WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3252/18E

BEFORE: L. Bradbury: Vice-Chair

HEARING: November 7, 2018 at Toronto
Written

D**ATE OF DECISION:** December 19, 2018

NEUTRAL CITATION: 2018 ONWSIAT 3933

APPLICATION BY WORKER FOR ORDER EXTENDING THE TIME TO APPEAL

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: L. Russell, Paralegal

Interpreter: Not required

REASONS

(i) Introduction

[1] The worker requests an extension of time to appeal a decision of the ARO dated May 12, 2016. The ARO rendered a decision based upon the written record without an oral hearing.

[2] The worker filed a notice of appeal with the Tribunal on May 11, 2018, one and a half years beyond the expiry of the six-month statutory time-limit for appealing this decision.

[3] The worker's representative provided a written submission in support of the time extension application on May 11, 2018. The employer objects to the extension of time and provided written submissions on July 23 and August 28, 2018.

(ii) Issues

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

[5] The employer representative submits that if the worker's application is granted, the employer appeal should also be reinstated.

(iii) Background

[6] The following are the basic facts.

[7] The worker injured her right shoulder in a work accident on November 4, 2013. The Board granted the worker entitlement to loss of earnings benefits from November 13, 2013 to January 2, 2014. The Board determined the employer had suitable modified work that was available after January 2, 2014.

[8] The Board later granted the worker entitlement to a 4% Non-Economic Loss (NEL) award but denied entitlement for Chronic Pain Disability (CPD). The employer claimed SIEF cost relief benefits and opposed the other benefits granted to the worker.

[9] The May 12, 2016 ARO decision denied the worker's and the employer's objections and found as follows:

[10] With respect to the worker's objection:

- Chronic Pain Disability remained denied.
- Permanent restrictions were confirmed.
- LOE benefits were paid appropriately.

[11] With respect to the employer's objection:

- The payment of LOE benefits to January 2, 2014 was confirmed as suitable modified work was not available.
- The 25% SIEF quantum was confirmed.

- The allowance of a permanent impairment for the worker's right shoulder was confirmed.
- The 4% NEL quantum for the right shoulder was confirmed.

[12] The employer filed an appeal with the Tribunal on June 17, 2016, within the time limit for appealing the decision. The worker filed an appeal with the Tribunal on June 22, 2016, also within the time limit.

[13] The Tribunal determined that the matter was not suitable to proceed by way of written submissions. In January, 2018 the Tribunal scheduled an oral hearing for May 2, 2018.

[14] On March 29, 2018, the worker representative wrote to the Tribunal and stated: "The worker wishes to withdraw her Appeals. Therefore could you please cancel the Hearing in this matter". The employer representative wrote to the Tribunal on April 4, 2018 and stated: "In recognition of the worker's withdrawal of her appeal, and contingent upon the withdrawal, the employer also wishes to withdraw its appeal".

[15] In a letter dated April 6, 2018 the Tribunal wrote to both parties and stated: "This is to confirm, after receipt of both letters, both parties have withdrawn their appeal. This appeal is now closed". The Tribunal stated that any further appeals would be subject to the time limit guidelines set out in the legislation.

[16] On May 11, 2018 the worker representative sent a new notice of appeal to the Tribunal with a written submission requesting an extension of time to bring the appeal. The Tribunal assigned a new file number and, according to the employer representative's letter of July 23, 2018, her office was not noted as the representative on the new file. This resulted in a delayed response from the employer.

[17] On August 28, 2018 the employer representative provided a new notice of appeal, together with detailed submissions opposing the worker's request for a time extension in this matter.

[18] I must now decide whether to grant the extension of time to appeal the May 12, 2016 ARO decision.

(iv) Relevant Law and policy

[19] Section 125(2) of the *Workplace Safety & Insurance Act, 1997* (the WSIA) provides that notice of appeal shall be filed with the Workplace Safety and Insurance Appeals Tribunal (the Tribunal) within six months of the Workplace Safety and Insurance Board's (the Board) decision or such longer period as the Tribunal may permit.

[20] The Tribunal's *Practice Direction: Time Extension Applications* indicates that the Tribunal generally counts the six months from the date on the Board decision to the date the notice of appeal is received by the Tribunal. Where there is a Board decision and a Board reconsideration of that decision, the date of the original decision is generally used. The date of the Board reconsideration decision will be used where the Board considered significant new evidence on the reconsideration or has changed the result of the original decision.

[21] In determining time extension applications, Tribunal decisions have considered the following factors (see, for example, *Decision No. 1173/15ER):*

- 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

[22] The worker representative submitted:

- There is no prejudice to the employer. The matter was reopened on April 12, 2018 when the representative provided the Tribunal with a copy of an insurance agreement that required the worker to pursue her worker's compensation entitlements in order to continue receiving private disability benefits. Thus, there is a delay of only 2.5 weeks between the time the original appeal file was closed and the reopening of the new appeal file.
- The worker's discontinuance is due, in part, "to the extensive time the Appeals Tribunal took to schedule the original hearing, the events that occurred in the interim, and the Worker's literacy and poor understanding of her litigation".
- The worker would be severely prejudiced if her appeal could not go forward "in so far as the insurance benefits the Worker thought she was entitled to, and were the reason why she discontinued the Appeals Tribunal case, would be in jeopardy".

[23] The employer representative submitted:

- There is a substantial delay. The worker's new notice of appeal was filed 18 months beyond the expiry of the statutory time limit to appeal. Any institutional or systemic delay attributable to the Tribunal is not relevant to this matter.
- There is prejudice to the employer. The worker cancelled the appeal hearing one month prior to the appeal when the employer had already expended a significant amount of time on appeal preparation. To reinstate the appeal will require additional resources.
- The worker has been represented by experienced counsel throughout her various disability income applications/ proceedings, including her WSIB matters and her negotiations with the private insurer. The worker retained different lawyers "but the proceedings in different venues all related to her claims for disability for the same conditions arising in or after 2013". The worker's representative "knew or ought to have known, or was in a position to

determine, the appropriate course of action". The representative submitted that: "Generally, the inadvertence or incompetence of a worker's representative is not accepted by the Tribunal as a sufficient basis for granting a time extension, without additional factors or exceptional circumstances".

(vi) Analysis

[24] After reviewing the information before me, including the parties' submissions, I have determined that the application for a time extension should be granted, in all the circumstances of this case. In addition, the employer's appeal is allowed to proceed. My reasons are set out below.

[25] Two recent Ontario Court of Appeal decisions have set out the principles that apply in considering requests for a time extension to file an appeal. In *Laski v. Laski*, 2016 ONCA 337 (CanLII), the Court stated that the "overarching principle "is whether "the justice of the case" requires it. At paragraph 26, Gillese, J.A. stated that, in determining the justice of the case, the Court "is to take into account all relevant considerations" and that each case depends on its own circumstances. Gillese, J.A. noted a number of factors that should be considered, including whether the moving party had a *bona fide* intention to appeal within the relevant time period; the length of and explanation for, the delay in filing; any prejudice to the responding parties caused by the delay; and, the merits of the proposed appeal (see Tribunal *Decision No.2354/18E*).

[26] Tribunal *Decision No. 3295/17* also referred to the Court of Appeal decision in *Cunningham v. Hutchings,* 2017 ONCA 938 (CanLII) where Brown, J.A. referred to the principles in *Laski* and adopted a "holistic" approach to determine the "justice of the case".

[27] Bearing these principles in mind, and the Tribunal's criteria as set out in the Practice Direction, I will now consider the relevant factors in this case.

[28] First, the worker indicated an intention to appeal prior to the expiry of the statutory time limit. Her first notice of appeal was filed within 6 weeks of the May 12, 2016 ARO decision. She acted diligently in proceeding through the appeal process until the March 29, 2018 withdrawal of her appeal.

[29] Second, the length of the delay in requesting a reopening of the appeal is minimal. The worker representative wrote to the Tribunal on April 12, 2018 to advise that the worker had new information that affected her earlier closure request, which was 2.5 weeks after the file was closed. The representative filed a new notice of appeal on May 11, 2018 which was 6 weeks after the closure request. I understand that the overall time from the date of the ARO decision is 18 months; however, in terms of this application, I am satisfied that the delay is not lengthy and it will not affect the Tribunal's ability to properly adjudicate the matter.

[30] Third, I am concerned about potential unfairness to the worker if the time extension is not granted. Her representative submitted that the worker stands to lose her private pension that would continue to age 65 if she does not pursue her workers' compensation appeal. The employer submitted that the worker representative knew, or ought to have known, the possible repercussions when he advised that the worker was withdrawing her appeal at the Tribunal. Without deciding that issue, I find that the potential consequences to the worker are serious and constitute an important factor in the circumstances of this case. I am equally concerned about potential unfairness to the employer who withdrew their appeal contingent on the worker's withdrawal. In my view, the circumstances are such that both appeals should be allowed to continue.

[31] Finally, I am satisfied that there is no potential prejudice to the employer in this case. As noted above, the delay with respect to the reopening request is not lengthy. The time spent in preparing for the earlier appeal date will not be wasted because a new hearing date will be set. The length of the delay is not likely to affect the appeal on its merits.

(vii) Conclusion

[32] In all the circumstances of this case, I conclude that the justice of the case favours granting the worker's application for a time extension to appeal the ARO decision dated May 12, 2016.

[33] The employer appeal may also proceed and will be heard together with the worker's appeal.

DISPOSITION

[34] The application is allowed. The worker is granted an extension of time under section 125(2), and the appeal may be heard by The Tribunal.

[35] The employer appeal may also proceed and will be heard together with the worker's appeal.

DATED: December 19, 2018

SIGNED: L. Bradbury