

REPORTER

Decision of the Appeal Division

Number: 92-0144, 92-0145
Date: January 21, 1992
Panel: Sonja Hadley, James Tonn, Walter N. Peain
Subject: Special Circumstances – Section 55(3)

This is an appeal from two Workers' Compensation Review Board (Review Board) findings dated March 12, 1990 and September 3, 1991.

The issues before this panel are:

1. Whether 75% of \$415.54 per week best represents the worker's actual loss of earnings by reason of his 1988 injury.
2. Whether the worker had returned to his 1988 pre-injury condition by August 7, 1989.
3. Whether there were special circumstances which precluded the worker from filing a claim for a 1982 work injury within one year of the injury.

[Editors' note: This decision is published for what it contains in respect of the 3rd issue and has been edited accordingly.]

Section 55(3) of the *Workers Compensation Act* provides:

Where 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), and

- a) where an application is filed within 3 years after that date, it may pay the compensation provided by this Part; or
- b) where the application is filed after three years after that date, it may pay the compensation provided by this part but not in respect of a period prior to the date the application is received by the board.

Item 93.22 of the *Rehabilitation Services and Claims Manual* states, in part:

Special circumstances 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 judgement 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 his 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 reason for not submitting his application in time are not sufficient to amount to special circumstances, his application is barred from consideration on the merits, notwithstanding that the evidence clearly indicates that he did suffer a genuine work injury.

The evidence presented by the worker both at the Review Board hearing, and at the Appeal Division hearing, was that prior to his 1982 injury any Workers' Compensation Board claims he had were initiated by his attending physician's office or the hospital, a report being completed by the receptionist and the worker signing that form. He relied heavily on his doctors to complete the forms for him and submit them to the Board. His evidence was that he had never dealt with the Board personally and that he never appealed any prior Board decision. His experience was that his doctors took the initiative of having the forms completed, signed, filed, and "the benefits simply arrived." He never had to initiate a Workers' Compensation claim on his own. Further, the evidence is that the worker has a grade 6 education and has some difficulty reading and comprehending documents. This difficulty was evident during the oral hearing. The evidence is also that his wife prepares any written correspondence or documents which he then signs.

The worker's evidence was that he was told by his physician in January 1982 that as his employer at the time had Confederation Life coverage, they probably did not have Workers' Compensation coverage. Further, he stated that the doctor told him that it was easier for him to bill through the B.C. Medical Plan and have Confederation Life pay the worker. He stated that the doctor told him that W.C.B. involved too much paper work. The doctor was asked by the adjudicator to verify whether the information provided by the worker was accurate. In the doctor's response of July 27, 1990, he stated in part:

There was no W.C.B. file opened. I have no record of alternative insurance being discussed. However, it is possible that the patient and myself may have thought he had adequate coverage from

Confederation Life. In retrospect this patient sustained a work-related injury. It is hoped that he will still be eligible for full W.C.B. benefits at this late date.

Further evidence is that of the employer's superintendent of employee relations who, in a letter dated June 19, 1991, stated in part:

At the time of [the worker's] incident in January, 1982 he was a heavy mobile equipment operator. This was rough jarring work. Open pit mining involves operating his equipment over rough terrain which can often be hard on the machinery and operator alike. *As best I can recall there was no specific injury.* Instead [the worker] suffered a gradual onset of back and neck pain.

Specific injuries on the job were dealt with by making a claim to Workers' Compensation. *When there was no specific injury, however, it was considered that Workers' Compensation did not apply* and the company fully compensated the worker for the first 180 days after which the insurers (Confederation Life) picked up the claim. (emphasis added)

Counsel provided the Reasons for Judgment in a Federal Court of Appeal case (*Canada (A.G.) v. Albrecht*, [1985] I.F.C. 710). This decision related to Section 20(4) of the *Unemployment Insurance Act, 1971*, which provides that if a claimant delays in making a claim and shows good cause for his delay the claim may be acceptable. In its Reasons for Judgment the Federal Court of Appeal considered the meaning of "good cause." The court found:

To say, as the Applicant does in effect, that ignorance of the law excludes good cause seems to me to defeat the whole purpose of the legislation since, apart from instances of physical incapacity and leaving aside possible cases of indifference or lack of concern, ignorance of the law is necessarily involved in the failure of a claimant to exercise his rights in due time Of course, I have no doubt that it would be illusory for a claimant to cite 'good cause' if his conduct could be attributed only to indifference or lack of concern. I readily agree, too, that it is not enough for him simply to rely on his good faith and his total unfamiliarity with the law. But an obligation, with its concomitant duty of care, can be demanding only to a point at which the requirements for its fulfillment become unreasonable. In my view, when a claimant has failed to file his claim in a timely way and his ignorance of the law is ultimately the

reason for his failure, he ought to be able to satisfy the requirement of having 'good cause' when he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the *Act*. This means that each case must be judged on its own facts and to this extent no clear and easily applicable principle exists; a partially subjective appreciation of the circumstances is involved which excludes the possibility of any exclusively objective test. I think, however, that this is what Parliament had in mind and in my opinion this is what justice requires.

The weight of the evidence supports that the worker's awareness of the compensation system was not extensive. His four previous claims with the Workers' Compensation Board had not required that he have any personal contact with the Board nor had they been contested. Each of those claims was initiated by the worker attending his doctor's office, who filled in the initiating form, which he signed. If further forms were submitted to the Board, his evidence was that they would have been completed by his wife and signed by him. In each of the previous claims, the worker relied on his doctors to initiate the claims. In the 1982 claim, his evidence was that he questioned both his attending physician and specialist regarding the possibility of a W.C.B. claim. He states in both instances the advice given to him was that the Confederation Life coverage would be preferable and it was unlikely that there was W.C.B. coverage. Although the attending physician, in his letter of July 27, 1990, did not explicitly agree with this statement, he also did not refute it. The superintendent's letter of June 19, 1991 supported both the worker's and others' testimony with respect to the understanding employees had of their coverage during that time period.

Although the worker's spouse was not present during the conversations her husband had with his doctors, her sworn evidence, which has not been contradicted, supports the worker's understanding of what he was told by his doctors at that time.

In order to determine if special circumstances existed, Board policy requires only that the worker's reasons for not claiming within the one-year time limit be considered. The panel finds the reasoning of the Federal Court of Appeal in *Canada (A.G.) v. Albrecht* helpful in considering whether the worker's "reasons" for not claiming within the one-year statutory limit constitute "special circumstances."

The panel also adopts the reasoning of the Appeal Division panel in Appeal Decision No. 91-0851 (see *Workers' Compensation Reporter* Volume 7(4), page 229) that the stringent interpretation of the word "preclude" as "absolutely prevent" is not justified, and that the liberal interpretation of Section 55(3) encouraged by Mr. Justice Anderson in *Caputo v. W.C.B.*, (1987) 13 B.C.L.R. (2d) 145 (B.C.C.A.) is appropriate. Accordingly,

in this worker's case, considering all of the circumstances, we find that his reasons for delay constituted special circumstances and effectively precluded him from applying within the one-year time limit.

The panel finds that there were special circumstances that precluded the worker from filing an application for his 1982 work injury and we direct that the 1982 claim now be considered on its merits.

Editors' note: This decision has been edited for publication.

