WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1141/18R

BEFORE: G. Dee: Vice-Chair

HEARING: March 22, 2019 at Toronto
Written

DATE OF DECISION: April 9, 2019

NEUTRAL CITATION: 2019 ONWSIAT 883

DECISION(S) UNDER APPEAL: Reconsideration request regarding *Decision No. 1141/18* dated May 9, 2018

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not participating

Interpreter: N/A

REASONS

(i) Issues

[1] The worker seeks a reconsideration of *Decision No. 1141/18.*

(ii) Reconsideration criteria

[2] The Appeals Tribunal has developed procedures to ensure that fair hearings take place. These rules make sure that workers and employers have a full opportunity to be heard. These rules that are based in the requirements of the *Workplace Safety and Insurance Act, 1997* also require that written reasons are provided for all of the final decisions that the Tribunal makes on appeals.

[3] Once a reasoned decision is issued by the Tribunal following a fair hearing it is expected that the Tribunal's decision is final. Under the law, workers and employers have no right to a further appeal from a final decision of the Tribunal.

[4] The *Workplace Safety and Insurance Act, 1997* does however provide that the Tribunal might reconsider a decision. This is not something that workers and employers have the right to demand from the Appeals Tribunal. Rather, section 129 of the Act provides the Tribunal with the discretion to reconsider a decision "if it considers it advisable to do so."

[5] The Tribunal has considered the question of when it might be advisable to reconsider a decision.

[6] In considering this question the Tribunal has taken into consideration:

- the fact that claims generally have a history of investigation and adjudication at the WSIB with opportunity for input by the parties even before they get to the Tribunal for a final decision;
- the resources spent by workers, employers and the Appeals Tribunal itself in having an appeal heard at the Tribunal;
- the time required to have an appeal determined by the Tribunal;
- the Tribunal's efforts through its policies and procedures to ensure that a fair hearing takes place; and
- the need to have certainty and finality in the decision making process.

[7] The Tribunal has concluded that its decisions should not be reconsidered on a routine basis. Instead, reconsiderations should only take place where it is shown that there has been a significant defect in the decision making process at the Tribunal.

[8] The need to show that there has been a significant defect in the decision making process at the Tribunal has been described as the "threshold test". The leading case on the threshold test is *Decision No. 871/02R2*. In that decision it was stated that:

> Any error and its resulting effects must be sufficiently significant to outweigh the importance of decisions being final and the prejudice to any party of the decision being re-opened.

[9] The Tribunal's reconsideration process was considered by the Divisional Court in *Gowling v. Ontario Workplace Safety and Insurance Appeals Tribunal*.[1] In that decision the Court found that a high threshold test is required in order to balance the interests of the Tribunal and other parties.

[10] The Tribunal has a Practice Direction on reconsiderations. The Practice Direction provides guidance about when the Tribunal will or will not allow a reconsideration request. The Practice Direction includes the following statements:

- A reconsideration will not be granted because a party disagrees with the decision and wants to re-argue the case.
- The Tribunal might decide that there is a good reason to reconsider a decision when:
    - significant new evidence is discovered which was not available at the original hearing and which would likely have changed the outcome
    - the decision overlooks an important piece of evidence (as opposed to rejecting the evidence or distinguishing it)
    - the decision contains a clear error of law (for example, the decision does not apply the relevant sections of the *Workplace Safety and Insurance Act, 1997*)
    - the decision contains a jurisdictional error (for example, the Tribunal decided an issue which it did not have the legal authority to decide).

(iii) Analysis

[11] The worker's reconsideration request is allowed.

[12] At the time of his accident on February 29, 2016 the worker was a sole-proprietor employer in the construction industry.

[13] The worker was a worker at the same time that he was a sole-proprietor employer because he was considered to be a deemed worker under the provisions of section 13 of the WSIA. These provisions that have expanded mandatory workers' compensation coverage in the construction industry came into effect on January 1, 2013.

[14] The Tribunal has limited experience in dealing with earnings basis issues for deemed workers in the construction industry under these provisions.

[15] The WSIB has determined the worker's pre-injury earnings basis based upon his adjusted net business earnings in 2015.

[16] The worker had a non-compensable (at least for the purposes of *Decision No. 1141/18*) injury in 2015. He has asserted that this injury, which caused him to be absent from work and reduce his business activity, made his 2015 earnings unrepresentative of his earnings at the time of accident in 2016.

[17] In his appeal the worker made a number of different proposals regarding how his pre-injury earnings might be determined. His primary submission was that the pre-injury earnings should be calculated by reference to his net business earnings in the years prior to 2015. Alternatively, it was suggested that the determination of his pre-injury earnings take into account

[1] [2004] O.J. No.919 (Div.Ct).

his increased labour costs as a proportion of his revenues due to his need to hire workers to perform the hands on work that he would have done himself in 2016. In the further alternative, it was suggested that the worker's earnings should be estimated at one third of the allowable maximum by reference to the WSIB's policies concerning personal coverage by election where a worker does not have an established earnings history from self-employment.

[18] *Decision No. 1141/18* did not accept the worker's submissions. The decision instead took the worker's adjusted business earnings from 2015 and essentially pro-rated those earnings over the number of days in the year and then multiplied the pro-rated earnings times the number of days missed and added the resulting figure to the worker's 2015 earnings as determined by the WSIB. The specifics of this calculation are found in paragraph 31 of the decision. The decision relies upon the add back provisions of OPM Document No. 18-02-08, *Determining Average Earnings – Exceptional Cases* in support of this approach.

[19] I have concerns with the use of the add back provisions of Document No. 18-02-08 in this manner. I also have concerns with the manner in which the pro-rated earnings are estimated based upon the number of days in the calendar year rather than the number of days that the worker actually worked. However, my more significant concern, that I would characterize as a significant error, is that the approach adopted in *Decision No. 1141/18* would not in my view result in a reasonable estimation of what the worker's pre-injury earnings were when the accident occurred on February 29, 2016.

[20] While the approach adopted is one that may be appropriate in the case of an individual earning wages and who gets paid for any time that they are at work, it does not in my view allow for an accurate estimation of the impact of missed time and a reduced ability to work for an individual such as the worker in this case whose whole business, or at least a major part of his business, was dependent upon his ability to perform physical work.

[21] A reduction in income for a wage earner has a direct linear relationship with the number of hours worked. However, this is not the case for a business owner whose absence from work will have an impact on sales that is unlikely to be linear and an impact on costs that is also unlikely to be linear. Costs could go down if there was no business coming in. Costs could go up if business was coming in but someone had to be paid to perform the work that the owner would have personally attended to. The inability of the business owner to show-up on a regular basis would likely reduce the ability to attract revenue for the business but exactly how it would do so and to what extent would be highly variable depending upon the nature of the business and the individual's role in that business.

[22] In the present appeal, while it is true that there are many factors that can affect profitability apart from whether the worker is present or not, the worker missed just 53.5 days from work (just over 20% of work days) in 2015 but his earnings went from an average of approximately 45 to 50 thousand dollars from 2011 to 2014 down to less than $4,000 in 2015.

[23] In the absence of evidence of other factors that may have affected profitability, it would appear that the worker's elbow injury impacted his profitability way out of proportion to the actual days missed. I note that in the four years prior to 2015 the worker's least profitable year still saw him earn over $33,000. Earnings of $4,000 in 2015 are clearly out of keeping with earnings in prior years.

[24] I also find that *Decision No. 1141/18* erred in its failure to consider the relevant factor of the change in labour costs that the worker experienced in 2015 due to his non-compensable injury. Paragraph 32 of the decision states as follows:

> I acknowledge the worker's representative's alternative submissions that requested consideration be given to the worker's increased labour costs for 2015. I find that there is no discretion in the WSIA or Board Policy that permits the import of labour costs into the consideration of average earnings for a sole proprietor or a sole proprietor with workers. Indeed, both OPM Document No. 18-02-08 "Determining Average Earnings – Exceptional Cases" referred to above, and OPM Document No. 14-02-18 "Insurable Earnings – Construction" which refers to premium payments for sole proprietors and sole proprietors with workers, refer to the worker's Net Business Income as derived from documents filed with CRA, or based on an accountant's review, without reference to other labour costs such as employees' wages. Also, the worker's labour costs in 2014 ($100,149.38) expressed as salaries, wages and benefits, were similar to 2015 ($102,955.02) without a similar break in the 2014 employment pattern such as an injury.

[25] The worker is a sole proprietor employer who is deemed to be a worker for the purposes of the WSIA. His earnings are the profits from his business that are calculated by deducting expenses from revenues. It is not possible to estimate average earnings without taking into consideration labour costs that are typically a business's single greatest expense.

[26] *Decision No. 1141/18* accepted that the worker's earnings in 2015 were significantly affected in a negative way by the worker's non-compensable shoulder injury. This finding creates a considerable amount of uncertainty about whether the worker's earnings from his business in 2015 should be considered an accurate indicator of what his earnings were at the time of his accident in 2016.

[27] I have also found that the approach adopted in *Decision No. 1141/18* to modify the worker's reported earnings for 2015 is not likely to provide a reliable estimate of the worker's likely pre-injury earnings at the time of his accident on February 29, 2016.

[28] This does not mean, however, that the worker's earnings from 2011 to 2014 are necessarily a better indicator of what his earnings were at the time of the accident in 2016 than the worker's 2015 earnings were as there is significant medical evidence that the worker's non-compensable injury continued to prevent the worker from full participation in work-related tasks in 2016. In this regard see Dr. Vennettilli's report of January 15, 2016. It cannot therefore be assumed that the worker in 2016 was capable of earning the same income that he did prior to the shoulder injury in 2015.

[29] The worker's representative submitted an affidavit from the worker dated October 10, 2017, in support of his appeal. The affidavit describes a change of approach by the worker to his business in 2016 that took into consideration his need to accommodate his shoulder injury and that that his revised approach was successful and would have allowed him to replicate the types of earnings that he had in 2011 to 2014.

[30] I have considered the information contained in the worker's affidavit but I do not believe that the information contained in the affidavit is sufficient for me to make a reliable estimate of the worker's likely earnings prior to his February 29, 2016 accident.

[31] Given the significant changes to the worker's business required by his non-compensable 2015 workplace injury, I find that this matter would be an appropriate one to be scheduled for an oral hearing prior to a determination being made about what the worker's earnings likely were prior to his February 29, 2016 accident.

DISPOSITION

[32] The worker's request for a reconsideration of *Decision No. 1141/18* is allowed.

[33] An oral hearing is to be scheduled in order to determine the worker's pre-injury earnings that are to be used to calculate the worker's workers' compensation benefits for his February 29, 2016 accident.

[34] I am seized of this matter.

DATED: April 9, 2019

SIGNED: G. Dee