that the denial of an extension of time to appeal is an exercise of the Tribunal's authority under s.240(2) to extend any time limit prescribed by Part II of the Act. To that extent, it is not a final decision in the context of the Tribunal's power to confirm, vary or reverse the decision of a Hearing Officer. Therefore, such a ruling does not attract the prohibition in s.252(2).

The denial or granting of an extension of time to appeal may be reconsidered under common law principles.

There is no doubt that the Tribunal's ruling on March 21, 2007 was a breach of natural justice and procedural fairness as it was made without giving the Employer an opportunity to be heard. The ruling can therefore be reconsidered.

On reconsideration, should the Worker's request for an extension of time to file the Notice of Appeal be granted?

Applicable legislation

Section 240(1) of the *Act* provides that the Appeals Tribunal shall determine its own procedures and may make rules governing the making and hearing of appeals. Subsection (2) provides that the Appeals Tribunal may, at any time, extend any time limit prescribed by this part or the Regulations where, in the opinion of the Appeals Tribunal, an injustice would otherwise result.

The Worker seeks to appeal a decision of a Hearing Officer outside of the 30 day time limit prescribed by s.243(1) of the *Act*. The s. 243(1) time limit is contained in Part II of the *Act* and, as such, the time limit may be extended where an injustice would otherwise result.

The Tribunal, pursuant to its power under s. 240(1), has adopted practice directions including one on extension of time to file an appeal. These are outlined in the Tribunal's procedure manual.

Section 3.21 of the procedure manual provides that in determining whether an injustice would result if the time limit is not extended, the Registrar may consider many factors, including:

- evidence of intention to appeal within the 30 day time limit
- the length of delay in filing the appeal
- prejudice to the person requesting the extension if it is not granted,
- prejudice to other potential participants if the request is granted
- events which prevented the filing of the appeal within the 30-day limit (for example, delayed receipt of the hearing officer's decision).

These are guidelines, they are not meant to fetter the Tribunal's discretion. The overriding principle is that the Tribunal must consider whether an injustice would result if the if the time limit is not extended.

I note that the Nova Scotia Court of Appeal has adopted a similar approach. The Court, while generally applying a three-part test for extensions of time to appeal, recognizes the overriding principle as observed by Hallett, J. A. in *Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173 (N.S.C.A.):

The simple question the court must ask on such an application is whether justice requires that the application be granted. There is no precise rule. The circumstances in each case must be considered so that justice can be done.

(See for example, *McCarron v. Houghton*, 2003 NSCA 148 and *Smith v. Heron*. 2003 NSCA 92)

The Nova Scotia Court of Appeal has also recently considered the application of s. 190 of the *Act* which similarly grants the Board the power to extend any time limit where, in the opinion of the Board, an injustice would result [*Thermo Dynamics Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2005 NSCA 150].

The Court in finding that s. 190 applies to the time limit prescribed at s. 122(2), described the power in s.190 as a “very broad discretion imparted to the Board by the legislature. In clear, unambiguous language the Board is empowered - if it chooses to do so - to extend any time limit prescribed in Part 1 or the regulations, at any time, if in the opinion of the board, an injustice would result”. [par 37]

The Court added:

“The power under s. 190 is discretionary. The circumstances of each particular case need to be carefully examined to see whether an “injustice” has occurred warranting an extension of time limits”. [par 41]

The Tribunal is also guided in all decisions by s. 186 of the *Act* which provides that decisions, orders and rulings shall always be based upon the real merits and justice of the case.

A recent decision of the Newfoundland Court of Appeal considered a similar section in the Newfoundland legislation. The Court interpreted the provision as follows:

Section 19(4) of the **Act** states:

1. The decisions of the commission shall be upon the real merits and justice of the case and it is not bound to follow strict legal precedent.

[47] That section has been in the Legislation since 1983. It is, quite frankly, more consistent with the traditional administrative law perspective - that discretion must be preserved and each case examined individually. Adjudication, on a case by case basis, is also a method of developing policy. (See the quotation from **Skyline Roofing** reproduced at § 36) The principle of *stare decisis*, so important to the courts, if applied by administrative decision makers would, over time, result in a consistent interpretation of the same statutory provisions. Section 19(4) indicates that case developed “policy” must give way to the “real merits” of the case, thereby indicating that there should be no fettering of discretion, that the Commission while stating its general approach must be open, in appropriate cases, to applying other considerations.

[*Jesso v. Newfoundland(Workers' Compensation Commission)*, [2001] N.J. No. 260 (C.A.) at par. 47]

Application of the law to the facts

The Worker's statutory declaration outlines his reasons for requesting an extension of time to file an appeal. The Worker stated, that with the assistance of his wife, who obtained a Notice of Appeal form from the Board, he filed an appeal from the August 14, 2006 Board decision to the Hearing Officer. On or about November 13, 2006, after the Hearing Officer decision, the Worker met with Linda Zambolin of the Workers' Advisers Program in Bridgewater. He did not bring the Hearing Officer's decision to that meeting.

The Worker further stated that either through an inadvertence or by misunderstanding, he believed that with his wife's assistance he had filed an appeal to the Appeals Tribunal. It was not until he contacted Linda Zambolin in the week of February 19, 2007, and after her inquiries, that he understood that no appeal had been filed.

The final paragraph of his statutory declaration is as follows:

"11. In retrospect, following this information I am not sure whether I misunderstood at the time that I met with Linda Zambolin from the Workers' Advisers Program that an appeal would be filed, or whether simply by inadvertence I did not file the appeal. But, it was clearly my intention to do so. My purpose in meeting with the Workers' Advisers Program was to have them review my file to determine if they could assist me."

The Employer argues that the evidence does not support an intention to file an appeal. No communication was made with the Tribunal during the 30 day time limit. The Worker should have been aware of the time limit and of his rights to appeal due to his previous claims and the fact that he had appealed twice to the Hearing Officer within the same 30 day time limit.

The Employer says that the Worker would suffer no prejudice from the denial of the request for an extension. The Employer submits that the Worker can ask the Board to reconsider its previous decisions pertaining to this claim pursuant to s.185(2) of the Act.

On the other hand, the Employer would suffer potential prejudice as two key witnesses who were involved in the claim are no longer employed with the company. Finally, the Employer submits that no event prevented the Worker from filing an appeal within the 30 day time limit.

I find that the evidence corroborates the Worker's statement that he had an intention to appeal the October 31, 2006 decision.

The Worker had previously tried to assert a causal link between his neck difficulties and his work in another claim resulting from an incident that occurred on September 23, 2005. On appeal to the Hearing Officer, the Hearing Officer could not find that the need for the medical aid requested was causally related to the September 23, 2005 incident [June 13, 2006 Hearing Officer decision]. She noted rather that the Worker was trying to assert that his ongoing complaints were the result of an over period of time injury, an issue not considered by the Board adjudicator decision. She suggested that the Worker may want to discuss such a claim with his case worker.

It is apparent from the file that the Worker contacted his case worker on June 20, 2006 to discuss this issue. Further to their telephone conversation, on June 21, 2006, the case worker sent a Notice of Appeal form to the Worker with the request to complete it with an explanation of how his problems related to his work. The Worker completed the new claim form on June 26, 2006, it was received by the Board on July 4. Following the August 14, 2006 denial by the Board Adjudicator, the Worker appealed to the Hearing Officer.

Within what would have been a short time of receiving the October 31, 2006 Hearing Officer decision, the Worker met with his Workers' Adviser on November 13, 2006. I accept that the purpose of the meeting was to discuss assistance in appealing from the Hearing Officer decision. Although the Worker stated that he did not bring a copy of the decision to the meeting, he may have faxed it to her office on the evening of November 13, 2006 as indicated by the copy of the Hearing Officer decision filed with the Tribunal on March 7, 2007.

The fact that the Worker had previously filed two appeals to the Hearing Officer level on his own within the 30 day time limit, but did nothing until he called his Workers' Adviser's office on February 19, 2007 to inquire as to the appeal, leads me to conclude that not only did he have an intention to appeal but also that he was under a misunderstanding as to who was going to file the appeal.

The Worker filed his appeal approximately three months out of time. The Employer has referred the Tribunal to several Ontario WSIAT cases dealing with requests for extension of time. These must be considered in the context of the Ontario legislation which provides a six month time limit to appeal to the Tribunal. The extension of deadlines would be more strictly enforced in that jurisdiction as compared to a jurisdiction providing 30 day time limits to appeal. In the circumstances of this matter, I do not find 3 months to be so excessive as to preclude the granting of the request.

The most important factor in determining whether it is just to extend the time limit is the potential prejudice to the participants to this appeal.

I recognize that there may be some logistical difficulties in hearing from the Employer's two employees, who as of March 30th and April 7, 2007, no longer work with the Employer. From a practical point of view, it is unlikely that an oral hearing would have been held prior

to this period even if the Worker had filed by early December, 2006. Therefore, the actual prejudice to the Employer is unproven. I assume that the Employer would have had an opportunity to discuss with these employees the issues raised by the Worker's June 26, 2006 claim prior to the employees' departure.

On the other hand, although the Worker can request that a final decision of the Board be reconsidered under s. 185(2) of the *Act*, the reconsideration is subject to the provision of "new evidence" as defined in Board Policy 8.1.7R1. The Worker must adduce evidence which satisfies the following criteria:

- i) It must be truly new evidence. It must not be a reiteration of the evidence already on file, or a new argument based on the same evidence, or evidence which is inconsequential and therefore, even if accepted, would not impact on the Workers' Compensation Board's final decision; and
- ii) the evidence could not have been presented by the worker or employer at the time the final decision was made.

The Court of Appeal in *Cherubini Metal Works Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2001 NSCA 81 has made it clear that reconsideration is a two step process.

First the Worker must submit new evidence which is scrutinized under the criteria set out in s. 1.2 of the Policy. If the new evidence is accepted as being truly new, not a reiteration of old evidence, capable of impacting on the original decision, and not available at the time of the original decision, the claims adjudicator moves on to the next step, the actual reconsideration, and determines whether the new evidence, combined with the old, justifies altering the decision. [at par. 19 and 61]

Considering the nature of this claim, for recognition of an injury over a period of time, I find that denying the extension to file an appeal would be more prejudicial to the Worker. The Worker would have to adduce new evidence before the whole of the evidence could be considered.

It is apparent from the Worker's Board files that the Worker has had previous neck injuries. He may also have a personal condition. He has other medical problems. Adding the requirement of "new evidence" to the mix would only add complexity to an already complex factual situation, making the adjudication of the Worker's entitlement to recognition more difficult for all participants.

Applying s. 240(2) and s. 186 of the *Act* to the circumstances of this appeal, I conclude that it would be unjust to deny the Worker's request for an extension to file a notice of appeal.

CONCLUSION:

The Worker is granted an extension to file a Notice of Appeal. Considering the circumstances of this case, it is just to grant the request pursuant to s.240(2) of the *Act*.