

**PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001
THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF
THE APPELLANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY
THE APPELLANT**

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

[2022] NZACC 109 ACR 111/20

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	BD Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Judgment on the papers.

Submissions: T Yates for the Appellant
 C Hlavac for the Respondent

Date of Judgment: 8 June 2022

**JUDGMENT OF JUDGE P R SPILLER
[Late filing of an appeal to the District Court –
s 151, Accident Compensation Act 2001]**

Introduction

[1] The appeal in the above matter was lodged by the appellant on 8 June 2020. The appeal is from the decision of a Reviewer dated 2 October 2019. The Reviewer dismissed an application for review of the Corporation's decision of 10 December 2018 reassessing the appellant's weekly compensation.

[2] On 8 June 2020, Judge Walker issued an initial minute which gave directions for a case management conference to be scheduled in the usual way, but it did not direct that a formal application for leave be filed.

[3] Both parties then proceeded on the basis the Court has exercised its discretion and allowed the late appeal. In May 2022, the appellant's advocate noticed a number of published decisions of the Court in which it had required formal applications for leave to be filed. The Corporation confirmed that it did not oppose an extension of time.

[4] On 2 June 2022, Mr Yates for the appellant, submitted that the appeal was filed late because, in the period following the Reviewer's decision through to the lodging of the appeal, the appellant was suffering from extreme pain, depression, stress, low self-esteem, fatigue and suicidal ideation. These conditions followed the very significant injuries he had suffered in an accident on 16 December 2016, and the life-changing effect they had on him and those around him. The appellant's impairment was overwhelming, and simply managing his basic needs and functions was the most that he could manage. The appellant's advocate at the review hearing withdrew from representation without giving a recommendation of an appeal. Eventually the appellant's wife obtained an opinion as to an appeal, and once this advice was provided the notice of appeal was filed promptly. There is a supporting affidavit from the appellant's wife.

Relevant law

[5] Section 151 of the Accident Compensation Act 2001 (the Act) provides:

- (1) An appellant brings an appeal by sending a notice of appeal to, or filing a notice of appeal in, a specified registry. ...
- (3) The notice must be received by the specified registry—
 - (a) within 28 days after the date on which the reviewer gives a copy of the review decision to the appellant; or
 - (b) ...
 - (c) within any longer time allowed by the District Court.

[6] In *Almond v Read*,¹ Arnold J (for the Supreme Court) outlined the following principles to guide the exercise of the discretion to grant or deny an extension of time to lodge an appeal:

[37] Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

[38] The ultimate question when considering the exercise of the discretion to extend time under r 29A is what the interests of justice require. That necessitates an assessment of the particular circumstances of the case. Factors which are likely to require consideration include:

- (a) *The length of the delay.* Clearly, the time period between the expiry of the appeal date and the filing of the application to extend time is relevant. But in a case where there has been a slip-up and the appeal date has been inadvertently missed, how quickly the applicant sought to rectify the mistake after learning of it will also be relevant. Obviously, the longer the delay, the more the applicant will be seeking an “indulgence” from the court and the stronger the case for an extension will need to be.
- (b) *The reasons for the delay.* It will be particularly relevant to know whether the delay resulted from a deliberate decision not to proceed followed by a change of mind, from indecision, or from error or inadvertence. If from a change of mind or from indecision, there is less justification for an extension than where the delay results from error or inadvertence, particularly if understandable.
- (c) *The conduct of the parties, particularly of the applicant.* For example, a history of non-cooperation and/or delay by an applicant may be relevant.
- (d) *Any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome.* Again, the greater the prejudice, the stronger the case will have to be to justify the grant of an extension of time. Where there is significant delay coupled with significant prejudice, then it may well be appropriate to refuse leave even though the appeal appears to be strongly arguable.
- (e) *The significance of the issues raised by the proposed appeal, both to the parties and more generally.* If there is a public interest in the

¹ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801, (2017) 23 PRNZ 533.

issues, the case for an extension is likely to be stronger than if there is no such interest.

Discussion

[7] In terms of section 151(3)(a) of the Act, the appellant was required to file a Notice of Appeal against the Reviewer's decision within 28 days after the date on which the Reviewer provided a copy of the review decision to him. The Reviewer's decision was dated 2 October 2019, which left a date of 30 October 2019 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 8 June 2020. This Court is now being asked to exercise its discretion to allow a longer time for filing the Notice of Appeal (in terms of section 151(3)(c)). In deciding whether to exercise its discretion, this Court will follow the guidelines provided by the Supreme Court in *Almond v Read*.²

(a) The length of the delay

[8] The Supreme Court noted that the longer the delay, the more the applicant will be seeking an indulgence from the Court and the stronger the case for an extension would need to be; and that, in a case where there had been a slip-up and the appeal date had been inadvertently missed, how quickly the applicant sought to rectify the mistake after learning of it would also be relevant.

[9] This Court notes that the delay in this case is over seven months, which is a significant period of time. However, there is evidence that the appellant's wife filed the notice of appeal for her husband promptly after obtaining an opinion as to an appeal.

(b) The reasons for the delay

[10] The Supreme Court noted that, if the delay arose from a change of mind or from indecision, there was less justification for an extension than where the delay resulted from error or inadvertence, particularly if understandable.

[11] Mr Yates for the appellant stated that the reasons for the delay were that he was suffering from extreme pain, depression, stress, low self-esteem, fatigue and

² Above, note 1.

suicidal ideation during the period between the Reviewer's decision and the filing of the notice of appeal. Mr Yates has submitted, with supporting evidence from the appellant's wife, that the appellant's impairment was overwhelming, and simply managing his basic needs and functions was the most that he could manage.

[12] This Court is satisfied that the appellant's delay arose out of understandable inadvertence.

(c) The conduct of the parties

[13] The Supreme Court observed that a history of non-cooperation and/or delay by an applicant might be relevant.

[14] This Court notes that, since the lodging of the appeal, the appellant's advocate has been proactive in seeking leave to apply for filing the appeal out of time. The Court is aware of a delay by the appellant in filing a review application against a previous decision of the Corporation, and he was allowed to file the review application for reasons similar to those presented in support of the application for leave to appeal to this Court.

(d) Prejudice or hardship to the respondent or to others with a legitimate interest in the outcome

[15] The Supreme Court noted that, where there is significant delay coupled with significant prejudice, then it might well be appropriate to refuse leave even though the appeal appeared to be strongly arguable.

[16] This Court notes that the delay in this case is significant. However, the Corporation has confirmed that it does not oppose an extension of time being granted to the appellant. The Court is not aware of any prejudice or hardship to others with a legitimate interest in the outcome of the present appeal.

(e) The significance of the issues raised by the proposed appeal, both to the parties and more generally

[17] The Supreme Court observed that, if there is a public interest in the issues, the case for an extension is likely to be stronger than if there is no such interest.

[18] This Court accepts that the proposed appeal is significant to the appellant. The Court is not in a position to assess the significance of the issues raised by the proposed appeal more generally.

The Decision

[19] In light of the above considerations, this Court finds that, in the particular circumstances of this case, the appellant has established that the interests of justice require the exercise of the Court's discretion to sustain his application for leave to file his appeal out of time, which is accordingly granted.

[20] There are no issues as to costs.

A handwritten signature in black ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller
District Court Judge