# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

# DECISION NO. 1914/17

**BEFORE**: J. Noble: Vice-Chair

**HEARING:** June 15, 2017 at Toronto
Written

**DATE OF DECISION:** September 13, 2017

**NEUTRAL CITATION:** 2017 ONWSIAT 2786

**DECISION(S) UNDER APPEAL:** WSIB Appeals Registrar (AR) decision dated July 8, 2016

**APPEARANCES:**

**For the worker:** Mr. R. Fink, Lawyer

**For the employer:** Not participating

**Interpreter:** None

## REASONS

### (i) Issues

[1] The issue to be decided in this appeal is whether the worker should have entitlement for an extension of the section 120 time limit to appeal the Payment Specialist's decision dated July 11, 2013.

### (ii) Background

[2] The worker was injured in the course of his employment on April 15, 2013 when sixteen sheets of drywall fell on him, resulting in fractures, including a fractured left femur. The Board granted entitlement for the accident.

[3] The Board eventually determined that the worker had a permanent impairment and was entitled to a Work Transition (WT) Program to qualify for the Suitable Occupation (SO) of Production/Logistics Clerk.

[4] In a letter to the worker dated May 30, 2013, the Board Payment Specialist advised that the WSIB was requesting information from the accident employer in order to review the worker's Loss of Earnings (LOE) rate to determine if it provided a fair reflection of the worker's earnings over the longer term. The letter stated that it was for information purposes only.

[5] In a letter to the worker dated July 11, 2013, the WSIB Payment Specialist stated that the worker's LOE benefits rate had been recalculated based on evidence received from the accident employer, and the letter stated that the worker's LOE benefit rate had been reduced since the worker's earnings varied. The letter to the worker dated July 11, 2013 stated:

> Subject: Loss of Earnings (LOE) Benefit Rate Recalculation Review
>
> I have received the earnings information I requested from your employer regarding recalculation of your loss of earnings (LOE) benefit rate. I have now completed my review.
>
> Details of the Case
>
> Date of injury/illness: April 15, 2013
>
> Total earnings considered October 30, 2012 to April 14, 2013: $12,576.50
>
> Number of calendar days in this period of time: 167
>
> Less allowable unpaid days (if applicable): 21
>
> Total days in period: 146
>
> Calculate daily rate (total earnings divided by total days in period: $86.14
>
> Calculated gross weekly rate (daily rate multiplied by 7 days): $602.98
>
> 2013 LOE long-term weekly benefit rate: $421.76
>
> Criteria
>
> WSIB Operational Policy 18-02-03, Determining Long-Term Average Earnings: Workers in Permanent Employment, states, in part:
>
> *The long-term average earnings of a worker in permanent employment are generally the same as a worker's short-term average earnings. A worker's average earnings are recalculated to long-term average earnings if the decision-maker determines that it is*

> *unfair to continue paying loss of earnings (LOE) benefits based on the short-term average earnings.*
>
> Decision
>
> It is considered unfair to continue paying LOE based on the short-term average earnings if these earnings vary. Since your earnings vary, I have recalculated your Loss of Earnings (LOE) benefit rate. Your new weekly benefit rate effective July 9, 2013 is $421.76.
>
> 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 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 January 11, 2014.
>
> To submit this written appeal notice, please go to our website at www.wsib.on.ca and complete the Intent to Object Form. There is an instruction sheet included on this site which also lists organizations that can provide free representation. The instruction sheet will come up if you type 'objection' into the search box on our site. If you do not have access to our website, you may call our toll free number above and request the form be mailed to you.

[6] In a letter dated August 11, 2015, the worker's representative Mr. Fink submitted that the time limit to object to the LOE benefit rate recalculation decision dated July 11, 2013 should be extended. The worker's representative also submitted that he had attached proof that the worker was concurrently employed at the time of the injury; that he had attached proof that the worker was an installer helper at the time of the accident and he was training to be a full installer and therefore he should be considered to be an apprentice; and that he had attached proof that the worker missed the time limit to appeal the decision dated July 11, 2013 because he suffered from Post Traumatic Stress Disorder, Adjustment disorder and depression, according to the reporting from Dr. Lee from November 2013.

[7] In a decision dated August 27, 2015, the Case Manager stated that she was confirming her decision regarding the time limits to appeal the Long Term Rate. The letter also stated:

> However should you submit proof as required by the applicable policies noted above to confirm [the worker] was a registered apprentice on the day of injury and/or that [the worker] was concurrently employed on the day of injury I will reconsider my time limit to appeal decision.

[8] In a letter dated November 10, 2015 addressed to the worker's representative, the Case Manager stated:

> You submitted a letter dated November 5, 2015 noting that you were enclosing a letter from [the claimed concurrent employer] dated June 19, 2015, receipt from [a construction training facility] dated June 24, 2012 and certificates from [the construction training facility] dated June 24, 2015.
>
> The reason for your letter wasn't specified. However I already addressed the relevance of this information in my letter to you on August 27, 2015.
>
> As a result there is no further action to take in [the worker's] claim in this regard.

[9] In a letter dated June 24, 2016, the Case Manager stated that the worker was granted temporary entitlement for Psychotraumatic disability under the claim, and stated:

> The case is allowed for temporary entitlement to Major Depressive Disorder with features of Post traumatic Stress Disorder in keeping with the diagnosis provided by Dr. Blessing from the Mount Sinai Function & Pain Program (FRP) report dated July 22, 2015. Also in keeping with the FRP report, there is a temporary psychological restriction from any work on a construction site. [The worker] is considered to be partially disabled by his Major Depressive Disorder and able to work within the noted psychological restriction and any physical restrictions associated with his compensable organic injury.

[10] The worker appealed the Case Manager decision dated August 27, 2015 to the Appeals Resolution Officer (ARO).

[11] The ARO decision under appeal dated July 8, 2016 considered the issue of whether the worker should have entitlement for an extension of time to appeal the July 11, 2013 Payment Specialist's decision. The ARO decision dated July 8, 2016 denied the worker's appeal, and stated:

> ANALYSIS
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> For the reasons set out below, I find the criteria for an extension to the time limit to appeal the decision of July 11, 2013 has not been met.
>
> In this case the deadline to appeal the July 11, 2013 decision was January 11, 2014. The first indication that the worker wanted to object to the decision came more than 18 months later when his representative filed an Intent to Object….
>
> Assessment
>
> None of the criteria that can be considered in extending the appeals time limits has been satisfied.
>
> I am not persuaded the worker's intelligence or psychological condition was a contributing factor to the delay in objecting to the decision within the time limits for the following reasons:
>
> In anticipation of the Long-term earnings review, I note the CM discussed the details of the calculation with the worker verbally on May 1, 2013. No concerns were brought forward by the worker at that time. In addition, on May 30, 2013 a letter was mailed to the worker advising the PS had requested earning information from his employer in order to calculate the upcoming long-term earnings review.
>
> The July 11, 2013 decision letter clearly advises the worker that if he did not agree with the decision that had been made he could call his CM. The letter also noted the ACT imposed time limits on appeals and in his case he was required to notify WSI B in writing, by January 11, 2014.
>
> The calculation of the long term earnings resulted in a decrease of the worker's weekly LOE benefit rate and this reduction in the amount of benefits paid to the worker would have been immediately evident to him. Despite this, there is no evidence to suggest the worker voiced any displeasure with the decision verbally or otherwise, or that he did not understand the decision. In fact, it appears that there was no disagreement with the decision until such time the worker sought formal representation, well after the time limit to appeal had passed.
>
> During the time period from July 2013 to January 2014, I make note the worker was in constant contact with the CM to discuss various topics such as transportation arrangements, health care appointments and receipt of cheques with no indication the worker was not able to comprehend the decisions.
>
> Furthermore, on September 17, 2013, as referenced in Memo 33, the worker attended the WSIB Toronto office and met with the Work Transition Specialist. During this meeting,

> the worker was able to initiate concerns on other topics with ease clearly demonstrating the ability to manage his affairs in the claim file.
>
> On January 12, 2015, without representation, the worker submitted and Intent to Object Form for a Non-Economic Loss decision of July 21, 2014 within the time limit. I find no explanation to support why the worker was able to object to the NEL decision within the time limit and not the Long-Term LOE benefit decision.
>
> In his second argument, the worker rep makes reference to an 'ambiguous' statement made by the CM. I find no reference to this statement within the case file and find it bears no relevance to the decision before me.
>
> CONCLUSION
>
> I conclude that an extension of the time limit to object to the July 11, 2013 decision letter is not in order.

[12] The worker appeals this decision to the Tribunal.

### (iii) Law and policy

[13] Since the worker was injured in 2013, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[14] Section 120 of WSIA applies to appeals of Board decisions, within the Board. Section 120 provides as follows:

> **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,
>
> (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.
>
> **(2)** The notice of objection must be in writing and must indicate why the decision is incorrect or why it should be changed.

[15] Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280.*

[16] The standard of proof in workers' compensation proceedings is the balance of probabilities. Pursuant to subsection 124(2) of the WSIA, the benefit of the doubt is resolved in favour of the claimant where it is impracticable to decide an issue because the evidence for and against the issue is approximately equal in weight.

[17] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #9, would apply to the subject matter of this appeal: #300 – Decision Making/Benefit of Doubt/Merits and Justice.

[18] The Board also indicated in its ARO decision that the WSIB *Appeals Services Division Practice and Procedures Document dated July 1, 2016* was applicable, and was available on the WSIB's web site. According to the ARO decision under appeal, the criteria to be considered for objections beyond the statutory time limit include:

> 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 (since decisions prior to the date of January 1, 1998 did not specifically refer to the time limit);
>
> Serious health problems experienced by the worker or the worker's immediate family, or the worker leaving the province due to ill health/death of a family member;
>
> A 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); and,
>
> 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.

### (iv) Submissions

[19] The worker's representative submits that the worker was dealing with a large number of appeal issues at the time of the decision dated July 11, 2013, and he lost track of the earnings basis issue. The worker's representative submits that the worker was also dealing with a mental health crisis as documented in the reports on file, and therefore he was unable to respond effectively to the time limits deadlines, and this should be grounds for an extension of the time to appeal.

[20] The worker's representative also submits that he relies on his submissions to the WSIB, with attachments, dated August 11, 2015.

### (v) Analysis

[21] On the issue of whether the worker should have entitlement for an extension of the section 120 time limit to appeal the Payment Specialist's decision dated July 11, 2013, I find for the worker.

[22] I begin by noting that the Board does not have a policy on time limits, but developed guidelines for dealing with the appeal of time limit extension decisions. I have referred to these guidelines – as set out in the Board's document - entitled the WSIB *Appeals Services Division Practice and Procedures Document dated July 1, 2016* – above in this decision. While these guidelines are not binding upon the Tribunal, I accept that they provide reasonable criteria for time limit extension appeals, and that they are helpful in this regard.

[23] I find that this would be an appropriate case in which I should exercise discretion and direct the Board to extend the time limits set out in the WSIA, for the worker to appeal the Payment Specialist's decision dated July 11, 2013. I have arrived at this conclusion for the following reasons.

[24] First, I note at the outset that it appears that the appeal issue before me regarding the worker's long term rate involves the rate calculation issues set out in the WSIB Payment Specialist's decision dated July 11, 2013; as well as the distinct issues raised by the worker's representative in his correspondence dated August 11, 2015, according to which the worker's

representative requested an adjustment in the earnings basis based on the new assertion that the worker was concurrently employed with another employer at the time of the accident; and based on the assertion that the worker was in training for the position of Full Installer and was therefore an apprentice at the time of the accident on April 15, 2013.

[25] I note that the worker's representative provided further information to the Board concerning the worker's claims to be concurrently employed, and to be an apprentice, on November 5, 2015. In the Case Manager's letter dated November 10, 2015, the Case Manager appears to state that this issue was addressed as part of the Case Manager's previous decision regarding the time limits to appeal the Long Term Rate. In my view the Case Manager's reply dated November 10, 2015 indicates a confusion of the new appeal issues raised by the worker's representative in August of 2015 - according to which the worker's representative requested an adjustment in the earnings basis based on the new assertion that the worker was concurrently employed with another employer at the time of the accident; and based on the assertion that the worker was in training for the position of Full Installer and was therefore an apprentice at the time of the accident on April 15, 2013 – and the issue outlined in the Payment Specialist's decision dated July 11, 2013.

[26] I observe in this regard that in a letter dated November 10, 2015 addressed to the worker's representative, the Case Manager stated:

> You submitted a letter dated November 5, 2015 noting that you were enclosing a letter from [the claimed concurrent employer] dated June 19, 2015, receipt from [a construction training facility] dated June 24, 2012 and certificates from [the construction training facility] dated June 24, 2015.
>
> The reason for your letter wasn't specified. However I already addressed the relevance of this information in my letter to you on August 27, 2015.
>
> As a result there is no further action to take in [the worker's] claim in this regard.

[27] We see that the Case Manager's decision letter dated November 10, 2015 appears to indicate that the worker's appeal on the new issues has missed the time limits to appeal, and so no further action will be taken. I do not agree that this is accurate.

[28] I find that with respect to the issues set out in the correspondence dated August 11, 2015 from the worker's representative - that is, the request for an adjustment in the earnings basis based on the assertion that the worker was concurrently employed with another employer; and based on the assertion that the worker was in training for the position of Full Installer and was therefore an apprentice at the time of the accident on April 15, 2013 –the evidence before me indicates that there was no delay in the worker's representative raising these issues. Based on the documentary evidence contained in the file, I conclude that these issues were raised in the first instance by the worker's representative on August 11, 2015. I find that these are distinct appeal issues that are not addressed in the WSIB Payment Specialist's decision dated July 11, 2013, and I conclude that the worker and the worker's representative are at liberty to proceed with their appeals concerning these issues.

[29] In summary, the worker's appeals on the issues of whether there should be an adjustment in the earnings basis based on the assertion that the worker was concurrently employed with another employer at the time of the accident; and based on the assertion that the worker was in training for the position of Full Installer and was therefore an apprentice at the time of the

accident on April 15, 2013, did not fail to meet a time limit for appeal. The worker is at liberty to pursue these appeals with the Board.

[30] Second, with respect to the long term rate calculation issues addressed in the WSIB Payment Specialist's decision dated July 11, 2013, it appears that there was a failure to meet the time limit to appeal, since the time limit to appeal was January 11, 2014, and the appeal was filed by the worker's representative on August 11, 2015. The delay was therefore approximately 19 months.

[31] I find that the worker is entitled to an extension of the section 120 time limit to appeal this decision for the following reasons:

1. I find that while the delay in appealing the decision in question is rather significant, it is not particularly lengthy.

2. I find that the weight of the evidence indicates that the worker was likely experiencing serious mental health problems at or around the time of the decision of the Payment Specialist dated July 11, 2013, that likely impeded his ability to understand the necessity of appealing the decision in question in a timely manner.

[32] I note in this regard that according to the Assessment Team reporting of Dr. J.W. Lee, registered psychologist; and Ms. J. Cohen, registered physiotherapist; with the Mount Sinai Function and Pain Program (FPP), dated November 8, 2013, the worker was suffering from symptoms suggestive of Posttraumatic Stress Disorder and Adjustment Disorder with Mixed Anxiety and Depressed Mood, as well as thoracic sprain and joint dysfunction and decreased his mobility as a result of the left femur and left hip fracture sustained in the accident. The report stated:

> [The worker] is a 34 year old man who was involved in a work injury on April 15, 2013, in which he was pinned underneath sheets of heavy drywall. He appears to have experienced this incident as a lift threatening event with feelings of extreme helplessness. He sustained a fracture of his leg in three areas and underwent surgical intervention with hardware inserted. he has participated in physical therapy…. in addition to ongoing pain symptomatology, he experiences a number of psychological symptoms that include marked anxiety, anxiety with the prospect of thinking of returning to his prior work, a sense of helplessness, anxiety about he described as lack of regulations occurring on his building site, sleep disruption potentially as a result of dreams, difficulty falling asleep due to pain and recollections of his accident, low self esteem, fatigue worry… and disruption concentration.

[33] I place significant weight on the accuracy of this evidence since as a registered psychologist Dr. Lee is qualified to provide an accurate report concerning diagnosis and etiology; and since the worker was referred to the FPP by the Board.

[34] I also note in this regard that in a letter dated June 24, 2016, the Case Manager stated that the worker had been granted temporary entitlement in the claim for Major Depressive Disorder with features of Post traumatic Stress Disorder in keeping with the diagnosis provided by Dr. Blessing from the Mount Sinai Function & Pain Program (FRP) report dated July 22, 2015; and there was also noted to be a temporary psychological restriction from any work on a construction site.

[35] The worker's representative submits that the worker's mental health crises, along with the various different matters that were being addressed in the worker's WSIB claim file at the time of the July 11, 2013 decision, impeded the worker's ability to appeal the decision of the Payment Specialist dated July 11, 2013 in a timely manner. I agree with this submission. I note that the worker experienced a serious accident, and went on to develop Major Depressive Disorder with features of Post traumatic Stress Disorder as a result of the accident and injuries. I accept that these conditions may have impeded the worker's ability to appreciate the necessity of appealing within the time limits, in the circumstances of this case.

[36] In summary, the worker has entitlement for an extension of the section 120 time limit to appeal the decision dated July 11, 2013.

[37] Based on all of the foregoing, the worker's appeal is allowed.

**DISPOSITION**

[38] The appeal is allowed.

[39] The worker has entitlement for an extension of the section 120 time limit to appeal the decision dated July 11, 2013.

[40] The worker's entitlement to appeal includes, but is not limited to, the worker's appeals on the issues of whether there should be an adjustment in the earnings basis based on the assertion that the worker was concurrently employed with another employer at the time of the accident; and based on the assertion that the worker was in training for the position of Full Installer and was therefore an apprentice at the time of the accident on April 15, 2013.

DATED: September 13, 2017

SIGNED: J. Noble