

Noteworthy Decision Summary

Decision: WCAT-2009-02847 **Panel:** Guy Riecken **Decision Date:** October 30, 2009

Sections 221(2) and 243 of the Workers Compensation Act – Extension of time – Special circumstances – Presumption of mail delivery eighth day after mailing

This decision considers whether special circumstances existed that precluded the filing of a notice of appeal on time where there was some question as to when the decision under review was received by the worker, but no argument that it was received within the statutory appeal period.

The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for a right knee sprain/strain that resulted from unaccustomed activities in his employment as a tree planter in May 2008. The Board paid temporary disability (wage loss) benefits from May 14 to June 2, 2008. The worker requested a review of the termination date of his wage loss benefits. In a decision dated February 19, 2009, the Review Division confirmed the entitlement officer's decision. Taking into account the eight-day period for mailing set out in section 221 of the *Workers Compensation Act* (Act), the 30-day statutory appeal period for the worker to appeal the review decision to WCAT expired on March 30, 2009. WCAT received the worker's notice of appeal seven days late on April 6, 2009.

The worker submitted that he did not receive the decision under appeal until March 10, 2009. The panel noted that the worker did not provide any explanation for the late receipt of the review officer's decision that would rebut the presumption of delivery set out in section 221 of the Act. As well, even if the worker received the review decision on March 10, 2009, that was still well within the appeal period and would not have precluded the worker from filing the appeal within the statutory appeal period. The panel denied the application for an extension of time, finding that the applicant failed to demonstrate that special circumstances precluded the filing of the notice of appeal on time as required by section 243(3) of the Act.

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Introduction

- [1] The worker wishes to appeal the February 19, 2009 decision of a review officer in the Review Division of the Workers' Compensation Board (Board)¹. The worker did not file his appeal within the time required by the *Workers Compensation Act* (Act).

Issue(s)

- [2] The issue is whether the worker should receive an extension of time to appeal the review officer's decision of February 19, 2009.

Jurisdiction and Procedure

- [3] Section 239 of the Act authorizes appeals to the Workers' Compensation Appeal Tribunal (WCAT) of final decisions by review officers with respect to most compensation matters.
- [4] Section 243(1) of the Act provides that an appeal of a decision referred to in section 239 must be filed within 30 days after the decision appealed was made. An additional eight days are provided by section 221(2), which provides that a document sent by mail is deemed to be received on the eighth day after it was mailed. Accordingly, WCAT adds eight days to the appeal period. The chair of WCAT is authorized under section 243(3) of the Act to extend the time to appeal. The chair has delegated that authority to all members of WCAT.
- [5] The employer is participating. Item #5.30 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides that an application for an extension of time is normally based on written submissions. The worker and the employer's representative have both provided written submissions. I conclude that an oral hearing of this application is not warranted. I am satisfied that there are no compelling reasons to depart from the usual practice by holding an oral hearing.

Background and Evidence

- [6] The Board accepted the worker's claim for a right knee sprain/strain that resulted from unaccustomed activities in his employment as a tree planter in May 2008. The Board

¹ The Board operates as WorkSafeBC.

paid temporary disability (wage loss) benefits from May 14 to June 2, 2008. In a decision letter dated July 11, 2008 an entitlement officer at the Board informed the worker that wage loss benefits were being terminated effective June 2, 2008 because the worker had unreasonably refused suitable light or modified duties offered by the employer. The worker requested a review of that decision.

- [7] In *Review Reference #R0096868* dated February 19, 2009 a review officer confirmed the entitlement officer's decision.
- [8] Taking into account the eight-day period for mailing set out in section 221 of the Act, the 30-day statutory appeal period for the worker to appeal the review decision expired on March 30, 2009.
- [9] The worker's notice of appeal was received by WCAT seven days late on April 6, 2009. The notice of appeal was dated March 30, 2009 and was received by mail.
- [10] In his notice of appeal the worker included the following statement with respect to the special circumstances that precluded him from filing the appeal within the statutory appeal period: "The Review is dated February 19th/09, however, I did not receive the file until March 10th/09" [all quotes are reproduced as written unless otherwise noted; in this case the capitalization in the original has been changed].
- [11] With respect to the injustice that would result if the appeal is not allowed to proceed, the worker stated the following in the notice of appeal: "Lost wages for the time period of June 4th/09 to August 15th09."
- [12] The WCAT Registry wrote to the worker on May 29, 2009 and invited him to provide further reasons why the appeal was late. The worker provided a written submission dated June 11, 2009 which addresses both the extension of time application and the merits of the appeal. With respect to the extension of time application the worker enclosed a copy of MRPP item #5.31 and stated that he had highlighted reasons for his delay. Item #5.31 sets out factors that WCAT may consider in deciding whether special circumstances precluded the filing of an appeal on time. In the enclosed copy of item #5.31, the worker highlighted in yellow all of the following factors:
- (a) the date on which the applicant actually received the decision under appeal;
 - (b) if there was a delay in receipt of the decision, the reason for the delay (e.g. inaccurately addressed mail, applicant out of town);
 - (c) whether the applicant was aware of the right of appeal and the time limit for initiating the appeal;

(d) whether the applicant has obtained significant evidence which, at the time the decision was issued, either did not exist or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered (see *WCAT Decision #2004-00433*); and,
(e) whether the applicant took all reasonable steps to ensure a timely appeal.

- [13] The employer's representative submits that the worker has not identified any special circumstances that precluded him from filing the appeal on time. The representative notes that the review decision was mailed to the worker's correct address, and that the accompanying cover letter informed the worker that he had 30 days from the February 19, 2009 decision in which to appeal. The cover letter also indicated that a pamphlet was enclosed that provided further details with respect to the appeal process.
- [14] The WCAT Registry provided a copy of the employer's submission to the worker and invited him to provide a rebuttal submission by July 9, 2009. As at the date of writing this decision, the worker has not responded.

Findings and Reasons

- [15] For the following reasons the application for an extension of time is denied.
- [16] Section 243(3) of the Act sets out three requirements that must be met in order for an extension of time application to be successful:
- the applicant is required to demonstrate that special circumstances precluded the filing of the notice of appeal on time;
 - it must be determined that an injustice would result if the extension of time were not granted; and,
 - the chair of WCAT (or delegate) must exercise the discretion to grant the extension of time in favour of the applicant.

Special Circumstances

- [17] Item #5.31 of the MRPP discusses what may be considered special circumstances. Item #5.31 states that, in the context of section 243(3) of the Act, the definition of "special" includes "unusual," "uncommon," "exceptional," and "extraordinary."
- [18] Although the worker provided a lengthy submission in relation to the merits of the appeal, as well as evidence on the merits of the appeal, at this point I am only considering whether special circumstances precluded the worker from filing the appeal within the statutory time frame.

- [19] As noted by the worker in his submission, item #5.31 outlines a number of factors which WCAT may consider in deciding whether special circumstances precluded the filing of an appeal on time. These factors include the following: when the worker actually received the review decision; whether the applicant was aware of the right of appeal and the time limit for initiating the appeal; and, whether the applicant took all reasonable steps to ensure a timely appeal.
- [20] The presumption under section 221 of delivery by regular mail on the eighth day after mailing can be rebutted by evidence that an applicant received the decision late due to absence, illness or other cause beyond their control, so long as they acted in good faith.
- [21] The worker has not provided any explanation for the late receipt of the review decision. In particular he has not indicated that he was absent from his home on a vacation or for other reasons, or that he was ill. He has not provided evidence about “another cause beyond [his] control,” other than to state that the decision was not received until March 10, 2009.
- [22] The review decision and cover letter were mailed to the worker at the address he provided to the Review Division in his request for review (the same address at which WCAT has been corresponding with him). The correspondence from the Review Division was not misaddressed. There is no indication that the review decision was actually mailed by the Board at a date later than the one stated on the cover letter. Nor is there any record in the Board file that mail sent to the worker at his address was returned undelivered. The worker has not provided any information about problems with receiving mail generally at his address.
- [23] It is possible that for some reason unknown to the worker the decision and cover letter were simply delayed in the mail until March 10, 2009. The worker’s statement that he did not receive it until that date is not contradicted. I do not find other evidence that would detract from the worker’s credibility or to suggest that he is not acting in good faith. I note that the worker resides in another province, although in a major city. The eight days allowed for delivery by regular mail under section 221 would be sufficient for the usual postal delivery times between major cities in Canada. I also note that once the worker mailed his notice of appeal on March 30, 2009, it was received by WCAT well within eight days. I do not find the fact that the worker lives in another province to amount to a special circumstance.
- [24] Considering the evidence as a whole I conclude that the presumption of delivery in section 221 has not been rebutted. In the absence of some circumstance that could explain the late delivery, I do not consider the worker’s bare assertion that he received the decision after the eight-day period sufficient to rebut the presumption. If it were sufficient, it would mean that in any late appeal the person would simply have to assert delayed delivery in order to rebut the presumption and to establish special

circumstances. I do not think that this is the intention of section 221 of the Act or of MRPP item #5.20, particularly in light of the examples in subsection 221(4), which refer to a party's absence, illness or other cause beyond their control. While "other cause beyond their control" is open-ended, the fact that it follows "absence" and "illness" indicates that it refers to causes similar in kind to those examples. In this case I find that the presumption has not been rebutted. Accordingly, the appeal period ran until March 30, 2009.

- [25] While the worker mailed the notice of appeal on March 30, 2009, section 243 requires that it must be received by WCAT by that date.
- [26] In the event that I am wrong, and the presumption of delivery under section 221 is rebutted, I have also considered whether the circumstances (including late delivery) amount to special circumstances for the purposes of section 243. A number of WCAT decisions have found that late delivery of the review decision amounted to special circumstances. (See, for example, *WCAT-2003-03842*; *WCAT-2005-04706*; and, *WCAT-2008-00375*). These decisions are not binding on me, but I consider their reasoning helpful.
- [27] I note that in *WCAT-2003-03842* (a decision of the chair which has been identified as noteworthy) and in *WCAT-2008-00375* the extent of the late delivery was significantly longer than in the present case. In both cases the applicant received the review decision after the statutory appeal ended. Accordingly, it was clear that the late delivery precluded the applicants from filing their appeals within the statutory appeal period. In this case, the worker received the review decision well within the appeal period. At the time he received it, he had a further 20 days in which to file his appeal (considering both the 8 days allowed under section 221 and the 30-day appeal period). Accordingly, even accepting that the late delivery amounted to special circumstances, it is necessary to consider whether it precluded the worker from filing the appeal within the statutory appeal period.
- [28] In *WCAT-2005-04706* (which has been identified as a noteworthy WCAT decision) the applicant received the review decision 12 days after the date of the decision (instead of the eight days provided under section 221). There was evidence in the form of the postmark on the Review Division envelope that the decision had not been mailed until six days after the decision date. The vice chair found that it would be unfair if a party, who receives the decision late through not fault of their own, is to be deprived of the benefit of the full 30-day statutory appeal period to consider their options, seek advice, etc., before initiating an appeal. The vice chair found that the late mailing by the Review Division amounted to special circumstances that precluded the applicant from commencing the appeal within the statutory time limit.
- [29] MRPP item #5.31 provides that "preclude" does not mean "absolutely prevent," but may include such meanings as "hinder," "impede," or "delay." While I do not disagree with

the conclusion reached by the vice chair in *WCAT-2005-04706*, each application must be decided on its own merits. I find that there are factors that distinguish this case. I note, for instance, that the applicant in *WCAT-2005-04706* had partly explained her delay in appealing on the basis that she was suffering depression at the time and dealing with various personal issues. While the vice chair did not expressly find those to be part of the special circumstances, they were part of the evidentiary background of the decision.

- [30] The worker has not provided evidence in this case that there were other factors that delayed, hindered or impeded him in filing his appeal once he received the review decision on March 10, 2009. Nor has he suggested that once he received the decision, he needed time to consider his options, seek advice or undertake other steps before he commenced the appeal. He has not described taking or attempting to take any other steps in furtherance of his wish to appeal prior to March 30, 2009, when he dated and mailed the notice of appeal.
- [31] Considering the factors in MRPP item #5.31, I note that once he received the review decision the worker was aware of the right to appeal and the time limit for doing so. The cover letter from the review officer included an appeal notice that stated "If you decide to appeal this decision, you must do so within 30 days of the date of this letter." The letter also stated that a pamphlet was enclosed containing information about how to initiate an appeal. The worker has not suggested that he did not receive the appeal information pamphlet.
- [32] The cover letter also stated that the worker could contact WCAT if he needed further guidance. I note that MRPP item #3.41 provides that WCAT will accept telephone notification of intent to appeal for the purpose of meeting the 30-day deadline. There is no indication that the worker contacted WCAT within the appeal period to seek information about how to commence an appeal or to indicate an intention to appeal.
- [33] If the presumption under section 221 were rebutted, based on all the information provided by the worker, I would be unable to conclude that once he received the decision (which was well within the appeal period) and was aware of the appeal deadline, he took all reasonable steps to ensure a timely appeal. While this factor is not necessarily determinative, I consider it to be an important consideration in the context of the circumstances in this case.
- [34] I would find that the worker has not shown that he was precluded by the late delivery of the review decision from commencing his appeal during the statutory appeal. The worker has not identified any other factors as special circumstances.
- [35] Since I have found that there were no special circumstances that precluded the worker from filing his appeal within the statutory appeal period, it is not necessary to consider the other factors under section 243(3) of the Act.

Conclusion

- [36] The worker's application for an extension of time to appeal the February 19, 2009 decision of the review officer is denied.
- [37] No expenses were claimed with respect to the application, none are apparent from my review of the file, and none are awarded.

Guy Riecken
Vice Chair

GR/jm/cd