Noteworthy Decision Summary

Decision: WCAT-2003-03842 **Panel:** Jill Callan **Decision Date:** November 27, 2003

Chair's decision - Extension of time - Interpreting "deemed" in section 221(2) of the Workers Compensation Act - Whether deemed means deemed conclusively or deemed until the contrary is proved, i.e. a rebuttable presumption - Chair finding deemed in section 221(2) establishes a rebuttable presumption, not a conclusive presumption

The worker sought an extension of the 30-day statutory time-limit to appeal a finding of the Workers' Compensation Review Board (Review Board). He notified WCAT of his intention to appeal in May 2003, nearly 4 months after the statutory time frame for appealing the Review Board finding had expired. The worker submitted that there were special circumstances that precluded the filing of the appeal on time because he had "just received" a copy of the decision. Also, he had been living with seven other people and that the original that had been sent "must have been misplaced". The issue was whether the worker should be granted an extension of time for filing his appeal.

Section 243(3) of the *Workers Compensation Act* (Act) sets out the requirements that must be met in order for an application for an extension of time to be successful and the Chair in *WCAT Decision #2003-01810* provided further analysis of the three requirements. Section 221(2) of the Act provides that a document is deemed to have been received on the eighth day after is was mailed. The word "deemed" may have one of two meanings: "deemed conclusively" or "deemed until the contrary is proved". In deciding whether the word "deemed" in this section establishes a conclusive or rebuttable presumption, the panel considered two factors. First, where the statute provides that mail is "conclusively deemed" to have been received, the ordinary meaning of the phrase is that the legislature intended the provision to be irrebuttable. The term "conclusively" does not appear in section 221(2). Secondly, the word "deemed" must be construed in the context of the statute as a whole. While the deeming provision supplies the certainty that is necessary to allow the time periods in the Act to function effectively, there must also be flexibility to accommodate those exceptional circumstances where it is established that a document was not received. This is necessary to ensure that access to WCAT, which is the final level of appeal, is not unfairly curtailed. In light of these factors, the panel, comprised of the Chair, found that section 221(2) established a rebuttable presumption that a document was received. The panel was satisfied that the worker did not receive the December 2002 Review Board finding when it was originally mailed to him, and accordingly found that the presumption was rebutted. The panel based this conclusion on the fact that the worker wrote to the Review Board in March 2003 asking whether a decision had been issued on his appeal. A note in WCAT's case management system indicates that a copy of the finding was mailed to the worker in April 2003. As the panel was satisfied that the worker did not receive the December 2002 Review Board finding when it was originally mailed to him, it found special circumstances precluded the worker from filing the notice of appeal on time. Given that the issue before the Review Board concerned the acceptance of a claim, a significant issue, the panel found an injustice would result from a denial of an extension of time. Moreover, the panel found that the employer would not be prejudiced by the granting of an extension of time. The extension of time was granted.

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19 WCR 447, #2003-03842, Deemed Receipt by Mail Rebuttable

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WCAT Decision Date: **November 27, 2003**
Panel: **Jill Callan, Chair**

Introduction

The worker seeks an extension of the 30-day statutory time limit to appeal a finding of the Workers' Compensation Review Board (the Review Board), which is dated December 27, 2002 and was mailed on the same date.

On March 3, 2003, pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). Pursuant to section 91 of the *Workers Compensation Act* (the Act) as it existed prior to the amendments that resulted from Bill 63, the worker had 30 days to appeal the December 27, 2002 Review Board finding. Accordingly, the time limit for initiating the appeal expired before March 3, 2003. Section 2(2) of the *Transition Review and Appeal Regulation,* B.C. Reg. 322/02 provides, in these circumstances, the worker can apply to the WCAT chair pursuant to section 243(3) of the Act, as amended by Bill 63, for an extension of time to appeal.

WCAT was notified of the worker's intention to appeal on May 30, 2003, which was nearly four months after the statutory time frame for appealing the Review Board finding had expired.

Although participating in the appeal, the employer has not provided a submission regarding this application.

Issue(s)

The issue is whether the worker should be granted an extension of time for filing his appeal of the December 27, 2002 Review Board finding.

Analysis

Section 243(3) sets out three requirements that must be met in order for an application for an extension of time 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.

In WCAT *Decision #2003-01810* (available online at http://www.wcat.bc.ca/research/appeal-search.htm) I provided further analysis of the three requirements.

The worker submits there were special circumstances that precluded the filing of the appeal on time because he had "just received" a copy of the decision. He indicated that he had been living in a building with seven other people and that the original that had been sent "must have been misplaced".

The circumstances raised by the worker require analysis of section 221(2) of the Act, which provides a document is deemed to have been received on the eighth day after it was mailed. The word "deemed" may have one of two meanings: "deemed conclusively" or "deemed until the contrary is proved" (*Hickey* v. *Stalker*, [1924] 1 D.L.R. 440 (Ont. App.Div.) at 442, quoted with approval in *Gray* v. *Kerslake*, [1958] S.C.R. 3).

In deciding whether the word "deemed" in section 221(2) establishes a conclusive or a rebuttable presumption, I have considered two factors. Firstly, where a statute provides that mail is "conclusively deemed" to have been received, the courts have interpreted the ordinary meaning of this phrase to be that the legislature intended the provision to be irrebuttable (*Foley* v. *British Columbia (Ministry of Forests)* (1999), 123 B.C.A.C. 287 (C.A.)). The term "conclusively" does not appear in section 221(2). Secondly, the word "deemed" must be construed in the context of the statute as a whole (*St. Peter's Evangelical Lutheran Church (Ottawa)* v. *City of Ottawa,* [1982] 2 S.C.R. 616). While the deeming provision supplies the certainty that is necessary to allow the time periods in the Act to function effectively, there must also be flexibility to accommodate those exceptional circumstances where it is established that a document was not received. This is necessary to ensure that access to WCAT, which is the final level of appeal in the workers' compensation system in British Columbia, is not unfairly curtailed. In light of these factors, I view section 221(2) of the Act as establishing a rebuttable presumption that a document was received.

In this case, I am satisfied that the worker did not receive the December 27, 2002 Review Board finding when it was originally mailed to him and, accordingly, the presumption in section 221(2) has been rebutted. I base this conclusion on the fact that the worker wrote to the Review Board on March 17, 2003 and asked whether a decision had been issued on his appeal. He also requested information on the changes

to the appeal system. On April 17, 2003, the consulting firm that had represented the employer on the appeal wrote to WCAT enclosing the worker's March 17, 2003 letter. The letter had been enclosed in error with some correspondence the employer's representative had received from WCAT. A note in WCAT's case management system indicates that a copy of the finding was mailed to the worker on April 23, 2003.

As I am satisfied that the worker did not receive the December 27, 2002 Review Board finding when it was originally mailed to him, I find special circumstances precluded the worker from filing the notice of appeal on time.

The issue before the Review Board panel concerned the acceptance of the worker's claim for compensation. As this is a significant issue, I find that an injustice would result from a denial of the extension of time.

The final issue arising under section 243(3) is whether this is an appropriate case in which to exercise the discretion to grant an extension of time in favour of the worker. In this case, I do not find the employer would be prejudiced by the granting of the extension of time. I also note that when eight days are added for mailing, the worker initiated his appeal within 30 days of the finding being mailed to him on April 23, 2003.

Conclusion

The extension of time is granted. The file is returned to the WCAT Registry for the processing of the appeal.

Jill Callan
Chair

JC/dlh