Noteworthy Decision Summary

Decision: WCAT-2007-03478 Panel: Herb Morton **Decision Date:** November 7, 2007

Interaction between claiming for Automobile insurance Benefits and Workers' Compensation Benefits – Section 55 of the Workers Compensation Act – Special Circumstances

This decision is noteworthy for its consideration of the practical effects for the worker arising from the interaction between claiming for automobile insurance benefits and subsequently for workers' compensation benefits in the context of determining whether there were special circumstances which precluded the worker from filing an application for compensation within one year of the date of injury.

The worker, a general manager of a business involving technology development and sales, was involved in a motor vehicle accident while travelling back to her office from meeting with a client. Her claim was held to be statute-barred under section 55 of the *Workers Compensation Act* because there were no special circumstances precluding her from filing her application for compensation within one year of her injury.

The worker's appeal was allowed. The panel found that there existed special circumstances which precluded the filing of an application within one year of the worker's injury.

The panel stated that whether there were special circumstances which precluded the timely filing of an application for compensation by the worker only concerned the initial one-year period following the date of injury. Any delay in filing an application for compensation subsequent to that period might be considered in connection with the additional issue as to whether an exercise of discretion should be made in favour of the worker.

The panel considered that the complexities of this situation which arose from the intersection of the automobile insurance and workers' compensation systems operated so as to hinder the worker from making of an application for workers' compensation benefits. In practical terms, the panel considered it understandable that the need to file a workers' compensation claim would likely not have been apparent to the worker during the initial one year period following her injury. It did not appear that any question regarding the acceptability of her automobile insurance claim, and the possibility of a "worker/worker" bar to her claim, was raised with her during the one-year time period following her injury. The worker was actively pursuing a claim for benefits following her injury, but was doing so in the context of the automobile insurance claim. The worker appeared to have sought legal advice as soon as the automobile insurer deferred the question of reimbursing her expenses. There was, as well, no delay in filing an application for workers' compensation benefits once the possibility of a worker/worker bar was raised. The panel also considered the fact that the worker did not have a prior Workers' Compensation Board, operating as WorkSafeBC, claim, had not obtained legal representation until after the one year period following her injury, and had not been encouraged to file a provisional claim by the insurance adjuster.

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WCAT Decision Number: WCAT-2007-03478
WCAT Decision Date: November 07, 2007
Panel: Herb Morton, Vice Chair

Introduction

The worker has appealed the March 16, 2007 Review Division decision (*Review Decision #R0074664*). The review officer found that special circumstances did not exist such that the worker was precluded from filing an application for compensation within one year of her February 28, 2005 injury, as required by section 55 of the *Workers Compensation Act* (Act). The review officer confirmed the November 15, 2006 decision by an entitlement officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), which denied the worker's application for compensation based on her delay in filing an application for compensation.

The worker is represented by a lawyer, who has provided a written submission dated September 7, 2007. The employer is not participating in this appeal, although invited to do so.

In her notice of appeal, the worker requested an oral hearing. By letter dated July 3, 2007, the Workers' Compensation Appeal Tribunal (WCAT) appeal liaison advised that based on WCAT criteria, the appeal would proceed by way of written submissions. However, I have a discretion to convene an oral hearing if I consider this necessary or helpful (as set out in WCAT's *Manual of Rules of Practice and Procedure* (MRPP) at item #8.90). I find that the issues raised by the worker's appeal are largely ones of law and policy which can be properly considered on the basis of the written evidence and submissions without an oral hearing.

For the purposes of my decision, I will use the phrase "the worker's lawyer" to refer to the various lawyers who have taken steps on her behalf, without differentiating between the particular persons. The Review Division decision used the initials AI to refer to the automobile insurer, and I will similarly use this abbreviation in my decision.

Issue(s)

Did special circumstances preclude the worker's filing of an application for compensation within one year of her February 28, 2005 injury? If so, should the Board's discretion under section 55(3) of the Act be exercised to pay compensation?

Jurisdiction

The Review Division decision has been appealed to WCAT under section 239(1) of the Act. WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (section 250(2) and 251 of the Act).

Preliminary – election to claim compensation

In her application for compensation dated September 12, 2006, the worker advised that she was injured in a motor vehicle accident on February 28, 2005. She provided particulars regarding the location of the accident, and the name and contact information for the other driver involved in the accident. She indicated that the other driver was the person responsible for her injuries.

Section 10(2) of the Act provides:

> 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 dependant may claim compensation or may bring an action. **If the worker or dependant 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**.
>
> [emphasis added]

A question arises as to whether the issue raised in this appeal concerning section 55 of the Act may be moot, unless the worker obtains the approval of the Board under section 10(2) of the Act for the granting of a longer period to elect to claim compensation. There is no reference on this file to consideration having been given to the worker's claim under section 10(2) of the Act.

It is not clear whether the worker is truly seeking to claim compensation, or whether she is merely seeking to establish a provisional claim for workers' compensation benefits pending a determination as to the status of the parties involved in the motor vehicle accident. Evidence has not been provided as to whether the driver of the other vehicle was working at the time of the accident. It is not clear from the evidence on file whether this was a "worker/worker" situation, which might cause the worker's action against the other driver to be barred under section 10 of the Act. It is not evident as to whether the other driver provided a statement to the AI. The identity of the registered owner of the other vehicle has not been provided, which may also bear on the worker's ability to pursue a legal action.

Notwithstanding these concerns, I note that the Board officer provided the worker with a decision concerning the application of section 55, this decision was the subject of a review by the Review Division, and the worker has exercised her right of appeal to WCAT. Accordingly, I accept that it is appropriate for WCAT to proceed to hear the worker's appeal. I will not address the possible application of section 10(2) of the Act in my decision. If necessary, that issue may be addressed separately by the Board at a future date.

Background

The worker has not had any other workers' compensation claim with the Board.

The worker was employed as the general manager of a business involving technology development and sales. She was involved in a motor vehicle accident on February 28, 2005. It appears that the accident occurred in connection with her travel involving a work meeting with a client. For the purposes of my decision, I will not address the circumstances of that accident, or determine whether that accident arose out of and in the course of her employment.

No medical report has been provided to the Board. In a letter dated July 10, 2006 to the worker's lawyer, a claims examiner, Head Injury Department, AI, noted:

> Find enclosed a copy of the Insurance Claim Application Form, G. F. Strong Rehab Centre – Acquired Brain Injury Program Out Patient Team Report dated January 6, 2006 (4 pages), CL 19 of Dr. Ramona Penner, clinical records of Dr. Penner (3 pages), massage therapy note from Dr. Penner and prescription note for Voltaren, physiotherapy note…..

Accordingly, it appears that evidence is available to support the adjudication of a potential workers' compensation claim by the worker. Although this has not been provided to the Board, I assume this could be readily obtained on request, if necessary to the adjudication of the worker's claim.

Copies have been provided of notes written by an AI representative concerning several contacts with the worker in March 2005. A March 2, 2005 entry indicated the AI representative requested that another person take a statement from the other driver to assist in considering whether this was a "worker/worker" claim. A March 8, 2005 entry indicated the worker stated she initially thought about seeing a lawyer for advice. The AI representative's notes state:

> I asked her if I can explain her claim to her. I explained Part 7 as well as tort and what is covered under tort. She felt alot better about that.
>
> [reproduced as written, except for capitalization]

Following the expiry of the one year time frame for filing an application for compensation for her February 28, 2005 injury, the worker wrote to the AI on March 1, 2006 to request reimbursement of receipts in the amount of $1444.00. By letter dated March 13, 2006, an AI claims representative advised:

> Unfortunately, we are not in a position to reimburse these expenses at this time. These medical expenses are "special Damages" and will be considered for reimbursement at the conclusion of this claim.
>
> [reproduced as written]

Following receipt of this letter, the worker retained a lawyer who wrote to the AI on March 27, 2006. He requested copies of relevant documents and information pertaining to the worker's claim. The AI's response to this letter was provided on July 10, 2006.

The worker's lawyer advises he was not advised by the AI of the existence of a workers' compensation issue until July 10, 2006. On September 18, 2006, the worker's lawyer wrote to the Board to initiate a provisional claim for compensation (and enclosed a copy of the worker's application for compensation). Accordingly, there was little or no delay in such filing, after the worker obtained legal advice and a possible workers' compensation issue was identified (albeit after the initial one-year time frame for making an application for compensation had expired).

By letter of November 7, 2006, the worker's lawyer advised the Board in part:

> I am advised by [the worker] that, following the motor vehicle accident, she attended at the [AI] Claim Center on March 1, 2005. [The worker] had, at that time, informed the [AI] Adjuster, [name], that she had finished meeting with a client and was on her way back to her office when the accident occurred. [The worker] recalls that [the adjuster] informed her that it was more difficult to proceed through the Workers' Compensation Board and that she did not have to worry about anything as [the AI] would look after all her invoices for her. From the date of the motor vehicle accident until my office received notice from [the AI], [the worker] had not been informed or advised by [the adjuster] or any other party that she was required to complete an application for Workers' Compensation Benefits and/or the time period in which an application needed to be completed. In fact, [the AI] has paid rehabilitation expenses for [the worker] in the approximate amount of $3,080.00.

By decision dated November 15, 2006, the entitlement officer noted that it appeared the worker's February 28, 2005 journey did appear to have a work aspect to it and this matter was discussed with an AI adjuster. She found that it was not the AI's responsibility to inform clients to file with the Board. She concluded that there were no

special circumstances which precluded the worker from filing a timely application for compensation.

The worker requested review by the Review Division. Her lawyer cited *WCAT Decision #2006-01901-RB* in support of the worker's request. By decision dated March 16, 2007, the review officer confirmed the November 15, 2006 decision. The review officer found that the worker's circumstances more closely resembled those addressed in *WCAT Decision #2005-03006-RB* (summarized as noteworthy on the WCAT website). That decision concerned a worker who had been injured in a non-work related motor vehicle accident (on December 27, 1998), and had also had a fall at work in a separate incident on August 15, 2001. That worker did not file an application for workers' compensation benefits in relation to the August 15, 2001 accident until October 2002, after settlement of his AI claim in relation to his 1998 accident.

In the present case, the review officer reasoned:

> The applicant's primary submission is that the AI's actions led her to believe that it would be more advantageous and efficient if her claim was handled through the AI. In fact, the AI's payment of expenses was a concrete demonstration that her claim would be adjudicated by the AI. Therefore, the applicant argues, the AI hindered her from filing a claim with the Board because the AI made her believe that such an application was not necessary.
>
> I do not find, however, that this amounts to special or unusual or extraordinary circumstances which made it difficult or otherwise hindered the applicant from filing an application with the Board within the one year time limit. Immediately after her MVA [motor vehicle accident], the worker sought out compensation for her injuries and made the choice to pursue her claim through the AI instead of through the Board. **The applicant may have relied to some degree on the AI adjuster's advice that it would be easier to proceed with a claim through the AI, but ultimately it was the applicant's decision to do so. Only after the possibility was raised that there might be an issue with her entitlement through the AI, did the applicant make the decision to pursue compensation benefits through the Board**.
>
> In summary, I conclude that special circumstances did not exist such that the applicant was precluded from filing her application for compensation with the Board within one year of February 28, 2005, as required by section 55 of the *Act.*
>
> [emphasis added]

The worker has appealed the Review Division decision to WCAT.

Law and Policy

The general requirement of section 55 of the Act is that an application for compensation for a personal injury be filed within one year after the date of injury. However, section 55(3) provides the Board with the following discretion:

> If the Board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), the Board may pay the compensation provided by this Part if the application is filed within 3 years after that date.

Policy at #93.22 of the *Rehabilitation Services and Claims Manual, Volume II*, explains:

> The general effect of these provisions is that two requirements must be met before an application received outside the one year period can be considered on its merits. These are:
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> 1. There must have existed special circumstances which precluded the application from being filed within that period, and
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> 2. The Board must exercise its discretion to pay compensation.

With respect to the requirement for "special circumstances," item #93.22 further provides:

> 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. The particular circumstances of each case must be considered and a *judgment made. However, it should be made clear 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. If the worker's reason 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 worker did suffer a genuine work injury.
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> The following facts illustrate a situation where special circumstances were found to exist. The worker suffered a minor right wrist injury on October 20, 1976, which at the time caused him no disablement from work and did not require him to seek medical attention. There was, therefore, no reason why he should claim compensation from the Board, nor any reason why his doctor or employer should submit reports to the

> Board. It was not until 1978 when the worker began to experience problems with his right wrist that he submitted a claim to the Board. It was only then that he was incurring monetary losses for which compensation might be appropriate.
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> [emphasis in original]

In relation to the exercise of discretion under section 55(3) of the Act, the policy further provides, in part:

> Once special circumstances within the meaning of section 55(3) have been shown to exist, the Board should in general exercise its discretion under that section in favour of allowing workers' applications to be considered on their merits.
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> …
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> 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.

Reasons and Findings

The worker's lawyer has cited *WCAT Decision #2006-01901-RB*, with respect to the meaning of the phrase "special circumstances which precluded." In turn, that decision cited the reasoning provided by the WCAT chair in a 2003 decision. *WCAT Decision #2003-01810*, "Extension of Time to Appeal to WCAT," 19 W.C.R. 189, summarized as noteworthy on the WCAT website, concerned an application for an extension of time to appeal to WCAT under section 243(3) of the Act. However, that section of the Act contains similar wording regarding whether "special circumstances existed which precluded the filing" of a timely notice of appeal. The WCAT chair reasoned:

> 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).

The policy of the board of directors concerning section 55(3) is set out in item #93.22 (*Application Made Out of Time*) of the *Rehabilitation Services and Claims Manual, Volume 2*, which provides, in part:

> 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. The particular circumstances of each case must be considered and a judgment made. However, it should be made clear 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.
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> [italics deleted]

In reaching her decision, the chair further reasoned:

> 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.
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> 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:
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> > 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:
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> 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*.

I agree with and adopt the reasoning quoted above. This broad interpretation is reinforced by the reasoning of the British Columbia Court of Appeal in *Caputo* v. *WCB (BC)*, (1987) 13 BCLR (2d) 145, 38 DLR (4th) 458. That decision concerned the exercise of the Board's discretion under section 58(5) of the Act, relating to the establishment of Medical Review Panels. In its reasoning, the Court of Appeal made reference to a range of discretionary provisions in the Act, including section 58(3), stating:

> …the Legislature has given the Board power to grant relief from non-compliance with other procedural requisites by granting the Board specific curative powers as follows:
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> …
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> See also s. 99 of the Workers Compensation Act reading as follows:
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> Legal precedent not binding
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> > 99. The board is not bound to follow legal precedent. Its decision shall be given according to the merits and justice of the case and, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the worker.

> **The above-quoted sections demonstrate, in my opinion, a legislative intent that the compensation scheme outlined in the Act be administered by the Board in accordance with practical, equitable and non-technical principles, "according to the merits and justice of (each) case"**.
>
> [emphasis added]

Sections 99(2) and 250(2) of the current Act similarly require that the Board and WCAT make their decisions based on the merits and justice of the case.

WCAT Decision #2006-01901-RB also cited the following reasoning from *Appeal Division Decision #00-1796*:

> Under the terms of the statute, any "special circumstances" which may fall to be considered are required to exist during the first year following the injury (or disablement by occupational disease) and there is no requirement that they must endure beyond that time, still less that they must continue unabated until the time of the ultimate application. This is acknowledged in the relevant published policy, where, in the subsection of Manual item #93.22 which deals with "special circumstances" (set out above), attention is focused on the applicant's circumstances within the one-year period.

I also agree with and adopt this reasoning. Accordingly, my consideration as to whether there were special circumstances which precluded the timely filing of an application for compensation is only concerned with the initial one-year period following the date of injury. Any delay in filing an application for compensation subsequent to the stipulated time period may be considered in connection with the additional issue as to whether an exercise of discretion should be made in favour of the applicant (see, for example, the denials of applications based on delay after the initial time period for filing in *Appeal Division Decision #2001-0732* regarding section 55, and *WCAT Decision #2006-02982* regarding section 243(3) of the Act).

The worker's lawyer submits that the worker suffered "a severe injury – a brain injury." He suggests that it is possible that the worker's brain injury impaired her judgement on this issue. It is unclear from this wording whether the injury is being characterized as severe because it was to her brain, or whether it was a severe brain injury. No medical evidence has been provided concerning the nature and extent of any injuries suffered by the worker. Accordingly, I place no weight on this argument in making my decision.

The worker's lawyer submits that the worker was hindered from applying for workers' compensation benefits by the advice of an AI adjuster that she did not need to file an application with the Board. This argument was set out in detail in the submission by the worker's lawyer to the Review Division.

I consider that this argument has some merit. The worker was injured in a motor vehicle accident. She promptly contacted her AI regarding her claim for benefits, and it appeared from her initial contacts with the AI that her claim had been accepted.

In this case, the AI adjuster requested (on March 2, 2005), that another person take a statement from the other driver to assist in considering whether this was a "worker/worker" claim. It is often the case that workers are encouraged or directed by the AI to make applications for compensation, to obtain preliminary determinations by the Board regarding their status. That did not happen in this case. While I am not finding that the AI had any obligation to advise the worker regarding the filing of an application for workers' compensation benefits, I nevertheless consider this aspect to be of possible relevance as one of the factual features of the worker's case.

It would require a considerable degree of knowledge on the part of the worker of the automobile insurance and workers' compensation systems to realize that she should protect her interests by filing a provisional application for workers' compensation benefits, while pursuing her claim for automobile insurance benefits. While the worker's actions implicitly involved an election to pursue automobile insurance benefits, rather than to claim compensation, the question as to whether the worker should be permitted additional time to elect to claim compensation under section 10(2) of the Act is not before me in this appeal.

The MRPP explains at item 20.24:

> Plaintiffs/claimants should file a Form 6 *Application for Compensation & Report of Injury or Occupational Disease* on a provisional basis pending the outcome of any section 257 application. This protects the plaintiff's/claimant's right to proceed with a workers' compensation claim should the legal action ultimately be barred. The general requirement of section 55 of the WCA is that an application for compensation be filed within one year of the date of injury. (See section 10 regarding subrogation and election.)

However, it does not appear that the worker sought advice from a lawyer during the one year following her injury, or that she commenced a legal action during that period. It was only after she received the March 13, 2006 letter deferring consideration of her request for reimbursement of expenses that she sought legal advice. Even at that point, the March 13, 2006 letter from the AI provided no clear indication that her claim for automobile insurance benefits was not an acceptable one.

I appreciate that it was the worker's choice whether to seek legal advice. In the context of a legal action for medical malpractice, in determining when the limitation period for initiating the legal action commences a party may be deemed to have had access to

legal advice regardless of whether or not this was sought. In *Vance v. Peglar*, [1996] B.C.J. 1753, 138 D.L.R. (4th) 711, 9 W.W.R. 513, 22 B.C.L.R. (3d) 251, application for leave to appeal dismissed, February 27, 1997, [1996] S.C.C.A. No. 452, the British Columbia Court of Appeal reasoned:

> …postponement does not depend upon the fact or absence of actual appropriate advice. The reasonable person, with the benefit of the facts the plaintiff could have known, is deemed to have appropriate advice about those facts in deciding whether or not the plaintiff should, as a matter of law, be regarded as having a cause of action at a particular date. Appropriate advice in this connection is deemed to be competent advice, which may be quite different from actual advice or no advice. For this reason, advice received or not received by the plaintiff, pro or con, is irrelevant except as evidence of what the plaintiff knew or did not know at any particular time.

However, that decision concerned the particular wording of section 6(3) of the *Limitation Act*, R.S.B.C. 1979, c. 236, regarding the limitation period for commencing a legal action for professional negligence. I consider that a different approach may be taken in considering the requirements of section 55(3) of the Act, as to whether special circumstances precluded a timely application for compensation. Thus, I consider the fact that the worker was unrepresented is a relevant factual feature of her case which I may take into account.

I consider that the complexities of this situation, which arises from the intersection of the automobile insurance and workers' compensation systems, operated so as to hinder the worker's making of an application for workers' compensation benefits. Quite simply, the need for doing so would likely not have been apparent to the worker. It does not appear that any question regarding the acceptability of her automobile insurance claim, and the possibility of a "worker/worker" bar to her claim, was raised with her during the one-year time period following her injury. The worker was actively pursuing a claim for benefits following her injury, but was doing so in the context of the automobile insurance claim.

It is evident from the circumstances addressed in various WCAT decisions under section 257 of the Act that the possibility of a section 10 bar to the legal action often does not arise within the first year following a motor vehicle accident. It may be that the circumstances of a worker's (plaintiff's) travel at the time of the motor vehicle accident are in a grey area as to whether or not such travel would be considered work-related. Alternatively, questions may arise as to whether the other driver was a worker within the meaning of Part 1 of the Act, or whether the circumstances of the other driver's travel at the time of the motor vehicle accident were such as to be work-related. Particulars of the other driver's circumstances may not be available to the worker/plaintiff during the first year following the accident. The possibility of a "worker/worker" bar may not be

identified until after examinations for discovery have been conducted in the legal action. Where, as here, the worker appears to have reasonably understood that her claim for automobile insurance benefits was an acceptable one, it could result in an unfairness were the worker to ultimately face bars to both that claim under section 10 of the Act, and to her workers' compensation claim under section 55 of the Act. In my view, consideration as to whether there were special circumstances which precluded an application for compensation should take into account the pragmatic realities of the legally complex situation encountered by the worker.

It is not uncommon for there to be considerable delay before the possibility of a "worker/worker" bar is identified. An illustration of such a situation is provided by the British Columbia Supreme Court decision in *Hazell v. Toews et al*., [1997] B.C.J. No. 2495. Mr. Hazell was injured in a motor vehicle accident on July 7, 1992. His legal action was commenced just before the expiration of the two-year limitation period. The trial had originally been set to commence in April 1996 but was adjourned by consent. In June 1996 the issue of whether the Board had jurisdiction over the claim of Mr. Hazell was raised by counsel for the defendant for the first time. In February 1997 an application was filed by counsel for the defendants to amend the statement of defence by pleading a defence pursuant to section 10 of the Act (that the parties were both workers). The Court noted the potential prejudice to the plaintiff created by this situation:

> 9 The importance of whether or not the defendants should be permitted to plead the provisions of the Act is obvious. If the Board determines that the plaintiff and the defendant Sprackman were workers, the Board will have exclusive jurisdiction over the claim of Mr. Hazell. If that should occur, Mr. Hazell will be deprived of a good portion of his benefits. Section 55(2) of the Act requires a worker to file an application for benefits within one year of the injury and, as occurred here, if no application is made within that year, the worker loses the right to benefits unless the Board exercises its discretion to grant benefits. If, as is also the case here, no application is made within three years, the Board retains a discretion to grant benefits but only for the period commencing on the date the Board receives the application for compensation. Mr. Hazell would thus be deprived of all benefits to which he might have been entitled prior to the date of his application.

Notwithstanding these concerns, the Court found as follows:

> 20 I conclude that the authorities binding on me and to which I am obliged to give deference make it clear that, at any stage of the proceedings, the issue may be raised and if that is done on any conceivable grounds, the proper course is to stay the action and refer the matter to the Board for a determination. The contrary authorities in Yuen

> and Parmar do not appear to have fully considered the issue and can be distinguished. There are circumstances described in the affidavit material which raise the question of whether this is a worker/worker action. The proper course is to allow the amendment and stay the action so that the issue of jurisdiction can be determined by the Board. The question of whether a stay of the action was necessary was discussed during submissions. There may be circumstances where a stay would be inappropriate but where, as here, court time and resources may be wasted if the action proceeds without resolving the jurisdictional issue, I find that a stay should be entered.

The circumstances of this case are distinguishable from those in *WCAT Decision #2007-02074*. In that case, the worker failed to follow up on a claim for either automobile insurance or workers' compensation benefits. In the present case, the worker appears to have sought legal advice as soon as the automobile insurer deferred the question of reimbursing her expenses. There was, as well, no delay in filing an application for workers' compensation benefits, once the possibility of a worker/worker bar was raised.

My reasoning, in this regard, is not intended to attribute any fault or blame to the representatives of the AI. Rather, it involves a consideration as to the practical effects for the worker, arising from such circumstances. In practical terms, I consider it understandable that the need to file a workers' compensation claim would likely not have been apparent to the worker during the initial one-year period following her injury.

The review officer noted that the worker made the choice to pursue her claim through the automobile insurer rather than the Board. That is a valid point. However, the question regarding an election to pursue a civil claim, or to pursue workers' compensation benefits, and whether the worker should be permitted to "re-elect" to claim compensation, is a separate issue under section 10(2) of the Act. While these questions may overlap to some extent, I consider that regard should be had to the legal complexities involved in such situations, in which the need to file a claim for workers' compensation benefits may not be apparent to the worker at the outset of a claim for automobile insurance benefits. In this case, there appears to have been no information provided to the worker during the initial one-year period following her injury, which might have alerted her to the possibility that the other driver may have been working at the time of the accident (so as to necessitate filing a workers' compensation claim on at least a provisional basis).

I consider that the circumstances of this case are distinguishable from those addressed in *WCAT Decision #2005-03006-RB*. In that case, the 2001 work accident was a separate event from the 1998 motor vehicle accident, and the worker's pursuit of automobile benefits in relation to the 1998 accident would not have prevented him from claiming compensation for his 2001 work accident.

While involving somewhat different circumstances, I find that a prior decision which involved similar considerations was *Appeal Division Decision #98-0371*. In that case, the panel reasoned as follows, in finding that special circumstances precluded the timely filing of an application for compensation:

> We agree with the majority Review Board panel that there is no evidence the worker was actively discouraged from filing an application for compensation or misled into believing that applying to the Board was unnecessary. Rather, the evidence points to a conclusion that neither [the AI], [the private insurer] or the worker's previous lawyer viewed the circumstances of her motor vehicle accident as raising a possibility of a workers' compensation claim until after the Examination for Discovery on August 28, 1995….
>
> …
>
> [The worker's] responses to questions posed during her Examination for Discovery were clear, consistent and unequivocal. However, the information known to her, although later found to be indicative of an employment relationship, would not have reasonably led her to consider the possibility of a workers' compensation claim. The analysis used to conclude that her injury arose out of and in the course of her employment with [the employer] required sophisticated knowledge of the facts and workers' compensation law…. We are satisfied that in these circumstances, it would not likely have occurred to a reasonable person, and it did not occur to [the worker], that she had any rights under the *Workers Compensation Act*.
>
> The panel finds that in this case there are special circumstances that precluded the worker from applying for compensation within the one year after the date of her injury. In coming to this conclusion, we find that the worker's delay was not "simply an oversight, lack of concern or forgetfulness". Rather, we adopt the interpretation of "precluded" as found in Appeal Division Decision #91-0851 (7 *W.C.R.* 211). We agree it is appropriate to adopt a liberal interpretation of Section 55(3) suggested by a reference in the *Caputo* case by Mr. Justice Anderson.

Although *Appeal Division Decision #98-0371* is not currently accessible on the Board's website, I do not consider it necessary to disclose it for comment as it supports the consideration of the worker's appeal and the employer is not participating.

On balance, and bearing in mind the legislative intent that the compensation scheme outlined in the Act be administered by the Board in accordance with practical, equitable and non-technical principles according to the merits and justice of each case, I am satisfied that the circumstances described above served to hinder or impede the worker in filing an application for workers' compensation benefits. Accordingly, I find that there existed special circumstances which precluded the filing of an application within one year of the worker's injury. In reaching this conclusion, I have taken into account the following factors (without attempting to weigh the significance of any one factor):

- the worker has not had any prior workers' compensation claim;
- following her accident, she promptly sought benefits from her AI;
- while a work connection was identified at the outset regarding the worker's travel, it does not appear that any information was provided to the worker to suggest that the other driver was working at the time of the accident;
- the worker did not obtain legal representation until after the one-year period for filing an application for compensation had expired;
- the worker was not encouraged by the automobile insurance adjuster to file a provisional claim for workers' compensation benefits;
- the worker reasonably believed that her claim for automobile insurance benefits had been accepted; and,
- the worker's lawyer acted promptly in filing an application for workers' compensation benefits once a workers' compensation issue had been identified (albeit after the initial one-year period had expired).

With respect to the exercise of discretion under section 55(3) of the Act, I find that the records available from the worker's automobile insurance claim should provide an adequate basis to support adjudication of her claim for workers' compensation benefits. Accordingly, I find that for the purposes of section 55(3) of the Act, the Board's discretion should be exercised in favour of allowing the worker's application to be considered on its merits (subject to the Board's further consideration under section 10(2) of the Act). Accordingly, the worker's appeal is allowed.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I therefore make no order regarding expenses of this appeal.

While not necessary to my decision, I would provide the following additional comments. If a legal action has been commenced, any party to that action may request a certificate from WCAT under section 257 of the Act regarding the status of the parties to the action. If the worker wishes to pursue an application for workers' compensation benefits, she should contact the Board's Legal Services Division to request consideration under section 10(2) of the Act.

Conclusion

I vary the Review Division decision. I find that special circumstances precluded the worker's application for compensation from being filed within one year of her February 28, 2005 injury. I further find that the Board's discretion under section 55(3) of the Act should be exercised in favour of allowing the worker's application to be considered on its merits (i.e. so as to pay compensation if such entitlement is established). This remains, however, subject to the Board's further consideration under section 10(2) of the Act, in the event the worker is in fact seeking to pursue a claim for workers' compensation benefits.

Herb Morton
Vice Chair

HM/gw