

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Gallant v. Nova Scotia (Workers' Compensation Board)*, 2018 NSCA 61

**Date:** 20180710

**Docket:** CA 477693

**Registry:** Halifax

**Between:** Shawn R. Gallant

Applicant

v.

The Workers Compensation Board of Nova Scotia  
The Workers Compensation Appeals Tribunal  
Attorney General of Nova Scotia

Respondent

**Judge:** Derrick, J.A.

**Motion Heard:** July 5, 2018, in Halifax, Nova Scotia in Chambers

**Held:** Motion dismissed.

**Counsel:** Applicant, Shawn R. Gallant in person  
Alison Hickey, for the respondent Workers' Compensation  
Appeals Tribunal  
Paula Arab, Q.C., for the respondent, Workers' Compensation  
Board  
Edward Gores, Q.C., for the respondent, Attorney General of  
Nova Scotia (not appearing)

**Decision:**

*Introduction*

[1] Mr. Gallant filed a motion to extend the time to file a Notice of Application for Leave to Appeal a decision of the Workers' Compensation Appeals Tribunal (WCAT) dated April 24, 2018 (WCAT Decision #2017-679-AD) which denied Mr. Gallant's appeal from the November 1, 2017 decision of the Workers' Compensation Board (WCB).

[2] The affidavit Mr. Gallant filed with his motion includes a description of what he says happened in his case. He notes that "WCB stopped this claim because of s. 83(6)...", that is, because he filed his Workers' Compensation claim more than five years from the accident he says caused his injuries when he was a newspaper carrier. This is indeed what WCAT determined; that Mr. Gallant's claim for compensation for back pain cannot proceed because of the operation of the time limitation in section 83(6) of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 (the "Act").

[3] Mr. Gallant says the WCAT decision is wrong. He says his claim should be allowed to proceed because it wasn't his fault he filed it outside of the five year time limitation. He wants the Court of Appeal to overturn the decision and order WCAT to process his claim.

*Mr. Gallant's Motion to Extend the Time to File His Application for Leave to Appeal*

[4] In his affidavit Mr. Gallant explained why he missed the deadline for filing his "Notice of Appeal". What he is actually asking to file is a Notice of Application for Leave to Appeal. There is no automatic right to appeal a WCAT decision to this Court. Section 256(2) of the *Act* requires that leave be sought, and leave shall not be granted by this Court unless it is applied for "in accordance with the *Civil Procedure Rules* within thirty days" of receipt of the WCAT decision (*Workers' Compensation Act*, s. 256(3)).

[5] Although Mr. Gallant believes he received the WCAT decision on April 24, 2018, Ms. Arab confirmed that it was emailed to him on April 25, 2018. *Civil*

*Procedure Rules* 90.13 and 94 apply to the calculation of time for Mr. Gallant's deadline. Applying these *Rules*, Mr. Gallant had until June 8, 2018 to file his Application for Leave to Appeal.

[6] Mr. Gallant indicated in his affidavit, and explained in detail in person, that his reasons for missing the filing deadline relate to his strained financial circumstances and the challenges he has with reading and writing.

[7] Mr. Gallant attached to his affidavit reports written in February 2018 by a general practitioner and a chiropractor, and MRI and CT scan results. These materials relate to Mr. Gallant's complaints of back pain. He confirmed that he produced this information in support of his proposed appeal.

[8] Mr. Gallant says that his proposed appeal has merit. He says his back pain was caused by a motor vehicle accident in April 2012 when he was delivering newspapers. He says he did not know until May 2017 that he could make a claim to Workers' Compensation for his back pain. Mr. Gallant says that he only found this out when he was dealing with Workers' Compensation about sprained calves caused while working at another job.

[9] Mr. Gallant says his failure to make a claim to Workers' Compensation in 2012 was the fault of his doctor and his employer at the time. The WCAT decision, which Mr. Gallant filed with his motion, explains the circumstances that he complains about:

The Worker testified that he was fired from his position as a newspaper carrier the day after the accident [a motor vehicle accident] on April 26, 2012. He is very angry about this and also angry about the fact that in five years of seeing doctors and other specialists as a result of the accident, "not one of them said it was WCB". He confirmed that the Employer cut off all ties and he testified that he did not become aware of Workers' Compensation until he filed a claim with a subsequent employer for calf pain. The Worker is adamant that the Employer knew about the accident and he believes the Employer should have reported the accident to the Board.

Section 83 of the *Act* sets out the requirements for notice of an injury. Subsection 83(1), which deals with an injury that is not an occupational disease, such as the injury sustained by the Worker on April 26, 2012, directs the Board not to pay compensation unless a worker has given the employer notice of the accident as soon as practicable after the accident and the worker makes a claim for

compensation within 12 months of the accident. There is discretion to extend this deadline up to five years, however, in accordance with subsection 83(6) there is no discretion to extend the time to file a claim beyond five years.

[10] WCAT and the Attorney General take no position on Mr. Gallant's motion. Ms. Arab made brief oral submissions at the hearing on behalf of WCB.

*The Applicable Law*

[11] The applicable law is the three-part "*Jollymore*" test, described by Bateman, J.A. in *Bellefontaine v. Schneiderman*, 2006 NSCA 96:

**3** A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (**Jollymore Estate Re** (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):

- (1) the applicant had a bona fide intention to appeal when the right to appeal existed;
- (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
- (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

[12] The three-part test is a guide for the exercise of the court's discretion but it is not "exhaustive." On occasion justice may demand that discretion be exercised to extend time (*Isles v. Nova Scotia (Workers' Compensation Board)*, 2015 NSCA 94, at para. 6; *Blinn v. Boudreau*, 2015 NSCA 78, at para. 10; *Bellefontaine, supra*, at para. 4).

[13] Applying these principles, I will now examine Mr. Gallant's motion to extend time.

*Analysis – Genuine Intention to Appeal and Reasonable Excuse for Delay*

[14] Mr. Gallant said in his affidavit that he has had a "genuine intention to appeal" since April 24, 2018, the date he thought he received the WCAT decision. Based on Ms. Arab's representations I am satisfied that Mr. Gallant received the

decision on April 25. The error in Mr. Gallant's recall is immaterial. I accept that Mr. Gallant formed a firm and genuine intention to appeal the WCAT decision as soon as he got it.

[15] Mr. Gallant has also satisfied me that he had a reasonable excuse for failing to file his Application for Leave to Appeal on time. Mr. Gallant filed with his motion materials a Psychoeducational Assessment report dated October 3, 2014. The Report was prepared to update Mr. Gallant's learning profile and "provide recommendations for accommodations" in an educational setting. It concludes with the following:

...Mr. Gallant's overall score on a measure of cognitive ability fell to the Average range. During this assessment, he displayed difficulties in areas of phonological analysis, writing and reading comprehension. Mr. Gallant's ability-achievement discrepancy scores suggest that he has a Specific Learning Disorder in areas of reading and writing.

During this assessment Mr. Gallant displayed phonological processing deficits which result in significant problems with reading comprehension and in difficulty with written expression...

[16] The psychoeducational assessment indicates Mr. Gallant has a reading comprehension at the Grade 9 level. He was assessed as having a stronger ability in verbal reasoning. His overall cognitive functioning was found to be average.

[17] The conclusions on the psychoeducational assessment accord with Mr. Gallant's statements in his affidavit that:

...I had to do all this work and it takes me more time to I hope to understand so I can write, then I get MLA to help with my writing. The biggest help I get was from reach Ability in getting information to me and check my work fix the spell and helped me touch then up, but never answer question or tell what to do and this is were it sucked.

[18] I asked Mr. Gallant to explain what he did to prepare the documents he needed to file for the purpose of appealing the WCAT decision. He wrote out in long-hand what he wanted to say and had the office assistant at his MLA's constituency office review and type it. It is apparent that, as Mr. Gallant told me, the assistant changed very little of the content. Mr. Gallant's affidavit does show that written expression is a significant challenge for him.

[19] I accept that, notwithstanding the difficulties he has with reading comprehension and writing, Mr. Gallant made a considerable effort to create the documents he needed for filing, including asking a ReachAbility volunteer to review what he had prepared.

[20] Mr. Gallant also told me that he waited a month to see a “Legal Aid lawyer.” He says he needed someone to give him “an idea of what to do.”

[21] As I noted earlier, Mr. Gallant indicated in his affidavit that he does not have much income. He says he is almost at the end of medical Employment Insurance benefits and may have to apply for social assistance. The Court file shows that on June 22, 2018 he used a friend’s credit card, with permission, to pay the court-filing fee of \$246.80.

[22] I am prepared to accept that Mr. Gallant has made out a reasonable excuse for not filing the necessary application documents on time. He has had to navigate the challenges of his learning disability in a context that demands a facility with reading and comprehension, and he has limited financial resources. But his low income and his genuine intention to appeal are only two aspects of the legal test I must apply in considering his motion. Mr. Gallant has a further and more difficult hurdle to clear: I have to be satisfied that the appeal he proposes to advance has merit.

*Analysis – Are There Real Grounds Justifying Appellate Intervention?*

[23] The *Jollymore* legal test I set out earlier requires Mr. Gallant to demonstrate there are “compelling or exceptional circumstances present that would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate intervention.”

[24] Mr. Gallant’s Grounds of Appeal are set out in his Notice of Application for Leave to Appeal. I will reproduce them here in their entirety:

- (1) Phonological Dyslexia Specific Learning Disorder in area of reading and writing
- (2) The Workers Compensation Board told me that it’s my responsibility to know the Act I say no it’s the employer’s responsibility to give us The Employee

Act, just like when we all rent a house or apartment we get The Landlord Tenant Act, so we know are rights

- (3) I'm being turn down by The Workers Compensation Board due to section 83(6). The 5years limit is over, but I just found out about The Workers Compensation Board's existence. (Not even 4 weeks over the dead line) [Worker's name redacted] my worker told me to file my back claim (2228210) were I never had any claims before it may go throw, (2226943) because my back has nothing to do with my Garda claim. I tried to say I have medical notes to move around for my back. [Worker's name redacted] told me outright to stay home don't walk you have 2 sprain calves and that what you're here to get fixed only. On April 26, 2012 my doctor didn't file anything after my working car accident, he only filed MVI and my Boss fired me on my 3day medical leave, my boss didn't file a report nor, what anything to do with me then and now with The Tribunal so how does the 5year law work here?
- (4) I'm not looking for any living cost I was not made disabled form April 26, 2012 I just have lots of pain in my upper part of my back, neck its all muscle and disk like my 2015 MRI shows but the muscles don't show up, but you can feel with your touch. Plus, my right leg I don't have all the feeling in it if I did I would only have got 1 sprain calves

[25] Mr. Gallant wants compensation for back pain which he relates to the April 2012 motor vehicle accident. He says he needs Workers' Compensation to cover the cost of his prescription pain medication.

[26] Mr. Gallant is of the view that at the time of the April 26, 2012 motor vehicle accident his employer and his doctor should have filed a report with WCB. He says he did not know to do so. The WCAT decision indicates that he filed an accident report with WCB on June 13, 2017, a report that was not signed by his former employer.

[27] I note the WCAT decision states that Mr. Gallant indicated at his appeal he had not filed a claim in 2012 because his employer told him the accident was not work-related. WCAT saw this as suggesting some knowledge in 2012 on Mr. Gallant's part of the basis for a WCB claim.

[28] Section 82 of the *Act* places an obligation on workers eligible to apply for compensation to "forthwith file" a claim with the Board. And while under section 86 of the *Act* a worker's employer is also required to make a report to the Board of

an accident that “occurs in such circumstances as may entitle a worker to compensation”, this does not alleviate the worker of his or her notice obligations.

[29] Mr. Gallant wants WCB to process a claim they knew nothing about until after the five year deadline had passed. Notice is key: it is the “triggering event in a request for compensation...” (*Meechan v. Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2001 NSCA 124, at para. 39).

[30] In *Meechan*, this Court observed that notice may come from a variety of sources:

...generally three means by which such an event comes to the attention of the Board. First and most likely, the Board receives a report of accident from an individual worker. Second, it may come in from an employer or, third, a medical report or other documentation will be sent in to the Board by a physician...(at para. 40)

[31] However notice is received by WCB, it has to come within the five-year time limit. This Court has found that the Board has “no power under the **Act** to award compensation” where the legislated time limit has been exceeded (*Walsh v. Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2001 NSCA 6, at para. 10).

[32] In *Walsh* there was a complaint of injustice similar to Mr. Gallant’s. Ms. Walsh was injured when she was 19. She filed her claim 22 years later. At the time of her accident she had given “no thought to the fact that she might be entitled to compensation” (at para. 9). She said it was unjust that the lateness of her claim meant she was denied compensation. This Court held that WCB “...is only permitted to act to prevent injustice caused by delay in making a claim where the delay does not exceed five years” (at para. 10).

[33] The appeal Mr. Gallant wishes to bring would address the same issue this Court settled in *Walsh*.

[34] It is plain that Mr. Gallant feels very aggrieved and frustrated but that does not get him past the requirements of the legal test that applies to his case. He has failed to identify “a strong case for error” and has not brought forward any “real grounds justifying appellate intervention.” The appeal Mr. Gallant wants leave to



bring raises the same issues that were canvassed thoroughly in his WCAT appeal. There is nothing new being advanced.

[35] And Mr. Gallant cannot succeed on the basis that justice requires the granting of an extension of time. Mr. Gallant's claim for compensation went to WCB outside the five-year time limit. It has been settled by this Court that WCB has no authority to award compensation for such a claim. The interests of justice are not served by extending time for an applicant to file his or her application for leave to appeal "where the proposed application is doomed to failure" (*Allen v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2011 NSCA 72, at para. 26; *Isle, supra*, at para. 22).

### *Conclusion*

[36] Mr. Gallant has advanced no arguable issues of law upon which leave to appeal could be granted. This is fatal to his motion. His motion to extend the time for him to file his Application for Leave to Appeal the WCAT decision dated April 24, 2018 is dismissed, in the circumstances without costs.

Derrick, J.A.