

## Noteworthy Decision Summary

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**Decision:** WCAT-2010-01650    **Panel:** L. Alcuitas-Imperial    **Decision Date:** June 15, 2010

***Section 55 of the Workers Compensation Act – Policy item #93.22 of the Rehabilitation Services and Claims Manual, Volume II (Application made out of time) – Special circumstances precluding filing of application within one year timeframe – Reasonable person test***

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 timeframe. In particular, it considers whether the "reasonable person test" should be applied when determining whether there were special circumstances.

In June 2005, the worker applied for compensation from the Workers' Compensation Board, operating as WorkSafeBC (Board), for asbestos-related disease. The Board accepted the worker's claim for right-sided asbestos-related pleural disease. The Board also advised the worker that if he believed that any respiratory diseases or other conditions were caused by his work activities, he needed to make a separate claim with the Board. The worker filed an application with the Board on July 31, 2008 for compensation for respiratory problems in both of his lungs. A Board officer advised that she was unable to consider the worker's claim on its merits because the claim was not filed within one year of the date of his disability as required by section 55 of the Act, and the Board officer did not find that special circumstances existed that precluded the worker from filing his claim within the one year timeframe. The Review Division confirmed the Board's decision. The worker appealed to the WCAT.

The WCAT panel allowed the appeal, finding that there were special circumstances that precluded the worker from filing an application for compensation within the one-year time period from his date of disablement, and that the Board should exercise its discretion to pay compensation. The panel stated that the two elements to consider when determining whether a worker was precluded from applying for compensation in a timely manner were that special circumstances must be shown, and it must be demonstrated that such circumstances made it difficult or otherwise hindered the worker from filing his or her application in a timely manner. The panel noted that in determining whether there are special circumstances it is necessary to evaluate the worker's reasons from the lens of whether his or her actions were that of a reasonable person. However, the worker's reasons for not submitting an application on time, along with any other circumstances identified, must still amount to special circumstances that precluded him or her from filing their application on time.

In this case, the panel found that the special circumstances that precluded the worker from filing an application for compensation on time were that he was advised by the Board to file a separate claim but the Board did not advise him of the prescribed timeframe; and, he failed to recognize that his chronic obstructive pulmonary disease (COPD) was related to his work, as the previous assessment of his treating physicians had been that his COPD was primarily related to his smoking. The panel further found that the Board's discretion to consider the worker's claim on its merits should be exercised as there was ample medical evidence available to adjudicate the worker's COPD claim.

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**Panel:** Luningning Alcuitas-Imperial, Vice Chair

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## Introduction

- [1] In June 2005, the worker applied for compensation from the Workers' Compensation Board (Board), operating as WorkSafeBC for asbestos-related disease. The Board accepted the worker's claim for a right-sided asbestos-related pleural disease for health care benefits only. Under this 2005 claim, the Board advised the worker that if he believed that any respiratory diseases or conditions, other than asbestos-related diseases, had been caused by his work activities, he needed to make a separate claim with the Board.
- [2] The worker filed an application for compensation from the Board dated July 31, 2008 (received on August 1, 2008). He stated that from 1980 to 2005, he had prolonged exposures in the workplace. He applied for compensation for respiratory problems in both of his lungs.
- [3] On December 12, 2008, a Board officer advised that she was unable to consider the worker's claim on its merits. The Board officer determined that the worker's claim was not filed within one year of the date of his disability and the Board officer did not find that special circumstances existed that precluded the worker from filing his claim within the one year timeframe.
- [4] The worker requested a review of the Board's decision. In *Review Decision #R0100072*, dated March 30, 2009, a review officer confirmed the Board's decision.
- [5] The worker now appeals this review officer's decision to the Workers' Compensation Appeal Tribunal (WCAT).

## Issue(s)

- [6] The sole issue arising on this appeal is whether there were special circumstances that precluded the worker from filing his application for compensation for an occupational disease within the one-year timeframe under section 55 of the *Workers Compensation Act* (Act).

## Jurisdiction

- [7] The worker brings this appeal under section 239(1) of the Act, which permits appeals of Review Division decisions to the WCAT.
- [8] Among other provisions of the Act relevant to my authority and jurisdiction, the following should be noted. Under section 254, I am authorized to inquire into, hear and determine all questions of fact, law and discretion that may arise or need to be determined in this appeal. My decision is required to be made on the merits and justice of the case. While not bound by legal precedent, I must apply policy of the Board's board of directors that is applicable to the case, except in the circumstances described in section 251. I am authorized to consider new evidence, and to substitute my decision for the decision under appeal. The standard of proof for compensation matters is the balance of probabilities, subject to section 250(4). Section 250(4) states that on an appeal respecting the compensation of a worker if the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in favour of the worker.
- [9] The worker requested an oral hearing into this matter, citing that he would be better able to explain his special circumstances in person. However, the WCAT Registry advised the worker in a June 25, 2009 letter that this matter was to be determined by way of written submissions. I agree with the WCAT's Registry decision. In reaching this conclusion, I reviewed Rule #8.90 of WCAT's former *Manual of Rules of Practice and Procedure* (MRPP) and Rule #7.50 of WCAT's current MRPP to see whether an oral hearing might still be required. I have concluded that it is not, as there is no issue about credibility, and the issue presented in this appeal is largely a medical, legal and policy one. I do not find that an oral hearing would assist me in deciding this appeal. I deny the worker's request for an oral hearing under both versions of the WCAT's MRPP.
- [10] The worker participated in this appeal and was represented by his union representative. Although invited to do so, the employer is not participating in this appeal.

## Background and Evidence

- [11] I reviewed the worker's claim file, as well as evidence and submissions presented by the worker. I find it is unnecessary to summarize all of the evidence and submissions. I provide the following summary as it relates to this appeal.
- [12] There is a good deal of medical information on the worker's 2008 claim from his previous 2005 claim for asbestos-related pleural disease. This information dates back to 1985 and reveals that the worker worked as an insulator and had workplace exposure to asbestos. In 1999, he was assessed by Dr. Williams (an internist and

respirologist) for chronic obstructive pulmonary disease (COPD). Dr. Williams diagnosed him with moderate COPD after testing.

[13] The worker also saw Dr. Lawson (an internist and respirologist) in September 2000. She told the worker that his major underlying disease was chronic bronchitis and emphysema from his smoking. However, in May 2005, Dr. Lawson reassessed the worker's COPD and stated that she supported the worker's plans to apply to the Board for compensation as a recent CT scan showed small amounts of honeycombing. Dr. Lawson also stated that the worker was well aware that most of his disease came from his smoking but there might be an element of asbestosis developing.

[14] Under the worker's June 2005 claim, a September 14, 2005 decision letter was issued. On the basis of an opinion from a Board internal medicine consultant, the Board accepted the worker's claim for a right-sided asbestos-related pleural disease for health care benefits only. The Board was unable to conclude that the worker had asbestosis or any asbestos-related respiratory impairment. Rather, the worker's significant respiratory impairment was due to chronic bronchitis/emphysema due to a history of smoking. No permanent partial disability award was granted.

[15] The September 14, 2005 decision letter also stated the following:

Please be advised that this decision relates only to your historical exposure to asbestos fibres. If you believe that any respiratory diseases or conditions, other than asbestos-related diseases, have been caused by your work activities in this Province, you will need to make a separate claim with the Board relative to such other disease or condition. For that purpose you would need to file a separate Form 6, Application for Compensation, with the Board.

[16] There is additional medical information on the worker's claim file, including diagnostic imaging and pulmonary function tests. A January 2008 CT scan of the worker's chest showed findings consistent with previous asbestos-related pleural disease, but no evidence of asbestos-related interstitial pulmonary fibrosis. March 2008 pulmonary function tests confirmed the worker had severe COPD.

[17] There were then two tests in July 2008. A July 5, 2008 CT scan of the worker's chest confirmed that the worker had diffuse emphysema; scarring or fibrosis at the left base of the lung; as well as a solitary, calcified plaque at the right lung base. The latter plaque was thought to possibly relate to a previous asbestos exposure or simply to a previous infection. July 21, 2008 tests confirmed the worker had very severe emphysema, but no comment was made on the causation of this condition.

[18] The worker filed an application for compensation from the Board dated July 31, 2008 (received on August 1, 2008). He stated that from 1980 to 2005, he had prolonged

exposures in the workplace. He applied for compensation for respiratory problems in both of his lungs. He asked that this be classified as a COPD claim and that it should be added on to his 2005 asbestos claim. He noted that the Board had all of his prior medical information, but that new imaging tests were to be reviewed by Dr. McNamara in August 2008. He noted that Dr. Wiebe (family physician) felt that if one compared x-rays of a man similar in age to himself and who also smoked, the damage from his working environment would become clear.

- [19] On September 4, 2008, a Board officer wrote the worker to advise about the requirements of section 55 of the Act. The Board officer noted that the worker was disabled in February 2005, but that his application was received in August 2008. The Board officer asked the worker to provide a detailed written description within 30 days of the special circumstances that prevented him from filing his application within the time prescribed.
- [20] The Board officer wrote the worker again on November 27, 2008. She noted that she had granted the worker a 60-day extension of time to file a submission; but that no submission had yet been received. The Board officer granted the worker a further two weeks to respond to the September 4, 2008 letter. If no submission was received, the Board officer advised that the worker's claim would be suspended and his file closed.
- [21] On December 12, 2008, the Board issued the decision letter underlying this appeal. The Board officer noted that the worker reported being disabled in February 2005 and that his application for compensation was received on August 1, 2008.
- [22] On December 15, 2008, the worker wrote the Board. He stated that he was feeling helpless. He stated that the Board did not know for certain that his working environment was not the cause of his illness. He also stated that his physician did not know that there was a claim for COPD. He recalled that a Board officer had told him to file a claim for COPD, but he now felt that he had been misled.
- [23] The worker's December 15, 2008 letter was taken as a request for a review of the Board's December 12, 2008 decision. A review officer issued the decision under appeal on March 30, 2009. I note that the worker did not make any further submissions to the review officer.

## **Submissions**

- [24] In his notice of appeal, the worker stated that he disagreed with the review officer's decision because the review officer did not properly consider the sequelae of events that led to the final conclusion about all of the consequences of his occupational exposure to asbestos. He stated that the test in section 55 was met, as he was dealing with a disease that had a specific latency period due to asbestos exposure. He asked

that his appeal be allowed and that I grant a remedy in the form of a finding that the test in section 55 had been met.

- [25] The worker provided a July 16, 2009 written submission, arguing that there were special circumstances that precluded him from filing a claim for compensation within the one-year timeframe. He first reviewed the file evidence, highlighting that when the Board advised the worker that he could file a new claim for conditions aside from asbestos-related pleural disease, no information on the timeframe for the filing of that claim was provided. The worker also argued that it was only in 2008 that he obtained the medical information that his COPD was work-related, as all previous medical information had indicated that it was due to his smoking. The worker also noted that there were other WCAT cases that found that the subsequent obtaining of supportive medical evidence was a special circumstance within the meaning of section 55 of the Act.
- [26] I provided the worker with further opportunity to comment on the proper approach to section 55 of the Act, noting three WCAT decisions as examples (*WCAT-2005-03006-RB*; *WCAT-2007-00095*; and *WCAT-2009-02864*). I note that all of these WCAT decisions are accessible on the WCAT website.
- [27] The worker provided a further January 25, 2010 written submission on the interpretation of section 55 of the Act. He submitted that there appeared to have recently developed a divergence among WCAT panels about the interpretation of the phrase “special circumstances” in section 55. He argued that the divergence could be traced back to *WCAT-2005-03006-RB*, which he submitted introduced a new test of “unusual and extraordinary circumstances” that was inconsistent with the Act and that should not be followed.
- [28] However, the worker also maintained that under any of the approaches articulated in the decisions interpreting section 55 of the Act, there existed special circumstances in his case and that he acted reasonably in those circumstances.
- [29] The worker then proceeded to review each of the WCAT decisions I provided to him. In commenting on *WCAT-2005-03006-RB*, the worker argued that the panel did not end up applying the “unusual and extraordinary circumstances” test, as the worker’s reasons for his delay were not supported by the evidence and it was unnecessary for the panel to address the test. While the worker acknowledged that prior WCAT decisions are not binding on other panels (unless designated as a precedent panel decision), he commented that the panel’s articulation of the “unusual and extraordinary circumstances” test was therefore made in *obiter* or to address an issue that was not necessary for the panel to address.
- [30] Moreover, the worker argued that the panel in *WCAT-2005-03006-RB* narrowly applied a dictionary definition of “special” and replaced the plain language of the statute, without

due regard for the purposes of the Act, in particular the purpose of section 55. The worker submitted that the purposes of section 55 differed from other provisions in the Act (such as section 243 which deals with extensions of time to file appeals to WCAT) and noted that different policy considerations come into play with each of those sections. In particular, he argued that section 243 deals with appellants who have already had contact with the workers' compensation system and therefore, the principle of finality would apply as a policy consideration. In contrast, he argued that section 55 involves workers whose claims have not yet been adjudicated on the merits and who might never have had any exposure to the claims adjudication process. The worker commented that perhaps there was little utility in attempting to articulate a unifying set of principles for consideration under all of these provisions.

- [31] The worker submitted that this was essentially a matter of statutory interpretation. He cited the following passage from *Appeal Division Decision #91-0851*, 7 WCR 211 at 220, which addressed the statutory history of section 55 of the Act, as well as parallel provisions in legislation across Canada:

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 Act 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 and finds no place in the governors' policy. It is appropriate in our view, to adopt the liberal interpretation of Section 55(3) encouraged by Mr. Justice Anderson [in *Caputo v. WCB* (1987) 13 B.C.L.R. (2d) 145 (B.C.C.A.)].

- [32] The worker submitted that the approach of the Appeal Division was in stark contrast to the approach of the panel in *WCAT-2005-03006-RB*, which rejected the notional "reasonable person" test as extremely broad. The worker submitted that the scheme, object and purpose of the Act revealed that an extremely broad approach to section 55 was indeed appropriate. He submitted that it was the legislature's intention to create an open, relatively informal, non-legalistic and non-adversarial system for compensating workers who are injured at work.
- [33] Finally, the worker asked me to review the prior Appeal Division decisions supporting the application of a "reasonable person" test. He commented that these decisions provided guidance in the interpretation of what constitutes "special circumstances."
- [34] In a March 23, 2010 letter, a WCAT appeal coordinator wrote the worker. She stated that I noted in reviewing the worker's claim file that one of his arguments was that it was only in 2008 that he obtained the medical information that his COPD was work-related.

As well, the worker noted on his July 31, 2008 application for compensation that Dr. Wiebe had comments on the damage to his lungs from his work environment.

- [35] The WCAT appeal coordinator invited the worker's submission on the further specific medical information that the worker relied on in support of this argument. She noted that I had only reviewed the worker's 2008 claim file, which contained some medical information but nothing specific from Dr. Wiebe on the work-related damage to the worker's lungs. The worker was granted until April 13, 2010 to make this further submission.
- [36] In an April 8, 2010 letter, the WCAT appeal coordinator granted the worker additional time to make his submission until May 13, 2010. No further submission was received from the worker. In a May 26, 2010 letter, the WCAT appeal coordinator confirmed that panel submissions were now complete and that the appeal had been forwarded to me.

## Reasons and Findings

- [37] Section 55(2) of the Act provides that, unless an application is filed within one year of the date of injury or one year of the date of death or disablement from an occupational disease, no compensation is payable except as provided in subsections (3), (3.1), (3.2) and (3.3).
- [38] Apart from section 55(3.3) which has no application to this appeal, I cite below those exceptions to the general rule set out in section 55(2):

55(3) 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.

55(3.1) The Board may pay the compensation provided by this Part for the period commencing on the date the Board received the application for compensation if

- (a) the Board is satisfied that special circumstances existed which precluded the filing of an application within one year after the date referred to in subsection (2), and
- (b) the application is filed more than 3 years after the date referred to in subsection (2).

55(3.2) The Board may pay compensation provided by this Part if

- (a) the application arises from death or disablement due to occupational disease,



- (b) sufficient medical or scientific evidence was not available on the date referred to in subsection (2) for the Board to recognize the disease as an occupational disease and this evidence became available on a later date, and
- (c) the application is filed within 3 years after the date sufficient medical or scientific evidence as determined by the Board became available to the Board.

[39] Item #93.22 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), deals with applications made out of time. The policy states that the general effect of the provisions of section 55 of the Act are that there are two requirements that must be met before an application received outside the one-year period can be considered on its merits. Those two requirements are:

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.

[40] The policy goes on to note that an application cannot be considered on its merits if no such special circumstances existed or the Board declines to exercise its discretion in favour of the worker. Each of the two requirements must be considered separately.

[41] In terms of guidance regarding what constitutes “special circumstances,” the policy notes 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. 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 claimant’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 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 did suffer a genuine work injury.

[42] In *WCAT-2009-02864*, I reviewed previous WCAT decisions and articulated my conclusion about the proper interpretation of the test in section 55 of the Act. I adopt my reasoning from that decision but modify my conclusion to the extent that I agree with the worker that it is not helpful to replace the word “special” in section 55 with the phrase “unusual or extraordinary circumstances.” Rather, in applying the test in section 55, I note that the dictionary definition of “special” includes the terms “unusual,” “extraordinary” and other terms. I note that WCAT takes a similar approach in

item #8.2.2 of the MRPP which deals with special circumstances under section 243(3) of the Act (extensions of time to file appeals). Item #8.2.2 states the test of special circumstances under section 243(3) and then simply refers to the dictionary definition of “special.” While I cite the approach taken under section 243(3), I am mindful of the worker’s submission that the purposes of the two sections of the legislation are arguably different and that different policy considerations may come into play for each section. I stated in paragraphs 41 and 42 of *WCAT-2009-02864* that decisions and policies interpreting section 243(3)(a) are of assistance in interpreting section 55. However, I did not state that they were determinative of the matter.

- [43] Therefore, when considering whether a worker was precluded from applying for compensation in a timely manner, the appropriate approach is to consider whether special circumstances existed and, if so, whether such circumstances made it difficult or otherwise hindered the worker from filing his or her application in a timely manner. I consider this approach contains two elements, in that not only must special circumstances be shown, the hindrance that those special circumstances created must also be demonstrated. Moreover, the totality of the circumstances and their effect must be considered, rather than an approach that compartmentalizes and considers each circumstance and its effect separately. As well, I note that the dictionary definition of “special” includes “unusual”, “uncommon”, “exceptional” and “extraordinary.”
- [44] As well, I consider that the word “circumstances” includes consideration of the worker’s reasons for not submitting an application within the one-year time period. It is necessary, in my view, to evaluate the worker’s reasons from the lens of whether his or her actions were that of a reasonable person. However, the worker’s reasons for not submitting an application on time, along with any other circumstances identified, must still amount to special circumstances that precluded him or her from filing their application on time.
- [45] Item #93.22 of the RSCM II points out that section 55 is concerned solely with the one-year period after the date of disablement. In other words, circumstances that go beyond the one-year period are not relevant to the first requirement in section 55; but may be relevant to the determination of whether or not the Board should exercise its discretion to pay compensation.
- [46] Having clarified the proper approach to section 55(3), I note that the issue before me is whether there were special circumstances that precluded the worker filing an application for compensation within one year of his date of disablement, namely from February 2005. In this case, I note that the worker’s application was filed more than three years after the expiry of the time limit in section 55.
- [47] As noted above, Item #93.22 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.

- [48] I also note that previous WCAT panels have cited a number of factors that provide guidance in determining whether special circumstances precluded a worker from filing an application for compensation in time. Those factors 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 one's 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.
- [49] While I recognize that this list is helpful in interpreting the policy, I again reiterate that item #93.22 gives clear direction that the particular circumstances of each case must be considered and a judgment made.
- [50] In this case, the worker argues that the special circumstances that precluded him from filing an application for compensation within the one-year time period were that he was advised by the Board to file a separate claim but the Board did not advise him of the prescribed timeframe; and he failed to recognize that his COPD was related to his work, as the previous assessment of his treating physicians had been that his COPD was primarily related to his smoking.
- [51] In reviewing the totality of the circumstances, I find that the weight of the evidence is that the worker's reasons for not filing an application for compensation within the one-year time period were reasonable. His reasons along with other evidence cited below amounts to special circumstances that precluded him from filing an application for compensation within the one-year time period.
- [52] I consider that the worker's lack of knowledge that his COPD might be work-related because of the failure of his treating physicians to recognize that it was related to his work; his reliance on his physicians for advice about the causation of his condition (which involved closely related respiratory symptoms); and his specific characteristics (namely, lack of familiarity with the specific timeframe to file an application for compensation given that he already had a separate claim for asbestos-related pleural disease in progress) amounted to special circumstances that precluded him from filing an application for compensation in the one-year time period. In reaching this conclusion, I also considered that it was significant that the Board failed to advise the worker of the one-year timeframe in which to file his separate COPD claim. The totality of these circumstances made it difficult or otherwise hindered the worker from filing his or her application in a timely manner until July 2008.

[53] In reaching my conclusion, I weighed the factors of the worker's lack of knowledge, reliance on his physicians and his specific characteristics against other factors. For example, it could be argued that the possibility of having a work-related COPD would have occurred to the worker much earlier than July 2008, thus making his actions in waiting until July 2008 to file his application not reasonable. However, given the complexity of the medical condition that the worker faced and the lack of conclusive knowledge about the causation of that condition, I consider that the worker's actions were reasonable in those special circumstances. I accept the worker's evidence that he did not know until July 2008 that he had medical evidence to support a COPD claim and I also accept his evidence that he felt misled about the Board's advice to file a separate claim. Although it would have been helpful to have Dr. Wiebe's evidence, it would not be reasonable in the circumstances to expect the worker to possess a level of detailed medical knowledge and knowledge about the workers' compensation system that might have led him to file a timely application. In reaching this conclusion, I have not taken the merits of the worker's claim into account, as I note that I have not reviewed any of the more recent medical information and do not know if it supports the worker's COPD claim or not.

[54] I also find that the second element of the test in section 55(3) has been met. I find that there is insufficient evidence that the Board's discretion should not be exercised in this case.

[55] Policy item #93.22 of the RSCM II discusses this second element of section 55(3) as follows:

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. However, the Board cannot automatically exercise its discretion in every case in this way without having regard to the particular facts of each claim. 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 will be a significant factor here, together with the nature of the injury. Also significant will be whether there are witnesses or other persons to whom the worker reported the injury and from whom he sought treatment for it who are still able to provide accurate statements to the Board.

[56] While there has been a lapse of over three years since the date of the worker's disablement, I find that this is not a significant lapse of time that would prejudice the Board's ability to carry out the necessary investigations to adjudicate the worker's claim on its merits. It appears that there is ample medical evidence available to adjudicate

the worker's COPD claim. This leads me to a conclusion that the Board's discretion to consider the worker's claim on its merits should be exercised.

## **Conclusion**

- [57] In summary, I find that the weight of the evidence is that there were special circumstances that precluded the worker from filing an application for compensation within the one-year time period from his date of disablement. I also find that the evidence leads to a conclusion that the Board should exercise its discretion to consider the worker's claim on its merits.
- [58] I allow the worker's appeal and vary the review officer's March 30, 2009 decision.
- [59] There was no request for reimbursement of appeal expenses and my review of the file does not indicate any such need; accordingly I make no order in that regard.

Luningning Alcuitas-Imperial  
Vice Chair

LA/jm