Legislation

Injured Workers first became subject to limitation periods for the purpose of appealing denial or termination of benefit claims with the passage of The *Workplace Safety and Insurance Act*[i] ("WSIA") which came into force on January 1st 1998. Claims arising before that date are governed by the *Workers' Compensation Act*[ii] ("WCA").

Under the WCA regime, injured workers were only subject to time limits for the purposes of making a claim for benefits. There were several notice requirements under the WCA. Most importantly, pursuant to section 22, a worker must file a notice of accident to the Workplace Safety and Insurance Board ("WSIB") within six months from its occurrence:

> 22.(1) Subject to subsection (5), compensation or health care is not payable unless notice of the accident is given as soon as practicable after the happening of it and before the worker has voluntarily left the employment in which he or she was injured and unless the claim for compensation or health care is made within six months from the happening of the accident or, in case of death, within six months from the time of death.

Subsection (5) allows compensation even if the deadline is missed, as long as the Board believes the claim is just and ought to be allowed:

> (5) Failure to give the prescribed notice or to make such claim or any defect or inaccuracy in a notice does not bar the right to compensation if in the opinion of the Board the employer was not prejudiced thereby or, where the compensation is payable out of the accident fund, if the Board is of opinion that the claim for compensation is a just one and ought to be allowed.

Pursuant to section 22.1, once a claim is filed, a person receiving benefits must notify the board of a material change in circumstances within 10 days of its occurrence.

> 22.1 A person receiving benefits or who may be entitled to receive benefits under the Act shall notify the Board of a material change in circumstances in connection with his or her entitlement to benefits within 10 days after the material change occurs.

Other notice requirements under the old act include: electing whether to claim compensation under the Act or foreign law, electing compensation outside Ontario, determining whether the worker is entitled to pursue a civil action against a person other than his employer,[iii] objecting to employer-requested medical examination,[iv] second medical assessments for non-economic loss benefits,[v] applications to determine whether an employ has fulfilled an obligation to re-employ,[vi] appealing a Board decision on access to health records,[vii] and employer's obligations to report accidents.[viii]

Notably, the WCA did not contain regular limits on an Injured Worker's right to appeal Board decisions to the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") or the Board itself, unless the decision was made before 1985:

> 94.(1) An appeal to the Appeals Tribunal lies from a decision of the Board with respect to the matters referred to in clauses 86 (1) (b) and (c).
>
> Decisions before October 1, 1985
> (2) With the leave of the Appeals Tribunal, a decision of a panel of the Board made before the 1st day of October, 1985 may be appealed to the Appeals Tribunal.
>
> Idem
> (3) Leave to appeal a decision to which subsection (2) applies shall not be granted unless,
> (a) there is substantial new evidence which was unavailable at the time of the hearing by the panel; or
> (b) there appears to the Appeals Tribunal to be good reason to doubt the correctness of the decision. R.S.O. 1990, c. W.11, s. 94.

This was changed under the WSIA, which introduced time limits for objections to Board decisions and filing notice of intent to appeal:

> 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.
>
> Notice of objection
> (2) The notice of objection must be in writing and must indicate why the decision is incorrect or why it should be changed. 1997, c. 16, Sched. A, s. 120.
>
> …
>
> 125. (1) A worker, employer, survivor, 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) may appeal a final decision of the Board to the Appeals Tribunal.

Notice of appeal

(2) The person shall file a notice of appeal with the Appeals Tribunal within six months after the decision or within such longer period as the tribunal may permit. The notice of appeal must be in writing and must indicate why the decision is incorrect or why it should be changed.

Pursuant to s. 112(3), the time limit on any decision rendered before January 1, 1998 begins on that day.[ix]

Similar to the WCA, the WSIA requires a worker to file an initial claim within six months:

22. (1) A worker shall file a claim as soon as possible after the accident that gives rise to the claim, but in no case shall he or she file a claim more than six months after the accident or, in the case of an occupational disease, after the worker learns that he or she suffers from the disease.

Extension of time

(3) The Board may permit a claim to be filed after the six-month period expires if, in the opinion of the Board, it is just to do so.

Again, pursuant to s. 23 there is a 10-day period to inform of material changes in circumstances.[x]

Also similar to the WCA, the WSIA has various miscellaneous notice requirements, including: electing whether to claim compensation outside Ontario, [xi] objecting to employer-requested medical examination,[xii] applications to determine whether an employ has fulfilled an obligation to re-employ,[xiii] appealing a Board decision on access to health records,[xiv] concurrent entitlements under insurance plans,[xv] decisions regarding rights of action and liability,[xvi] labour market re-entry plan for spouse, [xvii]and employer's obligations to report accidents.[xviii]

Policy and Guidelines

According to section 126 of the WSIA, WSIAT must apply any relevant Board policies in making a decision. It will also consider any relevant guidelines.

There is no Board Operational Policy Document which establishes the criteria to be considered by decision makers when faced with a request to extend the time for objecting to a Board decision. WSIAT decisions, however, often refer to the Board's Appeal System Practice and Procedure Document.[xix] Appendix A, titled "Guidelines for Dealing with Appeal Time Limits" which reads as follows:

4. RECONSIDERING DECISIONS AFTER EXPIRY OF TIME LIMITS

The WSIB has the authority under Bill 99 to reconsider any decision "at any time as it considers it advisable to do so". This contemplates decisions being changed by the WSIB through reconsideration after the expiry of the statutory appeal period.

Circumstances where the WSIB will exercise its authority to reconsider decisions outside of the appeal period include: where a technical error has been made (for example – an incorrect date has been used, incorrect earnings information was applied or an incorrect or out of date policy has been used); where new evidence is submitted, which is substantial in nature (for example – results of new medical testing, breakthroughs in medical science, or other information coming to light which was not reasonably available within the appeal period).

5. AUTHORITY TO GRANT EXTENSIONS

If reconsideration is not possible and the case has been brought forward for review after the expiry of the statutory time limit, the WSIB has the authority to extend the time limit in appropriate cases.

Requests for extensions will be considered by the adjudicator who will notify the party in writing of the outcome of the review and the right to object if the extension is denied.

6. CRITERIA TO BE APPLIED IN DETERMINING TIME LIMIT EXTENSIONS

The length of the delay. Broad discretion to extend will be applied where appeals are brought within one year of the date of the decision. Additional criteria to be considered for longer delays include:

- 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
- Whether there was actual notice of the time limit. This acknowledges that post '98 decisions specifically refer to the time limits but pre '98 decisions do not;
- Whether there are other issues in the appeal which were appealed within the time limits and which are closely related to the issues not appealed within the time limits;
- The significance of the issue in dispute;
- Whether the party was able to understand the time limit requirements.

All decisions to extend time limits will be based on the merits and justice of the case.

The Board does have policy in regards to initial claims. The policy identifies a series of circumstances that created grounds for a time extension. Some key circumstances include changes in law or policy, if the worker makes an incorrect election about claiming outside Ontario, if the employer does not report the accident and if there is a change in claim status (see Appendix A). Workers may also be granted an extension in "exceptional circumstances":

> Exceptional circumstances can include
>
> - compelling personal reasons, such as serious health problems or accident (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
> - the worker's ability to understand the time limit requirements and consequences of not meeting them (e.g., was the worker made aware at the workplace of the requirement to claim and consent; were language difficulties a factor?), and
> - whether the worker reported the accident to the employer, health care professional, or co-workers.

Reconsideration

If a worker seeks an extension from either the Board or WSIAT and is denied, both bodies have the power to "confirm, amend or revoke" any of their decisions at any time if they consider it "advisable to do so", pursuant to sections 121 and 129 respectively. Consequently, if a time extension is not allowed, the matter can be revisited upon application, however the test is stringent. In Decision No. 2402/01ER, the Vice-Chair outlined the oft-repeated test:

> Because of the need for finality in the appeal process, the Tribunal has developed a high standard of review, or threshold test, which it applies when it is asked to reconsider a decision.
>
> Generally, the Tribunal must find that there is a significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision. The error and its effects must be significant enough to outweigh the general importance of decisions being final and the prejudice to any party of the decision being re-opened. The threshold test has been discussed in some detail in Decisions Nos. 72R (1986), 18 W.C.A.T.R. 1; 72R2 (1986), 18 W.C.A.T.R. 26; 95R (1989), 11 W.C.A.T.R. 1; and 850/87R (1990), 14 W.C.A.T.R. 1.

While a high bar, the test has proved successful when new evidence becomes available or when new counsel attempts to correct former counsel's errors. For instance in Decision No. 388/03ER , a case in which I acted for the Injured Worker before WSIAT, new medical evidence led the Vice-Chair to reconsider a previous WSIAT decision not to grant an extension. The worker's former representative had failed to appeal the Board's decision in time, and the appeal was eventually filed seven months late. The first WSIAT hearing found that inadequate representation alone was not grounds alone to allow an extension. On reconsideration, the Vice-Chair found that the former representative was responsible for providing inadequate justification for an extension. However, the current representative had now provided that explanation. Specifically, the Vice-Chair found the rejected back claim related to three other back claims, and raised an issue of a permanent disability. Reconsideration was allowed.

Case Law

As noted above, with the WSIA coming into force in January 1998, for the first time Injured Workers were subject to time limits within which they could object to the Board's decisions. For decisions issued before January 1, 1998, section 112(3) of the new act provided that the time to appeal began on January 1, effectively giving employees until June 30, 1999 to object. Several claimants missed this initial deadline, and subsequently appealed the Board's refusal to reconsider their claims to WSIAT.

On July 13, 1999, WSIAT released a group of nine time limit decisions, in the so-called "Motions Day" decisions. In each case, the Vice-Chair allowed a time extension. However, he noted that the time limits must be respected to ensure appeals were brought in a timely fashion, so evidence is fresh, prejudice to other parties is limited and finality is ensured. "The tribunal's discretion to extend time therefore must be exercised with a view to also ensuring effective and consistent application of this provision." With this in mind, the Vice-Chairs outlined seven, non-exhaustive factors to be considered in considering an extension:

1. The lapse of time between the expiry of the time limit and when the appeal was filed and whether there is an explanation for this.

2. The nature of the issues under appeal; whether the appeal presents a *bona fide* case on its face and is not frivolous or vexatious.

3. Whether there is prejudice to a respondent or whether the case is so stale that it cannot be reasonably adjudicated.

4. Whether the appellant ought to have known of the time limit.

5. Whether the appellant acted diligently once he or she learned of the time limit.

6. Whether a refusal to hear the appeal by the Tribunal could result in a substantial miscarriage of justice due to defects in prior process or clear and manifest errors.

7. Whether there is evidence to show an intention to appeal prior to the expiry of the time limit.

The "motions day" cases illustrate how these seven factors are employed, and how other considerations will also be given weight in granting an extension.

In Decision No. 972/99E, the appellant's representative mistakenly sent its intent to appeal a final decision of the Board to the Board itself, not the Tribunal as required by s. 125. The proper notice was not sent until eight months after the time limit expired. The Vice-Char granted an extension because the worker had shown an intent to appeal before the deadline and taken steps to provide notice. Moreover, the Vice-Chair recognized that the letter sent by the Board informing of the deadline to appeal could be easily misinterpreted, leaving room to recognize an honest mistake.

In Decision No. 973/99E, the worker's union representative took responsibility missing the deadline by six days. The Vice-Chair granted an extension given the short delay and because the employer did not object. Similar reasons were given in No. 974/99E, where the delay was again six days and the notice had been mailed well before the deadline.

In Decision No. 977/99E, the worker's representative believed that the time limit applied only to internal Board appeals, not WSIAT appeals. The Vice-Chair found the 27-day delay was short and that the employer did not object, so he granted an extension.

In Decision No. 981/99E, the Vice-Chair granted an extension after the worker missed the deadline by just over one month. The worker was self-represented, the employer did not object, and the application came just after the law introduced time limits.

A similar result was reached in Decision No. 983/99E. The unrepresented worker did not know of the new time limits and missed the deadline by a month and a half. He immediately filed an appeal when he found out about the deadline. The Vice-Chair accepted that he did not know of the change in the law and granted an extension on the grounds that the worker acted quickly after learning of the deadline. Also, in Decision No. 985/99I, the Vice-Chair held that a worker was not formally represented during the appeal notice period. The worker thought his request for representation constituted his notice of intent to appeal. As a result, he missed the deadline by just over three months. The Vice-Chair extended the deadline noting that a representative would have filed the appeal in time, there was an intent to file an appeal and that there was no prejudice.

In Decision No. 982/99E, the Employer sought an extension from WSIAT because it had been confused about the new time limits, and had been given misinformation when it inquired with the Board before the deadline. The worker opposed the appeal, arguing it would cause her considerable stress. The Vice-Chair allowed the extension, noting that the employer was a small business and had shown an intent to appeal by contacting the Board. The Vice-Chair also noted that the worker's objection could not be used as the sole ground

for denying an extension. The worker would have to show the claim was without merit, frivolous or vexatious.

In Decision No. 984/99E, the lawyer for the worker said he was not informed until after the deadline that an Appeals Resolution Officer ("ARO") had made a decision. The Vice-Chair held that an extension should be allowed because the law had recently changed, there was no prejudice and the appeal raised a substantial issue.

The seven factors have remained a fixture of time-extension considerations. However, they have been restated and slightly reformulated. Currently, the board identifies nine considerations as key (though not exhaustive) criteria:[xx]

1. The lapse of time between the expiration of the six months and the date the appeal was filed and any explanation for the delay;

2. Whether there is evidence to show an intention to appeal prior to the expiry of the six months;

3. Whether the applicant ought to have known of the time limit;

4. Whether the applicant acted diligently;

5. Whether there is prejudice to a respondent;

6. Whether the case is so stale that it cannot reasonably be adjudicated;

7. Whether the issue is so connected to another appeal that the Tribunal cannot reasonably adjudicate the other appeal without considering it;

8. 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;

9. Whether there are exceptional circumstances.

Case law on each factor is outlined below. As a general note, the board will not allow a time extension if an alternate remedy is available. For example, in Decision No. 698/02E, the Vice-Chair denied a 8.5-month time extension because the remedy sought – re-determining her non-economic loss – was available to her under another section of the act.

Lapse of time

While precedent is not binding at WSIAT, Vice-Chairs attempt to use previous cases to establish principles and consistent rulings. Regarding the lapse of time, many Vice-Chairs refer to Decision No. 1815/08E.[xxi] The worker missed the Notice of Appeal deadline by two

days. The Vice-Chair allowed the extension, but noted that even when the deadline is missed by only a couple of days, an explanation needs to be provided. In this case, the worker's representative had made the error. Generally, the Vice-Chair said:

> What the above signifies is that no representative should be sanguine that the mere fact that an appeal is only a few days late will automatically entitle him or her to an extension of time. There will need to be compelling reasons to grant an extension of time, no matter what the period of delay. The nature of the delay will be a factor in considering whether to grant an extension of time. It is obvious that a five-year delay is of a different nature than a five-day delay and the particular facts will be considered by the decision-maker. Assumptions about an automatic grace period, however, are not, in my view, justifiable and all reasonable efforts should be made to comply with the statutory time limits.

This reasoning was reflected in Decision No. 2441/08E. The worker missed the deadline by only five days. Nevertheless, the Vice-Chair denied the extension, citing that the worker's representative was experienced and should have known about the deadline. Also, there had been no evidence of an intent to appeal before the deadline.

Despite decisions in this spirit, in other cases a short delay in and of itself has been sufficient to grant an extension. In Decision No. 412/10E, the worker missed the deadline by about two weeks. The Vice-Chair found no intent to appeal before the deadline, no representative error and that the worker ought to have known about the deadline. Nevertheless, the extension was allowed, in part because there was no prejudice to the employer.

In Decision No. 1215/10, the worker missed the appeal date by about two months. The Vice-Chair noted that this was only one third of the time given to appeal. More importantly, he found that the delay had not made the case so stale that it could not be reasonably adjudicate and that there was no prejudice to the employer.

Evidence to show an intention to appeal prior to the expiry of the time limit

This is a common consideration in both allowing and denying extensions. In Decision No. 614/01, the Vice-Chair noted that whether or not a worker can show an intent to appeal before the deadline is a "critical issue".

In Decision No. 1512/08ER, WSIAT reconsidered its decision to deny an extension. The worker had retained new representation, who brought evidence of an intent to appeal before the deadline. Specifically, the worker submitted an affidavit that said she had instructed the previous counsel to pursue the appeal before the deadline, and that he then followed the wrong procedure. She, however, was under the impression that the appeal was being pursued properly. This evidence, the Vice-Chair held, would have led WSIAT in

the initial application to allow the extension. A similar result occurred in Decision No. 2380/09 and Decision No. 1359/00ER2.

Establishing intent to appeal can assist a worker overcome a notably lengthy delay in filing a Notice of Appeal. In Decision No. 158/06E, the worker sought to appeal decisions made in 1976 and 1978. He filed his notice in June, 2005, seven years after the June 30, 1998, deadline for pre-1998 cases. Since 1996, the worker had contacted the Board about the claim, but received inconsistent answers as to whether the matter had been the subject of a final decision. Given the circumstance, the board found it would be unfair to deny the extension.

In Decision No. 644/10E, the worker sought to object to the Board's permanent disability award to WSIAT. He mistakenly sent the notice of objection to the Board office and not WSIAT. The chair noted that a mistake in sending the notice is often considered to be evidence of intent to appeal. However, he denied the extension because the objection did not indicate why the Board quantum was incorrect, which is technically require by s. 125 of the WSIA.

Ought to have known of time limit to appeal

This issue is often raised when faulty notice has been given to the worker about appeal time limits. In Decision No. 119/08E, the Vice-Chair granted a nine-year and two month extension. Despite the long delay, the Vice-Chair found no evidence that the worker was ever made aware of the time limit until 2006, when the Board advised that there should be an appeal to the Tribunal. As a result, there was no reason he ought to have known about the limit. In Decision No. 421/01ER, on reconsideration of an earlier decision, the Vice-Chair granted a one-year extension because the worker was not notified of the time limit to file a notice.

In Decision No. 2134/01, the Vice-Char held that the worker's experienced representative should have known about the time limit to appeal. The representative had filed the notice late because he was waiting on medical reports. However, these reports were not necessary to file the notice. As a result, the request for a two-month extension was denied.

Diligent actions

In Decision 488/10ER, the Vice-Chair outlined that the longer the delay, the greater burden there is on the defendant to show diligence. In this case, despite submissions about his representative's health and difficulties in retrieving information from him, the Vice-Chair did not grant an extension.

'Diligent action' decisions often look at the conduct of the worker's representative. Generally, as has been seen, WSIAT will show sympathy if the worker's previous representative acted to the detriment of the worker.

For instance in Decision No. 1731/04ER, the worker sought a reconsideration of a time extension denial. Since the date of the original decision, the worker's representative had been banned from appearing before WSIAT. The representative had also been found guilty on several counts of fraud. The Vice-Chair reconsidered the decision and allowed the extension.

The Vice-Char in Decision No. 3536/00ER3 outlined the considerations the board should take into account when assessing a representative's conduct. The Vice-Chair noted that there are few opportunities for a worker to hold representatives accountable under the WSIA and said:

> In my view, in the context of the non-adversarial tradition in which the Tribunal operates, it is necessary and appropriate to consider the conduct of the representative separately from the conduct of the appellant. In this regard, I agree with Decision No. 1013/02ER (October 8, 2003), in which the Vice-Chair commented:
>
> > In my view, the carelessness of a representative can only be fairly evaluated as a factor in determining an extension of time request when the conduct of the worker is also assessed. For example, consideration could be given to such things as whether the worker failed to exercise a reasonable degree of diligence with the representative or showed no significant interest in the pursuit of the appeal.
>
> In my view, this approach is particularly necessary when there is evidence that the representative has led the client to believe that the appeal was filed within the time limit period. If that has happened, it is difficult to see what the client could have been expected to do.

In Decision No. 1299/11E, the worker did not appeal until more than three years after the deadline. He submitted that he had presumed that his lawyer was handling the appeal. The lawyer had been arrested for fraud in 2009, at which point the worker discovered the appeal had not been filed. The worker sent the notice of appeal in April 2011. The employer objected to the extension. The Vice-Chair denied the application because the worker had made no effort to follow-up with his representative during the six-month appeal period. Once the appeal period had passed, the worker should have been concerned that he had received no correspondence from the tribunal. Finally, the board did not recognize the arrest as special circumstances, because his lawyer was not taken into custody until 10 months after the deadline passed.

In Decision No. 2812/07ER, the Vice-Chair outlined what a worker should establish to show it acted diligently in communicating with a representative:

1) Satisfactory evidence that the appellant instructed the representative to proceed with the appeal and that the [worker] had reasonable grounds to expect the representative had acted upon those instructions
2) Reasonable diligence on the part of the appellant to follow-up with the representative on the status of the appeal. Long periods of time without communication with the representative may result in a denial of the time extension application
3) The diligence of the appellant to act in haste upon becoming aware that the appeal had not been filed within the time limit to do so.

In this application for reconsideration, the worker presented evidence that it had acted within these guidelines, and the Vice-Chair allowed an extension of more than two-years.

In Decision No. 72/11E, a one-year extension was granted because the French-speaking worker had been receiving documents in English. The Vice-Chair found that despite the delay, the worker was diligent in contacting the board to receive the documents in French.

Prejudice to a respondent

In Decision No. 1544/00ER, the Vice-Chair outlined some principles on the issue of prejudice. The worker was seeking a reconsideration of a decision denying a five-month extension. The representative relied on the worker's statement that she had sent an intent to appeal all claims. In fact, she had only sent the notice for all claims in 1988, which did not include a decision by the ARO. For a number of reasons, the Vice-Chair allowed the reconsideration, including for a lack of prejudice. On this point, the Vice-Chair said:

> "Prejudice generally refers to the detrimental effect on the respondent's ability to present its case as a result of the lateness of the appeal. For example, prejudice to a respondent may be established if a material witness becomes unavailable during the period following the expiration of the time limit."

In Decision No. 2161/06E, another case in which I acted for the Injured Worker before WSIAT, the employer objected to a request for a two-month extension. The worker had been denied entitlement for chronic pain in her hands, wrists, elbows, shoulders and knees. The Vice-Chair held that the worker had shown an intent to appeal before the deadline by phoning the board, and that the former counsel had acted negligently. Moreover, the entitlement issue was deemed to be significant. In regards to the employer's objection, the Vice-Chair held that the employer needed to submit grounds of actual prejudice, not just a bald objection.

In Decision No. 1171/08E, another case in which I acted for the Injured Worker before WSIAT, the worker sought an extension of nine years after he was found not to be entitled to certain loss of earnings benefits. The Vice-Chair allowed the extension because, among

other reasons, the employer had since gone out of business. As a result, there was no risk of prejudice.

In Decision No. 1377/00, a 14-month extension was denied because of prejudice. The worker sough to appeal the ARO's decision that the employer had not breach re-employment obligations when it fired the worker. The worker had been involved in other appeals, and was held to be aware of the time limit requirements. The worker had sued the employer for wrongful dismissal, and had not raised the re-employment issue in settlement discussions. The Vice-Chair found that filing the appeal after her other claims and lawsuit settlement resulted in sufficient prejudice to the employer to deny the application.

Issue is so stale it cannot be reasonably adjudicated

Whether an issue is so stale that it cannot be reasonably adjudicated is often tied to the risk of prejudice to the respondent.

In Decision No. 2510/09, the worker sought to appeal a 16-year-old decision of the Board. The ARO denied the extension, and the worker appealed to WSIAT. The Vice-Chair found that the length of time between claim and the appeal made the case too stale to adjudicate. The worker was a sewing machine operator with limited English skills. The Vice-Chair determined she likely received notice in 1998 about the new time limits to appeal, and should have sought assistance at that time.

In Decision No. 91/041, the Vice-Chair considered a series of nine claims stemming from an injury that happened in 1988. Five of the claims raised issues of staleness. The ARO had allowed a time extension all claims and the employer appealed. Since the injury, the worker had become addicted to heroin and alcohol, which caused him to be hospitalized regularly. The worker eventually filed the notice of appeal three years after the June 30th, 1998 deadline. In the Decision, the Vice-Chair addressed the issue of staleness on the Board's initial denial of a $140 medical bill claim. The Board found no evidence that the worker ever paid the bill, or that the clinic had been seeking payment. There was no evidence the clinic still operated. As a result, the Board held the issue of the bill was too stale for proper adjudication. Staleness was also considered in a claim for a taxicab expense. The Vice-Chair found that the worker would likely not be able to locate his taxi receipts from 1988, or identify whether a particular receipt was used for purposes relevant to the WSIA. The same was true for a claim for a clothing allowance and a drug dependency allowance. Nevertheless, the Vice-Chair allowed the extension for a claim related to the effects of a 1996 surgery, because the issue was interrelated with main issue of an entitlement to chronic pain disability. Moreover, there was evidence available about the procedure and its effects.

Connected to another appeal that Tribunal cannot reasonably ignore it

The reason for considering an application for an extension in light of other appeals was discussed in Decision No. 1368/06. WSIAT granted a 19-month extension to appeal a Board decision denying the worker entitlement for carpal tunnel syndrome in her neck and left wrist. The claim was related to several other appeals about the carpal tunnel syndrome, which the worker had filed on time. The Panel determined that the extension needed to be granted to "exclude this one issue would, in our view, compromise the Panel's ability to treat the worker as a 'whole person'."

Decisions conflict on what constitutes sufficient connection. In Decision No. 536/05E, another case in which I acted for the Injured Worker before WSIAT, the Vice-Chair granted a 20-month extension in part because he found that the claim in question was so connected with an appeal filed on time that both needed to be adjudicated. The on-time appeal addressed the Board's denial of entitlement for chronic pain disability resulting from an elbow impairment. The appeal requiring an extension dealt with, among other things, a non-economic loss determination with respect to the same elbow condition.

In contrast, a month later the same Vice-Chair issued Decision No. 862/05E, in which I also acted for the Injured Worker. He denied the one-year extension, in part because there was not a sufficient connection between the issue under appeal and another appeal filed on time. The employer objected to the extension. The decision in question denied the worker organic entitlement for a left shoulder injury. The on-time appeal dealt with chronic pain claims also relating to the shoulder injury. The Vice-Chair agreed with employer, saying: "While the issues in the two decisions are connected, for example, entitlement for the left shoulder is considered in both decisions, they are not so connected that the "in time" appeal could not reasonably be adjudicated without considering the late appeal."

This decision also stands in contrast to Decision No. 1185/10, where the Vice-Chair allowed a 12-year extension because a claim for an organic entitlement should be heard together with a claim for chronic pain.

When a worker misses the 30-day deadline to appeal a labour market re-entry ("LMR") decision, establishing a connection to other issues can assist in securing an extension. In Decision No. 2419/10, the Vice-Chair recognized that LMR issues are often intertwined with loss of earnings ("LOE") and suitable employment or business ("SEB") determinations. "The reality of the SEB and LMR issues is that they are often intrinsically connected to LOE benefits. This point was made in Decision Nos. 2199/04 and 673/06E where it was held that a worker would be unable to evaluate the adequacy of an LMR plan identifying the SEB without complete information with respect to the deemed earnings from the SEB." A similar result was also reached in Decision No. 2261/08.

In Decision 826/08, another case in which I acted for the Injured Worker before WSIAT, the worker appealed an LMR plan decision to the Board, which pursuant to s. 120 must be done within 30 days. The original notice of the LMR plan was sent in February, 2003. In July, 2005, the worker was informed about what his Loss of Earning benefits would be

under the plan. The appeal was filed eight and a half months after this letter. The Vice-Chair held letters constituted appealable decisions by the Board. WSIAT granted an extension on the 2005 letter because this fell within the Board's policy to grant broad discretion to allow an appeal brought within a year of the decision. For the 2003 letter, the board also granted an extension, as the issues raised in that letter were too intertwined with the issues of the 2005 letter that both should be allowed to proceed.

Substantial miscarriage of justice

The issue of substantial miscarriage of justice often leads to an extension in the face of procedural and substantive errors by the Board and Tribunal.

In Decision No. 1389/06, another case in which I acted for the Injured Worker before WSIAT, an extension was granted after almost a two-year delay. The worker, a millwright, attributed a back injury to heavy lifting associated with his work. In his report, the Claims Adjudicator ("CA") wrote that the worker's chiropractor did not believe the injury was work-related. This directly contradicted the evidence before the CA. Moreover, the CA also did not address the worker's claim that his employer pressured him to seek accident and sickness benefits, not WSIB benefits. Noting other concerns, the Vice-Chair found there were "clear and manifest" errors in the decision that risked causing a substantial miscarriage of justice. He also found no prejudice to other parties, and consequently granted the extension.

In Decision No. 1257/02E, at issue was whether an accident had in fact occurred. The ARO had referred to evidence given by co-workers, but the decision itself did not rely or address the statements. The Vice-Chair held that the co-worker's evidence was key to determining whether there had been an accident, and that there was a risk of a substantial miscarriage of justice if the ARO's decision stood. As a result, she granted a 45-day extension.

In Decision No. 170/04, the worker sought to appeal the Board's decision to terminate his benefits. A nail had gone through his eye while at work. The Vice-Chair found that this injury had been psychologically traumatic, particularly because the worker had been young and immature at the time of accident. This trauma made it difficult for him to take the proper steps to object to a board decision. With this in mind, the Vice-Chair wrote:

> "Considering the seriousness of the compensable disability, the serious and long-lasting effect of the decision to which the worker seeks to object, the evidence of intent to object, the fact that the employer has not opposed this appeal, the delay involved is under a year and the exceptional and circumstances in this case, including his youth and his reaction to the injury itself, I am of the view that a potential exists for a miscarriage of justice, if I do not extend the time limit for objecting to the decision of August 2002."

Exceptional circumstances

Whether exception circumstances should qualify a worker for an extension arises most often when the worker delays in reporting the accident.

In Decision No. 1023/11, the worker reported his shoulder injury to the Shop Foreman and a co-worker. Later he reported the accident to his physician. While he did not fulfill the formal requirements of the WSIA, the Vice-Chair found these actions to constitute exceptional circumstances allowing for an extension.

In Decision No. 2289/08, the worker did not report the accident because he did not believe it was work-related. In 2000, he had slipped in the parking lot outside work, and fractured his right ankle. In 2005, he filed the claim after learning it might be work related. The Vice-Chair found that this constituted exceptional circumstances.

In Decision No. 1165/08E, the worker filed his notice of accident nine and half years late. The employer vehemently opposed the application for an extension, as the personnel file had been destroyed in the intervening time. However, the worker submitted evidence that he suffered from serious psychiatric problems that impaired his ability to file a claim on time. This, the Vice-Char found, constituted an exceptional circumstance.

The foregoing demonstrates what is, on the whole, a generous and lenient attitude by Worker's Compensation decision-makers, particularly at the WSIAT level, to Injured Workers seeking to extend time limits for appealing adverse decisions. Counsel are well-advised to review **every** decision letter received from the Board on behalf of a client to ensure a notice of intent to appeal is filed with the Board. A simple one or two sentence letter identifying the impugned decision and making a bald assertion as to the grounds for appeal is sufficient to secure a right of appeal. After a right of appeal is secured, there is no time limit within which the formal Objection process must be commenced; counsel can proceed at their leisure. Bookmarking every adverse decision with a Notice of Intent to Appeal will save counsel considerable time and effort in making time extension request submissions which, as noted above, require considerable and time-consuming evaluation of a number of criteria.

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[i] S.O. 1997, CHAPTER 16

[ii] R.S.O. 1990, CHAPTER W.11

[iii] 9.(1) Where by the law of the country or place in which the accident happens the worker is or his or her dependants are entitled to compensation in respect of it, they shall be bound to elect whether they will claim compensation under the law of such country or place or under this Part and to give notice of such election, and, if such election is not made and notice given, it shall be presumed that they have elected not to claim compensation under this Part.

(2) Notice of the election, where the compensation under this Part is payable by the employer individually, shall be given to the employer and, where the compensation is payable out of the accident fund, to the Board, and shall be given in both cases within three months after the happening of the accident or, in case it results in death, within three months after the death or within such longer period as either before or after the expiration of such three months the Board may allow.
The same limit applies to compensation outside Ontario (s. 9.1) and where the worker is entitled to action against person other than the employer (s. 10).

[iv] 23(2) Where a worker objects to the requirement of the employer to submit to a medical examination or to the nature and extent of the medical examination, being conducted by a medical practitioner the worker or the employer may, within a period of fourteen days of the objection having been made, apply to the Appeals Tribunal to hear and determine the matter and the Appeals Tribunal may set aside the requirement or order the worker to submit to and undergo a medical examination by a medical practitioner or make such further or other order as may be just.

[v] 42(14) A worker or an employer who requires a second medical assessment shall give notice thereof to the Board within the forty-five day period referred to in subsection (13).

[vi] 54(11) A worker may apply to the Board for a determination whether the employer has fulfilled the employer's obligations to the worker under this section and the Board shall make the determination.

[vii] 71(6) (6) A worker, employer or party of record may appeal a decision of the Board made under this section within twenty-one days of the mailing of the Board's decision and no access to or copies of the Board's records shall be provided until the expiry of the twenty-one day period or until the Appeals Tribunal gives its decision, whichever is later.

[viii] 133.(1) Every employer, within three days after learning of the happening of an accident to a worker in the employer's employment by which the worker is disabled from earning full wages or that necessitates health care, shall notify the Board in writing of,

(a) the happening of the accident and the nature of it;
(b) the time of its occurrence;
(c) the name and address of the worker;
(d) the place where the accident happened;
(e) the name and address of the physician or surgeon, if any, by whom the worker was or is attended for the injury, and shall in any case furnish such further details and particulars respecting any accident or claim to compensation as the Board may require

[ix] (3) Sections 120 and 123, subsection 125 (2), section 126 and subsections 174 (1) to (5) of this Act apply, with necessary modifications, to pre-1998 injuries and to decisions of the Board rendered before January 1, 1998, but the time limits in section 120 and subsection 125 (2) apply only from January 1, 1998

[x] 12(3) A person receiving benefits under the insurance plan or who may be entitled to do so shall notify the Board of a material change in circumstances in connection with the entitlement within 10 days after the material change occurs.

[xi] 20. (1) This section applies if a worker is entitled to benefits under the insurance plan relating to an accident and is also entitled to compensation under the laws of another jurisdiction in respect of the accident regardless of where the accident occurs. This section also applies with necessary modifications if the worker's survivors are so entitled.

(2) The worker shall elect whether to receive benefits under the insurance plan or to receive compensation under the laws of the other jurisdiction and shall notify the Board of the option elected. If the worker is employed by a Schedule 2 employer, the worker shall also notify the employer.

(3) The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death. However, the Board may permit the election to be made within a longer period.

(4) If an election is not made or if notice of the election is not given, the worker is presumed to have elected not to receive benefits under the insurance plan unless the contrary is shown. 1997, c. 16, Sched. A, s. 20.

[xii] 59(4) The worker, claimant or employer may appeal the Board's decision to the Appeals Tribunal and shall do so within 21 days after the Board gives notice of its decision.

[xiii] 41(11) Upon the request of a worker or on its own initiative, the Board shall determine whether the employer has fulfilled the employer's obligations to the worker under this section.

(12) The Board is not required to consider a request under subsection (11) by a worker who has been re-employed and whose employment is terminated within six months if the request is made more than three months after the date of termination of employment.

[xiv] 59(4) The worker, claimant or employer may appeal the Board's decision to the Appeals Tribunal and shall do so within 21 days after the Board gives notice of its decision.

[xv] 30(4) The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death.

(5) The Board may permit the election to be made within a longer period if, in the opinion of the Board, it is just to do so. 1997, c. 16, Sched. A, s. 30 (5).

(6) If an election is not made or if notice of election is not given, the worker or survivor shall be deemed, in the absence of evidence to the contrary, to have elected not to receive benefits under the insurance plan. 1997, c. 16, Sched. A, s. 30 (6).

[xvi] 31. (1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the Insurance Act may apply to the Appeals Tribunal to determine,

(a) whether, because of this Act, the right to commence an action is taken away;

(b) whether the amount that a person may be liable to pay in an action is limited by this Act; or

(c) whether the plaintiff is entitled to claim benefits under the insurance plan.

…

(4) Despite subsections 22 (1) and (2), a worker or survivor may file a claim for benefits within six months after the tribunal's determination under subsection (1).

[xvii] 73(9) Upon request, the Board shall provide a spouse with a labour market re-entry assessment. The request must be made within one year after the death of the worker.

The same limit applies for bereavement counseling under subsection (12).

[xviii] 21. (1) An employer shall notify the Board within three days after learning of an accident to a worker employed by him, her or it if the accident necessitates health care or results in the worker not being able to earn full wages.

[xix] See, for example, Decision No. 1389/06.

[xx] See, for example, Decisions No. 64/07, 90/03E, 388/03ER, 536/05E and 1398/06.

[xxi] See, for example, Decision No. 1484/09E and Decision No. 3/09E.

APPENDIX A – Board Policy on extending initial notice of claim

Changes in law or policy

If changes in law or policy expand new areas of entitlement for claims which may have been denied previously, workers may subsequently file a claim for benefits.

In these cases, the WSIB issues the first benefit payment even if the worker has not met the requirements. Once the WSIB sends a Form 6 to the worker and asks the worker to complete it, the worker has thirty calendar days to file the form. If the worker does not meet the deadline, no further benefits are provided.

Worker makes incorrect election

On rare occasions, workers may elect to claim benefits in another jurisdiction, only to discover that the claim can only be pursued in Ontario. If this happens

- before the six-month deadline to file a claim for benefits has expired, workers are given the balance of the six months, or thirty calendar days from the date they discover that the claim can only be pursued in Ontario whichever is greater, to file a claim for benefits and complete the appropriate election form.
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- after the six-month deadline has expired, workers are given thirty calendar days to notify the WSIB that they wish to file a claim for benefits under the insurance plan. Upon receiving a Form 6 and the appropriate election form from the WSIB, workers are then given a further thirty calendar days to complete and return the forms to the WSIB.

In both cases, no benefits are provided until the worker completes and returns the relevant forms to the WSIB.

Accident not reported by employer

Independent of the worker's requirements to claim and consent, employers must report accidents to the WSIB (see 15-01-02, Employers' Initial Accident-Reporting Obligations). Therefore, the WSIB will accept a worker's claim past the six-month deadline if

- the worker does not file a claim by the six-month deadline, but
- the employer did not report the accident, and
- Regulatory Services determines that the employer created a coercive workplace environment which resulted in the worker waiving, or forgoing, any benefits to which the worker was entitled.

Once Regulatory Services makes this determination, the worker has thirty calendar days to file the claim. In these cases, no benefits are provided until the worker meets the dual requirements. For more on employer offences, see 22-01-08, Offences and Penalties - Employer.

Change in claim status

In some cases, a claim may have been accepted in which the WSIB initially paid health care benefits only, but the worker subsequently experiences a loss of earnings and/or requires further health care.

If the worker did not meet the claim and consent requirements at the time the claim was initially accepted, the worker is now expected to meet those requirements, regardless of whether more than six months have passed since the original accident.

Similarly, workers who initially experienced a loss of earnings for less than two weeks, but did not meet the claim and consent requirements at the time the claim was accepted, are now expected to meet those requirements if they experience a recurrence, regardless of whether more than six months have passed since the original accident.

Both of these scenarios can also occur in cases when the loss of earnings is due to a breach of the employer's re-employment obligations. In these cases, if a worker did not meet the claim and consent requirements at the time the claim was initially accepted, that worker is now expected to meet those requirements, regardless of whether more than six months have passed since the original accident. For more information, see 19-04-02, Re-employment Obligation.

In all three cases, no benefits are provided until the worker meets the requirements to claim and consent.

Workers can meet the requirement to claim by signing a Form 6 or Form RE06.

Workers can meet the requirement to consent to the disclosure of functional abilities information by signing

- a Form 6
- a FAF (Functional Abilities Form for Planning Early and Safe Return to Work), or
- an RE06 (Worker's Continuity Report).

Completing Form RE06

If the WSIB sends the worker a Form RE06 to complete

- before the six-month deadline has expired, workers are given the balance of the six months, or thirty calendar days, whichever is greater, to return it to the WSIB
- after the six-month deadline has expired, workers are given thirty calendar days to return it to the WSIB.

If the WSIB issues an RE06 to the worker after the six-month deadline has passed, and the worker does not meet the claim and consent requirements within the thirty-day period requested, the WSIB does not provide any benefits to that worker.

Exceptional circumstances

If a worker fails to file a claim by the respective deadline, the WSIB allows the claim to be filed at a later date if the worker can show that exceptional circumstances existed at the deadline.