Noteworthy Decision Summary

Decision: WCAT-2005-01460-RB **Panel**: Teresa White **Decision Date:** March 23, 2005

Extension of time – Election – Section 10 of the Workers Compensation Act – Policy item #111.22 of the Rehabilitation Services and Claims Manual, Volume I

This decision is noteworthy because it lists several factors the Workers' Compensation Board (Board) should consider in exercising its discretion to allow a worker an extension of time to elect to sue or claim compensation under section 10 of the *Workers Compensation Act* (Act), noting that there are no policy criteria to apply in exercising that discretion. The panel further noted that section 10 does not bar workers from pursuing other administrative remedies.

The worker alleged she had been sexually harassed at her workplace by a supervisor. The worker spoke very little English. The Board first learned of the injury from a report of the attending physician. The Board wrote to the worker two weeks after the injury and told her that she was required to make an election either to sue in damages or claim compensation within three months of the injury. This letter also stated that this time could be extended.

Eight weeks after the injury, the worker submitted an application for compensation to the Board. The Board responded acknowledging its receipt but again stating that the worker must choose either to sue or to claim compensation. Soon thereafter, a Board investigator took a statement from the worker. Seven months later the Board wrote to the worker again, enclosing copies of the two previous letters and advising that, if the election form was not received within two weeks, no further action would be taken. Nine months after the injury, the Board learned the worker had not received its previous three letters. The Board then sent a fourth letter to the worker. Eleven months after the injury, the worker returned a completed election form. The Board concluded that the worker had elected to pursue her own remedies (a human rights complaint) with representatives of her choice and declined to extend the time to elect under section 10.

The panel found the worker's pursuit and abandonment of a human rights complaint was not a court action and did not constitute an election for the purposes of section 10. The panel also found some merit to the argument that, under policy item #111.22 of *Rehabilitation Services and Claims Manual, Volume I,* the worker made her election when she submitted her application for compensation form. The panel further noted that as the worker had given a statement to the Board very soon after the injury, and the parties had stated their positions on the human rights complaint, the Board was not seriously prejudiced in investigating the worker's complaint.

The panel noted that there was no policy guidance respecting the Board's exercise of discretion to extend the time to make an election under section 10. The panel referred to other sections of the Act which provided time limits for taking various actions and included a discretion to extend the time. The panel concluded that the Board should have exercised its discretion in this case and based this decision on the following factors:

- The complexity of the law and policy surround the statutory bar, and specifically section 10, in conjunction with a lack of legal advice;
- The worker's lack of proficiency in English;

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- The worker's lack of sophistication respecting workers' compensation matters;
- The fact that the Board's letters did not reach the worker for many months;
- The fact that the worker commenced a human rights complaint, and not a court action;
- The worker's mental health difficulties;
- The fact that the delay in making an election was only eight months;
- The specific legislative granting of discretion to the Board to extend the time for making an election, without any policy criteria to apply in exercising that discretion; and
- The circumstances alleged by the worker to surround the alleged injury, including allegations of threats made against her.

The worker's appeal was allowed. The panel directed the Board to consider the worker's claim on its merits.

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Panel: Teresa White, Vice Chair

Introduction

The worker appeals a decision of the Workers' Compensation Board (Board) dated July 24, 2002. The Board informed the worker that since she had not made an election pursuant to section 10(2) of the *Workers Compensation Act* (Act) within three months, her claim could not be further pursued.

The worker is represented by a workers' adviser. The employer is no longer registered with the Board. The employers' advisers were notified of this appeal and are participating as the deemed employer.

This appeal is proceeding by way of a read and review of the evidence and submissions on file. I agree that the issue can be fully and properly considered and resolved without an oral hearing. The issue is primarily a legal one involving the interpretation of law and policy. I have read the entire file, and read and considered all of the submissions.

Issue(s)

The issue is whether the Board should investigate and adjudicate the worker's claim.

Whether or not any or all of the worker's allegations are true is not an issue in this appeal. Neither is whether the claim should be accepted or not. The sole issue is whether the Board should further investigate and adjudicate this appeal.

Jurisdiction

This appeal was filed with the former Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and Workers' Compensation Review Board (Review Board) were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As no panel of the Review Board had begun deliberations respecting these appeals, this appeal is being adjudicated as a WCAT appeal.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254).

Background and Evidence

The worker alleges that on May 7, 2001, a male individual (whom the worker states was her supervisor) made comments to her of a sexual nature and that those comments constituted sexual harassment or assault.

The worker is a relatively new immigrant to Canada. She apparently speaks very little English. An audiotape of a statement taken from the worker and her husband by a Board investigator is on file. The worker gave evidence through an interpreter. I have listened to the entire tape.

Although it is evident from the file that there has been some confusion relating to his status, I accept for the purposes of this decision that the male individual was the "lead hand" of the company that employed the worker as a labourer. He was in a supervisory capacity with respect to the worker.

The alleged incident came to the attention of the Board because of a physician's report sent to the Board by the worker's attending physician. On May 24, 2001, the case manager wrote to the worker. The letter states, in part:

> As your situation suggests Personal Injury which may have been caused by another individual, Section 10 of the Workers Compensation Act provides that you must make a choice. You may choose either to sue the third party for damages or elect to claim compensation under the Act. This choice must be made within three months of the injury, although the Workers Compensation Board may extend this time frame. **If you pursue this route, you must complete an election form, which I have taken the liberty of enclosing.**
>
> [emphasis in original]

The worker signed a form titled "worker's report of injury or occupational disease to employer" on July 4, 2001. The form contains a detailed description of the events the worker alleges occurred on May 7, 2001. According to the worker's evidence, this form was completed by a person at a multicultural services agency who was assisting the worker.

On July 19, 2001, the case manager wrote to the worker acknowledging receipt of the application, but again stating that the worker must choose either to sue or to claim compensation. Again, the letter states that this election must be made within three months, although the Board could extend the time. Again, an election form was enclosed. The July 19, 2001 letter finally states that if the Board did not receive the election within two weeks, the case manager would assume that the worker no longer wished to pursue the matter.

The taped statement was taken by the Board investigator on July 25, 2001. Although it is not necessary for the purposes of this decision to set out the worker's evidence in detail, it is necessary to note that the worker's evidence is that she was threatened by the owner of the company (and father of the alleged harasser). The worker's evidence is that this individual threatened to kill her if she started a claim against the alleged harasser.

The investigator, at the close of the interview, suggested that the worker and her husband listen to the audiotape and decide whether they wished to pursue the claim. The investigator told the worker and her husband that he would not investigate further until the worker said she wished to pursue the matter, as he did not want to create further problems for the worker.

A file note dated September 4, 2001 and completed by the case manager states that the investigator said that it now seemed the worker wanted to proceed. The file note states that the investigator knows the case manager would need an employer's report, and an election form.

On December 17, 2001, the case manager wrote to the worker again, enclosing copies of the previous two letters. The case manager said in the letter that the Board had not received an election form. If the Board did not receive the form within two weeks, no further action would be taken on the claim.

A February 13, 2002 letter from the case manager notes that the letters set in May, July and December of 2001 had not been received by the worker. Other evidence on the file suggests they were sent to the wrong address. Copies were enclosed with the February 13, 2002 letter, plus another election form.

On March 28, 2002, the case manager wrote to the worker again, noting that there had been no response and the worker's claim remained suspended.

The multicultural services agency employee who was assisting the worker telephoned the Board on March 25, 2002, and said that she would call the worker and her husband in to discuss the election form. She was "not sure" what their intent was.

The worker initially pursued a human rights complaint but had dropped it, as it was too much for her emotionally. There had been no human rights outcome. The only documents in the file relating to the human rights complaint are a response to the complaint by the employer, which outright denies the worker's allegations, and a further response by the worker insisting that the allegations were true.
The worker did provide an election form, dated April 8, 2002.

The case manager spoke to the multicultural agency employee again on May 28, 2002. The worker was told that her human rights claim could not be restarted. The worker

wanted to proceed with the workers' compensation claim as the human rights claim was closed.

On May 29, 2002, the case manager wrote to the worker acknowledging receipt of the election form. She reminded the worker that the Board starting a claim did not mean that the decision to provide benefits had been made. The worker was asked to provide all copies of pertinent reports and other information connected to the alleged incident. The letter advises the worker, in bold letters, that she cannot pursue a claim with the Board and take private action at the same time.

In accordance with Board practice, the case manager sought advice from the Board's in-house legal services. Their opinion is dated July 23, 2002. It notes first that the election was executed approximately 11 months after the alleged incident. Section 10 requires that an election be made within 3 months of the date of injury, but the time frame can be extended.

The opinion notes that the circumstances complained of would require proof of conversations that occurred between the worker and the alleged harasser, who had denied the conversations. The ability of the Board to seek evidence and determine credibility had eroded over time.

On that basis, the opinion was that it was open to the Board to conclude that the worker had made her election, and her election was to pursue her own remedies with representatives of her choice. The passage of time and actions taken by the worker during the intervening time had prejudiced the Board's ability to successfully pursue a subrogated lawsuit. For those reasons, the time to elect under section 10 of the Act should not be extended.

On that basis, the case manager wrote the decision under appeal.

Findings and Reasons

The interpretation of section 10 of the Act is central to this appeal. Section 10 provides:

> 10 (1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or

> agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

The provisions of section 10 are referred to as the "statutory bar" and are at the heart of the workers' compensation system, which is based on the "historical compromise" whereby workers are entitled to compensation on a no-fault basis, and employers are immune from suit.

In order for the statutory bar to operate, the circumstances of the injury must establish that the person claiming is a worker, the injuries arose out of and in the course of the employment, the "third party" who caused the injury is a worker or employer, and the third party's actions arose out of and in the course of employment. This is pointed out in a June 10, 2003 memorandum from the Board's legal department, and is fundamental to the operation of the statutory bar.

Section 10(2) of the Act provides:

> 10(2) Where the cause of the injury, disablement or death of a worker is such that an action lies against some person, other than an employer or worker within the scope of this Part, the worker or dependent may claim compensation or may bring an action. If the worker or dependent elects to claim compensation, he or she must do so within 3 months of the occurrence of the injury or any longer period that the Board allows.

In this case, the evidence suggests, and I have accepted for the purposes of considering the issue under appeal, that the person alleged to have injured the worker was himself a worker or employer. The Board's response is to point out that there are circumstances in which such a person has removed himself from the course of employment by his conduct. The result, if that circumstance applies, is that an action against the person would not be barred by section 10. Cases of sexual harassment or sexual assault are said to fall within that principle.

In that respect, section 5(4) of the Act states that where an injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious permanent disability. Further, published policy addresses "assaults" (policy item #16.30) and "unauthorized activities" (policy item 16.00).

Thus, if the actions of the person that the worker alleges has injured her can be found to be outside the scope of his employment, it may well be that she has a cause of action against him. That determination is beyond the scope of this decision, and I have mentioned it here because, fundamentally, the worker would not be required to (or, by implication, have the right to) make an election if the injuries asserted did not fall within the scope of the statutory bar.

The July 23, 2002 memorandum from the legal department refers to the fact that the worker had commenced a human rights complaint, which she had later abandoned. The memorandum then states that this information suggests that it is open to the Board to conclude that that the worker has made her election and her election was to pursue her own remedies with the representative of her choice.

This suggests that a worker would be required to "elect" whether to pursue a workers' compensation claim or proceed under the *Human Rights Code*. It would, perhaps, be a reasonable interpretation of section 10 of the Act to suggest that it bars a human rights complaint. Whether or not that interpretation is viable is not the subject of this appeal. Whether or not section 10 encompasses human rights complaints has not been the subject of any previous decision that I am aware of.

Whether or not section 10 would bar a complaint under the Labour Relations Code was considered, but not resolved in a decision of the former Appeal Division (*#96-1315*, reported at 13 WCR 83).

As was noted by the panel in the above Appeal Division decision, section 1 of the *Supreme Court Act* defines a "proceeding" as including an action, suit, cause, matter, appeal or originating application. Section 39 of the *Interpretation Act* states that the definitions section of the *Supreme Court Act*, so far as the terms defined can be applied, extends to all enactments relating to legal proceedings.

It could be argued, based on the above provisions, that "action" is a subset of "proceeding" as such is defined in the *Supreme Court Act*, and as such, an "action" is a court proceeding. The result would be that section 10 refers to "court proceedings" and does not include a complaint under the *Human Rights Code*.

Section 25 of the *Human Rights Code* provides:

> **Deferral of a complaint**
>
> **25** (1) In this section and in section 27, **"proceeding"** includes a proceeding authorized by another Act and a grievance under a collective agreement.
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> (2) If at any time after a complaint is filed a member or panel determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the member or panel may defer further consideration of the complaint until the outcome of the other proceeding.
> (3) [Repealed 2002-62-11.]
>
> [emphasis in original]

This section of the *Human Rights Code* clearly contemplates multiple proceedings, but allows a panel established under that legislation to defer further consideration of the complaint until the outcome of the other proceeding, if that other proceeding is "capable of appropriately dealing with the substance of the complaint."

Section 257 is the current section of the Act which allows for certification to the court by WCAT. It does not mention certification to any other legal body, and in particular to any administrative tribunal, including the Human Rights Tribunal.

There is a dearth of other previous appellate decisions, or court decisions, directly addressing this point. However, as I understand it, it is not the practice of the Board to consider proceedings before other administrative tribunals as attracting the statutory bar. In that respect, I note that the discriminatory action provisions of the Act (which are not the subject of the section 10 bar) specifically require a worker to chose the method of proceeding, be it the discriminatory provisions of the Act or a grievance under a collective agreement. Those provisions do not require a worker to choose between the Act and the *Human Rights Code*.

From this, I have concluded, for the purpose of this decision, that the worker's pursuit and abandonment of a human rights complaint does not mean, in law, that she has made an "election" as such is defined in the Act. It means simply that she pursued a remedy under another administrative law scheme. Section 10 did not bar her from doing so.

Still, the fact that the worker pursued a remedy under the *Human Rights Code* could suggest that she had elected not to purse worker's compensation benefits, particularly if she had been counselled and was fully aware of her rights in that respect.

I do not consider the evidence to support a conclusion that the worker was fully apprised of and understood her rights and responsibilities. The difficulty in interpreting the applicable sections of the Act are illustrative of the complexity underlying their operation. The worker clearly did not speak English well. Her statement was taken with the help of an interpreter. Although she received some assistance from the multicultural worker, there is no suggestion that she received legal counsel. Rather, I consider the evidence to support a conclusion that she did not seek legal counsel. Her own statement in reply to the employer's submission to the Human Rights Tribunal does not appear to have been prepared by a lawyer. It is not on a lawyer's letterhead and I consider it reasonable to conclude that the worker did not have legal advice respecting her human rights complaint.

The Board made numerous attempts to have the worker execute an election form. As late as February 13, 2002, the Board sent the worker an election form. The Board also requested copies of the documentation from the human rights complaint. The Board did not, at the expiry of the three-month period, inform the worker that she had irrevocably failed to make the election it believed was required under section 10.

Despite that, I consider it was reasonable, given the complexity of the allegations raised by the worker, and the issues arising respecting the necessity for an election, that the Board would require an election, even before making a determination respecting the worker's status, and the status of the individual alleged to have caused injury.

However, the issues relating to status were far from clear, and I do not consider that it is likely the worker understood the implications. For example, I consider it unlikely that the worker appreciated the distinction between a court action and a complaint to the Human Rights Tribunal.

Policy item #111.22 in the RSCM I provides:

> **# 111.22 Form of Election**
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> Any signed notification from a worker or dependant outlining her or his decision is a valid election. A Form 6 Application for Compensation (5) could constitute an election. However, to ensure that the worker is fully aware of the implications of making the election, the Board also forwards an explanatory brochure entitled "Legal Actions and the Right to Choose". Enclosed with the brochure is the Board's Form 25W75, "Third Party Election Covering Non-Motor Vehicle Accidents", or a Form 25W78, "Election Covering Third Party Motor Vehicle Accidents".

It was submitted by the worker's adviser that, on the basis of policy item #111.22, the worker had already made an election by providing a "Form 6A" to the Board. There is some merit to that submission, despite the fact that the Board continued to send the worker election forms.

Section 10(2) clearly provides the Board with the discretion to allow an election after "any longer period" that the Board allows. There is no policy guidance respecting when the Board will exercise that discretion, or what criteria should be applied in the exercise of the discretion.

The reason for refusing to extend the time is that the worker's actions in the intervening time, and the passage of time itself had prejudiced the Board's ability to pursue a subrogated lawsuit.

With respect, I do not consider those reasons sufficient to support a refusal to extend the time. In reaching that conclusion, it is notable that the worker gave a statement to the Board very soon after the injury, and the human rights complaint would have, effectively, crystallized the party's positions and their evidence respecting the events complained of.

It is certainly the case that the circumstances and events complained of would require determinations with respect to "who said what and to whom." The worker's allegations would be difficult to substantiate one way or another. However, I do not consider that the passage of 11 months seriously prejudiced the Board's ability to make those determinations. In that respect, it should also be noted that the worker provided a form detailing her allegations to the Board as early as July 2001, only two months after the alleged incident.

It is also the case that correspondence from the Board respecting the worker's election went astray, in that it was sent to the wrong address. It was not until February 2002 that the error was corrected. As such, and given the complexity of the issues, it would be unfair to count that time against the worker, who then made her election in April 2002.

Had the worker commenced a court action, that would have strongly suggested that the worker had made an election not to claim compensation. In that respect, it would have been likely that the worker had retained legal counsel, and counsel would likely have explained the implications of such an action to a workers' compensation claim. However, that is not what happened. The worker made a human rights complaint. She was never informed that making a human rights complaint would bar her from claiming workers' compensation, and as set out above, it seems unlikely that making the complaint would have been a bar in any event.

On that basis, I am left with the decision of the Board, based simply on the passage of time, that the worker's election was "out of time." The substance of the Board's determination in that respect is the conclusion that the passage of time had prejudiced the Board's ability to successfully purse a subrogated legal action. Based on the foregoing analysis, such a subrogated legal action must be taken to mean a court action, and not a human rights complaint. I am unable to find any precedent for the Board making or continuing a subrogated human rights complaint, whether or not the Board would have the legal authority to do so, which is questionable.

There is no policy guidance respecting the Board's exercise of discretion under section 10(2). As such, I have had reference to section 55 of the Act, which provides some guidance regarding the exercise of discretion in allowing an application for compensation made outside the required one-year period from proceeding. That section refers to "special circumstances" which precluded a worker from filing an application. I have also had reference to policy and practice relating to the time limits for requesting a review by the Review Division, and for appealing to WCAT.

The WCAT *Manual of Rules of Practice and Procedure* states that the chair may extend the time for appealing if special circumstances precluded the filing of the appeal on time; the chair is satisfied that an injustice would result if the extension were not granted; and, the chair decides to exercise the discretion to extend time in favour of the applicant. Special circumstances must preclude the filing of the appeal on time. The

definition of "special" includes "unusual," "uncommon," "exceptional," and "extraordinary." In the context of section 243(3), "preclude" does not mean "absolutely prevent." It may include "prevent," "hinder," "impede," or "delay" (see *WCAT Decision #2003-01810*). In the context of an extension of time application, panels will not consider the merits of the appeal

Although the law and policy respecting extensions of time is not directly applicable, it does provide some guidance. Based on my review of the file and submissions, I have concluded that the Board's discretion should have been exercised in favour of the worker. In particular, I have considered:

- The complexity of the law and policy surround the statutory bar, and specifically section 10, in conjunction with a lack of legal advice.
- The worker's lack of proficiency in English.
- The worker's lack of sophistication respecting workers' compensation matters.
- The fact that the Board's letters did not reach the worker for many months.
- The fact that the worker commenced a human rights complaint, and not a court action.
- The worker's mental health difficulties. In that respect, whether or not they are compensable, which is not before me, it is notable that the worker did experience relatively severe mental health problems during the period after the alleged injury.
- The fact that the delay in making an election was only eight months.
- The specific legislative granting of discretion to the Board to extend the time for making an election, without any policy criteria to apply in exercising that discretion.
- The circumstances alleged by the worker to surround the alleged injury, including allegations of threats made against her.

On that basis, I have decided to allow the worker's appeal and direct the Board to extend the time for the election required by section 10(2) of the Act. I recognize that the worker's claim may well be difficult to adjudicate. However, that difficulty does not preclude consideration of the claim.

Conclusion

The worker's appeal is allowed and the Board's decision varied. The time limit for the election required under section 10(3) of the Act is extended to encompass the date of the worker's election, and the Board directed to consider the worker's claim on its merits.

Teresa White
Vice Chair

TW/gw/pm

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