--SUMMARY--

Decision No. 1217/20 **01-Dec-2020** **R.Nairn**

- Time limits (appeal) (intent) (notice to Board)

No Summary Available

11 Pages

References: Act Citation
- WSIA

Other Case Reference
- [w0321n]k

Style of Cause:
Neutral Citation: 2020 ONWSIAT 1924

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1217/20

BEFORE: R. Nairn: Vice-Chair

HEARING: October 29, 2020 at Toronto
Written

DATE OF DECISION: December 1, 2020

NEUTRAL CITATION: 2020 ONWSIAT 1924

DECISION(S) UNDER APPEAL: WSIB Appeals Registrar (AR) decision dated June 4, 2019

APPEARANCES:

For the worker: Mr. F. Evangelista, Paralegal

For the employer: Not participating

Interpreter: Not applicable

REASONS

(i) Introduction

[1] The worker appeals a decision of the Appeals Registrar, which concluded that he was not entitled to an extension of the time limit in order to appeal the Case Manager's decision of October 11, 2013.

[2] The worker filed the notice of objection in December 2018, about 4.5 years after the expiry of the six-month statutory time-limit for objecting to this decision.

(ii) Issues

[3] The issue on this appeal is whether the worker's request to extend the time to file a notice of objection with the Board should be granted.

(iii) Background

[4] The following background information is provided in order to place this appeal into its proper context:

- At the time of the accident under consideration here, the worker was employed as "fitter" with the accident employer. Born in 1959, the worker started with the employer in about 2003.
- On October 4, 2008 the worker experienced an onset of pain and discomfort in his hands which he related to the nature of his employment. He sought medical attention and the Health Professional's Report (Form 8) of November 26, 2008 provided diagnoses of "1. Bilateral Carpal Tunnel Syndrome, 2. Right Thumb (CMC joint) arthritis".
- The WSIB (the "Board") established a claim to deal with the worker's injuries and eventually recognized the worker's bilateral Carpal Tunnel Syndrome ("CTS") and right thumb arthritis as compensable. He received health care and Loss of Earnings ("LOE") benefits. In August 2010 the worker was granted a 16% Non-Economic Loss ("NEL") award for his compensable injuries.
- With the worker being unable to return to his pre-accident employment, the Board provided him with Work Transition ("WT") services in about 2011. A psycho-vocational assessment was conducted, as was a Functional Work Capacity assessment and eventually a WT Plan was developed with an employment goal or Suitable Occupation ("SO") of Dispatcher. The WT Plan called for the worker to participate in vocational training and to be provided with job search training and some training on the job. The worker completed the WT Plan in late 2013 but did not secure employment.
- In a decision dated October 11, 2013 a Case Manager dealt with the issue of the worker's entitlement to LOE benefits following the closure of WT services. The Case Manager indicated the worker was entitled to partial LOE benefits and noted:

> I congratulate you on the successful completion of your Work Transition Plan (WTP) in the chosen Suitable Occupation (SO) of Dispatcher which is suitable, safe and within the limitations for your hands. You now have the qualifications and skills to enter the workforce in the above SO.

> Since completing your WTP, you have acquired the skills to gain employment in the above SO. The projected entry level wage for the above SO you would be expected to earn upon completion of your WT plan is $10.25/hour based on updated Labour Market information.
>
> (…)
>
> Decision
>
> You are entitled to partial loss of earnings benefit based on 85 per cent of the difference between your pre-injury wage and the current wage of $10.25.hr. Partial loss of earnings will be paid to you effective September 23, 2013 at a weekly rate of $446.93.
>
> (…)
>
> I have made this decision based on the information available to me. If you do not understand the decision, or if you do not agree with the conclusions reached, please call me. I would be pleased to discuss your concerns.
>
> **It is important to know that the Workplace Safety and Insurance Act (the Act) imposes time limits on objections. If you want to object to my decision, the Act requires that you notify me in writing no later than 11April 2014.**

- As noted above, the deadline for appealing the Case Manager's October 11, 2013 decision was April 11, 2014.
- In Memo No. 141 of December 12, 2014 a Case Manager dealt with the matter of the worker's final (72 month) LOE review. Noting that the worker remained unemployed, had a 16% NEL award and was 55 years of age, the Case Manager recommended that "the updated entry level wage of $11.20 per hour x 40 hours per week be used to calculate the final benefit. This will yield a 56.80% wage loss at a weekly rate of $425.90 until he attains age 65". The Case Manager then issued a decision dated December 12, 2014 which concluded:

> (…) I reviewed the earnings information you submitted along with the health (medical) and employment information in your claim file. You remain unemployed. Therefore effective December 17, 2014 your loss of earnings benefit entitlement will be based on the ability to earn the updated entry level wage of a Dispatcher, which is $11.20 per hour based on 40 hours per week. Your biweekly benefit will be $851.80.
>
> (…)
>
> There will be no further review of this benefit payment, unless you failed to notify us of a material change in circumstances that occurred before the 72 month period ended.
>
> (…)
>
> If you do not understand the reasons for this decision, or if you do not agree with the conclusions reached, please call me. I would be pleased to discuss your concerns. I also wish to inform you that the Workplace Safety and Insurance Act (the Act) imposes time limits on appeals. If you plan to appeal the decision, the Act requires that you notify me in writing by June 12, 2015.

- Subsequently, the Board considered the issue of whether the worker ought to be granted psychotraumatic entitlement in this claim. In a decision dated August 1, 2017 a Case Manager concluded that the worker ought to be granted temporary entitlement for a Major Depressive Disorder. The Case Manager approved 12 sessions of psychological treatment.

- In April 2018 the 16% NEL award the worker had been receiving for his organic injuries was increased to 25% to reflect additional entitlement granted for his left thumb ("OA, failed CMC arthroplasty").
- Also in 2018, after reviewing additional medical reporting provided, the Board accepted that the worker had permanent psychotraumatic impairment. Arrangements were made for a NEL determination. In July 2018 a NEL Clinical Specialist determined that the worker had a 20% Whole Person Impairment relating to his Major Depressive Disorder. When that award was "combined" with the 25% NEL award the worker was receiving for his organic injuries, it left him with a NEL award totaling 40%.
- Following the increases in the worker's NEL awards, a Case Manager reviewed the issue of the worker's post-72 month lock-in LOE benefits and noted the following in Memo No. A0052 of August 2, 2018:

> I explained to [the representative] that I was calling to discuss my decision regarding the Post Lock-in review further to the increased NEL benefits.
>
> I explained to [the representative] that due to the increase in the NEL benefits, I am now able to review the loss of earnings (LOE) benefits Post Final LOE/72 Month lock-in per the WSIB Act and Policy#18-03-06.
>
> I explained to [the representative] my decision as outlined in the Decision Memo#A0051. I advised her that I have concluded that the evidence continues to support that prior to the Final LOE review decision and at the time of the Final LOE review back around December 2014, [the worker] was still considered partially impaired for both the work-related organic physical injuries and the non-organic psychological condition (major depressive disorder). The evidence supports that [the worker] was continuing to look for suitable employment in the work force right up to the Final LOE decision.
>
> I advised her that based on my review I have concluded that the Final LOE/ 72 Month Lock-in decision as per the Decision letter dated December 12, 2014 is still appropriate.
>
> I explained to [the representative] that based on the current evidence on file after the Final LOE decision and in reviewing the reports from Dr. Kirstine and Dr. Marino. I have determined that evidence supports that [the worker] has suffered a significant deterioration due to the work-related psychological condition as of October 6, 2016 when [the worker] had to undergo further psychological treatment with Dr. Kirstine for his psychological conditions - severe major depressive disorder, chronic, severe anxiety, and chronic pain syndrome.
>
> I explained to [the representative] that the significant deterioration of the work-related psychological condition continued until he was discharged from treatment by Dr. Marino on March 5, 2018.
>
> I advised [the representative] that I have approved full loss of earnings benefits for the period from October 6, 2016 to March 5, 2018, less any CPP-D benefits received during this period. This period has been approved under Bill 187 'Health Care' as [the worker] was considered to be totally disabled and unable to work due to the work-related psychological condition while receiving medical rehabilitation treatment.
>
> [The representative] inquired about entitlement to Full LOE benefits from the Final LOE decision in December 2014 to October 2016.
>
> I explained to [the representative] that in my review of the evidence on file, there is no medical evidence after the Final LOE decision in December 2014 up to when [the worker] started his psychological treatment on October 6, 2016. The evidence does not support a significant deterioration due to the work-related injuries during this period. The

> evidence supports the significant deterioration as of October 6, 2016 when [the worker] started his psychological treatment.
>
> [The representative] understood (…)

- The Case Manager issued a decision dated August 3, 2018 concluding:

> I have concluded that the evidence continues to support that prior to the Final LOE review decision, [the worker] was still considered partially impaired for both the work-related organic physical injuries and the non-organic psychological condition. The evidence supports that [the worker] was continuing to look for suitable employment in the work force. I have concluded that the Final LOE/ 72 Month Lock-in decision as per the Decision letter dated December 12, 2014 is still appropriate.
>
> Based on the circumstances of the claim and taking into consideration the WSIB policies and Bill 187, I have conclude that the evidence supports that [the worker] has suffered a significant deterioration due to the work-related psychological condition as of October 6, 2016, when [the worker] had to undergo further psychological treatment with Dr. Kirstine and Dr. Marino.
>
> I have concluded that [the worker] qualifies for Full loss of earnings benefits from October 6, 2016 (1st treatment date) to March 5, 2018 (discharge date), less any Canada Pension Plan Disability (CPPD) benefits received during this period, under Bill 187 due to the psychological significant deterioration requiring health care rehabilitation treatment.
>
> (…)
>
> I have approved the adjustment of the post lock-in benefits effective March 5, 2018 to Full loss of earnings benefits for the period from March 5, 2018 to the age of 65 (…) less the offset of the Canada Pension Plan Disability (CPP-D) benefits, at which time the LOE benefits will stop.

- In a letter dated December 18, 2018 the worker's representatives advised the Board that they objected to the Case Manager's conclusion concerning the retroactive date selected for awarding full LOE benefits. The representatives submitted that "the chronology of the events demonstrate that [the worker] ought to have been locked in December 2014".

- In a decision dated January 8, 2019 a Case Manager replied to the worker's representatives and indicated in part:

> This is further to your Intent to object form and letter dated December 18, 2018 regarding your objection to the August 3, 2018 decision letter regarding the Post Final LOE/ 72 Month Lock-in decision.
>
> In review of the ITO and letter, no new information has been provided for reconsideration. In your letter, you provide your viewpoint of the facts of the claim. In your letter, you are requesting a reconsideration of the August 3, 2018 decision and requesting full loss of earning benefits from September 23, 2013.
>
> In review of the claim, I noted the October 11, 2013 decision letter, which outlined the decision rendered by the prior LTCM Case Manager regarding the adjustment of the LOE benefits following the completion of the WT services as of September 23, 2013. The time limit to appeal the October 11, 2013 decision was April 11, 2014. In review of the claim, [the worker] did not object to this decision and the time limit to object has expired.
>
> The issue in dispute as per your Intent to object form and letter is the August 3, 2018 decision, which I have reconsidered regarding the Post Final LOE/ 72 Month Lock-in review decision.

> In review of the NEL decision letter dated July 19, 2018; the Psych/CPD Case Manager decision letter dated April 16, 2018 along with review of the psychological reports from Dr. Kirstine and Dr. Alfonso Marino. The evidence continues to support that [the worker] experienced a significant deterioration post lock-in because of the work-related psychological condition as of October 6, 2016, which warranted a post lock-in review of the Final LOE benefits under the WSIB Policy#18-03-06. I have concluded that the August 3, 2018 decision is still appropriate. Your objection has been denied.

- The worker did not agree with the conclusions of the Case Manager and requested that the time limit to appeal the October 11, 2013 decision be extended. In a decision dated March 13, 2019, a Case Manager denied that request and concluded:

> I have considered your submission on February 27, 2019. The review of loss of earnings (LOE) benefit Post Final LOE/ 72 Month lock-in due to an increase in the Non-Economic Loss benefit for the non-organic condition was addressed in the decision dated August 3, 2018. You are appealing the August 3, 2018 decision. The October 11, 2013 decision is separate from the August 3, 2018 decision. You have not met the time limit to appeal the October 11, 2013 decision and I am unable to allow a time limit extension on this matter.

- The worker's objection was eventually referred to an Appeals Registrar and in a decision dated June 4, 2019 the Appeals Registrar denied the worker's appeal. The Appeals Registrar concluded:

> I am not satisfied that the issue of the permanent worsening date, resulting in the LOE adjustment after lock-in is intertwined with the issue of LOE post WT plan completion. The LOE adjustment was done after clinical information was received indicating a permanent worsening of the worker's psychological condition, three years after the work transition plan completed. This issue can be reviewed using the clinical information associated with the worker's worsening psychological state as a separate issue.
>
> In the worker representative's submission dated March 20, 2019, they assert that the worker's psychological condition, initially diagnosed March 12, 2012 was affecting the worker at the time of the October 11, 2013 decision letter and that the worker's ongoing mental distress affected his ability to meet the time limit. I also note that claims has accepted the worker's psychological level of impairment had deteriorated effective August 3, 2018 as per the October 6, 2018 decision, indicating that there was a marked decrease in the worker's ability to return to work, therefore increasing the worker's LOE benefits to full as of that date.
>
> Until the permanent worsening date of August 3, 2018, the worker was considered partially impaired as per the medical assessment of March 12, 2012, further supported by the psycho-vocational assessment undertaken as part of the WT planning process. I also note that the worker representative received file access, including a copy of the October 11, 2013 letter on October 14, 2016 and their objection to the issues in that letter was not received until February 2019. A further delay of over two years after becoming active in the file.
>
> The worker representative has not provided compelling argument to support an extension of time limit to object to the October 11, 2013 decision.

- The worker has appealed the June 4, 2019 Appeals Registrar decision to the Tribunal.

(iv) Law and policy

[5] Section 120(1) of the *Workplace Safety & Insurance Act, 1997* (the "WSIA") provides that a notice of objection shall be filed with the Workplace Safety and Insurance Board (the Board):

> (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
>
> (b) in any other case, within six months after the decision is made or within such longer period as the Board may permit.

[6] The Board does not have a policy on time extensions; however, the Board's Appeals Services Division has adopted a Practice Guideline entitled "Time Limit to Object", which is periodically updated. While the Tribunal is not required to apply the Practice Guideline, it may consider the document if it provides relevant and helpful guidance.

[7] The Practice Guideline states that where a party is objecting to two different decisions involving both the 30 day and six month time limits, the WSIB will default to the six month time limit.

[8] The Practice Guideline sets out criteria for extending the time limit to object beyond the applicable statutory time limit. The Practice Guideline notes that the criteria that were in place at the time of the operating area decision on the time limit should be applied. As the operating area decision on the issue of extending this time limit was made on March 13, 2019, the following criteria from the Practice Guideline may be of assistance in determining whether the time limit should be extended:

- 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 is clear documentation in the claim file that the party was disputing the issue(s) in a particular decision even though a formal notice of objection was not filed (direct correspondence or memo outlining a telephone discussion about the particular issue);
- 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.

[9] The Tribunal has also considered two decisions from the Ontario Court of Appeal: *Laski* v. *Laski*, 2016 ONCA 337 (CanLII) ("*Laski*") and *Cunningham* v. *Hutchings*, 2017 ONCA 938 (CanLII) ("*Cunningham*"), which indicated a "holistic approach" should be taken to time extensions, and emphasized that decision-makers must take all relevant considerations into account. *Decision No. 3295/17* found that the Board's Practice Guideline (as well as the Tribunal's *Practice Direction: Time Extension Applications* and case law) are consistent with *Laski*, which states at paragraph 26:

> The overarching principle on a motion to extend time to file a notice of appeal is whether the "justice of the case" requires that an extension be given: *1250264 Ontario Inc. v. Pet Valu Canada Inc*., 2015 ONCA 5 (CanLII), at para. 6. Each case depends on its own circumstances but, in answering that question, the court is to take into account all relevant considerations, including:
>
> 1. whether the moving party formed a *bona fide* intention to appeal within the relevant time period;

2. the length of, and explanation for, the delay in filing;
3. any prejudice to the responding parties caused, perpetuated or exacerbated by the delay; and
4. the merits of the proposed appeal.

[10] In determining time limit objection appeals for Board decisions, some Tribunal decisions have also considered the following factors (see, for example, *Decision No. 1493/98I*):

- The lapse of time between the expiration of the six months and the date the appeal was filed and any explanation for the delay;
- Whether there is evidence to show an intention to appeal prior to the expiry of the six months;
- Whether the applicant ought to have known of the time limit;
- Whether the applicant acted diligently;
- Whether there is prejudice to a respondent;
- Whether the case is so stale that it cannot reasonably be adjudicated;
- Whether the issue is so connected to another appeal that the Tribunal cannot reasonably adjudicate the other appeal without considering it;
- Whether a refusal to hear the appeal could result in a substantial miscarriage of justice due to defects in prior process or clear and manifest errors;
- Whether there are exceptional circumstances.

(v) Submissions of the worker's representative

[11] The worker agreed to have this appeal considered by means of written submissions. Mr. Evangelista provided submissions dated September 16, 2020 which have been reviewed and are included in Addendum No. 4. In his submissions, Mr. Evangelista indicated in part:

> (…) Further and more importantly, the decision of October l, 2013 at the very least deserves to be reconsidered because of the change in entitlement.
>
> Two requests to do this at the WSIB were denied and the WSIB essentially placed us into an extension of time appeal when, we submit, it was incumbent upon the Board to reconsider said decision. Our correspondence dated December 18, 2018 asked the WSIB to reconsider benefits from October 2013 (page 48) and our submissions filed with the ARF were forced first to go through a review of the time limit issue in regards to the October 2013 decision.
>
> This greatly prejudiced the worker because at the very least, his file deserved a formal reconsideration of the October 2013 decision but the WSIB got around this by forcing the time limit issue.
>
> In this case, we argue, that the circumstances are not that much different than what they are in a case where a material change is reported. The material change in this case is the change to the worker's entitlement to include a permanent impairment for the worker's psychiatric condition.
>
> (…)
>
> Our grievance here is that the WSIB changed the nature of entitlement in 2017 to include psychiatric entitlement.

> We take issue with the Boards' phrasing. The WSIB has consistently treated the inclusion of the worker's psychiatric impairment as a worsening of the worker's permanent impairment. We argue however that it isn't so much a worsening as it was an "expansion" of entitlement because the worker never had been granted entitlement to a psychiatric condition before 2018.
>
> Had the worker previously been granted psychiatric entitlement and the Board later decided to rate it or increase its NEL value then we could agree with the "worsening" position. However this wasn't the case. The first notice the worker received that his entitlement would be expanded to include the psychiatric problems was in 2017 (Aug l 2017 decision - page 98).
>
> This wasn't a worsening of the worker's condition as the WSIB stated to justify their limited review of benefits in accordance with Section 44 (2. l)(e) which would then, agreeably require the WSIB to review benefits post lock-in in accordance with Section 44(2.4)(a).
>
> In essence, the WSIB ADDED to the worker's entitlement in this case, approving an area of the body that was not previously considered in the loss of earnings reviews. That action, in our respectful view, should have triggered a reconsideration of the prior 2013 decision.
>
> (…)
>
> There would be no prejudice to the respondent in this case who is well outside their cost window. Furthermore, they have chosen not to participate with the worker's appeal. Also, the case and the evidence within it is relatively current and there is no concern about any aspects of the case being stale.
>
> More importantly, WSIAT must consider two very important factors.
>
> 1. The issue is so connected to another appeal that the Tribunal cannot reasonably adjudicate the other appeal without considering it.
> 2. The refusal to hear the appeal could result in a substantial miscarriage of justice due to defects in prior process or clear and manifest errors.
>
> The worker has another appeal with a different WSIAT number that deals with the same issue. That is, the retroactive date of the benefit adjustment per the WSIB's decision of August 3, 2018 (page 59).
>
> Furthermore, as we have argued, the refusal to hear an appeal to the 2013 decision would result in a substantial miscarriage of justice given the change in entitlement, and the fact the WSIB refused to reconsider the 2013 decision.
>
> (…)
>
> Therefore the key reason for our position that the time limit to appeal the October 11, 2013 decision should be extended, is that the worker's psychiatric condition was not factored into it.
>
> Noting the condition was allowed at a later date and the fact that the evidence on which it was allowed existed in 2013, (but was NOT considered by the Board) it would stand to reason that the decision should be revisited in the interest of justice.

(vi) Analysis

[12] Having had the opportunity to consider all of the evidence before me, I am satisfied that this would be an appropriate case in which to grant a time extension. In reaching that conclusion, I have taken particular note of the following:

- While the delay in notifying the Board of an intention to appeal in this case was significant - about 4.5 years (April 2014 to December 2018), the employer has decided not to participate in these proceedings and as such, there is no evidence of significance before me that its position would be prejudiced were a time extension to be granted after a delay of this length.
- The delay in this case has not rendered the evidence so stale that the matter cannot be properly adjudicated. As Mr. Evangelista notes, this appeal can be adjudicated based on the documentary evidence already on file.
- At the time the October 11, 2013 decision was issued, the worker was representing himself in his dealings with the Board and was likely unfamiliar with appeal deadlines and the consequences of failing to meet those deadlines.
- As Mr. Evangelista notes, at the time the October 11, 2013 decision was issued and the Board decided the worker was only entitled to partial LOE benefits from the date of the closure of WT services, the worker was in receipt of a 16% NEL award in recognition of a permanent organic impairment. The Board confirmed that the worker remained entitled to only partial LOE benefits at the date of the final LOE review in December 2014. In 2018 the Board agreed not only that the worker's organic NEL award ought to be increased from 16% to 25% but also agreed that he had a permanent psychotraumatic impairment and a 20% Whole Person Impairment for his Major Depressive Disorder. Having made those determinations, the Board's operating area, correctly in my view and in line with the statutory provisions, agreed to reconsider the issue of the quantum of LOE benefits paid to the worker from the date of his final LOE review. After reviewing the evidence, a Case Manager decided that the worker was entitled to full LOE benefits from October 2016 to age 65 but not from December 2014 forward. As Mr. Evangelista notes in his submissions, the worker has an appeal currently before the Tribunal regarding the August 3, 2018 decision. In my view, the issue of whether the worker ought to have been granted full LOE benefits from the closure of WT services in September 2013 is so intertwined with the issue properly before the Tribunal of the worker's entitlement to full LOE benefits from December 2014, that it is appropriate that both issues be heard together, should that be necessary.

[13] For the reasons noted above and given the particular facts of this case, the worker's request for a time extension is granted.

DISPOSITION

[14] The worker's appeal is allowed. The worker is granted an extension of time under section 120(1)(b) and the objection may be heard by the Board.

DATED: December 1, 2020

SIGNED: R. Nairn