

Noteworthy Decision Summary

Decision: WCAT 2004-00230 **Panel:** Michelle Gelfand **Decision Date:** January 19, 2004

Example where Workers' Compensation Board (Board) should have applied section 96(7) of the Workers' Compensation Act instead of section 96(4) - Board wrongly refused to reconsider a case manager's decision based on section 96(4) which prohibits reconsideration if more than 75 days has elapsed – But section 96(7) overrides this and allows the Board to set aside a decision that resulted from fraud or misrepresentation - Extension of time under section 243(3) – Extension of time denied because there was no evidence that the worker intended to appeal within the 30 day statutory time period for appeal

The case manager had denied her claim on March 5, and on May 8 a Workers' Compensation Board (Board) officer refused to reconsider that decision. The worker then requested (1) an extension of time to review the March 5 decision (*Review Decision #3358*) and (2) a review of the May 8 decision (*Review Decision #3921*). On the former matter, the review officer, upon considering the worker's letter of July 2 explaining her delay in requesting a review, denied her application for an extension of time. On the latter matter, the review officer rejected the request on June 20, and his decision formed the basis of the present extension of time request before WCAT; the worker submitted his application for an extension of time to appeal the June 20 decision two months after the expiry of the 30 day appeal period. The application was denied.

The worker explained her delay in appealing on the basis that English was not her first language, and she was confused and instead of appealing the review officer's decision to WCAT, she mistakenly wrote back to the review officer on July 2. However that letter clearly refers to *Review Decision #3358*, not *Review Decision #3921*. The panel found no evidence that the worker showed an intention to appeal the June 20 decision within the 30 day appeal period. Although the events on this claim could lead to confusion, the worker was represented, there was no evidence of confusion in her correspondence, an appeal pamphlet was enclosed with the June 20 decision, and she should have been aware of limitation periods since she had previously initiated a review outside the time limit. The June 20 decision specified that the other review was being dealt with separately. The panel therefore found no special circumstances that precluded her from appealing on time.

The panel noted that the Board refused to reconsider the March 5 decision of the case manager based on section 96(4) of the *Workers' Compensation Act* (Act), which prohibits reconsideration of a decision if more than 75 days have elapsed. However, section 96(7) of the Act overrides that provision, and allows the Board to set aside a decision that resulted from fraud or misrepresentation. In this case, the decision denying the claim was based on information that the parking lot where the worker slipped and fell was not owned or controlled by the employer, but the employer later retracted this and advised that it in fact controlled the lot. As the entitlement officer did not consider the effect of section 96(7), the panel recommended that the Board review the claim in light of that provision and relevant policy at C14-104.01.

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Introduction

The worker applies for an extension of time to appeal a June 20, 2003 decision of a review officer. The worker initiated this appeal on September 10, 2003, more than two months after the expiry of the 30 day statutory time period for appeal. The chair of the Workers' Compensation Appeal Tribunal (WCAT) is authorized under section 243(1) of the *Workers Compensation Act* (the Act) to extend the time to appeal. She has delegated that authority to all members of WCAT.

Although invited to do so, the employer is not participating in this application. The worker is represented by an advocate.

Issue(s)

The issue is whether the worker should be granted an extension of time to appeal the June 20, 2003 decision of a review officer.

Analysis

Section 243(3) sets out three requirements for a successful application for extension of time. The chair (or delegate) must conclude that:

- special circumstances precluded the filing of the appeal on time;
- an injustice would result if the extension were not granted; and
- the discretion to grant the extension should be exercised.

The relevant chronology follows:

- March 5, 2002 – a case manager denies the worker's claim for a slip and fall accident in the parking lot outside her workplace, primarily based on information from the employer that the parking lot was not owned or controlled by the employer.
- April 15, 2003 – the employer writes the case manager and advises that the parking lot was provided and controlled by the employer.
- May 8, 2003 – an entitlement officer refuses to reconsider the March 5, 2002 decision.

- May 26, 2003 – the worker requests an extension of time for review of the March 5, 2002 decision (review reference #3358), and requests a review of the May 8, 2003 decision (review reference #3921).
- June 20, 2003 – a review officer rejects the worker's request for review of the May 8, 2003 decision (#3921).
- June 23, 2003 – a review officer invites the worker to file submissions on her extension of time request (review reference #3358).
- July 2, 2003 – the worker writes the Review Division, referencing #3358, and explains her delay in requesting a review of the March 5, 2002 letter.
- Sept 9, 2003 – the chief review officer denies the worker's application for an extension of time on the March 5, 2002 decision (#3358).
- Sept 10, 2003 – the worker telephones WCAT, indicating an intention to appeal the June 20, 2003 review officer decision.

The worker explains her delay in appealing on the basis that English is not her first language, and she was confused by the information contained in the review officer's June 20, 2003 decision. She submits that, instead of appealing the review officer's decision to WCAT, she mistakenly wrote back to the review officer on July 2, 2003. That letter refers to review reference #3358 and was clearly written in response to a June 23, 2003 letter inviting submissions on the worker's late request for review of the March 5, 2002 decision. There is no reference in her letter to a dispute with the June 20, 2003 decision, in which a review officer rejected the worker's request for review of the May 8, 2003 letter.

After considering the above chronology, I find no evidence that the worker showed an intention to appeal the June 20, 2003 decision within the 30 day statutory appeal period, despite the fact that an appeal pamphlet was enclosed with that letter. Although I accept that the events on this claim could lead to confusion, the worker was represented throughout the relevant part of the process and there is no evidence of confusion in her correspondence. The June 20, 2003 review decision specified that the review of the March 5, 2002 decision was being dealt with separately. As well, having previously initiated a review outside of the statutory time limit, I would expect the worker to be aware of limitation periods. I therefore find no special circumstances that precluded the worker from appealing on time.

I note that the case manager refused to reconsider the March 5, 2002 decision based on section 96(4) of the Act which prohibits reconsideration of a decision if more than 75 days have elapsed. However, section 96(7) overrides that provision, and allows the Board to set aside a decision that results from fraud or misrepresentation of the facts or

circumstances upon which the decision was based. In this case, the decision denying the claim was based on information provided by the employer to the effect that the parking lot where the worker slipped and fell was not owned or controlled by the employer. That information was later retracted, and the employer advised the Board in its April 15, 2003 letter that the lot was in fact provided and controlled by the employer. It does not appear that the entitlement officer considered the effect of section 96(7) in this case, and I recommend that the Board review the claim in light of that provision and the relevant policy at C14-104.01 of the *Rehabilitation Services & Claims Manual*.

Conclusion

The extension of time to appeal the review officer's June 20, 2003 decision is denied for the reasons set out above.

Michelle Gelfand, Vice Chair

MG/dlh