

Decision of the Workers' Compensation Appeal Tribunal

Number: 2003-03842

Date: November 27, 2003

Panel: Jill Callan, Chair

Subject: Deemed Receipt by Mail Rebuttable

Introduction

The worker seeks an extension of the 30-day statutory time limit to appeal a finding of the Workers' Compensation Review Board (the Review Board), which is dated December 27, 2002 and was mailed on the same date.

On March 3, 2003, pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). Pursuant to section 91 of the *Workers Compensation Act* (the Act) as it existed prior to the amendments that resulted from Bill 63, the worker had 30 days to appeal the December 27, 2002 Review Board finding. Accordingly, the time limit for initiating the appeal expired before March 3, 2003. Section 2(2) of the *Transition Review and Appeal Regulation*, BC Reg. 322/02 provides, in these circumstances, the worker can apply to the WCAT chair pursuant to section 243(3) of the Act, as amended by Bill 63, for an extension of time to appeal.

WCAT was notified of the worker's intention to appeal on May 30, 2003, which was nearly four months after the statutory time frame for appealing the Review Board finding had expired.

Although participating in the appeal, the employer has not provided a submission regarding this application.

Issue(s)

The issue is whether the worker should be granted an extension of time for filing his appeal of the December 27, 2002 Review Board finding.

Analysis

Section 243(3) sets out three requirements that must be met in order for an application for an extension of time to be successful:

- Firstly, the appellant is required to demonstrate that special circumstances precluded the filing of the notice of appeal on time;

- Secondly, it must be determined that an injustice would result if the extension of time were not granted; and
- Thirdly, the chair must exercise the discretion to grant the extension of time in favour of the applicant.

In WCAT Decision #2003-01810 (19 *Workers' Compensation Reporter* 189) I provided further analysis of the three requirements.

The worker submits there were special circumstances that precluded the filing of the appeal on time because he had “just received” a copy of the decision. He indicated that he had been living in a building with seven other people and that the original that had been sent “must have been misplaced.”

The circumstances raised by the worker require analysis of section 221(2) of the Act, which provides a document is deemed to have been received on the eighth day after it was mailed. The word “deemed” may have one of two meanings: “deemed conclusively” or “deemed until the contrary is proved” (*Hickey v. Stalker*, [1924] 1 DLR 440 (Ont. App.Div.) at 442, quoted with approval in *Gray v. Kerlake*, [1958] SCR 3).

In deciding whether the word “deemed” in section 221(2) establishes a conclusive or a rebuttable presumption, I have considered two factors. Firstly, where a statute provides that mail is “conclusively deemed” to have been received, the courts have interpreted the ordinary meaning of this phrase to be that the legislature intended the provision to be irrebuttable (*Foley v. British Columbia (Ministry of Forests)* (1999), 123 BCAC 287 (CA)). The term “conclusively” does not appear in section 221(2). Secondly, the word “deemed” must be construed in the context of the statute as a whole (*St. Peter's Evangelical Lutheran Church (Ottawa) v. City of Ottawa*, [1982] 2 SCR 616). While the deeming provision supplies the certainty that is necessary to allow the time periods in the Act to function effectively, there must also be flexibility to accommodate those exceptional circumstances where it is established that a document was not received. This is necessary to ensure that access to WCAT, which is the final level of appeal in the workers' compensation system in British Columbia, is not unfairly curtailed. In light of these factors, I view section 221(2) of the Act as establishing a rebuttable presumption that a document was received.

In this case, I am satisfied that the worker did not receive the December 27, 2002 Review Board finding when it was originally mailed to him and, accordingly, the presumption in section 221(2) has been rebutted. I base this conclusion on the fact that the worker wrote to the Review Board on March 17, 2003 and asked whether a decision had been issued on his appeal. He also requested information on the changes to the appeal system. On April 17, 2003, the consulting firm that had represented the employer on the appeal wrote to WCAT enclosing the worker's March 17, 2003 letter. The letter had been enclosed in error with some correspondence the employer's representative had received from WCAT. A note in WCAT's case management system indicates that a copy of the finding was mailed to the worker on April 23, 2003.

As I am satisfied that the worker did not receive the December 27, 2002 Review Board finding when it was originally mailed to him, I find special circumstances precluded the worker from filing the notice of appeal on time.

The issue before the Review Board panel concerned the acceptance of the worker's claim for compensation. As this is a significant issue, I find that an injustice would result from a denial of the extension of time.

The final issue arising under section 243(3) is whether this is an appropriate case in which to exercise the discretion to grant an extension of time in favour of the worker. In this case, I do not find the employer would be prejudiced by the granting of the extension of time. I also note that when eight days are added for mailing, the worker initiated his appeal within 30 days of the finding being mailed to him on April 23, 2003.

Conclusion

The extension of time is granted. The file is returned to the WCAT Registry for the processing of the appeal.

