

Decision of the Review Division

Review Reference: 4090
Date: November 26, 2003
Chief Review Officer: Louise Logan
Subject: Extension of Time — Acts and Omissions of Representatives

The worker seeks an extension of the 90-day statutory time limit to request a review of a February 6, 2003 decision of the Workers' Compensation Board (the "Board").

The statutory time limit expired on May 15, 2003. 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 June 4, 2003, 20 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's February 6, 2003 decision advised the worker that her claim would not be reopened for time loss after January 30, 2003. The decision letter provided a phone number for the worker to call if she had any questions or wished to discuss the claim. The final paragraph of the letter stated the 90-day time limit for appealing the decision, and an appeal pamphlet detailing appeal provisions was included.

Submissions

The worker's representative submits that the worker indicated a clear intention to request a review of the decision. The representative provided a copy of the worker's letter to it dated February 25, 2003, attaching a copy of the Board's decision of February 6, 2003. The representative also provided a copy of the representative's March 5, 2003 letter to the worker, enclosing a Request for Review form. Finally, the representative provided copies of the

Request for Review form and authorization form signed by the worker on March 17, 2003.

The representative submits that the above clearly shows that the worker intended to appeal the decision within the 90-day time limit. However, on June 4, 2003 the representative became aware that, through an unexplained failure of the representative's bring forward system, the Request for Review form had not been filed within time.

Finally, the representative asks that the extension of time request be granted because the Request for Review form would have been filed within the 90-day time limit had it not been for the representative's inadvertence.

Practices and Procedures

Item 2.3.2 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 that the worker's reasons do amount to special circumstances which precluded the filing of a request for review within the statutory time limit under section 96.2(4) of the Act.

I note that the pre-March 3, 2003 Act provided broad discretion for the former Workers' Compensation Review Board ("Review Board") and the chief appeal commissioner of the former Appeal Division to grant extensions of time in relation to the appeals filed with them. Section 90(1) of the Act, as it read prior to March 3, 2003, provided that a party had 90 days to appeal a decision of an officer of the Board to the Review Board from the day the decision was communicated to the party "or within another time the review board allows." Section 91(1) provided that a party had 30 days to appeal a finding of the Review Board to the Appeal Division "or within a longer period the chief appeal commissioner may allow."

The broad discretion granted to the previous appeal bodies by the Act to extend time has not been granted to me in relation to requests for review. Requiring that there be "special circumstances which precluded the filing of a request for review within the time period" of 90 days suggests that the legislature intended a higher standard to be applied in granting extensions of

time to file review documents.

In its 1997 report, the Royal Commission on Workers' Compensation in British Columbia noted the problems with backlog and delay in the former appeal system, stating that one of the factors affecting the capacity of that system to deal with appeals in a timely manner was an increase in requests for an extension of time to appeal to both the Review Board and the Appeal Division. However, the Royal Commission did not make any specific recommendations with respect to the criteria for granting extensions of time.

In his 2002 report, the core reviewer concluded that there should be some discretion to grant an extension of time. However, the granting of such extensions should be the exception in order to provide some finality to the issue. The core reviewer recommended that an extension should only be granted "to avoid an injustice," in order to establish a higher standard for the granting of an extension than found in the Act at that time.

In the March 3, 2003 amendments, the legislature appears to have adopted an even higher standard than that suggested by the core reviewer. "Injustice" is only considered, once a party has been able to demonstrate "special circumstances." This is reflected in the Review Division's Practices and Procedures which provide that, in determining whether "special circumstances" exist, I only consider the applicant's reasons for not filing a request for review on time. No consideration is given to the merits of the review.

The Act does not define what constitutes "special circumstances" for purposes of section 96.2(4). Nor does it provide guidance as to when special circumstances may have "precluded" a party from filing a request for review. I have therefore considered the dictionary definitions of the terms "special" and "precluded."

Among the definitions of "special" in the *Webster's Third New International Dictionary (3rd edition)* ("*Webster's*") is "distinguished by some unusual quality : uncommon, noteworthy, extraordinary." Among the definitions of "preclude" in *Webster's* is "to put a barrier before : shut up : hinder, stop, impede, close."

These dictionary entries suggest that "special circumstances" exist where there is something above and beyond the ordinary circumstances that arise in the affairs of parties to Board decisions. Those "special circumstances" must "hinder," "stop," or "impede" the party from filing the request for review within the 90 days provided by the Act to do so.

Experience has shown that there are generally three categories of circumstances that parties bring forward in seeking extensions of time under section 96.2(4) – acts and omissions on the part of the Board, the personal circumstances of the party, and acts or omissions of representatives retained by parties to deal with their cases. The case before me falls into the third category.

On the one hand, it could be said that the acts and omissions of representatives should never be considered special circumstances which precluded the filing of a request for review within the statutory time limit. Section 96.3 of the Act defines the persons who, if directly affected by a decision of the Board set out in section 96.2, may request a review of that decision. It is the responsibility of those parties to determine their rights under the Act and to take appropriate action to preserve those rights. Parties should not be allowed to pass on responsibility for

preserving those rights to others and absolve themselves of any further involvement in the process. In fact, where representatives are involved, a higher standard should be imposed because parties had the expert resources available to them. Allowing extensions of time in situations where an extension would not be allowed for an individual unrepresented party may be perceived as unfair.

On the other hand, it could also be said that the acts and omissions of representatives should always constitute special circumstances which precluded the filing of a request for review within the statutory time limit. Parties who seek representation because they do not consider themselves able to deal with the issues arising from matters under the Act are taking responsibility for preserving their rights. They are consulting with “experts” in the field. If parties give instructions to representatives, it is not unreasonable to expect those instructions to be carried out. It may be perceived as unfair to “punish” a party for the act or omission of the party’s representative.

As mentioned earlier, determining whether “special circumstances” have “precluded” the filing of a request for review within the 90-day time limit is a matter of individual judgment in each case. It is not, therefore, appropriate to adopt a rigid approach. It would, however, be appropriate to adopt a set of guidelines by which the particular circumstances under consideration may be considered. In applying those factors, regard would be had to the apparent legislative intent that a high standard be set for the exercise of my discretion.

It appears that the following factors are relevant in making decisions involving the acts and omissions of representatives:

- whether there is evidence that the party intended to request a review within the 90-day time limit through instructing the representative to do so;
- whether there is evidence that the party gave instructions promptly (early in the 90-day period);
- whether the party followed up with the representative within the 90-day time limit to ensure that the representative acted in accordance with the party’s instructions;
- whether the failure to comply was somehow the responsibility of the party, for example failure to provide the necessary information to file a request for review such as the date of the decision in dispute;
- whether the representative acted as quickly as possible to remedy the error as soon as it was identified;
- if the representative is no longer representing the party, whether the party acted as quickly as possible to remedy the error as soon as it was identified;
- whether the failure to comply was the result of a failure in the representative’s normal business practices or something more;
- whether the failure to comply resulted from a reasonable choice on the part of the representative in dealing with the party’s case that was “superseded” by subsequent developments beyond the representative’s control; and

- any other relevant circumstances particular to the case.

Having regard to the submission by the worker's representative, I accept that the worker gave the representative the necessary instructions to request a review within the 90 days. This is evidenced by the date of both the requests for review and the representative authorization document. The representative, herself, acknowledges that the failure to comply was not the fault of the worker. I note also that the representative took steps to remedy the error as soon as it was identified.

On the other hand, there is no evidence that the worker followed up with the representative after providing the initial request for review and authorization documents. There is no mention of this in the representative's submission. While the worker demonstrated an intent to file a request for review, the worker did not maintain her personal responsibility for confirming that her instructions had been carried out.

In this case, I find that although the worker did not maintain her personal responsibility to ensure the request for review was filed in time, the representative did act in a timely manner upon discovering her error, the request for review was received within 20 days of the statutory time limit, and the request was received at a time when there were significant changes to the *Workers Compensation Act* and the workers' compensation appeal structure.

On balance, and in light of these factors, I find that special circumstances did exist which precluded the worker from filing her request for review in time. I note, however, that it is the combination of factors listed above, not the inadvertence or failure in the representative's normal business practices that leads to the finding in this case. Although parties may engage representatives to assist them in the review and appeal process, this does not relieve the parties themselves of any further involvement or responsibility for the process, including responsibility for ensuring that their instructions are followed in a timely manner.

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 involves the reopening of the worker's claim for wage loss benefits after January 30, 2003. This issue could have a significant financial impact on the worker 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. The request for review is accepted as of the date of this decision letter.

