

Workers' Compensation Appeal Tribunal

Decision #187

Claim No.: 97-1600

Date of Notice of Appeal: April 1, 2011

Date Notice received at the Tribunal: April 4, 2011

Date of Documentary Review: June 17, 2011

Date of Decision: July 21, 2011

Appeal Committee Members appointed under s. 64 (1) of the *Workers' Compensation Act*, S.Y. 2008, c. 12

Committee Chair:	E. Sumner
Member representative of employers:	N. Huston
Member representative of workers:	W.C. Gryba

Documentary Review

Location: 456 Range Road
Whitehorse, Yukon Territory

Introduction

In 1997 this then 21-year-old woman was working as an exotic dancer at a local Whitehorse bar. At the time of the incident she resided permanently in Alberta. She filed a claim for compensation with Yukon Workers' Compensation Health and Safety Board (YWCHSB) on November 22, 1997 for an injury which occurred on November 1, 1997.

On November 28, 1997 an adjudicator denied the worker's claim because she was not deemed to be a worker as defined by the *Workers' Compensation Act* ("Act").

The worker requested a hearing officer's review on March 21, 2011. The hearing officer rendered a decision on March 22, 2011. He concluded the worker filed her request for appeal outside of the legislated timelines; he did not have jurisdiction to review the November 28, 1997 decision.

As this appeal deals with jurisdiction, the appeal committee requested written submissions from the deputy workers' advocate. A documentary review was conducted on June 17, 2011.

Decision

The limitation period for filing an appeal has expired. We do not have jurisdiction to hear and decide this appeal

Background and Evidence

- [1] The appeal committee considered the advocate's submissions and the entire claim record as provided by the board.
- [2] An Alberta booking agent, acting as an employment agency, booked the worker to perform at various establishments. The worker paid the agency a commission on her earnings for booking jobs. The worker was provided airfare and accommodations by the hotel in Whitehorse where she was performing. On November 1, 1997 while doing her routine, the worker fell from a pole and injured her head and neck.
- [3] The claim file contains a Doctor's First Report by Dr. A. on a YWCHSB form. "Yukon" has a line drawn through it and "Alberta" is written in. This also has a line drawn through it and "Yukon" is written above. On the same form the "Employer" is noted as the Alberta booking agent; this has a line drawn through it and the Whitehorse bar where the worker was performing her act when she was injured is entered.

Dr. A. reports the worker attended complaining of neck pain. On observation she did not appear to be inebriated and there was no loss of consciousness. He diagnosed "fracture c-spine spinous process."

- [4] An Ambulance/Medevac Trip Report dated November 1, 1997 notes they picked the worker up at approximately 7:00 p.m. that evening. She complained of a sore head, neck and back. "No loss of consciousness" was noted.
- [5] A November 26, 1997 memorandum from the board's assessment auditor to the adjudicator states:

Artists, entertainers and performers, who are engaged from outside the Territory through placement agencies, are under a contract for service. A master-servant relationship does not exist and the provisions of the *Workers' Compensation Act* do not apply (see Section 101(1) – Definition: “worker” means (a) a person, whom performs services for an employer under a contract of service. . . “

- [6] The adjudicator renders a decision on November 28, 1997 stating that the claimant is not deemed to be a worker as defined by the *Act*; therefore her claim for compensation has been denied. He sets out the following from the 1992 *Workers' Compensation Act*, R.S.Y.:

Section 101(1) part 12 – definitions of “worker” states:

But does not include

- (h) a person who entered into or works under a contract of service or apprenticeship outside the Yukon, who ordinarily resides outside of the Yukon and is employed by an employer who is based outside of the Yukon and carries on business in the Yukon on a temporary basis.

- [7] There are no further documents on the claim file until October 4, 2010. A note to file of that date by the claims team assistant states the worker called and would like to re-open her claim.

Issue: Does the appeal tribunal have jurisdiction to hear and decide this appeal?

Answer: No

The Advocate's Submission

- [8] The advocate provided written submissions to the appeal committee asking that they consider waiving the timelines on this appeal due to extenuating circumstances. She said the worker was a young woman at the time of the accident. She went through a prolonged period of recovery. There were personal issues going on in her life as well. The worker's attention was focused solely on trying to get her life back to a level of functioning.
- [9] The worker and her mother do not recall ever seeing a decision letter from the board. She did not have knowledge of the decision and did not know of any mechanism for review or appeal. After speaking with a neurologist who recommended she contact YWCHSB, she immediately did so in October of 2010. The advocates' office was also contacted at this time.
- [10] The advocate then entered into discussions with the Director of Claimant Services. Due to delays in information gathering and trying to resolve the issue informally at the board level, the advocate submits, an appeal that would have been filed only 3-4 months late was delayed in excess of 8 months.
- [11] She contends the Yukon board denied this worker's claim based on the fact they believed she was employed by an Alberta employer. The Alberta board has told her there is no Alberta employer to link her injury to. The advocate says this has resulted in a gross injustice to the

worker with unintended results. They maintain this appeal has significant merit to proceed. There were extenuating circumstances that contributed to the delay of filing of the appeal that resulted directly from the injury the worker suffered in 1997.

Reasons and Findings

[12] Section 52 of the *Workers' Compensation Act*, S.Y. 2008 deals with "Limitation period for appeals and reviews" as follows:

52(1) A notice of review or appeal respecting a decision referred to in sections 15, 53, 54 and 59 must be filed within, and not after, 24 months of the date that the decision was made.

52(2) For all decisions referred to in sections 15, 53 and 54 made prior to July 1, 2008, the notice of review or appeal must be filed prior to July 1, 2010.

[13] Section 53(1) of the 2008 *Act* provides:

On the written request of a worker, . . . a hearing officer or a panel of hearing officers shall review any decision made concerning a claim for compensation under section 15.

Section 54(1) states:

A worker, . . . may appeal a decision made under section 53 to the appeal tribunal established under Part 10.

[14] As the hearing officer noted in his March 21, 2011 decision, the original decision was rendered on November 28, 1997 under section 11 of the 1992 *Workers' Compensation Act*; a precursor to section 15 of the current *Act*. In order for the decision of November 28, 1997 to be appealed to the hearing officer or the appeal tribunal, the request for appeal must have been filed prior to July 1, 2010. The request for a review by the hearing officer was filed on March 21, 2011; eight months past the legislated timelines.

Decision

The limitation period for filing an appeal has expired. We do not have jurisdiction to hear and decide this appeal.

Dated this **21st day of July 2011** in the City of Whitehorse, Yukon Territory.

W. C. Gryba, Member

E. Sumner, Committee Chair

N. Huston, Member