

Noteworthy Decision Summary

Decision: WCAT-2004-03980-RB **Panel:** Jill Callan **Decision Date:** July 27, 2004

Transitional appeals - Given that the worker had initiated an appeal of the 1994 Workers' Compensation Review Board (Review Board) finding to the Workers' Compensation Board Appeal Division (Appeal Division) in 1995 and had, in essence, abandoned that appeal, she could not now appeal to WCAT because section 2(2) of the Transitional Review and Appeal Regulation, B.C. Regulation 322/02, only provides an appeal right to a person who has not previously exercised a right of appeal - As the worker previously exercised her right of appeal to the Appeal Division, there was no basis on which to consider her application for an extension of time to appeal the 1994 Review Board finding

In 1995 the worker filed an appeal from a 1994 Workers' Compensation Review Board (Review Board) finding with the Workers' Compensation Board Appeal Division (Appeal Division). But because she did not file reasons for the appeal it was considered abandoned and the Appeal Division took no further action. In February 2004 WCAT received the worker's notice of appeal from the 1994 Review Board finding. In March 2004, WCAT received the worker's application for an extension of time to appeal. Section 243(3) of the *Workers Compensation Act* sets out three requirements that must be met in order for an extension of time application to be successful. In describing the special circumstances that precluded her from filing her notice of appeal on time, the worker said it had been impossible for her to write, and that she experienced pain, nightmares, and mental anguish. However, section 2(2) of the Transitional Review and Appeal Regulation, B.C. Regulation 322/02 (Regulation), only provides an appeal right to a person who has not previously exercised a right of appeal. Given that the worker had previously initiated an appeal of the 1994 Review Board finding to the Appeal Division and had, in essence, abandoned that appeal, the panel did not find that the worker could now appeal to WCAT on the basis that she had "not exercised a right under the Act to appeal a decision of the Review Board to the Appeal Division" within the meaning of section 2(2) of the Regulation. As the worker previously exercised her right of appeal to the Appeal Division, there was no basis on which to consider her application for an extension of time to appeal the 1994 Review Board finding.

WCAT Decision Number: WCAT-2004-03980
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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 (Review Board), which is dated December 30, 1994 and was mailed on January 3, 1995.

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 (Act)* as it existed prior to the amendments that resulted from Bill 63, the worker had 30 days to appeal the Review Board finding to the Appeal Division. Section 2(2) of the *Transitional Review and Appeal Regulation, B.C. Reg. 322/02* (Regulation) provides:

If, before the transition date,

- (a) a person has not exercised a right under the Act to appeal
 - (i) a decision of the Board to the appeal division, or
 - (ii) a finding of the review board to the appeal division, and
- (b) the time period within which the person must exercise that right has expired,

the person may apply to the chair under section 243(3) of the Act, as enacted by the amendment Act, to extend the time to file a notice of appeal under that section and the chair may extend the time to file the notice of appeal under that section.

The worker notified WCAT of her intention to appeal on January 14, 2004, which was almost nine years after the expiration of the statutory time frame for appealing the Review Board finding.

The employer is no longer active.

Issue(s)

The issue is whether the worker should be granted an extension of time for filing her appeal of the December 30, 1994 Review Board finding.

Background and analysis

The background relevant to this matter may be summarized as follows:

- By letter dated February 3, 1995, the Appeal Division intake clerk wrote to the worker's daughter and acknowledged the worker's intent to appeal the Review Board findings mailed on January 3, 1995.
- Following a telephone conversation, by letter dated February 17, 1995, the worker's daughter wrote the intake clerk and confirmed that, if she was unable to gather medical information/documentation from her mother's prior physicians, she would have no alternative but to withdraw the appeal.
- By letter dated March 2, 1995, the appeal officer wrote to the worker's daughter requesting reasons for the appeal be provided on or before March 23, 1995. The appeal officer informed the worker's daughter that if reasons were not received by that date, the appeal would be considered abandoned.
- By letter dated April 3, 1995, the appeal officer wrote to the worker's daughter and confirmed their March 23, 1995 telephone discussion in which the worker's daughter informed the appeal officer that the worker's appeal to the Appeal Division was to be withdrawn. The letter also stated that the appeal officer had requested that the worker's daughter provide a request to withdraw the appeal in writing. The letter informed the worker's daughter that, as the Appeal Division had not received the written request to withdraw the appeal, she had "closed off the appeal" and the Appeal Division would take no further action.
- By letter dated January 9, 2004 (received by WCAT on January 14, 2004), the worker asked to "open" her claim.
- On February 3, 2004, WCAT received the worker's notice of appeal from the December 30, 1994 Review Board finding.

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:

- the appellant is required to demonstrate that special circumstances precluded the filing of the notice of appeal on time;

- it must be determined that an injustice would result if the extension of time were not granted; and
- 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.

On March 31, 2004, WCAT received the worker's application for an extension of time to appeal. In describing the special circumstances that precluded her from the filing her notice of appeal on time, the worker stated it had been "impossible for [her] to write" and she had experienced pain, nightmares, and mental anguish.

On June 14, 2004, WCAT wrote to the worker and enclosed copies of the correspondence to and from the Appeal Division summarized above. We requested submissions in light of the fact that the Regulation is only applicable to "a person [who] has not exercised a right under the Act to appeal".

On June 24, 2004, we received a June 20, 2004 submission from the worker which related to the worker's injury and not the matter raised in the June 14, 2004 letter.

Section 2(2) of the Regulation only provides an appeal right to a person who has not previously exercised a right of appeal. Given that the worker had previously initiated an appeal of the December 30, 1994 Review Board finding to the Appeal Division and had, in essence, abandoned that appeal, I do not find the worker can now appeal to WCAT on the basis that she has "not exercised a right under the Act to appeal ... a decision of the review board to the appeal division" within the meaning of section 2(2) of the Regulation.

It is apparent from some of the documents the worker provided to WCAT that she may be seeking a reopening of her claim for further benefits or a reassessment of her permanent partial disability pension. If this is a case, she may wish to contact the Workers' Compensation Board.

Conclusion

As the worker previously exercised her right of appeal to the Appeal Division, there is no basis on which to consider her application for an extension of time to appeal the December 30, 1994 Review Board finding, which was mailed on January 3, 1995.

Jill Callan
Chair

JC/dlh