

## Decision of the Review Division

**Number:** 22274  
**Date:** November 19, 2004  
**Chief Review Officer:** Joe Pinto  
**Subject:** Extension of Time —  
Failure to Copy Authorized Representative

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The worker seeks an extension of the 90-day statutory time limit to request a review of a June 15, 2004 decision of the Workers' Compensation Board (the "Board").

The statutory time limit expired on September 21, 2004. This includes the eight-day grace period provided for mailing of decisions in subsection 221(2) of the *Workers Compensation Act* (the "Act"). The worker's request for review was received on September 27, 2004, six days beyond the statutory time limit to request a review.

Subsection 96.2(4) of the Act authorizes the chief review officer to extend the time to file a request for review where special circumstances existed which precluded the filing of a request for review within the 90-day time period and where an injustice would otherwise result.

### Issue

The issue is whether special circumstances existed which precluded the filing of a request for review within the 90-day time period and, if so, whether an injustice would otherwise result if an extension were not granted.

### Background

The Board decision letter of June 15, 2004 advised the worker with respect to his long-term disability entitlement and provided details as to the manner in which it was calculated.

The second to last paragraph of the decision letter of June 15, 2004 stated:

If you disagree with this decision, you have the right to request a review by the Review Division. A request for review of this decision must be filed within 90 days from the date of this decision letter. Please see the enclosed appeal pamphlet for further information.

## **Submissions**

The worker's legal counsel submits that:

- The worker's medical condition is such that he has difficulty with his memory and stress and is unable to efficiently manage his claim,
- Counsel has represented the worker with respect to all aspects of his claim since October 14, 2003, and which has included two prior requests for review before the Review Division in relation to other Board decisions,
- Any and all correspondence to the Board or the Review Division from the worker has been drafted by counsel, on whom the worker has relied totally for assistance,
- The worker was under the impression that counsel had been copied on all decisions rendered under his claim, and which had been the case, with the exception of the decision letter of June 15, 2004,
- Counsel discovered the existence of the decision letter of June 15, 2004 only after reviewing a decision of the Review Division, dated September 27, 2004, which had referenced the decision of June 15, 2004, and following which, counsel contacted the Board officer to confirm the existence of the June 15, 2004 decision,
- The Board officer confirmed that the decision letter of June 15, 2004 had been mailed only to the worker,
- Counsel was mailed a copy of the decision letter of June 15, 2004 at which time counsel promptly filed a request for review of that decision on the worker's behalf, and
- Since the signing by the worker of the authorization document on September 23, 2003, the worker had been of the view that all decisions on his claim would be copied to counsel and, accordingly, the worker did not think it to be necessary to contact counsel upon the worker receiving the decision letter of June 15, 2004.

## **Practices and Procedures**

Item B2.4.2 of the Review Division's *Practices and Procedures* provides guidance in determining whether to grant an extension of time. The chief review officer must first be satisfied that special circumstances existed which precluded the filing of the request for review within the 90-day time period. No consideration is given to the merits of the request for review. If the worker's reasons do not amount to special circumstances, no further consideration will be given to the extension request.

Where special circumstances are found to exist, the chief review officer will then consider whether an injustice would otherwise result if the time limit were not extended. It is only when it is found that both special circumstances existed and an injustice would otherwise result that an extension of time will be granted.

## **Reasons and Decision**

### **Special Circumstances**

I find the worker's reasons for not filing a request for a review do amount to special circumstances.

Decisions of the Board are, in many instances, communicated directly to the worker or employer in written letter form (although Board policy does not require written decisions in many non-contentious matters). In cases in which the worker or employer has previously engaged the services of legal counsel or a representative, Board policy states that the Board will cooperate with and notify the worker's or employer's counsel or representative of any Board decisions which have been made and which have been communicated to the worker or employer. In a majority of cases the representative is copied and in the same manner regardless of whether he or she represents the worker or employer.

In the matter before me, I must consider whether the late filing of a request for review of a Board decision may be attributed, in whole or in part, to the failure of the Board to provide a copy of the decision to the representative. If so, I must further decide whether this constitutes a special circumstance that precluded the filing of the review request within 90 days. In doing so, I must weigh and strike a balance between requirements for disclosure of Board decisions to representatives specified in Board policy and the need for finality and timeliness that is inherent in the legislation.

I am of the view that, in any case in which a proper signed authorization has previously been provided by the representative, it is entirely appropriate that the representative be sent a copy of the written decision of the Board at the time that it is sent to the worker or employer. The Board should continue its efforts to ensure that occurs without exception. However, I am also of the view that the failure to copy the representative does not, in itself, equate to the granting of an extension of time to file a request for review. The retention of a representative in a legal matter does not absolve an individual of their personal responsibility to comply with statutory requirements.

In some cases, however, the circumstances may be such that the failure to notify a properly authorized representative does constitute a special circumstance that precluded the filing of the application. Such circumstances will include some combination of the following:

- the authorization had been specific and clear. In particular, with respect to a matter involving a particular claim, the representative's written authorization specifically and clearly referenced the claim involved,
- there had been prior communication between the representative and the Board on the specific matter,
- the representative had initiated an inquiry in response to which the Board decision was generated,
- absent the receipt of a copy, the representative could not have known of the existence of the Board decision or could not have known at an earlier date,

- the worker or employer was, due to his or her individual circumstances, significantly reliant upon the representative,
- the length of time, upon discovering the existence of the Board decision, the representative took to file the request for review,
- any other relevant circumstances particular to the case.

In addition to finding that a special circumstance existed which precluded filing within 90 days, I am also, before allowing an extension, required to find that an injustice would result. The same criteria that I apply in making this latter determination in other applications will apply in this type of case as well.

There are a number of factors to consider when determining whether special circumstances existed. Two key factors are evidence of the worker's intention to request an appeal or review within the 90-day time limit, and the length of the delay.

A review of the claim file reveals that counsel had represented the worker on several prior matters with respect to his claim for the past year since October of 2003. This has included numerous communications between counsel and a Board officer in addition to the Review Division in relation to two prior requests for review. I also note that, due to the state of the worker's health, he has, of necessity, relied upon counsel to assist him in relation to his claim. I find it to be reasonable that counsel would have had no prior opportunity to learn of the existence of the decision letter of June 15, 2004 until her later review of the Review Division decision of September 20, 2004. I also accept that the worker would have had no reason to suspect that the decision letter of June 15, 2004 had not been copied to counsel as copies of all other Board decisions had been sent to her. I also note that counsel moved promptly to file a request for review as soon as she became aware of the existence of the decision letter of June 15, 2004. Lastly, and although the authorization document does not specifically refer to the worker's claim by file number, I note that it does reference counsel's authority in relation to all Board matters, "including any reviews before the Review Division."

As for an intention to file a request for review, I have concluded that, had counsel received a copy of the decision letter of June 15, 2004, she would have filed a timely request on behalf of the worker as had been done on two prior occasions. The delay in filing of six days is considered to be reasonable in the particular circumstances of this case.

In light of the above, I conclude special circumstances existed that precluded the worker from making an application on time.

### **Injustice**

In addition to finding that there existed special circumstances, I must also find that an injustice would otherwise result if an extension were not granted. This involves having regard to the significance of the matter that is the subject of the request for review and the degree of prejudice to the worker that would result from a denial of the requested extension of time.

In this case, I have concluded that injustice would result if I were not to grant an extension. The issue in dispute on this request for review is the extent of the worker's entitlement to a disability award. This issue could have a significant financial impact on the employer who would be prejudiced by a denial of the requested extension of time.

### **Conclusion**

I allow the application for extension of time to file the request for review which is accepted as of the date of this decision letter.

In granting this extension of time to request a review, I am not making a finding with respect to the worker's disagreement with the June 15, 2004 decision. I am simply finding that the worker has met the legal requirements for an extension of time and that the June 15, 2004 decision can now be reviewed by a review officer.

