

NOVA SCOTIA COURT OF APPEAL

Citation: *Murphy v. Nova Scotia (Workers' Compensation Appeals Tribunal)*,
2024 NSCA 14

Date: 20240126

Docket: CA 525360

Registry: Halifax

Between:

Kim Murphy

Appellant

v.

Crothall Services Canada Inc., The Workers' Compensation Board of Nova Scotia,
Nova Scotia Workers' Compensation Appeals Tribunal, Attorney General of Nova
Scotia

Respondent

Judge: Derrick, J.A.

Motion Heard: January 25, 2024, in Halifax, Nova Scotia in Chambers

Held: Motion granted

Counsel: Kim Murphy, appellant in person
Paula M. Arab, K.C., for WCB (watching brief)
Alison Hickey, for WCAT (watching brief)
Caroline McInnes, Registrar

Decision:

Introduction

[1] The Registrar of the Court of Appeal brought a motion to dismiss Ms. Murphy's Notice of Application for Leave to Appeal a WCAT decision – which at times I will call an appeal for the sake of simplicity. Ms. Murphy has not advanced her appeal since it was filed in July 2023. She responded to the Registrar's motion by asking for it to be adjourned. I have decided the motion should not be adjourned. I am granting the motion to dismiss the appeal.

The Registrar's Motion

[2] The Registrar's motion to dismiss Ms. Murphy's appeal pursuant to *Civil Procedure Rules* 90.43(3) and (4) and 91.02 was attended by Caroline McInnes, Registrar and Kim Murphy, representing herself. Paula Arab, K.C. and Alison Hickey, respectively for the Workers' Compensation Board and Workers' Compensation Appeals Tribunal, were in attendance with watching briefs.

[3] The Registrar's motion was brought because Ms. Murphy has not taken the steps required by the *Civil Procedure Rules* ("CPR") to perfect her appeal. *CPR* 90.43 defines what is meant by a "perfected appeal". It is an appeal where the appellant has complied with specified requirements that include "applying for a date and directions..." and "filing the certificate of readiness". An appellant who has not taken these steps has not perfected their appeal.

[4] The Rules relied on by the Registrar for her motion, *CPR* 90.43(3) and (4), state:

In an appeal not perfected before 80 days from the date of the filing of the notice of appeal, or before any other time ordered by a judge, the registrar must make a motion to a judge for an order to dismiss the appeal on five days notice to the parties.

A judge, on motion of a party or the registrar, may direct perfection of an appeal, set the appeal down for the hearing, or, on five days notice to the parties, dismiss the appeal.

[5] The Registrar's motion indicates the following:

- On July 14, 2023, Ms. Murphy filed a Notice of Application for Leave to Appeal from a decision of the Workers' Compensation Appeals Tribunal made June 28, 2023, bearing Decision Number 2022-34-AD.
- On August 3, 2023, the Registrar sent out the usual letter to Ms. Murphy indicating she must file a notice of motion for date and directions and certificate of readiness no later than November 10, 2023.
- On August 8, 2023 the Registrar was called by Ms. Murphy who advised she was working with the WCB and no longer wanted to pursue her appeal.
- The Registrar sent Ms. Murphy a Notice of Discontinuance to sign and instructions on how to file it.
- On August 18, 2023, the Registrar was called by Ms. Murphy who advised she had not been feeling well and had not signed the Notice of Discontinuance but still intended to do so. She said she would try to file it the following week. No Notice of Discontinuance was ever filed.

[6] Ms. Murphy has not filed anything in relation to her appeal since her Notice of Application for Leave to Appeal. She has not filed a motion for date and directions nor a certificate of readiness. A certificate of readiness is a document in which the appellant must certify a number of things, including that she will be able to file the appeal book by a specified date. (*CPR* 90.26)

[7] Nothing further happened after August 18 until the Registrar filed the motion to dismiss.

Ms. Murphy's Request for an Adjournment of the Registrar's Motion

[8] When the Registrar filed the motion to dismiss, Ms. Murphy got in touch with the Court. She indicated she wanted the motion adjourned. On January 24 she filed a one page brief explaining her reasons for this request. She said the following:

- She appealed originally "due to the WCB not acknowledging me".
- She has since been "acknowledged".
- She is receiving chiropractic care for her back. She is "very grateful to have the chiropractor covered".

- She wants her “long-term benefits” from WCB to be determined on a longer work period, the work period before her injury. She says “the WCB should use these hours to determine my benefits” rather than the fewer hours she says are under consideration.

[9] Ms. Murphy said at the Chambers hearing she wanted to keep her appeal “open” as she was not sure the WCB were going to deal with her claim in a way that was satisfactory to her.

Ms. Murphy’s Notice of Application for Leave to Appeal

[10] Ms. Murphy says she has a disability which makes the court process challenging for her. She indicates it is a “Diagnosed Verbal Disability” and told me during the Chambers hearing that she experiences delayed comprehension and processing.

[11] Ms. Murphy’s Notice of Application for Leave to Appeal the WCAT decision contains grounds of appeal that claim:

- (1) WCAT misunderstood her words.
- (2) She has a diagnosed communication barrier and needs a support person to “articulate” her words.
- (3) “It seems to be always wrongful recorded information against my name which causes my lower back concern remain untreated”.

WCAT Decision Number 2022-34-AD

[12] Ms. Murphy’s appeal to WCAT was allowed in part. The decision says the following under the heading “Conclusion”:

The Worker’s appeal is allowed in part. It is as likely as not that the Worker’s injury is contributing to her earnings loss. The evidence, however, supports that temporary earnings-replacement benefits are not warranted because it is more likely than not that the earnings loss is no longer temporary.

Entitlement to an extended earnings-replacement benefit requires that a worker have a permanent impairment. The Worker and Board should facilitate consideration of her entitlement to a pain-related impairment rating following which her entitlement to an extended earnings-replacement benefit can be considered.

[13] At the Chambers hearing I read these paragraphs to Ms. Murphy pointing out she had been partially successful in her appeal to WCAT. She said she is working with the WCB and is fine with WCAT having said her claim should go back to the Board. I told Ms. Murphy I did not see what she was appealing from in the WCAT decision. I said if she was dissatisfied with what comes from working with the WCB she can follow the same process as before and appeal a decision she regards as unfavourable.

The Request to Adjourn the Registrar's Motion

[14] I find there is nothing to be gained by adjourning the Registrar's motion. Ms. Murphy wanting to keep her WCAT appeal "open" in case she is unhappy with how WCB deals with her claim is not a basis for delaying consideration of the Registrar's motion. Ms. Murphy's appeal is not a catch-all to deal with future issues in relation to her WCB claim. And furthermore, as I will explain, I have concluded she would not be granted leave to appeal WCAT Decision Number 2022-34-AD.

The Factors to Be Considered on a Registrar's Motion to Dismiss

[15] This Court has set out the factors to be considered on a Registrar's motion to dismiss an appeal:

- The appellant who has not taken the required steps to advance her appeal must satisfy the Chambers judge why the Registrar's motion should be denied.
- Is there a good reason for the appellant not advancing her appeal? A good reason that excuses the failure is required.
- Do the grounds of appeal raise legitimate, arguable issues?
- What is the appellant's willingness and ability to comply with the requirements of the *Rules* and future deadlines?
- What is the prejudice to the appellant if the Registrar's motion is granted?
- What is the prejudice to the respondent if the motion is denied?
- Appeals should be perfected and heard in a timely fashion.
- What are the obstacles to the appellant moving the appeal forward?

[16] I have to weigh and balance these factors.

Analysis

[17] I have considered all the circumstances and factors. I am granting the Registrar's motion for the following reasons:

- Ms. Murphy has not shown a consistent intention to advance her appeal.
- I do not have any confidence Ms. Murphy has the ability to advance her appeal in accordance with deadlines and requirements under the *Civil Procedure Rules*.
- It prejudices the respondents to allow the Notice of Application for Leave to Appeal to remain outstanding and unperfected.
- Ms. Murphy's Notice of Application for Leave to Appeal does not reveal any grounds that could result in leave being granted for her appeal to be heard. Leave to appeal is only granted on a question of law. There is no question of law raised in Ms. Murphy's Notice.
- Furthermore, Ms. Murphy was partially successful before WCAT. WCAT concluded its reasons by saying Ms. Murphy and WCB should be looking into her entitlement to a pain-related impairment rating "following which her entitlement to an extended earnings-replacement benefit can be considered".
- Ms. Murphy has been working with the WCB following the WCAT decision, in accordance with the decision.

Conclusion

[18] The Registrar's Motion is granted pursuant to *Civil Procedure Rule* 90.43(4) and an Order will issue dismissing Ms. Murphy's Notice of Application for Leave to Appeal filed July 14, 2023.

Derrick, J.A.