Noteworthy Decision Summary

Decision: WCAT-2005-03006-RB **Panel**: Elaine Murray **Decision Date:** June 9, 2005

Extension of time to apply for compensation – Special circumstances – Section 55 of the Workers Compensation Act – Policy item #93.22 of Rehabilitation Services and Claims Manual, Volume I

This decision is noteworthy for its analysis of the test under section 55 of the *Workers Compensation Act* (Act) for determining whether special circumstances existed that precluded the worker from filing an application for compensation within the statutory time. The appropriate test is whether unusual and extraordinary circumstances existed that made it difficult or otherwise hindered the worker from undertaking the claim.

The worker, a railway labourer, injured his back in a motor vehicle accident (MVA) that was unrelated to his work and claimed damages for personal injury from the Insurance Corporation of British Columbia (ICBC). Three years later, the worker reported pain in his left leg and back. He did not mention a work-related injury or accident at the time. Thirteen months later, the worker's ICBC claim was concluded on the basis that his symptoms did not result from the MVA, and appeared to be work-related. One month later, the worker applied to the Workers' Compensation Board (Board) for compensation.

The Board denied the worker's application under section 55. His physicians had not precluded him from applying, as he had not mentioned a work-related injury to them in the year following the incident. The Board also found no workplace incident had occurred. The worker appealed to the Workers' Compensation Appeal Tribunal (WCAT).

The panel noted that, before an application for compensation received outside the one-year period can be considered on its merits, it must satisfy the requirements of section 55. The panel held that the meaning of the phrases "special circumstances" and "preclude" is, for all intents and purposes, the same in both section 243(3)(a) and section 55. Therefore, *WCAT Decision #2003-01810*, in which the WCAT chair considered the requirements of section 243(3)(a) to allow an extension of time to appeal a decision to WCAT, provides significant guidance.

The panel noted that in previous Workers' Compensation Appeal Division (Appeal Division) decisions a "reasonable person" test was used in determining whether special circumstances existed that precluded the filing of an application in a timely manner. A number of these decisions referred to the judgment of the Federal Court of Appeal in *Canada v. Albrecht*, [1985] 60 N.R. 213. The *Albrecht* decision, however, was in the context of the *Unemployment Insurance Act*, which had less stringent requirements than those of the Act. The panel concluded that the appropriate test under section 55 was whether unusual and extraordinary circumstances existed, and if so, whether these circumstances made it difficult or otherwise hindered the worker from undertaking his claim.

Although there are no set criteria for determining "special circumstances", a number of factors have been cited in previous Appeal Division decisions. These include:

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- Characteristics of the worker such as language difficulties, which would create obstacles to understanding that there is a system of workers' compensation and how to access it.

- Lack of knowledge that an injury or disease might be work related because of delayed onset of the condition, minor nature of the original injury, or failure to recognize that it is related to work.

- Reliance on the advice of others, such as a physician or employer, where the worker is dependent on such advice owing to language difficulties.

The panel found the worker had decided to pursue workers' compensation benefits only after ICBC denied his claim. Thus, the worker was not precluded from filing a claim with the Board. The worker's appeal was denied.

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Introduction

By decision dated January 10, 2003, an officer of the Workers' Compensation Board (Board) informed the worker that there were no special circumstances that precluded the filing of an application for compensation within one year of the date of a workplace injury. The worker alleged that he injured his low back at work on August 15, 2001, but he did not file a claim until October 2002.

The worker now appeals the January 10, 2003 decision. He attended an oral hearing on May 2, 2005 with his representative, Mr. Gosal. The employer is participating in this appeal and its representative, Mr. Johnson, also appeared at the hearing, along with the employer's claims representative, who attended as an observer.

The worker contends that the uncertainty concerning his diagnosis and the causative significance of various low back injuries sustained between December 1998 and September 2001 resulted in the delay in filing his claim. Mr. Gosal, on behalf of the worker, seeks a finding that special circumstances existed that precluded the worker from filing a claim within one year, and that he suffered a compensable low back injury on August 15, 2001, which has permanently disabled him. In the alternative, Mr. Gosal contends that the worker's work activities over time (1998 to 2001) were "the major contributing factor in aggravating a pre-existing temporary condition or disability to the point of being permanently disabled".

Preliminary Matter

I will not address the merits of the worker's claim for compensation. The decision under appeal only addresses whether special circumstances existed that precluded the worker from filing an application for compensation within the statutory time frame.

Issue(s)

Were there special circumstances that precluded the worker from filing an application for compensation within one year of August 15, 2001? If so, should the Board exercise its discretion under section 55 of the *Workers Compensation Act* (Act) to pay compensation?

Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal, in accordance with section 38 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63).

Section 250 of the amended Act provides that WCAT must make its decision based on the merits and justice of the case but, in so doing, must apply relevant policies of the Board's board of directors. Section 254 of the amended Act gives WCAT 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.

Background and Evidence

The worker, a railway labourer, injured his low back on December 27, 1998 in a (non-compensable) motor vehicle accident (MVA). He made a claim for damages for personal injury through the Insurance Corporation of British Columbia (ICBC).

As a result of the 1998 MVA, the worker was disabled from working from December 28, 1998 until July 1999. He stopped working again on September 10, 1999 until the spring of 2000. He returned for a few months and stopped again in October 2000. He then returned on April 23, 2001.

On September 25, 2000, Dr. Luttrell, the worker's family physician at the time, reported that the worker had increased lumbar pain, which radiated to his left leg. Dr. Luttrell diagnosed a lumbar strain and minor degenerative disc disease at L4-5 (shown on an October 1999 x-ray).

On November 10, 2000, Dr. Rocheleau, a physiatrist, offered his opinion that persistence of the worker's soft tissue pain was a possibility, given his musculoligamentous injury in the 1998 MVA. He thought that the worker could return to his pre-MVA employment, but he would not be symptom-free.

On July 27, 2001, the worker, who had since returned to work, saw Dr. Brown, his current family physician. The worker complained of "left lumbar pain 5-6 months", which sometimes radiated to his left anterior thigh and calf. An x-ray taken that day revealed Grade I anterior spondylolysis at L4 on L5, and accompanying disc narrowing at L5-S1. Dr. Brown referred the worker for physiotherapy.

The worker was working out of town on August 15, 2001. According to his October 24, 2002 application for compensation, at approximately 10:30 that morning, while bending

over to open bolts on the rail tracks with a bolter, he experienced lower back pain, which radiated to his left leg. He told his supervisor, who drove him to the doctor.

The worker attended a medical clinic at 11:22 a.m. on August 15, 2001. He reported lumbar pain, which radiated to his left leg. Dr. Dionne, a general practitioner, examined him. Her clinical notes and records for that appointment do not indicate that the worker mentioned a work-related injury or incident. Dr. Dionne noted that the worker was off work. She prescribed Flexeril and told the worker to follow up with his regular family physician.

The worker saw Dr. Brown on August 17, 2001. Dr. Brown's clinical notes and records from that date read: "No improvement, using Flexeril. Can't work. X-ray spondylolisthesis. Using chiropractor. Sick leave – 1 m. RW – Sept. 30".

The worker's physiotherapist's August 17, 2001 clinical note entry records the following:

> MVA98
> L hip since off and on…
> Last couple of weeks worse

The above-noted clinical entry also records the name of the employer, with two words alongside it. The physiotherapy clinic staff interpreted those two words (the treating physiotherapist was no longer available to decipher his notes) as "bent lifting".

Dr. Brown's September 20, 2001 clinical note entry records: "This back pain has been results of MVA in 1998. Fixes railroad tracks – work is seasonal. Saw Dr. Caines – not working. CT scan pending."

The worker was involved in another (non-compensable) MVA on September 22, 2001. He complained to Dr. Brown on September 24, 2001 of right shoulder, arm and back pain.

On January 4, 2002, Dr. Brown reported to ICBC that the worker was off work owing to back pain from his 1998 MVA.

On January 6, 2002, Dr. Rocheleau reported that the worker continued to have low back and left leg pain after returning to work in April 2001. According to Dr. Rocheleau, "over time, [the worker's] situation deteriorated, and by August 15, 2001, he felt that he was having too much pain to continue and stopped working again." Dr. Rocheleau diagnosed mechanical lumbar pain, primarily at L5-S1, and mild left-sided nerve root irritation, which was suggestive of a disc protrusion. Dr. Rocheleau was of the opinion that the worker remained symptomatic from his MVA, and he had a poor prognosis concerning resolution of his symptoms.

A March 27, 2002 CT scan revealed Grade I spondylolisthesis at L4-5 with an associated concentric disc bulge. The radiologist noted that there might be compression of the nerve roots in the neural foramina.

The worker saw Dr. Gittens, a neurologist, on April 3, 2002. They discussed the 1998 and 2001 MVAs. There is no reference in Dr. Gittens' April 3, 2002 report to anything happening on August 15, 2001. Dr. Gittens thought that the worker's differential diagnosis was between a back strain, a sacroiliac strain, or a facet joint problem. He did not think that the worker's lumbar pain was the result of disc herniations, but wanted to personally review the CT scan and arrange for a bone scan. A May 27, 2002 bone scan did not show any evidence of skeletal lesion.

A June 22, 2002 lumbar spine MRI revealed a moderate broad-based disc protrusion at L4-5, with mild left neural foraminal narrowing and Grade I spondylolisthesis.

On August 7, 2002, Dr. Gittens reported to the worker's ICBC claim lawyer, in part, as follows:

> With respect to the degenerative changes and spondylolisthesis noted on his x-rays [the worker] clearly had degenerative changes ongoing at L4-5 prior to the first motor vehicle accident. During the course of his assessment he was found to have a spondylolitic spondylolisthesis L4-5 which was not produced or precipitated by the motor vehicle accident. This condition I believe pre dated the motor vehicle accident which in itself is a source for ongoing lower back pain, and may be primarily responsible for his current ongoing lower back pain. It is possible that it could have been aggravated or even activated by the motor vehicle accidents, the first motor vehicle accident more so than the second. However, I suspect that the increasing symptoms in 2001 leading up to his being off work related primarily to the degenerative pathology.
>
> In regard to the disc protrusion reported on the MRI scan of June 22, 2002, I believe this is a reflection of the ongoing degenerative changes of the L4-5 disc. It may be responsible for ongoing lower back pain. It is difficult to know whether this is responsible for his left lower extremity pain. Furthermore, it is also not possible to state when this disc protrusion occurred, and if so, whether it was related to the motor vehicle accident. I suspect it is probably more likely the result of ongoing degenerative change at the L4-5 disc.

In a September 13, 2002 letter to the employer, the worker's ICBC claim lawyer wrote as follows:

> …this will confirm that [the worker] has just concluded his claim with ICBC of [*sic*] the basis that his inability to work and current back problems did

> not arise from his motor vehicle accident. Rather the protruded and herniated disc at L4-5 appears to have arisen at work on August 15, 2001 (see clinical record of Dr. Karla J. Dionne enclosed).

The lawyer noted that the worker had instructed him to ask the employer to open a WCB file in order to treat the disc herniation as work-related.

Dr. Brown's clinical note entry for September 18, 2002 reads as follows:

> Dec 98 – MVA – off 4 m. Returned to work July 5 99 but still having problems. Worked July 1999 to Sept 99, still pain from same MVA. Disabled Sept 99 – due to MVA Dec 98 to April 23, (indecipherable). Still wasn't that well. Worked Ap 23 00 – Sept 25, 00. Off Sept 25, 00 – RW Apr? 2001. Always in pain from MVA, never perfect. Worked Ap 2001 – August 16, 01. **WCB Aug 15 01? Not mentioned to me once!**
>
> [emphasis added]

Dr. Brown then sent a report to the Board, dated September 19, 2002. He noted a date of injury as August 15, 2001, and wrote as follows:

> Opening joint of railroad track, bent forward pushing hard, sudden pain in left lower back, immediate pain down left leg. His supervisor took him to the local clinic. He has not worked since then, continues intense pain, recent MRI, being evaluated by Dr. Gittens.

On October 21, 2002, the worker told a Board officer that he was injured at work in August 2001, and his employer drove him to the doctor. He said that he was in so much pain that he thought that he was still on ICBC, and did not know to claim to the Board.

The worker's ICBC claim lawyer told a Board officer on November 17, 2002 that the incident at work resulted in a new injury and was not an exacerbation of his pre-existing non-compensable injury. There is no indication in the Board officer's November 17, 2002 claim log entry why the lawyer had reached that conclusion.

On November 25, 2002, the employer's "WCB Specialist" informed the Board that the worker had not reported any work-related injury for August 15, 2001.

In a December 2, 2002 letter to the Board, the worker explained that he did not report his injury sooner because his specialist (Dr. Gittens) did not confirm until the beginning of September 2002 that his disc herniation was most likely related to the August 15, 2001 work incident, and not to any prior MVA. The worker added that Dr. Brown had maintained that his pain after August 15, 2001 arose from the December 1998 MVA.

Finally, the worker noted that it was not ignorance or forgetfulness on his part; rather, it was the lack of a firm medical diagnosis that delayed his application to the Board.

In the decision under appeal, the Board officer informed the worker that his physicians did not preclude him from filing an application within one year of August 15, 2001. In the Board officer's view, they could not have precluded the worker, since he had never mentioned a work-related injury to them within that year. The Board officer also found as fact that a workplace incident did not take place on August 15, 2001.

Worker's Evidence at Oral Hearing

The worker gave evidence under oath that on August 15, 2001 he was opening old railroad track joint holes with a small bolter. He was on the outside of the track lifting a bolt when the bolter slipped and he fell. He recalled that a co-worker lifted the bolter up, and asked him how he was doing. According to the worker, three co-workers were there at that time, including a foreman. He said that he was driven to where the supervisor, Mr. E, was located. Mr. E then drove him to the medical clinic. The worker thought that Mr. E told him he would take care of filing a first aid report.

The worker said that he told Dr. Dionne that he fell and injured himself at work that day. He also said that he told Dr. Brown the same thing on August 17, 2001. He could not explain why Dr. Brown wrote in his notes in September 2002 that the worker had never mentioned an incident at work on August 15, 2001.

Law and Policy

The worker's claim is adjudicated under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). Policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), which relates to the former (pre-Bill 49) provisions of the Act.

Section 55(2) of the Act provides that an application must be filed, or an adjudication made, within one year after the date of injury. Section 55(3) of the Act states that if the Board is satisfied that special circumstances existed that precluded the filing of an application within one year after the date referred to in section 55(2), the Board may pay compensation if the application is filed within three years after that date.

Policy item #93.22 in the RSCM I provides guidance in the interpretation and application of section 55 of the Act. Before an application for compensation received outside the one-year period can be considered on its merits, it must satisfy the following two requirements of section 55 of the Act:

1. there must have existed special circumstances which precluded the application from being filed within that period, and

2. the Board must exercise its discretion to pay compensation.

These two requirements must be considered separately.

With respect to "special circumstances," the policy states that it is not possible to define in advance all the possible situations that might be recognized as special circumstances which precluded the filing of an application. Each case is considered based on its particular circumstances and a judgment made. The concern is "solely with the claimant's reasons for not submitting an application within the one-year period", and no consideration is given to whether or not the claim is otherwise a valid one. If the claimant's reasons for not submitting an application in time are not sufficient to amount to special circumstances, the application is barred from consideration on the merits, notwithstanding that the evidence clearly indicates that the claimant suffered a genuine work injury.

In *WCAT Decision #2003-01810* (available on WCAT's website) the chair considered the requirements of section 243(3)(a) of the Act. Specifically, section 243(3)(a) provides that an extension of time to appeal a decision to WCAT can be allowed where the chair is satisfied that "special circumstances existed which precluded the filing of the notice of appeal in the required time period". Although the chair's decision concerns whether an extension of time to file an appeal would be allowed, the legislation considered was for all intents and purposes the same as section 55(3) of the Act. In considering the above-quoted phrase, the chair wrote as follows:

> The definition of "special" in *Webster's New Twentieth Century Dictionary of the English Language,* 2nd ed. *(Webster's)* includes "unusual; uncommon; exceptional; extraordinary".
>
> The concept of special circumstances that precluded meeting a statutory time frame is also set out in section 55(3) of the Act, which concerns the situation in which a worker has failed to file an application for compensation within one year from the date of injury or disablement from an occupational disease. Accordingly, decisions by appellate tribunals and policies concerning the application of section 55(3) are of assistance in interpreting section 243(3)(a).

In reaching her decision, the chair also made the following comments:

> It is not sufficient for the appellant to merely identify special circumstances. The nature of the special circumstances must be such that they precluded the filing of the appeal on time. In determining whether an appellant was "precluded", all reasonable steps that the appellant ought to have taken in order to ensure a timely appeal must be taken into account.

The word "preclude" is capable of being strictly interpreted to mean "prevent" or "make impossible". However, in *Webster's*, "preclude" is more broadly defined to mean:

> to hinder, exclude, or prevent by logical necessity; to bar from access, possession, or enjoyment; to make impossible, especially in advance; as, these facts *precluded* his argument.

Accordingly, "preclude" may be interpreted to include "hinder", which is defined in *Webster's* to mean:

> 1. to make difficult for; to impede; to retard; to check in progression or motion; to obstruct for a time, or to render slow in motion; as cold *hinders* the growth of plants.
>
> 2. to keep back; to restrain; to get in the way of.

In *Decision #91-0851* (*Section 55 and Grain Dust Asthma*, 7 WCR 211), the Appeal Division considered the appropriate interpretation of "preclude" in the context of section 55 of the Act. At pages 220-221, the panel stated:

> In the final analysis to interpret any statutory provisions one has to determine the substance of its words in the context of the ideas expressed in the whole [A]ct and in light of the social purpose that was a driving force behind the legislation. Considering all of these factors this panel is not satisfied that the stringent interpretation of the word "preclude" is justified. The rigid interpretation of preclude as "absolutely prevent" is harsh and narrow. It has never been adopted by previous commissioners [of the Board] and finds no place in the governors' policy.

Similarly, I find in the context of section 243(3) "preclude" should be interpreted in the broader manner supported by the definition in *Webster's*.

Some WCAT panels have found guidance in the chair's decision when considering section 55(3) of the Act. Other panels, while also finding guidance in the chair's decision, have referenced additional decisions of the Appeal Division, such as *Appeal Division Decision Nos. 92-0144/92-0145*, which considered the matter even more broadly. In those decisions, there was a notional adoption of a "reasonable person test" when determining whether special circumstances existed that precluded the filing of an application in a timely manner.

*Appeal Division Decision Nos. 92-0144/92-014*5 referred to the judgment in the Federal Court of Appeal in *Canada v. Albrecht*, [1985] 60 N.R. 213. The reasonable person test discussed in *Albrecht* was in relation to the language in the *Unemployment Insurance Act* (1971), which deals with the circumstance when a claimant delays filing a claim but "shows good cause for his delay." The Court in *Albrecht* concluded, in part:

> …an obligation, with its concomitant duty of care, can be demanding only to a point at which the requirements for its fulfillment become unreasonable. In my view, when a claimant has failed to file his claim in a timely way and his ignorance of the law is ultimately the reason for his failure, he ought to be able to satisfy the requirement of having "good cause", when he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the Act. This means that each case must be judged on its own facts and to this extent no clear and easily applicable principle exists; a partially subjective appreciation of the circumstances is involved which excludes the possibility of any exclusively objective test.

The *Albrecht* decision was addressed by a WCAT panel in *Decision #2004-05968.* The panel noted that the requirement of having good cause for the delay under the *Unemployment Insurance Act* was less stringent than section 55 of the Act, which requires that there be special circumstances that precluded filing in a timely manner. As such, the panel concluded that using the "reasonable person test" would provide an extremely broad view of the issue before it.

In the appeal before me, I accept that the appropriate approach to take is whether unusual and extraordinary circumstances existed, and if so, whether such circumstances made it difficult or otherwise hindered the worker from undertaking his claim. I agree with the panel's conclusion in *WCAT Decision No. 2004-05968* that the "reasonable person test" provides an extremely broad approach to a determination under section 55(3) of the Act.

If I accept that special circumstances exist, the second requirement of section 55(3) is whether the Board should exercise its discretion to pay compensation. The exercise of the Board's discretion depends on the extent to which the lapse of time since the injury has prejudiced the Board's ability to carry out the necessary investigations into the validity of the claim. The length of time elapsed is a significant factor, together with the nature of the injury. The Board will not exercise its discretion under section 55(3) in favour of allowing an application to be considered where, because of the time elapsed, sufficient evidence to determine the occurrence of the injury and its relationship to the worker's complaints cannot now be obtained.

An employer is required by section 54(1) of the Act to report every injury to a worker that "is or is claimed to be one arising out of and in the course of employment", in which

any one of a number of conditions is present or subsequently occurs. These conditions include where a worker is transported or directed by a first aid attendant or other representative of the employer, to a hospital or other place of medical treatment, or is recommended by such person to go to such place.

Reasons and Findings

The crux of this matter is whether the worker's reasons for failing to apply to the Board within one year of August 15, 2001 amount to special circumstances that precluded him from filing an application with the Board. In that regard, I must be satisfied that his reasons are supported by the evidence. For example, if a worker contends that he was precluded from filing an application because he did not know that the Board existed, but he had previously filed claims with the Board, I would not accept his reason as being valid.

The worker wrote in his December 2, 2002 letter to the Board that it was not until Dr. Gittens told him that his back problems, particularly his disc herniation, were related to his work on August 15, 2001 that he knew to report to the Board. At the hearing, he maintained that this was his reason for the delay in filing.

Rather than focusing on the worker's stated reason for the delay in filing, Mr. Gosal led evidence at the hearing concerning whether an incident occurred at work on August 15, 2001. He contends that there is evidence (based particularly on what the worker said at the oral hearing) that a workplace incident occurred on that date. Mr. Gosal submits that the August 17, 2001 physiotherapy record, which is deciphered to read "bent lifting", supports the worker's evidence that an injury occurred at work on August 15, 2001. Nevertheless, he submits that there was no reason for the worker to attribute his symptoms to that incident until Dr. Gittens told him over a year later that his symptoms were work-related. Accordingly, Mr. Gosal argues that the worker's lack of knowledge of a causal connection to the August 15, 2001 incident amounts to special circumstances within the meaning of the Act.

Mr. Johnson points out that the worker's evidence at the oral hearing differs from his evidence on the claim file, given that the worker now says that he fell at work. Mr. Johnson contends that a falling incident at work would surely have alerted the worker to the potential of a work-related injury. On that basis, he argues that special circumstances do not exist. The worker would have known that he had an accident at work, and he was injured. As a result, he ought to have reported within the year.

Mr. Johnson contends that in the event I do not rely on the worker's evidence at the hearing that he fell at work on August 15, 2001, it is more than coincidence that the worker did not apply to the Board until after his ICBC claim was settled. Mr. Johnson further noted that his review of Dr. Gittens' reports did not reveal an opinion that the worker's back problems were related to his work activities on August 15, 2001.

I found the worker's evidence at the oral hearing to be troubling. This was the first time that he had ever mentioned having fallen at work. If he had been injured in a fall, I would have expected the employer to have filed a report of injury in accordance with its obligation under section 54(1) of the Act. I would also have expected the worker to have clearly mentioned his fall to Dr. Dionne and Dr. Brown. In addition, one would have expected the worker to mention a fall in his October 24, 2002 application to the Board. Mr. Gosal contends that the deciphered physiotherapist's note on August 17, 2001 supports that an incident occurred at work. I am not, however, persuaded of the accuracy of the interpretation of the record. Moreover, even if the record does refer to "bent lifting", it does not reference a fall at work.

I do not find the worker's evidence at the hearing concerning a fall at work to be reliable. I find his evidence closer to the event to be more reliable. Accordingly, I will proceed to determine if special circumstances existed, based on the file evidence concerning the absence of a specific incident on August 15, 2001.

In addition, I do not accept that the worker mentioned possibly injuring himself at work on August 15, 2001 to any of his treating doctors or therapists in the year following that date. Dr. Brown's September 18, 2002 clinical note entry confirms that the worker never mentioned a WCB incident on August 15, 2001. The reports from Dr. Rocheleau and the physiotherapist's clinical notes also do not suggest that the worker mentioned the events of August 15, 2001 to them. Moreover, Dr. Gittens' reports do not reveal that he was aware of that date as having any relevance.

As I earlier noted, I accept that the appropriate approach to take in determining the application of section 55(3) of the Act is to ask whether unusual and extraordinary circumstances existed and, if so, whether such circumstances made it difficult or otherwise hindered the worker from undertaking his claim.

The policy in item #93.22 of the RSCM I states that it is difficult to prescribe rules or criteria for the establishment of "special circumstances". There are, however, a number of factors that were frequently cited by previous Appeal Division panels as constituting special circumstances. WCAT panels have also found guidance in these factors, which include:

- characteristics of the worker such as language difficulties, which would create obstacles to understanding that there is a system of workers' compensation and how to access it.

- lack of knowledge that an injury or disease might be work related because of delayed onset of the condition, minor nature of the original injury, or failure to recognize that it is related to work.

- reliance on the advice of others, such as a physician or employer, where the worker is dependent on such advice owing to language difficulties.

In this case, while English is not the worker's first language, I find that he was able to understand and communicate in English without difficulty. He had also made four previous claims to the Board, which suggests that he was familiar with the workers' compensation system and how to access it.

This leaves the worker's stated reason, that is, his failure to recognize that his condition was work-related owing to his doctors' opinions.

I have set out the background evidence concerning the worker's claim in some detail. This includes some of the medical evidence concerning the worker's injury. In setting out this evidence, I am mindful that in determining whether special circumstances existed, the concern is solely with the worker's reasons for not submitting an application within the one-year period. No consideration is given to whether or not the claim is otherwise a valid one. Accordingly, I have not examined the medical evidence to attempt to evaluate the merits of the worker's claim for compensation, namely whether his back problems on August 15, 2001 and beyond were causally related to his work activities at that time. Rather, I reviewed the medical reports in an effort to see if they shed any light on the worker's state of mind and surrounding circumstances at that time. The information in the medical reports has some potential probative value in determining whether the worker attributed, or had reason to attribute, his back problems to his employment.

This was not a case in which the worker suffered a minor bump or scratch, which did not require medical attention or time off work. He contends that he was disabled from working, and required medical treatment including referrals to medical specialists. It would seem that the employer, the worker's physicians, and the worker himself, viewed his back problems as unrelated to his work, but related to his prior non-work injury or injuries. It appears that there was an assumption that in light of the non-compensable nature of the worker's prior back problems, and the absence of any specific incident or accident at work (or knowledge on the part of the doctors of any incident at work), that there was no basis for submitting an application for workers' compensation benefits.

Thus, in the present case, the factors which tend to support a conclusion that there were special circumstances that precluded the worker from claiming compensation include the following:

- No specific incident at work to cause the worker or employer to consider reporting a work-related incident.

- The medical evidence in the one-year period suggested that the worker's symptoms after August 15, 2001 arose from his 1998 MVA or his pre-existing degenerative changes.

This second factor warrants further consideration. The worker maintains that Dr. Gittens did not tell him until September 2002 that his back problems (including his disc herniation) after August 15, 2001 were work-related. Yet, Dr. Gittens' reports only suggest that the worker's ongoing low back pain stems from his pre-existing degenerative changes. In particular, Dr. Gittens thought that it could not be determined when the disc herniation occurred. In his view, it was most likely the result of degenerative pathology. I find, however, that the worker's contention that he was advised by Dr. Gittens that his disc herniation and ongoing back pain were related to his work activities on August 15, 2001 is contrary to Dr. Gittens' reports. In short, the worker's reasons for his delay in reporting are not supported by the evidence.

If Dr. Gittens offered an opinion that the events of August 15, 2001 were of some relevance to the worker's back problems, I would expect that his ICBC claim lawyer would have referenced that in his September 13, 2002 letter to the Board. Moreover, knowing that this appeal turns on the worker's reasons for the delay, I note that Dr. Gittens did not provide any evidence to support the worker's account of what Dr. Gittens told him and when, which is essentially hearsay.

I am also struck by the fact that the worker only applied for compensation after settling his ICBC claim. I agree with Mr. Johnson that this is more than a coincidence. The worker's ICBC lawyer informed the Board that it had been decided that the worker's ongoing complaints were work-related. The lawyer did not reference Dr. Gittens having reached that conclusion; rather, he referenced Dr. Dionne's clinical record from August 15, 2001. I consider that record suggests nothing more than the worker having back and left leg pain on August 15, 2001.

In my view, special circumstances do not exist in this case. The worker clearly did not consider the 2001 "incident" significant enough to make a claim for compensation. The evidence suggests that he did not consider it significant enough to mention it to his doctors until after Dr. Gittens' August 7, 2002 opinion that his ongoing back problems did not arise from the 1998 MVA. The worker finally made a claim to the Board in October 2002 because his lawyer settled his ICBC claim on the basis that he had recovered from his 1998 MVA sometime prior to August 15, 2001.
The worker maintains that Dr. Gittens attributed his ongoing disability to his work. However, the evidence from Dr. Gittens does not suggest that he even knows about the events of August 15, 2001. If he does, I accept that they were not mentioned to him until sometime after August 7, 2002. This leads me to conclude that the worker either knowingly withheld telling his physicians about the events at work on August 15, 2001 until after his ICBC claim was settled or he began to search for another explanation for his disability after August 15, 2001 when Dr. Gittens' August 7, 2002 opinion effectively ended his ICBC claim.

The worker has not worked since August 15, 2001 and is, understandably, seeking compensation from some source for his ongoing back problems. The evidence suggests that he now believes, in hindsight, that his ongoing problems are compensable as arising from a work-related injury.

In this situation, I do not find that there was a failure to recognize for over a year that the worker's symptoms might be work-related; rather, I consider it more likely that a decision was made to pursue workers' compensation benefits only after ICBC declined to compensate the worker for his ongoing symptoms. I find that the worker was not precluded from filing a claim with the Board. The weight of the evidence suggests that he did not consider filing a claim with the Board until benefits were no longer available from ICBC. He chose not to tell his doctors that there was an "incident" at work on August 15, 2001 until sometime after August 7, 2002. In short, I accept that he was not hindered or prevented from filing a claim within the one year; he either made a choice not to or it did not occur to him to seek out another possible avenue of compensation until after his ICBC claim was concluded.

In summary, I conclude that special circumstances did not exist so as to preclude the worker from filing his claim with the Board within one year of August 15, 2001, as required by section 55 of the Act. As a result, I deny the worker's appeal.

Conclusion

I confirm the Board's January 10, 2003 decision.

No expenses were requested and none are awarded.

Elaine Murray
Vice Chair

EM/ml

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