

Noteworthy Decision Summary

Decision: WCAT-2003-01810 **Panel:** Jill Callan, Chair **Decision Date:** July 31, 2003***Extension of Time for Appeal - Section 243(3) of the Workers Compensation Act***

The worker sought an extension of the 30-day statutory time limit to appeal the finding of the Workers' Compensation Review Board (Review Board). The worker informed WCAT of a change of address from Calgary to Kelowna. An unsigned copy of the Review Board finding was sent to the worker at the Kelowna address. The signed original Review Board finding, however, was mailed to the worker's former address in Calgary. The worker filed an appeal ten days beyond the statutory time limit.

The criteria for granting an extension of time is set out in section 243(3) of the *Workers Compensation Act*. Pursuant to that section the chair may extend the time to file a notice of appeal, even if time to file has expired, if the chair is satisfied that special circumstances existed which precluded the filing of a notice of appeal within the applicable time period, and an injustice would otherwise result. The chair concluded that the failure to send the original finding to the worker's Kelowna address constituted special circumstances. The worker was precluded or hindered in initiating the appeal on time because the copy of the finding sent to his correct address did not include the dates that would enable him to calculate the time frame for initiating the appeal and misdirected him by stating that the finding was appealable to the Appeal Division. There would be an injustice if the worker were not granted an extension of time as the issue before the Review Board, which was whether a particular occupation was a suitable occupation for the worker, had the potential to significantly impact his entitlement to benefits. Accordingly, the chair exercised the discretion to grant an extension of time in favour of the worker.

This decision has been published in the *Workers' Compensation Reporter*:
19 WCR 189, #2003-01810, Extension of Time to Appeal to WCAT

WCAT Decision Number: WCAT-2003-01810
WCAT Decision Date: July 31, 2003
Panel: Jill Callan, Chair

Introduction

The worker seeks an extension of the 30-day statutory time limit to appeal the March 31, 2003 finding of the Workers' Compensation Review Board (the Review Board), which was mailed on April 2, 2003.

On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). The worker's right to appeal arises under section 41(3) of the transition provisions set out in Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Section 41(3) allows the worker to appeal the Review Board finding to WCAT "within 30 days after the finding [was] sent out". This language is significantly different from the language in sections 243(1) and 243(2) which indicate the time for appealing Review Division decisions and decisions and orders of officers of the Workers' Compensation Board (the Board) runs from the time the decision or order "being appealed was made". In this case, as the finding was mailed on April 2, 2003, I view April 2 to be the date the finding was "sent out" for the purposes of calculating the 30-day time frame.

When the eight-day period for mailing set out in section 221(2) of the *Workers Compensation Act* (the Act) is taken into account, the statutory time limit for the initiation of the worker's appeal expired on Saturday, May 10, 2003. In calculating the time limit, I have excluded April 2, in accordance with section 25(5) of the *Interpretation Act*. Since the time limit expired on a Saturday, pursuant to section 25(3) of the *Interpretation Act*, the time limit is extended to Monday, May 12, 2003, which was the first WCAT business day after May 10.

The worker's notice of appeal was received at the Kelowna office of the Board on May 22, 2003 and forwarded to WCAT, which received it on May 26, 2003. I find May 22, 2003 to be the date on which the worker filed the notice of appeal because that was the date it was received within the worker's compensation system. As the deadline for filing the appeal was May 12 and the worker filed the appeal on May 22, the appeal was filed ten days beyond the statutory time limit.

Section 41(2) of Part 2 of Bill 63 provides that section 243(3) of the Act applies to the worker's application for an extension of time.

Although invited to do so, the employer has not participated in this application.

Issue(s)

The issue is whether the worker should be granted an extension of time for filing his notice of appeal.

Background

The sequence of events that is relevant to the worker's application for an extension of time is as follows:

- On March 18, 2003, the worker telephoned WCAT to provide notification of his change of address from Calgary to Kelowna.
- On March 31, 2003, the finding was completed by a Review Board panel which had been seized of the appeal pursuant to section 38(3) of Part 2 of Bill 63.
- On April 1, 2003, the worker asked WCAT to mail the Review Board finding to his new address in Kelowna. An entry in the WCAT case management system indicates that an unsigned copy of the March 31, 2003 finding was sent to the worker and that the original finding would be sent to him when it was returned by Canada Post. This suggests, although the original finding was not posted until the next day, it could not be retrieved from the mail.
- On April 2, 2003, the signed original of the Review Board finding was mailed to the worker at his previous address in Calgary.
- On May 22, 2003, the Kelowna office of the Board received a Review Division request for review form from the worker in relation to the Review Board finding. Attached to the request for review form is an unsigned copy of the Review Board finding. The date of the finding and the date of mailing are missing, indicating that this is the copy that WCAT mailed to the worker on April 1, 2003. The attached advisory notice states that the finding is appealable to the Appeal Division. This constitutes an error because, in fact, the finding is appealable to WCAT because the Appeal Division had been replaced by WCAT on March 3, 2003.
- On June 10, 2003, the original of the Review Board finding was returned to WCAT by Canada Post. The finding was mailed to the worker's new Kelowna address.

Criteria for granting an extension of time

Section 243(3) of the Act provides:

On application, and where the chair is satisfied that

- (a) special circumstances existed which precluded the filing of a notice of appeal within the time period required in subsection (1) or (2), and
 - (b) an injustice would otherwise result,
- the chair may extend the time to file a notice of appeal even if the time to file has expired.

I view the new criteria set out in section 243(3) as more stringent than the criteria that were previously applied by the Appeal Division and the Review Board in considering applications for extensions of time to appeal. There are three requirements for an application under section 243(3) to be successful:

- Firstly, the appellant is required to demonstrate that special circumstances precluded the filing of the notice of appeal on time;
- Secondly, it must be determined that an injustice would result if the extension of time were not granted; and
- Thirdly, the chair must exercise the discretion to grant the extension of time in favour of the applicant.

Special circumstances which precluded the filing of a notice of appeal

The definition of “special” in *Webster’s New Twentieth Century Dictionary of the English Language*, 2nd ed. (*Webster’s*) includes “unusual; uncommon; exceptional; extraordinary”.

The concept of special circumstances that precluded meeting a statutory time frame is also set out in section 55(3) of the Act, which concerns the situation in which a worker has failed to file an application for compensation within one year from the date of injury or disablement from an occupational disease. Accordingly, decisions by appellate tribunals and policies concerning the application of section 55(3) are of assistance in interpreting section 243(3)(a).

The policy of the board of directors concerning section 55(3) is set out in item #93.22 (*Application Made Out of Time*) of the *Rehabilitation Services and Claims Manual, Volume 2*, which provides, in part:

It is not possible to define in advance all the possible situations that might be recognized as special circumstances which precluded the filing of an application. The particular circumstances of each case must be considered and a judgment made. However, it should be made clear that in determining whether special circumstances existed, the concern is solely with the worker's reasons for not submitting an application within the one-year period.

[italics deleted]

Similarly, it is impossible to enumerate all of the potential special circumstances that could arise in connection with an extension of time application. The facts of each case will have to be considered on their merits. As WCAT decides extension of time applications related to specific appeals, the body of decisions will provide guidance to workers and employers. I am of the view that special circumstances could include the following situations:

- The decision that the appellant seeks to appeal was not provided to the appellant in a timely manner;
- The decision was not sent to the appellant's correct address (provided that the appellant had kept the Board informed of any address changes);
- The decision that the appellant seeks to appeal did not advise the appellant of the right of appeal and the time limit for initiating the appeal;
- The appellant was away when the decision was issued and did not return until after the time frame for appealing had expired; or
- At the time that the decision was issued, evidence to support the appeal either did not exist or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered.

In considering the special circumstances that are advanced by the appellant, it will be important to consider whether the appellant acted promptly to initiate an appeal when he or she became aware of the decision, the time limit for appealing, or the significant new evidence that would support the appeal.

The question of whether acts or omissions of the appellant's representative will constitute special circumstances will have to be resolved in considering future applications involving such fact patterns.

I have read several Review Division decisions regarding applications for extensions of time. They indicate that the two key factors in considering special circumstances are evidence of the appellant's intention to request a review within the time limit and the

length of the delay. I also view these factors to be relevant to the determination of whether there are special circumstances. An explanation that may be adequate for a short delay by an appellant who had demonstrated the intention to file an appeal on time may not be adequate where the delay is longer and the appellant did not demonstrate the intention to appeal in a timely manner.

It is not sufficient for the appellant to merely identify special circumstances. The nature of the special circumstances must be such that they precluded the filing of the appeal on time. In determining whether an appellant was “precluded”, all reasonable steps that the appellant ought to have taken in order to ensure a timely appeal must be taken into account.

The word “preclude” is capable of being strictly interpreted to mean “prevent” or “make impossible”. However, in *Webster’s*, “preclude” is more broadly defined to mean:

to hinder, exclude, or prevent by logical necessity; to bar from access, possession, or enjoyment; to make impossible, especially in advance; as, these facts *precluded* his argument.

Accordingly, “preclude” may be interpreted to include “hinder”, which is defined in *Webster’s* to mean:

1. to make difficult for; to impede; to retard; to check in progression or motion; to obstruct for a time, or to render slow in motion; as cold *hinders* the growth of plants.
2. to keep back; to restrain; to get in the way of.

In *Decision #91-0851 (Section 55 and Grain Dust Asthma, 7 WCR 211)*, the Appeal Division considered the appropriate interpretation of “preclude” in the context of section 55 of the Act. At pages 220-221, the panel stated:

In the final analysis to interpret any statutory provisions one has to determine the substance of its words in the context of the ideas expressed in the whole [A]ct and in light of the social purpose that was a driving force behind the legislation. Considering all of these factors this panel is not satisfied that the stringent interpretation of the word “preclude” is justified. The rigid interpretation of preclude as “absolutely prevent” is harsh and narrow. It has never been adopted by previous commissioners [of the Board] and finds no place in the governors’ policy.

Similarly, I find in the context of section 243(3) “preclude” should be interpreted in the broader manner supported by the definition in *Webster’s*.

Injustice

Even if special circumstances precluded the filing of the appeal on time, the discretion to grant an extension of time does not arise unless an injustice would result if the extension of time were not granted. In *Webster's*, "injustice" is defined to mean "the quality of being unjust or unfair; lack of justice; wrong".

In the *Core Services Review of the Workers' Compensation Board* by A. Winter (British Columbia: Ministry of Skills Development and Labour, 2002), Mr. Winter concluded (at page 38) that the granting of extensions of time should be exceptional because of the importance of finality. However, he thought it would be appropriate to grant an extension of time "to avoid an injustice".

A discussion of the concepts of finality and justice in the context of an extension of time to appeal a decision of an administrative tribunal is found in the reasons of Marceau, J. in *Tarsem Singh Grewal v. Minister of Employment and Immigration* [1985] 2 F.C. 263. In that case, the Federal Court was considering an application for an extension of time to review and set aside a decision of the Immigration Appeal Board. Marceau, J. stated in part:

The imposition of time limits to dispute the validity of a legal decision is of course meant to give effect to a basic idea of our legal thinking that, in the interest of society as a whole, litigation must come to an end ... and the general principles adopted by the courts in dealing with applications to extend those limits were developed with that in mind. Only if the ultimate search for justice, in the circumstances of a case, appears to prevail over the necessity of setting the parties' rights to rest will leave to appeal out of time be granted. Hence the requirement to consider various factors, such as the nature of the right involved in the proceedings, the remedy sought, the effect of the judgment rendered, the state of execution of that judgment, the prejudice to the other litigants in the dispute, the time lapsed since the rendering of the judgment, the reaction of the applicant to it, his reason for having failed to exercise his right of appeal sooner, [and] the seriousness of his contentions against the validity of the judgment. It seems to me that, in order to properly evaluate the situation and draw a valid conclusion, a balancing of the various factors involved is essential.

In the Review Division decisions I have read, the chief review officer has considered the following criteria for determining whether "an injustice would otherwise result", which are set out in item 2.3.2.2 of the *Review Division Practices and Procedures*:

- (a) the significance of the matter that is the subject of the Request for Review (i.e., is there a serious or significant issue to be reviewed); and
- (b) the degree of prejudice to the applicant that would arise from the denial of the extension request.

Similarly, I find the significance of the matter under appeal and the prejudice to the appellant if the extension of time were denied are relevant to the question of whether an injustice will result. It seems that these two factors will usually be closely linked as the degree of prejudice to the applicant will often be dependent on the significance of the matter under appeal.

The merits of the appeal will not be considered. However, the question of whether an injustice can be established on the basis of a clear error on the face of the decision under appeal will likely be considered in the context of a future application as will other factors related to the injustice requirement.

Exercise of discretion

In most cases in which the first two requirements in section 243(3) have been met, the discretion to grant the extension of time will be exercised in favour of the applicant. However, it will be relevant to consider any prejudice to the respondent that will result. Future applications may raise other factors relevant to exercising the discretion.

Analysis

Although the worker used the Review Division's request for review form, I find the use of that form was an effective method of filing the appeal.

The worker asserts that the fact that the Review Board finding was mailed to his former address in Calgary rather than his current address in Kelowna constitutes special circumstances which precluded the filing of the appeal on time.

The worker's argument requires consideration of section 221 of the Act, which provides in part:

- 221(1)A document that must be served on or sent to a person under this Act may be ...
 - (b) sent by mail to the person's last known address, ...
- (2) If a document is sent by mail, the document is deemed to have been received on the 8th day after it was mailed.

I have reviewed the worker's claim file and note that he does not appear to have notified the Board of his change of address. It would be prudent for him to do so. However, in this case, it is appropriate to consider the worker's last known address as communicated to the Review Board and WCAT. That address was the Kelowna address. Although, given my analysis set out below it is not necessary to make a finding in this regard, it is certainly arguable that the time for initiating the appeal did not start to run until WCAT mailed the original Review Board finding to the worker's Kelowna address on June 10, 2003. Although WCAT mailed a copy of the finding to the Kelowna address on April 1, 2003, the copy did not include the date of the finding and the date of mailing, which are key elements when there is time sensitivity.

In any event, I am satisfied that the failure to send the original finding to the worker's Kelowna address when the finding was issued constituted special circumstances. I am also satisfied that the worker was precluded or hindered in initiating the appeal on time because the copy of the finding sent to his correct address on April 1 did not include the dates that would enable him to calculate the time frame for initiating the appeal and misdirected him by stating the finding was appealable to the Appeal Division. I note the worker was diligent in following up with WCAT to ensure that he received a copy of the finding at his correct address and in a timely manner. Also, the worker took reasonable steps to preserve his right of appeal. I find that special circumstances precluded the worker from filing the appeal on time.

I also find that there would be an injustice if the worker were not granted an extension of time. The issue that was before the Review Board panel was whether a particular occupation was a suitable occupation for the worker. This issue has the potential to significantly impact his entitlement to benefits.

I find it is appropriate to exercise the discretion to grant an extension of time in favour of the worker. I have concluded that there will be no prejudice to the employer because the delay in initiating the appeal was short.

Conclusion

The extension of time to appeal the March 31, 2003 Review Board finding, which was mailed on April 2, 2003, is granted. The file will be returned to the Registry for the processing of the appeal.

Jill Callan
Chair

JC/dlh