

Noteworthy Decision Summary

Decision: WCAT-2014-01368 **Panel:** Guy Riecken **Decision Date:** May 6, 2014

Section 55 of the Workers Compensation Act – Application for compensation – Special circumstances – Policy item #93.22 of the Rehabilitation Services and Claims Manual, Volume II – Application made out of time – Section 5.1 of the Workers Compensation Act – Mental Disorder

This decision analyzes a late application for compensation of a mental disorder where the very nature of the mental disorder is alleged to have precluded a timely application for compensation.

The worker filed a late claim for compensation for a stress reaction arising from his supervisor's actions. The worker argued that the combination of his psychological condition and the effects of medication made him unable to act in his best interest. As well, he relied on the advice of a union representative not to file a claim. The Workers' Compensation Board, operating as WorkSafeBC, determined special circumstances did not preclude a timely application pursuant to section 55, and the Review Division upheld the Board decision. The worker appealed to WCAT.

The WCAT panel noted that the worker's actions suggested he was able to act in a timely manner in his own best interest: the worker was involved in a grievance of his supervisor's decisions, and he applied for both short-term and long-term disability benefits from a private insurer. There was no medical indication that the worker was confused to the extent that he could not act in his best interest, and he did not fail to submit other private compensation materials in a timely manner. WCAT also found that the worker was not misled or misrepresented by his union representative. The worker's appeal was denied.

WCAT Decision Number :

WCAT-2014-01368

WCAT Decision Date:

May 06, 2014

Panel:

Guy Riecken, Vice Chair

Introduction

- [1] In an application for compensation in January 2013 the worker reported to the Workers' Compensation Board (Board)¹ that he had gone off work on March 18, 2011 after incidents at work. He informed the Board that after going off work he went on short-term and long-term disability benefits (through private insurance plans) due to anxiety brought on by harassment by the employer.
- [2] The Board denied the worker's claim because he had not applied for compensation within one year of the date of injury as required by section 55 of the *Workers Compensation Act* (Act). The worker requested a review of that decision by the Board's Review Division. In a September 16, 2013 decision a review officer confirmed the Board's decision (*Reference #R0158360*). The review officer agreed with the Board that special circumstances had not precluded the worker from filing his application within the statutory time limit.
- [3] The worker is appealing the review officer's decision.

Issue(s)

- [4] The issue in this appeal is whether special circumstances precluded the worker from applying for compensation within one year of the date of his injury.

Jurisdiction and Method of Hearing

- [5] Section 239(1) of the Act provides for appeals to the Workers' Compensation Appeal Tribunal (WCAT) of final decisions by review officers regarding compensation matters.
- [6] This is an appeal by way of rehearing, in which WCAT considers the record and also has jurisdiction to consider new evidence and to substitute its own decision for the decision under appeal. WCAT has inquiry power, including the discretion to seek further evidence, but is not obliged to do so.

¹ The Board operates as WorkSafeBC.

- [7] WCAT must make its decision on the merits and justice of the case, but in doing so, must apply a policy of the Board's board of directors that is applicable in the case. The applicable policy is found in the *Rehabilitation Services and Claims Manual, Volume II*.
- [8] The worker is represented by an adviser from the Workers' Advisers Office. The employer is participating in the appeal and is represented by a consultant. Both representatives have provided written submissions.
- [9] In the notice of appeal the worker requested that the appeal proceed in writing (through written submissions). Having considered the submission and the criteria for determining the appeal method in item #7.5 of the *WCAT Manual of Rules of Practice and Procedure*, I find that an oral hearing is not required and that the matter can be considered in writing as requested by the worker.

Findings and Reasons

Background and Evidence

- [10] For the sake of convenience, the following is set out in chronological order rather than the order in which the various documents were received at the Board after the worker commenced his claim.
- [11] The materials in the claim file include a May 10, 2011 report from Dr. Tancon, who has been the worker's regular family physician for 30 years, addressed to the B.C. Life and Casualty Company regarding the worker's application for short-term disability benefits (placed on file as part of the Review Division process). Dr. Tancon included the following information. He initially saw the worker (with respect to the present matter) on March 24, 2011. He presented with a lot of stress related to his work situation. He felt his supervisor had been working covertly against him with respect to his safety record. The supervisor had laid off two senior fallers and was apparently intent on trying to lay off other senior fallers. He had threatened the worker with suspension. The worker had been working as a faller for 39½ years with a good safety record.
- [12] Dr. Tancon stated that as a result of these events the worker had developed an acute anxiety/stress reaction. He was suffering from loss of sleep, had become very vigilant, lost his concentration, had fears about his performance, and worries about losing his job. These symptoms made it unsafe for him to work as a faller. The worker was seen again on April 4, 2011 with persistent symptoms. He was continued on zopiclone for sleep and Celexa (an anti-depressant/antianxiety medication) was started. He was seen on April 28, 2011 with only minimal improvement. The DSM² diagnosis was labeled situational stress with anxiety. He had referred the worker to a psychiatrist.

² *Diagnostic and Statistical Manual of Mental Disorders*, American Psychiatric Association.

- [13] In a November 13, 2012 consultation report (arbitrating independent medical examination or AIME), Dr. Tomita, a psychiatrist, reported to the union's long-term disability plan on the worker's condition. Dr. Tomita summarized the worker's employment and medical history, and his account of the events leading to his current medical leave.
- [14] The worker reported to Dr. Tomita that he had been working for a new company since it purchased a former company about 10 or 15 years ago. He said he had worked under his supervisor, who he referred to as a bullbucker, for 11 years without difficulty. Then, about 2 years ago, a new supervisor took over the position and workplace problems began. According to the worker the new supervisor got rid of six older fallers by calling them unsafe workers. When the new supervisor focused his attention on the worker, and accused him of being unsafe, his anxieties began. The first accusation was that the worker had been standing too close to a falling tree and had not made proper stumps. The worker worried that the supervisor was building a case against him. As a result of an incident about 1½ years ago, the worker was suspended from work for 5 days.
- [15] The worker decided to put a grievance in through his union around March 2011, but the issue did not get resolved, and according to the worker his union missed a deadline to file a second grievance. The worker then received a letter from the employer advising him that the next time he was caught in unsafe practices he would be terminated. Following receipt of that letter the worker went to see Dr. Tancon, who advised him he was medically unfit to work. This was based on the fact he was constantly worried there was a witch hunt against him. He was having sleep problems and was unable to concentrate at work. After going off work he continued to have problems with not being able to sleep, a feeling of "stomach in knots", feeling sad, having a loss of interest, experiencing decreased concentration, and walking around not sure what he was doing. The worker was on short-term disability benefits for about six months, and then applied for long-term disability benefits but needed to go on Employment Insurance when the long-term disability application was initially denied.
- [16] Dr. Tomita stated that the most likely diagnosis was an Adjustment Disorder with Mixed Anxiety and Depressed Mood. The stressor was directly related to his work. The worker had been taking anti-depressant medication.
- [17] The materials in the claim file include a December 21, 2012 letter to the worker from the union's long-term disability plan informing him that based on Dr. Tomita's report the worker's application for long-term disability benefits had been approved. Approval was conditional on the worker submitting a claim to the Board as workplace issues had contributed to the onset of his disability. (This was included in the materials submitted to the Review Division by the worker.)

- [18] The worker made an application for compensation by telephone on January 23, 2013. The client services representative noted that he stated the date of injury was March 18, 2011. That was the date on which the worker went on medical leave due to stress caused by harassment by his supervisor. The worker reported that he sought treatment on March 24, 2011 from Dr. Tancon, who advised him to stay off work because of anxiety and depression and prescribed sleep medication. Dr. Tancon later referred the worker to a psychiatrist. The worker advised that he had taken short-term disability benefits and long-term disability benefits, and had been advised by the long-term disability plan to open a claim with the Board.
- [19] The employer submitted a report of injury stating that the worker was issued a disciplinary suspension for two weeks by the bullbucker because of unsafe work habits. According to the employer the worker went on short-term disability on March 18, 2011 due to anxiety brought by alleged harassment by the bullbucker. The employer later wrote to the Board protesting acceptance of the claim.
- [20] In a February 11, 2013 memorandum the case manager documented her telephone conversation with the worker in which she advised him that he was outside the one-year time limit for filing an application. The worker stated that his union had advised him that it would not have been accepted by the Board even if he made the claim back in 2011, because the claim arose from disciplinary action by the employer. The case manager concluded that there were no special circumstances that precluded the worker from submitting an application for compensation within one year of the date of injury. This decision was communicated to the worker in the February 12, 2013 letter.

Submissions

- [21] In addition to the submissions to WCAT, I have reviewed the submissions to the Review Division.
- [22] In the submissions to the Review Division the worker asserted that he had been advised by his union not to make a claim to the Board because in his circumstances it would not be accepted. He referred to the reports of Dr. Tancon and Dr. Tomita. He argued that the combination of his psychological condition in combination with the powerful psychotropic medications he was taking would be enough to render any person confused and not able to act in their own self-interest in a timely way. Dr. Tancon described him as a "non-complainer" and as such he was not one to readily admit to having a problem. When he did admit to having a problem he was not the kind of person who would question the assertion of the union representative, whom he presumed was working in his best interest.
- [23] It was only after he saw Dr. Tomita that the long-term disability plan made approval of his application conditional on his making a claim to the Board that he followed through with that instruction.

- [24] While acknowledging that the initial issue is “special circumstances,” and not the merits of the claim, the worker addresses the merits with respect to the question of whether the Board should exercise its discretion to adjudicate the claim. The worker submits that his psychological condition resulted from harassment by the supervisor, which is a valid basis for a mental disorder claim under section 5.1(1)(a)(ii) of the Act.
- [25] In his submission to WCAT the worker essentially reiterated his submission to the Review Division.
- [26] The employer also relies on its submission to the Review Division. Its submission is that after a discussion with a union representative the worker initially decided that he would not submit a claim to the Board. The reasons he has provided do not amount to special circumstances. In response to the worker’s argument respecting the merits of the claim under section 5.1 of the Act, the employer notes that section 5.1(1)(c) excludes compensation where the mental disorder is caused by a decision of the worker’s employer relating to the worker’s employment, including a decision to change the work to be performed or the working conditions, to discipline the worker, or to terminate the worker’s employment.

Section 55 of the Act and related policy

- [27] Generally speaking, section 55 of the Act requires a worker to file a claim within one year of the date of an injury or disablement by occupational disease. That section provides, in part, as follows:
- (1) An application for compensation must be made on the form prescribed by the Board or the regulations and must be signed by the worker or dependant; but, where the Board is satisfied that compensation is payable, it may be paid without an application.
 - (2) Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from occupational disease, no compensation is payable, except as provided in subsections (3), (3.1), (3.2) and (3.3).
 - (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.

(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).

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

(a) the application arises from death or disablement due to an 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.

[28] Policy item #93.22 ("Application Made Out of Time") provides that before an application for compensation can be considered on its merits, it must satisfy the requirements of section 55. The general effect of section 55 is that two requirements must be met before an application received outside the one-year period can be considered on its merits. These 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.

The 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.

[29] Policy item #93.22 also provides 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 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.

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.

- [30] Various WCAT panels have cited *WCAT-2005-03006* in the course of their consideration of section 55. *WCAT-2005-03006* has been identified by WCAT as a noteworthy decision. While I am not bound to follow previous WCAT decisions, including noteworthy decisions, I agree that, when considering “special circumstances” under section 55, the appropriate approach is to consider whether unusual and extraordinary circumstances existed, and, if so, whether such circumstances made it difficult or otherwise hindered the worker from undertaking his or her claim. I am also aware of the analysis in *WCAT-2010-01650*, which has also been identified as a noteworthy decision. That analysis included the conclusion that in considering whether there were special circumstances under section 55, it is necessary to consider whether the appellant’s actions were those of a reasonable person. I consider the central question to be whether there were “special circumstances” which precluded the worker from applying within one year of the injury as contemplated by section 55. While the actions of a “reasonable person” may be relevant, consideration is not limited to what a “reasonable person” would have done in the circumstances.
- [31] In *WCAT-2005-03006* the panel also noted that there are no set criteria for determining what are “special circumstances” but that a number of factors had been cited in previous appellate decisions including:
- Characteristics of the worker such as language difficulties, which would create obstacles to understanding that there is a system of workers’ compensation and how to access it.

- Lack of knowledge that an injury or disease might be work related because of delayed onset of the condition, minor nature of the original injury, or failure to recognize that it is related to work.
- Reliance on the advice of others, such as a physician or employer, where the worker is dependent on such advice owing to language difficulties.

[32] I agree with these examples, while recognizing they are not an exhaustive list. As stated in policy item #93.22, the particular circumstances of each case must be considered and a judgment made.

Analysis

[33] The initial question is when the one-year period from the date of injury begins. In other words, what was the date of injury? This is not a case in which the worker experienced a single incident to which he attributes his psychological injury. Instead, he describes ongoing stressors over time arising from his dealings with his supervisor. However, it is only in cases of occupational disease that section 55 refers to the date of disablement rather than the date of injury. The Board does not consider psychological conditions to be occupational diseases (policy item #32.10). Yet, given the nature of many psychological disorder claims that involve gradual onset over time due to workplace stressors (or a series of multiple traumatic events) it is not always clear when the “injury” occurred.

[34] In this case the stressors and events to which the worker attributes his psychological condition occurred before he went off work on March 18, 2011. By the point he went off work he was experiencing stress and anxiety which he felt prevented him from continuing to work. In the circumstances of this case, I find that the date of injury for the purposes of section 55 was March 18, 2011. The worker had one year after that date to submit an application.

[35] I note that even if the date on which the worker was diagnosed by Dr. Tancon and advised to stay off work (March 24, 2011) were used as the date of injury (which I do not accept), the worker’s application was made well beyond one year after that date, and it would still be necessary to consider whether special circumstances precluded him for applying within one year. In deciding this issue the initial consideration is of the circumstances during the one-year period. If special circumstances are established, the length of the delay beyond the one-year period and reasons for it may be considered in deciding whether the discretion should be exercised in favour of adjudicating the claim on its merits.

[36] The essence of the worker’s position respecting “special circumstances” during the one-year period is two-fold. He argues that the combination of his psychological condition and the effects of the medications taken to treat it would be enough to render any person confused and not able to act in their own self-interest and in a timely

manner. Secondly, he argues that he relied on the advice of a union representative not to file a claim with the Board because it would not succeed.

- [37] Although the worker asserts that the psychological condition and the medication would render “any person” confused, he has not explicitly asserted that he was confused to the extent that he could not act in his own self-interest or in timely manner. Nor does the medical evidence he has provided describe the effects of his disorder or his medications in those terms. The symptoms of the worker’s situational stress condition and his Adjustment Disorder with Anxiety are described in the reports by Dr. Tancon and Dr. Tomita. Dr. Tancon and Dr. Tomita were of the opinion that the worker’s symptoms rendered him unable to work in the safety-sensitive job of tree faller. The symptoms and mental status observations do not include mental confusion or cognitive impairment to a degree that would plausibly result in a significant impairment of the worker’s ability to act in his own self-interest in a timely way.
- [38] The worker has not provided new medical opinion evidence to the Review Division or to WCAT that supports the argument that the worker’s ability to act in his own self-interest in a timely manner was significantly impaired by his psychological condition and medication effects during the one-year period following his diagnosis by Dr. Tancon in March 2011.
- [39] The worker’s actions suggest that he was able to act in a timely way in his own self-interest during the one-year period after he went off work and was diagnosed by Dr. Tancon. At some point (he does not specify when) he was engaged in a grievance of his supervisor’s decisions respecting his breach of safety requirements, and he applied for both short-term and long-term disability benefits. There is no indication in the materials provided by the worker that there was any issue with his failing to submit those applications in a timely manner or with his ability to comply with other requirements respecting those applications.
- [40] I find that it is unlikely that the worker’s psychological condition and medication effects made it difficult or otherwise hindered the worker from undertaking his claim within the one-year period after he was diagnosed by Dr. Tancon.
- [41] While at this stage I am not considering the merits of the worker’s claim, it is worth noting with respect to the advice the worker received from a union representative about the merits of a possible claim that, during the one-year period following his diagnosis by Dr. Tancon in March 2011, section 5.1 of the Act did not provide for compensation for mental stress as a result of workplace stressors, including bullying and harassment. It only allowed for compensation for mental stress resulting from sudden and unexpected traumatic events.

- [42] Section 5.1 of the Act was amended only after the one-year application period ended in March 2012 to provide for compensation for mental disorders resulting from workplace stressors, including bullying and harassment, in cases where the workplace stressors were the predominant cause of the disorder. In addition, both during the worker's one-year application period and since the July 1, 2012 amendments to section 5.1, paragraph 5.1(1)(c) has excluded the payment of compensation for mental stress or mental disorders resulting from decisions by the employer respecting a worker's employment, including decisions to discipline a worker.
- [43] In light of the foregoing, the advice the worker received from a union representative during the one-year period following March 2011, that a claim to the Board would not succeed, does not appear inherently or obviously misleading. I am unable to conclude that the worker was clearly misdirected or misinformed by the union representative in respect of the version of section 5.1 that existed at the time.
- [44] Aside from the substance of the advice he received from the union representative, the worker has not suggested that he was actively dissuaded or hindered by the union representative from contacting the Board if he wished to do so. Nor has he provided evidence that due to such factors as cognitive impairment, language difficulties, or other factors, that he was unaware of the existence of the Board and of the system of workers' compensation and was thereby reliant on the union representative. Other than the matters I have already discussed, he has not described circumstances that would have made it difficult, or otherwise hindered him, from contacting the Board to explain his situation and to ask for advice about submitting a claim if he wished to do so.
- [45] The circumstances described by the worker are not substantially similar to the example given in policy item #93.22. By the time the worker went off work in March 2011, he was aware that the stress he was experiencing was related to the events related to his employment, namely the behaviour of his supervisor. In addition, by the time he saw Dr. Tancon in March 2011, which was well within the one-year period after he went off work, he was aware he had been diagnosed with a psychological condition and had been prescribed medication to treat it. By that point, only a few weeks into the one-year period, he was aware of a work-related injury, of losing time from work, and receiving medical treatment. This is very different from the example in policy item #93.22, of a worker who has a minor injury that does not initially result in time loss from work, and which at the time does not require medical treatment.
- [46] I find that the evidence is consistent with a situation in which the worker decided to accept the advice he had received and to not contact the Board about making a claim. He could have contacted the Board about initiating a claim had he wished to do so. He only decided to do so after he was informed that it was a condition of approval of his long-term disability benefits application.

[47] I find that the worker was not precluded by special circumstances from filing an application with the Board within one year of the date of injury as required by section 55 of Act.

[48] The worker's appeal is denied.

Conclusion

[49] I deny the worker's appeal and confirm the September 16, 2013 review decision. The worker was not precluded by special circumstances from applying for compensation within one year of the date of injury as required by section 55 of the Act.

[50] The worker did not request reimbursement of any expenses related to this appeal. There is no order respecting appeal expenses.

Guy Riecken
Vice Chair

GR/hb/cv