

Noteworthy Decision Summary

Decision: WCAT-2004-00433 **Panel:** H. Morton **Decision Date:** January 28, 2004

Extension of time – Section 243(3) of the Workers Compensation Act (Act) - Relief of claim costs – Section 39(1)(e) of the Act

The employer seeks an extension of the 30-day statutory time limit to appeal the February 11, 2003 decision of a case manager to deny relief of claim costs under section 39(1)(e) of the *Workers Compensation Act* (Act). On May 6, 2003, the case manager requested further medical advice and the Board medical advisor confirmed the worker did have a pre-existing condition of traumatic plantar fasciitis that was related to the work injury and had prolonged recovery. The appeal was initiated on May 7, 2003, 44 days beyond the time for filing an appeal. The employer applied for an extension of time to appeal dated July 22, 2003.

In *WCAT Decision #2003-01810*, the chair noted that the test of special circumstances which precluded the timely filing of an appeal might include the situation where, 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. The panel accepted that the medical evidence obtained on this claim in May, 2003, constituted new evidence which did not exist until after the 30 day appeal period had expired. Special circumstances precluded the filing of a timely appeal, based on the fact that the new evidence to support such an appeal did not come into existence until a later date. Further, an injustice would result if the application were denied. In this regard, an extension of time to appeal may be the only avenue for obtaining consideration of this new evidence. An extension of time is granted for the employer's appeal of the February 11, 2003 decision to deny relief of claim costs under section 39(1)(e) of the Act.

WCAT Decision Number:**WCAT-2004-00433****WCAT Decision Date:****January 28, 2004****Panel:****Herb Morton, Senior Vice Chair
and Tribunal Counsel**

Introduction

The employer seeks an extension of the 30-day statutory time limit to appeal the February 11, 2003 decision of a case manager to deny relief of claim costs under section 39(1)(e) of the *Workers Compensation Act* (the Act).

On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). The employer's right of appeal to WCAT arises under section 41(1) of the transitional provisions set out in Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Section 41(1) allows a party who had an unexercised right of appeal to the Appeal Division immediately before March 3, 2003, to appeal to WCAT. If the appeal is not filed in time, section 41(2) provides that an application for an extension of time to appeal may be made under section 243(3) of the Act.

Pursuant to section 96(6) of the Act as it existed prior to the amendments that resulted from Bill 63, the employer had 30 days to appeal the decision. The Appeal Division's practice was to allow an additional ten days for mailing pursuant to the former section 101 of the Act. When the ten day period for mailing is taken into account, the statutory time limit for the initiation of the employer's appeal expired on Sunday, March 23, 2003. Since the time limit expired on a Sunday, pursuant to section 25(3) of the *Interpretation Act*, the time limit is extended to Monday, March 24, 2003.

In a letter dated May 7, 2003 addressed to the Appeal Division and received by the Workers' Compensation Board (Board) on May 7, 2003, the employer indicated its intent to appeal the February 11, 2003 decision. As notice of the employer's dissatisfaction was received within the workers' compensation system on May 7, 2003, I consider that to be the date on which the appeal was initiated. Accordingly, the employer was 44 days late in initiating the appeal.

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

In paragraph 20 of WCAT *Decision No. 1, Delegation by the Chair*, the chair delegated to WCAT members the authority to consider and determine applications for an extension of time to appeal.

Issue(s)

The employer seeks an extension of time to appeal the denial of relief of claim costs.

Criteria for granting an extension of time

The criteria for granting an extension of time to appeal to WCAT are found in section 243(3) of the Act. This section sets out three requirements that must be met in order for an 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>), the chair provided further analysis of these three requirements.

Background and submissions

The worker injured his right foot at work on November 27, 2002. This was initially diagnosed as a contusion injury. He received wage loss benefits for temporary total disability from December 2, 2002 until January 26, 2003. He commenced a graduated return to work on January 27, 2003, during which time temporary partial disability benefits were paid under section 30 of the Act.

By memo dated February 10, 2003, the case manager noted:

I have completed a review of this claim for consideration of cost relief. Based on my findings, [I] am unable to conclude that this worker has a pre-existing condition that has either prolonged or enhanced the period of disability. Therefore, cost relief is not applicable.

By decision dated February 11, 2003, the case manager advised the employer as follows:

Under this policy [#114.40 through 114.50 of the *Rehabilitation Services and Claims Manual*], no consideration is given to the application of Section 39(1)(e) until the worker has been temporarily disabled for a minimum period of 10 weeks following the injury.

1. There is no evidence of a pre-existing disease, condition or disability that enhanced (prolonged or made greater in extent) the disability accepted under this claim.
2. I have reviewed the evidence on the initiating incident and find the severity was moderate.

Based on the above, it is my decision to deny relief of costs under section 39(1)(e) of the *Act*. This means that the costs for this claim will continue to be charged to your firm.

As of February 7, 2003, the worker had been temporarily disabled for ten weeks. The February 11, 2003 decision was rendered after the worker's initial ten weeks of disability. The worker appeared to be recovering, and was pursuing a graduated return to work. Information on file indicates the worker worked 28 hours from February 3 to 9, 2003, and 32 hours from February 10-13, 2003.

Subsequent to the February 11, 2003 decision, the worker suffered a recurrence of temporary total disability. The claim was reopened for further wage loss benefits for temporary total disability from February 14, 2003 until July 25, 2003. The decision to suspend benefits from July 7-13, 2003 was later overturned by the Review Division on January 5, 2004 (Review Reference #6608). Wage loss benefits were paid for more than five months following the February 14, 2003 reopening. The Review Division further concluded that the worker continued to be temporarily partially disabled after July 25, 2003, finding that a six week graduated return to work would be appropriate.

As noted above, the time period for appealing the February 11, 2003 decision expired on March 24, 2003. On May 6, 2003, the case manager requested further medical advice. He noted that the claim was initially accepted for a contusion injury, but the diagnosis of traumatic plantar fasciitis had now been provided. The case manager requested an opinion as to whether the new diagnosis was correct and whether it was reasonably related to the work injury. By response dated May 6, 2003, the Board medical advisor confirmed the diagnosis of traumatic plantar fasciitis and advised this was reasonably related to the work injury.

In a memo dated May 6, 2003, the case manager summarized his telephone conversation with the employer. He noted in part:

I did explain that I was reviewing the claim for possible consideration of cost relief. I explained that there was evidence to suggest the worker has flat feet, and that he is somewhat obese. Therefore, his recovery may be prolonged due to a pre-existing condition.

On May 7, 2003, the case manager made a file notation:

I have reviewed this file further in regard to consideration of cost relief. Based on my discussions with a Board Medical Advisor, this worker does in fact have a pre-existing condition that has prolonged recovery. As noted by Dr. Koelink, the worker does have mild pes planus deformity bilaterally, which has prolonged the recovery. As a result, cost relief would be applicable. However, as the claim has now exceeded 75 days from the date of the decision, reconsideration cannot occur.

The employer filed an appeal on May 7, 2003.

The January 5, 2004 Review Division decision noted, in its summary of the background facts:

On February 26, 2003, the worker was assessed at a Medical Rehabilitation Program ("MRP"). On examination, the worker clinically had a condition of traumatic plantar fasciitis. Factors which contributed to his symptoms included his mild, pre-existing pes planus deformity, poor footwear and his heavy weight.

In an application for an extension of time to appeal dated July 22, 2003, the employer's human resources manager states that the employer was recently advised that the worker may have a pre-existing condition of "flat feet" which would exacerbate or delay his recovery from his injury. The manager further advises that on May 7, 2003, she learned during a telephone conversation with the case manager that the worker did have a pre-existing condition known as flat feet which was hampering his ability to recover from his injury. She states this was the first time this information was brought to her attention.

Analysis

Section 96(4) and (5) of the Act, as amended March 3, 2003, provide:

(4) Despite subsection (1), the Board may, on its own initiative, reconsider a decision or order that the Board or an officer or employee of the Board has made under this Part.

(5) Despite subsection (4), the Board may not reconsider a decision or order if

- (a) more than 75 days have elapsed since that decision or order was made,
- (b) a review has been requested in respect of that decision or order under section 96.2, or
- (c) an appeal has been filed in respect of that decision or order under section 240.

It is evident from the case manager's file memorandum of May 7, 2003 that he would have provided a new decision concerning the employer's request for relief of costs, based on significant new medical evidence, but concluded he was barred from further addressing the matter as more than 75 days had elapsed since the February 11, 2003 decision to deny relief of costs.

I note the reasoning provided in a decision by a former chief appeal commissioner in *Appeal Division decision #96-1676*, as well as a later Appeal Division decision which quoted from that decision and applied similar reasoning (#2001-1961, accessible on the internet at http://www.worksafebc.com/appeal_decisions/appealsearch/advancesearch.asp). *Decision #2001-1961* reasoned as follows:

The only "merits" decision made on the present claim concerning relief of claim costs was rendered at the time of the 13 week review. The decision that was made at that time was that section 39(1)(e) relief was not applicable "as there is no underlying disease, condition or disability **that is prolonging disability.**" [emphasis added in Decision #2001-1961]

(20) I consider it significant that the claims adjudicator did not rule out the existence of any underlying disease, condition or disability. Rather, she modified or qualified this reference by use of the phrase "that is prolonging disability". I consider that this analysis can only be properly understood in the context in which the decision was made, namely, that by the time of the 13 week review, there was no evidence of any pre-existing disease, condition or disability that was prolonging the worker's disability to that point.

(21) At that point, the claims adjudicator was in no position to contemplate whether wage loss benefits would be payable for a further six months, twelve months or eighteen months. Depending on the duration of the claim, the medical evidence might change as to whether the worker's disability was being prolonged or enhanced by reason of a preexisting disease, condition or disability. The situation would be different had the adjudicator simply ruled out the existence of any pre-existing disease,

condition or disability. For the reasons expressed above, I do not read the March 29, 1990 decision as having had that effect.

The February 11, 2003 decision was rendered at a point where the worker was participating in a graduated return to work, and seemed to be recovering from his injury. Shortly after that decision, the worker suffered a recurrence of temporary total disability, and wage loss benefits were paid for several more months.

While not necessary to my decision on this application, I consider that the case manager was in error in concluding that his February 11, 2003 decision to deny relief of costs precluded consideration of possible relief of costs under section 39(1)(e) in relation to further claim costs subsequent to that decision. If the February 11, 2003 decision had been intended as a categorical denial of the existence of any pre-existing disease, condition or disability, it would have been sufficient to state that there was no evidence of a pre-existing disease, condition or disability. The February 11, 2003 decision by the case manager did not rule out the presence of any pre-existing disease, condition or disability. Rather, the decision was that there was “no evidence of a pre-existing disease, condition or disability **that enhanced (prolonged or made greater in extent) the disability accepted under this claim**”. [emphasis added] Accordingly, the decision is properly interpreted as speaking only to the claims costs incurred to the date of the decision. Such a limited decision leaves room for future consideration of the question as to whether any pre-existing disease, condition or disability may have enhanced any future periods of disability.

I have considered whether to refer this matter back to the case manager for further adjudication. A concern might arise, however, whether the file notation to deny reconsideration, may itself be viewed as a decision subject to the section 96(5) limits on the Board’s reconsideration authority. While this argument may be met by the fact that no written decision was communicated to the employer as contemplated by section 221, the fact remains that the case manager has denied relief and has refused to reconsider based on new evidence.

In *WCAT Decision #2003-01810*, the chair noted the test of special circumstances which precluded the timely filing of an appeal might include the situation where, 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. I accept that the further medical evidence obtained on this claim in May, 2003, constituted new evidence which did not exist until after the 30 day time appeal period had expired (on March 24, 2003). I find that special circumstances precluded the filing of a timely appeal, based on the fact that the new evidence to support such an appeal did not come into existence until a later date.

I am reinforced in this interpretation of section 243, by section 256 of the Act. That section provides that WCAT decisions, which are final and conclusive, are subject to an application for reconsideration on the basis of new evidence which:

- (a) is substantial and material to the decision, and
- (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

Inasmuch as the legislature has created an exception to the finality of WCAT decisions on such grounds, it is reasonable to interpret the discretionary authority contained in section 243(3) as admitting of a similar exception to the finality of Board decisions (i.e. on the basis that the absence of evidence to support an appeal meets the test of special circumstances which precluded the filing of a notice of appeal within the required time period). The discretion to grant an extension of time to appeal on the basis of significant new evidence which did not exist, or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered, allows for a measure of relief from the finality imposed by section 96(4) and (5) of the Act.

In this case, the human resources manager for the employer wrote to the Board on April 24, 2003, stating that the employer felt the worker had been off work for an excessive amount of time for an apparently minor injury. A second medical opinion was requested, as well as investigation for possible fraud. The appeal period had expired a month earlier. The employer was protesting the continuing costs of the claim, but was not aware of evidence to support a request for relief of costs. This evidence was subsequently obtained by the case manager in May, 2003, at which point the employer acted immediately to file an appeal.

I am satisfied that special circumstances precluded the filing of an appeal within the 30 day time limit. I further find that an injustice would result if the application were denied. I note, in this regard, that case manager has refused to further consider the employer's request for relief of costs matter based on the new evidence, and an extension of time to appeal may be the only avenue for obtaining consideration of this new evidence. The granting of an extension of time for the employer's appeal does not affect the finality of any previous decisions made concerning the worker's claim entitlement. In the circumstances, I have decided to exercise the discretion to extend time for the employer's appeal.

Conclusion

An extension of time is granted for the employer's appeal of the February 11, 2003 decision to deny relief of claim costs under section 39(1)(e) of the Act. The WCAT Registry will contact the employer concerning the further handling of the appeal.

Herb Morton
Senior Vice Chair and Tribunal Counsel

HM/dlh