



## WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

### DECISION NO. 189/211

**BEFORE:** L. Gehrke: Vice-Chair

**HEARING:** February 9, 2021 at Toronto  
Oral by Videoconference  
Post-hearing activity completed on March 18, 2021

**DATE OF DECISION:** May 26, 2021

**NEUTRAL CITATION:** 2021 ONWSIAT 834

**DECISION UNDER APPEAL:** WSIB Appeals Resolution Officer (ARO) decision dated September 20, 2019

**APPEARANCES:**

**For the worker:** J.M. Hammond, Lawyer

**For the employer:** J.B. Siegel, Lawyer

**Interpreter:** Not required

## REASONS

### (i) Introduction

[1] The worker appeals the decision of the ARO, which concluded:

1. The worker does not meet the time limit to claim a left elbow injury occurring on July 13, 2015.
2. Initial entitlement for the left shoulder is denied.

[2] The Vice-Chair adjourned the hearing of this appeal after hearing the worker's testimony and submissions of the parties on the time extension and the left shoulder entitlement issues. The Vice-Chair permitted the employer's representative to provide submissions responding to Tribunal decisions, which were first cited by the worker's representative in their reply submissions.

[3] In this interim decision, the worker's appeal is allowed for a time extension to claim entitlement for injury to the left elbow. The worker's appeal on the issue of initial entitlement for the left shoulder is adjourned, pending the adjudication of the left elbow claim by the Board. This interim decision provides instructions for reporting on the progress of the adjudication of that issue. I take jurisdiction over any appeal to the Tribunal regarding the left elbow claim, to be determined together with the left shoulder claim. I remain seized.

### (ii) Issues

[4] The issues as defined in the Tribunal's "Hearing Ready Letter" dated August 19, 2020 are as follows:

1. Entitlement to an extension of the section 22 time limit to file a claim for a left elbow injury due to a July 13, 2015 accident.
2. Entitlement for a left shoulder injury claimed to have been sustained in an accident at work on January 5, 2016.

[5] For reasons that follow, I have decided to amend the second issue to include injury to the left upper extremity, including the shoulder, arm, elbow and hand. The worker's representative submitted that the worker seeks entitlement for the left upper extremity, including his shoulder, arm and elbow as a result of his work duties on January 5, 2016. The initial reports of injury, including the Forms 6, 7 and Form 8 refer to pain and numbness in the left arm and hand, and a diagnosis of ulnar nerve impingement. On January 8, 2016, Dr. Wolnik diagnosed an ulnar nerve impingement in the Form 8. Dr. Wolnik described the areas of injury as the left arm and hand. The ulnar nerve is described in the *Merriam-Webster Dictionary* as a nerve that passes around the back of the elbow, where it rests on what is commonly called the "funny bone" (the humerus). Based on the Form 8, I interpret the worker's claim for an injury occurring on January 5, 2016 to include injury to the left elbow, arm and hand. As a result, in my view, the issue that presented itself to the ARO in the decision under appeal was whether the worker had initial entitlement for an injury to the left upper extremity, including the left shoulder, arm, elbow and hand, as a result of an injury on January 5, 2016.

**(iii) Background**

[6] The following are the basic facts.

[7] The worker had been employed since 2002 as a heavy equipment operator with the accident employer.

[8] On July 13, 2015, the worker reported an injury to his left elbow to his supervisor. The worker reported that he was removing a hose and in doing so banged his left elbow on another part of the machine. The worker's representative provided this report of injury to the Board on January 3, 2019, after the worker obtained it through his union representative.

[9] On January 5, 2016, the worker, who was then 55 years old, reported to his employer an injury to his left arm while driving a loader. In his Worker's Report of Injury/Disease (Form 6) dated January 27, 2016, the worker stated that he was "driving [a] loader, then pain went through left arm gradually started on 05.01.16." The employer stated in its Report of Injury/Disease (Form 7) that on January 8, 2016, the worker reported an injury on January 5, 2016 as follows: "The worker reported feeling a gradual onset of pain in his left arm."

[10] The worker sought medical attention from Dr. M. Wolnik on January 8, 2016. In a Health Professional's Report (Form 8), Dr. Wolnik diagnosed a repetitive strain injury, ulnar nerve impingement related to an injury on January 5, 2016. The areas of injury were described as the left arm and hand.

[11] In the decision under appeal, the ARO denied a time extension to file a claim for injury to the left elbow on July 13, 2015; and denied initial entitlement for injury to the left shoulder on January 5, 2016.

[12] On June 21, 1993, the worker's neck was injured while working for a different employer. A herniated disc was diagnosed. He underwent cervical fusion surgery in 1993. The Board recognized permanent impairment resulting from this injury, for neck strain and herniation with discectomy and fusion with a 29% non-economic loss (NEL) award evaluated in October 1996.

**(iv) Law and policy**

[13] Since the worker claimed to be injured in 2015 and 2016, 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] An "accident" is defined in section 2(1) to include:

- (a) a wilful and intentional act, not being the act of the worker,
- (b) a chance event occasioned by a physical or natural cause, and
- (c) disablement arising out of and in the course of employment;

[15] General entitlement to benefits is governed by section 13:

13(1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

(2) If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.



[16] The statutory presumption set out in section 13(2) does not apply to an injury by disablement. See, for example, *Decision Nos. 268 and 42/89*.

[17] 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*.

[18] 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.

[19] 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: #197; #241; and #300. I have considered these policies as necessary in this appeal.

**(v) Analysis**

[20] The appeal is allowed in part for the reasons set out below.

**(a) The time extension appeal**

[21] Section 22 of the WSIA provides in part:

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.

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

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

1. whether the moving party formed a *bona fide* intention to appeal within the relevant time period;
2. the length of, and explanation for, the delay in filing;
3. any prejudice to the responding parties caused, perpetuated or exacerbated by the delay; and
4. the merits of the proposed appeal.

[23] In determining time limit objection appeals for Board decisions, some Tribunal decisions have also considered the following factors (see, for example, *Decision No. 1493/981*):

- 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.

[24] The Board has confirmed that *Operational Policy Manual (OPM) Document No. 15-01-03, "Workers' Requirement to Claim and Consent,"* dated February 15, 2013, applies to this appeal. This policy provides in part that the six-month deadline to file a claim may be extended if the worker can show that exceptional circumstances existed at the deadline. Exceptional circumstances include:

**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.

- 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 coworkers.

**1. Intent to claim within the time limit**

[25] Based on the worker's testimony, the affidavit of his former supervisor and the Employee Statement of Personal Injury dated July 13, 2015, I find that the worker immediately reported a left elbow injury to the employer on July 13, 2015. This report of injury indicates an intent to claim within the six-month statutory time limit. Further, this report constitutes an exceptional circumstance within Board OPM Document No. 15-01-03, quoted above.



## 2. Length of, and reasons for the delay in filing the claim

[26] The worker immediately reported an injury on July 13, 2015 to his supervisor. The worker's report to the employer was first provided to the Board by the worker's representative with a letter to the Board Eligibility Adjudicator on January 3, 2019 in support of a request to reconsider the decision to deny entitlement for injury on January 5, 2016. The representative's letter states in part that the report was obtained by the worker through his union representative:

I am enclosing two forms entitled Employee Statement of Personal Injury which were obtained by [the worker] through his union representative. The one mentioning the sudden specific event is dated July 13, 2015 and the other is dated January 8, 2016.

[27] The Employee Statement of Personal Injury dated July 13, 2015 states that the worker was removing a hose and in doing so banged his left elbow on another part of the machine. The worker confirmed this report and the occurrence of the injury in his testimony before me. He testified that he continued to work although his elbow was symptomatic until January 5, 2016. On that date, the pain became so severe that he could not continue working. He reported the January 5, 2016 injury to the employer immediately and to the Board on January 27, 2016, about two weeks after the expiry of the six-month statutory deadline for filing a claim for the July 13, 2015 injury.

[28] As I noted above in the "Issues" section, in the Form 8 dated January 8, 2016, Dr. Wolnik diagnosed an ulnar nerve impingement and described the areas of injury as the left arm and hand. The ulnar nerve passes around the back of the elbow. Based on the Form 8, I interpret the worker's claim for an injury occurring on January 5, 2016 to include injury to the left elbow, arm and hand.

[29] I find that the worker has provided a reasonable explanation for the delay in filing a claim for injury to the left elbow, namely the immediate report of both injuries to the employer and the filing of a Form 6 Report of Injury and seeking of timely medical attention when he began to lose time from work. While the worker did not file a formal report of the elbow injury (Form 6), he did report the injury to his employer immediately, on July 13, 2015. He did not lose time from work until January 5, 2016. He reported the injury to his employer on that date and sought medical attention three days later. He filed a timely claim for that injury to his left arm which included injury to the elbow on January 27, 2016, two weeks after the expiry of the six-month time limit to report the left elbow injury. His July 13, 2015 Report of Injury to the employer was forwarded to the Board three years after the expiry of the time limit when the worker obtained it from his union representative.

## 3. Issues in the claim and appeal are inextricably intertwined

[30] The worker's representative submitted that the worker seeks entitlement for the left upper extremity, including his shoulder, arm and elbow as a result of his work duties in January 2016. This appeal was filed within the six-month statutory time limit and is properly before the Tribunal to determine.

[31] I find that the issue, whether the worker injured his left elbow on July 13, 2015, is inextricably intertwined with the appeal that is before the Tribunal to decide. The left elbow is the subject of a timely appeal and as well as the claim for which a time extension is sought.

[32] Whether or not the worker sustained a compensable injury to his left elbow in July 2015 is directly relevant to determining whether the worker has initial entitlement for a compensable

left elbow (ulnar nerve) injury in January 2016. Whether there was a prior compensable injury to the left elbow is directly relevant to the issue of initial entitlement in this appeal.

[33] In all of the foregoing circumstances, I find that the issues under appeal of initial entitlement for injury on January 5, 2016 and the claim for which the worker seeks a time extension, for injury to his left elbow on July 13, 2015, are inextricably intertwined.

#### **4. Merits of the case**

[34] It is not appropriate given the scope of the time extension application to make findings on the merits of the worker's claim for injury to the left elbow, beyond whether the worker has an arguable case. The worker's testimony, the employer's incident report and the former supervisor's affidavit indicate that the worker injured his left elbow at work on July 13, 2015. I find that the evidence indicates that the worker has an arguable case on the merits for entitlement to a left elbow injury on July 13, 2015.

#### **5. Prejudice to the employer**

[35] The employer did not submit that it has suffered prejudice as a result of the delay in filing the claim. Based on the Employee Statement of Personal Injury report to the employer dated July 13, 2015 and the supervisor's affidavit, I find that the employer was likely aware or should have been aware of the worker's report of injury to his left elbow on that date.

#### **6. Justice of the case**

[36] Taking a holistic approach to the factors discussed above, I find that the justice of the case weighs in favour of allowing a time extension to file a claim for injury to the worker's left elbow in July 2015. While he did not file a Form 6 Report of Injury within six months, the worker reported a left elbow injury on July 13, 2015 immediately to his employer. The immediate report of injury to the employer constitutes an exceptional circumstance within Board OPM Document No. 15-01-03. The issue of the claim for injury to the left elbow, is inextricably linked with the issues in the worker's timely appeal which is before this Tribunal, which concerns a subsequent injury to the left upper extremity, including the elbow, on January 5, 2016. The worker has an arguable case on the merits for his claim that he injured his left elbow at work on July 13, 2015. Prejudice to the employer has not been submitted and the employer was likely aware or should have been aware of the worker's 2015 report of injury.

#### **(b) Entitlement for injury to the left shoulder on January 5, 2016**

[37] I have decided to adjourn this part of the worker's appeal, pending the adjudication of his claim for injury to his left elbow on July 13, 2015. My reasons follow. The worker's representative submits that the primary focus of the worker's appeal is his claim for injury to the entire left upper extremity, including the left elbow on January 5, 2016. I have allowed the worker's appeal for a time extension to make his claim for injury to the left elbow in July 2015, in large part because entitlement for a previous injury to the left elbow is inextricably linked with the determination of the worker's claim for injury to the left upper extremity on January 5, 2016.

[38] I find that a holistic approach to the adjudication of the worker's claim for injury to his left upper extremity should be taken. In order to enable a holistic adjudication of the worker's claim for injury to the left upper extremity in January 2016, it is necessary to also consider the worker's entitlement for injury to the left elbow injury in July 2015. In order to achieve this goal, I direct that the worker's appeal to the Tribunal regarding entitlement for a disablement

injury to the left upper extremity in January 2016 be adjourned, pending the adjudication by the Board of the worker's claim for injury to the left elbow in July 2015. The Disposition below sets out the steps to be taken. I remain seized.



**DISPOSITION**

[39] The appeal is allowed in part as follows:

1. The worker is allowed a time extension under section 22 to make a claim for an injury to his left elbow on July 13, 2015.
2. The issue of initial entitlement for injury to the left upper extremity on January 5, 2016 is adjourned pending receipt of a final Board decision on the issue of the left elbow or abandonment of the claim for injury to the left elbow on July 13, 2015 by the worker.
3. The Vice-Chair directs that the following steps to be taken:
  - a. The worker's representative is to contact the Tribunal within three months of the date of this decision to provide information about the progress or completion of the adjudication of the claim for a July 13, 2015 injury to the left elbow. If the worker's representative has not contacted the Tribunal within three months the claim for the July 13, 2015 left elbow injury will be considered to be abandoned, and the Vice-Chair may proceed to decide the issue of initial entitlement for the left upper extremity, based upon the evidence and submissions received.
  - b. Upon receipt of the Board's final decision of left elbow entitlement, the worker's representative and the employer's representative shall advise the Tribunal of their intent to appeal that decision. In the event that the worker or the employer choose to appeal the Board's decision to the Tribunal, the Vice-Chair is seized of this appeal and will determine this entitlement together with entitlement for injury in January 2016 to the left upper extremity. A reconvened hearing will be scheduled to hear evidence and submissions regarding the appeal of the Board's decision on entitlement for the left elbow.
4. The Vice-Chair remains seized.

DATED: May 26, 2021

SIGNED: L. Gehrke