WORKERS COMPENSATION
APPEAL TRIBUNAL

BETWEEN:

WORKER
CASE ID # [personal information]

APPELLANT

AND:

WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND

RESPONDENT

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DECISION #123

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| Appellant | Worker, self represented |
| Respondent | Brian Waddell, Solicitor representing the Workers Compensation Board |
| Place and Date of Hearing | October 8, 2009<br>Inn on the Hill<br>Charlottetown, Prince Edward Island |
| Date of Decision | November 25, 2009 |

**Facts/Background**

1. The Appellant is appealing the decision of the Internal Reconsideration Officer dated May 29, 2009 (Decision IR-09-44), wherein the Appellant's request for an internal reconsideration was dismissed on the grounds that the 90 day time limitation as set forth in s. 56(1) of the *Workers Compensation Act* ("*Act*") had expired.

2. The Appellant had several work related injuries over the years, most specifically injuries in 1993, 1994, 1998 and 1999. However, it was the injury that occurred on June 16, 1994, that resulted in the Appellant being assessed at a 10% whole body impairment. On June 16, 1994, the Appellant was injured at work - while holding a heavy object she fell [personal information]. As a result of that injury, the Appellant was assessed a permanent impairment assessment regarding [personal information] on July 8, 2004, and was awarded a 10% whole person impairment award. However, the Appellant was never advised of the assessment, and never received any compensation for that assessment, as per section 49(6)(b) of the *Act* there is no monetary value provided for injuries which occurred prior to January 1, 1995.

3. On December 9, 1998, the Appellant fell again at the workplace and hurt her [personal information]. As a result of that injury she subsequently had surgery on her [personal information].

4. By Memo dated April 30, 2008, Dr. Steven O'Brien, from the Workers Compensation Board ("Board") indicated that given that the Appellant had a history of non-displaced or minimally displaced fracture of the [personal information] with surgery, and that a referral for a Permanent Medical Impairment would be appropriate. [Appeal Record – Tab 6]

5. The Appellant also requested that Dr. DeMarsh receive additional information concerning injury to her [personal information]. [Appeal Record – Tabs 8 and 9]

6. By Memo dated June 23, 2008, Dr. O'Brien stated that the [personal information] issue raised by the Appellant did not result in permanent impairment nor did it result in loss of activities of daily living or restrictions in daily living and thus would not qualify for an impairment rating. As the remainder of her injuries under the claim related to her [personal information] injury and [personal information] and also her history of pre-existing disease, such would be reviewed by the physician during her Permanent Medical Impairment Assessment. [Appeal Record – Tab 10]

7. On May 6, 2008, the Entitlement Officer referred the Appellant for a Permanent Impairment Assessment as a result of her fractured [personal information]. It was a result of that assessment that she became aware that she had been assessed with a 10% whole person impairment award for the earlier injury of June 16, 1994.

8. Dr. John DeMarsh performed a Permanent Impairment Assessment and provided a report dated October 17, 2008. In his report Dr. DeMarsh reviewed the Appellant's history regarding her injury of December 9, 1998, and reported that a permanent assessment had been made under Case ID#30227 regarding her [personal information] on July 8, 2004. As a result of the physical examination and his review of the file, Dr. DeMarsh assessed her injury arising from the December 9, 1998, accident as follows:

   (a) an 8% whole person impairment for the [personal information];
   (b) 3% whole person impairment for the [personal information]; and
   (c) 2% whole person impairment award for her significant pain. Using the combined values chart, that gave her a total impairment of 13% whole person. [Appeal Book – Tab 13]

9. The Appellant wrote a letter to the Board dated October 23, 2008, [Appeal Book – Tab 14] wherein she argued that the assessment of Dr. DeMarsh was incomplete due to the restrictions placed on Dr. DeMarsh in stating that she was only assessed for injuries to her [personal information]. This letter was reviewed by Dr. Steve O'Brien on behalf of the Board, and by Memo dated November 12, 2008, Dr. O'Brien stated that Dr. DeMarsh's assessment of October 17, 2008, was appropriate for the Appellant's injuries under this claim [Appeal Record – Tab 16].

10. By letter dated November 14, 2008, [Appeal Record – Tab 17] Angie Fullerton of the Board wrote to the Appellant stating that:

> *". . . A previous assessment, dated July 2004, awarded a 10% whole person impairment for a low back injury which occurred on June 16, 1994. As per section 49(6)(b) of the Workers Compensation Act, there is no monetary value provided for injuries prior to January 1, 1995. In view of this, you were not awarded a lump sum payment at that time.*
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> *Dr. DeMarsh, in his assessment on October 17, 2008 rates the impairment to your* [personal information] *as 8% and the injury to your* [personal information] *sustained in 1998 which required subsequent surgery to be 5%. Therefore, you are entitled to a payment of $1,810.00 which is equal to 5% of $36,200.00, the maximum annual earnings in 1998. A cheque for this amount is enclosed. . . ."*

11. In addition, a second letter dated the same date (ie November 14, 2008) [Appeal Record – Tab 18] was issued by Angie Fullerton to the Appellant. The second letter dealt with the Appellant's claim that Dr. DeMarsh was improperly limited in his ability to properly assess the necessary injured anatomical areas arising from the December 9, 1998, accident. In this letter, Ms. Fullerton stated that the October 17, 2008, Permanent Impairment Assessment by Dr. DeMarsh included the appropriate anatomical areas accepted under their claim as well as under the present claim #30227 under appeal. In both letters dated November 14, 2008, the Appellant was advised by the Board of her right to seek a reconsideration.

12. The Appellant filed a Notice of Request for Internal Reconsideration dated December 2, 2008, which was received by the Board on December 3, 2008. The issues to be reconsidered were identified by the Appellant as follows:

> *"R1-01: My challenge is on the opinion of Dr. O'Brien to Dr. DeMarsh and A. Fullerton that my impairment assessment be limited to* [personal information] *due to a statement from Dr. Farmer who alleges I denied leg pain during his service of epidural injections into my* [personal information]. *I cannot and did not deny leg pain at any time. My care from Dr. Farmer was for my Primary Pain at the time, my* [personal information] *and into* [personal information] *was terrible and my main complaint to Dr. Farmer. I do recall informing Dr. Farmer that the pain in my coccyx and hips kept me from sitting and limited any walking. I spent most of my day & night laying on my side due to the* [personal information] *pain not my legs, as I couldn't use my legs.*
>
> *R1-02: I used a number of modalities to try and avoid surgery at my age. My limits & pain became so bad I had to have my* [personal information] *removed and at that point realized through surgical findings the amount of splintering bone that had spread out into the tissue around the* [personal information]. *With the* [personal information] *out, slivers of bones causing "boil" like blisters coming out by the surgical route my awareness of my legs really became clear as not all related to* [personal information]. *My lower back discs and my neck stiffness – headaches and loss of arm strength was to the other injury sites. My sacrum discs were causing my leg and thigh pain and numbness and feet complaints. My cervical discs responsible for my neck, headaches, and neck pain, stiffness and weakness.*
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> *R1-03: A reassessment of full body (spinal) impairment not just the* [personal information]. *My impairment has caused me to need a cleaning lady. I can't take part in attending entertainment like card plays, theatre, car drives of any distance. I am forced to carry a horseshoe cushion, special in-shoe supports. Housecleaning & painting I use to do myself. Impairment should be 35- 40% not 13%. I believe the statements of Dr. Farmer limited Dr. O'Brien's consideration of x-ray evidence and all other treatment providers including the* [personal information] *injuries on how hard I fell and that fall affected my whole spine including* [personal information] *and the weight of the* [personal information] *in my arms and the velocity of my fall injured beyond the limits Dr. DeMarsh was asked to assess."* [Appeal Record – Tab 3]

13. It is to be noted that there is no specific reference in this Notice of Reconsideration as to whether the Appellant should have received a monetary award for the earlier 10% impairment assessment. Rather the Appellant claimed that her assessment rating should have been 35% to 40% not 13%.

14. The Board sent a letter to the Appellant dated February 5, 2009, signed by the Internal Reconsideration Officer, Bonnie Blakney confirming that the issue on the reconsideration was as follows:

> *"R1-01: Was the decision to limit the worker's permanent impairment assessment to lower the back and subsequent rating of 13% appropriate?"*
>
> [Appeal Record – Tab 22]

15. The Appellant did not reply that there was an additional ground of appeal i.e. her failure to obtain compensation for her 10% whole person impairment award.

16. The Board issued a decision of the Internal Reconsideration Officer dated May 6, 2009. In this decision, the IRO upheld that the correct anatomical areas were evaluated by Dr. DeMarsh, and that the appropriate impairment assessment was performed based on the Board legislation and policy, and thus the Appellant's reconsideration request was denied. [Appeal Record – Tab 2]

17. By letter dated June 20, 2009, [Appeal Record – Tab 1] the Appellant appealed to this Tribunal, and requested the Tribunal waive the 90 day time limit prescribed under section 56(1) of the *Act*. In this letter, the Appellant states she was seeking an appeal of the decision made on November 14, 2008, [presumably the decision set forth at Appeal Record Tab 17] whereby the Entitlement Officer refused payment to the Appellant of 10% of the permanent impairment award arising out of the accident or injury of June 16, 1994.

18. The Appellant argues that she did raise this issue in the hearing arising from the December 2, 2008, Notice of Request for Internal Reconsideration, although the Appellant does acknowledge that this ground of appeal is not noted in the Notice for Request of Reconsideration.

19. The Appellant claims that to deny her appeal on the basis of the 90 day time limit as set forth in the *Act* is a denial of natural justice.

20. The Board claims that it has no authority to extend the time for request for reconsideration of a decision, in that the *Act* specifically states that a request for reconsideration must be made no later than 90 days from the date of notification of the decision.

21. As part of her presentation, the Appellant provided the Tribunal a lengthy history of the Workers Compensation legislation for the Province of Prince Edward Island and the various changes to the legislation over the years.

22. According to the Appellant, between 1990 and 1995, the Board made lump sum awards to workers in certain circumstances, and although such lump sum awards were not specifically permitted or required under the legislation in force at the time, it became part of the unofficial policy of the Board. It was during this time that the Appellant's injuries occurred for which she initially received the 10% whole person impairment assessment occurred. However, according to the Appellant, the determination of whether the worker would receive a lump sum award was rather subjective and depended in part on whether the Board ordered an assessment of the worker. In some cases, the Appellant argued that the Board never obtained assessments for workers that may have been entitled to a lump sum award, while in other cases assessments were obtained but lump sum awards were never granted. The Appellant argues that she was in this latter group. (i.e. assessments where obtained but lump sum awards not granted)

23. The *Act* was amended in 1995 and the amended *Act* stated that any injuries that occurred prior to January 1, 1995, would not be entitled to a lump sum payment. This amendment would apply to the Appellant. The Appellant argued that she was never advised that she had a 10% whole person impairment assessment and that when she had requested copies of her file, this assessment was not included in her file. Therefore, based on the rules of natural justice, the Appellant argues that she was entitled to receive this information, and failure to receive such documentation is a denial of natural justice and thus the 90 day limitation period should be waived.

**Analysis**

**Whether this Tribunal has the authority to waive the 90 day time limitation set forth in section 56(1) of the Act with respect to reconsideration by the Board of decisions made by an Entitlement Officer.**

24. Section 56(1) of the *Act* states as follows:

> *"56. (1) The Board shall not reconsider a decision under this Act or the prior Act made after this section comes into force, except on the written request of a person with a direct interest in the decision made not later than 90 days from the date of notification of the decision."*

25. It is clear from the wording that it is mandatory that the Board **shall not** reconsider a decision unless the request is made within 90 days of the date of notification of the decision.

26. In *Doyle* v. *Workers Compensation Board of Prince Edward Island and Ano.,* (2008) PESCAD 11 [Respondent Factum – Tab 4], the PEI Court of Appeal considered the effect of subsection 56.2(3)(a) of the *Act* which states:

> *". . . (3) Leave to appeal shall not be granted by the Court of Appeal unless*

> *(a) application for leave to appeal is made by the appellant within 30 days of the date of the decision of the Appeal Tribunal . . .."*

27. In *Doyle*, the Appellant did not file an application for leave to appeal within the 30 days as required by section 56.2(3)(a). The Court of Appeal held:

> *"In the case of* Tolofoson v. Jensen, [1994] 3 S.C.R. 1002*, it was held that a limitation period prescribed in a provincial statute was substantive law and not procedural. If it is a procedural matter, the Court has jurisdiction to consider whether the time should be extended. If it is a substantive law issue, this Court has no such jurisdiction. I find that to be the case here. The* ***Workers Compensation Act*** *has made provision for a time period which this Court cannot interfere. We have no jurisdiction to determine whether the time should be extended. Accordingly, the applicant cannot be granted an extension of time in which to seek leave to appeal. As a result, the application must fail."* (p. 9)

28. In an earlier decision of the Prince Edward Island Supreme Court – Appeal Division, *Ballum* v. *Workers Compensation Board of Prince Edward Island* [2002] PEIJ No. 87 [Respondent Factum – Tab 3], the Court considered section 32(3) of the *Workers Compensation Act* R.S.P.E.I.1998, Cap. W-7. In that case, the Court of Appeal held:

> *"Appeals are entirely creatures of statute. Appellate rights are limited by the terms of the granting statute. The right of appeal under the Act is contained in s. 32 and is obviously intended to be strictly limited . . . subsection 32(3) provides 'the appeal shall be provided by notice served . . . within ten days after the leave to appeal has been granted.' The statute does not adopt the appeal procedures in the Rules of Civil Procedure and makes no provision for extension of time. Accordingly, I have no authority to extend the time for bringing an appeal in this matter."*

29. In this appeal, the wording of the *Act* is clear: the Board **shall not** reconsider a decision except on written request made within 90 days of the date of notification of a decision. The *Act* does not give the Board or this Tribunal the power to waive or extend that 90 day time period.

30. With respect to the Appellant's argument that she has been denied natural justice, given that the time limitation is statutorily imposed, and that the Appellant was advised of her right to seek a reconsideration, this Tribunal rules that there has been no denial of natural justice with respect to the issue on appeal.

31. As such the Board did not err when it refused to reconsider the decision of the Entitlement Officer dated November 14, 2008.

32. Therefore, the Appellant's appeal is dismissed.

Dated this 25th day of November, 2009.

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Wendy E. Reid, Q.C.
Chair of the Workers Compensation Appeal Tribunal

Concurred:

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Nancy Fitzgerald, Worker Representative

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Harvey MacKinnon, Employer Representative