

**Noteworthy Decision Summary**

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**Decision:** WCAT-2003-04175 **Panel:** Jill Callan, Chair **Decision Date:** December 17, 2003

***Expiry of appeal period - Application to extend time to appeal - Acts or omissions by a representative - Special circumstances – Factors to consider - Injustice – Wage loss benefits – Delay – Prejudice - Section 243(3) of the Workers Compensation Act***

The worker applied to extend the time to appeal a May 12, 2003 Review Division decision to terminate her wage loss benefits. The appeal was filed eight days after the appeal period expired. Twenty-three days prior to the appeal period expiring the worker advised her representative that she wished to appeal the decision. She was unable to meet with her representative but was mailed a copy of the form and returned it without providing her name or a legible signature. The representative identified the worker's appeal form six days after the appeal period expired.

The WCAT panel granted the worker's application to extend the time to appeal. The panel concluded that while the worker's representative ought to have initiated the appeal by telephone, it was satisfied that in all the circumstances the worker took reasonable steps to preserve her right of appeal and that the acts or omissions of a representative can constitute special circumstances precluding the filing of the appeal on time.

In particular, the panel determined that the following factors should be considered on extension applications in these circumstances:

- whether there is evidence that the party intended to appeal within the time limit;
- whether there is evidence that the party gave instructions promptly;
- whether the party followed up with the representative within the time limit;
- whether the failure to comply was somehow the responsibility of the party;
- whether the representative acted as quickly as possible to remedy the error as soon as it was identified;
- if the representative is no longer representing the party, whether the party acted as quickly as possible to remedy the error as soon as it was identified;
- whether the failure to comply was the result of a failure in the representative's normal business practices or something more;
- whether the failure to comply resulted from a reasonable choice on the part of the representative in dealing with the party's case that was "superseded" by subsequent developments beyond the representative's control; and
- any other relevant circumstances particular to the case.

**This decision has been published in the *Workers' Compensation Reporter*:  
19 WCR 453, #2003-04175, Delay in Filing Appeal Due to Act or Omission of a  
Representative**

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## **Introduction**

The worker seeks an extension of the 30-day statutory time limit to appeal a decision of the Review Division of the Workers' Compensation Board, which is dated May 12, 2003.

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 June 19, 2003. On June 27, 2003, WCAT received the worker's notice of appeal. Accordingly, the worker was eight days beyond the statutory time limit for notifying WCAT of her intention to appeal the Review Division decision.

Although invited to do so, the employer is not participating in this application.

The worker is represented by a workers' adviser.

## **Issue(s)**

The issue is whether the worker should be granted an extension of time for filing her appeal of the May 12, 2003 Review Division decision.

## **Analysis**

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

In this case, the following chronology of events is relevant:

- On May 12, 2003, the review officer issued the Review Division decision.
- On May 20, 2003, the workers' adviser left a message on the worker's answering machine asking if she wanted to appeal to WCAT.
- On May 27, 2003, the workers' adviser discussed the Review Division decision with the worker. She had decided she wanted to appeal and said she would sign the form at the workers' adviser's office.
- On June 5, 2003, the worker called the workers' adviser to inform that she couldn't make it to his office as her vehicle had broken down. She asked that the appeal form be sent to her and was advised that it would be mailed out that day.
- On June 19, 2003 the time frame for initiating the appeal expired.
- On June 25, 2003, an assistant at the workers' adviser's office had determined that a signed appeal form that they had received had been submitted by the worker. There had been confusion because the worker had not put her name on the form and her signature was unreadable.
- On June 27, 2003, WCAT received the notice of appeal.

Item #3.40 (How to Appeal) of the *WCAT Manual of Rules, Practices and Procedures* provides "[t]elephone notice of intent to appeal will ... be accepted, for the purpose of meeting the 30 day time limit". In this case, a prudent representative would have telephoned WCAT to initiate the appeal after the worker's call on June 5. At the very least, a prudent representative would have telephoned WCAT on or before June 19<sup>th</sup>.

In *WCAT Decision #2003-01810*, I indicated that the question of whether acts or omissions of an appellant's representative will constitute special circumstances would have to be resolved as various scenarios arose. One approach to this issue is to attribute the acts and omissions of the representative to the appellant because the representative is the appellant's agent. However, this would be quite a technical approach. It would render appellants accountable for delays that occur when they have acted reasonably in relying on a representative to initiate an appeal on their behalf and the representative's failure to do so has been beyond the control of the appellant.

In *Review Reference #4090*, dated November 26, 2003 (available online at [http://www.worksafebc.com/review\\_search/decisions/preliminary\\_matters/4090-eot%20decision-allow.pdf](http://www.worksafebc.com/review_search/decisions/preliminary_matters/4090-eot%20decision-allow.pdf)), the chief review officer considered the question of whether the acts or omissions of a representative could constitute special circumstances that precluded the filing of an appeal on time. At pages 4 and 5, she stated:

It appears that the following factors are relevant in making decisions involving the acts and omissions of representatives:

- whether there is evidence that the party intended to request a review within the 90-day time limit through instructing the representative to do so;
- whether there is evidence that the party gave instructions promptly (early in the 90-day period);
- whether the party followed up with the representative within the 90-day time limit to ensure that the representative acted in accordance with the party's instructions;
- whether the failure to comply was somehow the responsibility of the party, for example failure to provide the necessary information to file a request for review such as the date of the decision in dispute;
- whether the representative acted as quickly as possible to remedy the error as soon as it was identified;
- if the representative is no longer representing the party, whether the party acted as quickly as possible to remedy the error as soon as it was identified;
- whether the failure to comply was the result of a failure in the representative's normal business practices or something more;
- whether the failure to comply resulted from a reasonable choice on the part of the representative in dealing with the party's case that was "superseded" by subsequent developments beyond the representative's control; and
- any other relevant circumstances particular to the case.

In my view, these are appropriate factors for WCAT to take into account in considering acts and omissions of representatives that delay the filing of an appeal with WCAT.

In this case, prior to the expiration of the time frame for appealing, the worker informed her representative that she wished to appeal. She also made an appointment to sign the notice of appeal during the time period for appealing. Unfortunately her car broke down and the worker's representative's office was delayed in realizing she had sent a signed notice of appeal. While I am of the view that the worker's representative ought to have initiated the appeal by telephone, in all of the circumstances I am satisfied that the worker took reasonable steps to preserve her right of appeal and special circumstances precluded the filing of the appeal on time.

The worker had sustained the injuries accepted under her claim when she was hit by a motor vehicle while working as a gas station attendant. The issue before the Review Division concerned the termination of the worker's wage loss benefits. In her notice of appeal, the worker contends that her compensable injuries continue to prevent her from returning to work. As the issue under appeal is significant, I find an injustice would result if an extension of time were not granted.

As the delay in initiating the appeal was relatively short, I find that the employer will not be prejudiced by the granting of the extension of time. I find this to be an appropriate case to exercise the discretion to grant an extension of time to the worker.

**Conclusion**

The worker is granted an extension of time to appeal the May 12, 2003 Review Division decision. The WCAT Registry will process the appeal.

Jill Callan  
Vice Chair

JC/dlh