

WCAT Decision Number :

WCAT-2012-02739

WCAT Decision Date:

October 24, 2012

Panel:

James Sheppard, Vice Chair

Introduction

[1] In *WCAT-2011-00625* dated March 9, 2011 the vice chair stated:

...In the circumstances, I do not feel the union should be reimbursed for the full amount of the cost of the ergonomic study, as much of the analysis and presentation was not necessary for the resolution of this matter. I find, however, it was as useful as a medical-legal opinion would have been, and I order the Board to reimburse the union the sum of \$1,430.00, the amount set out in the Board's schedule of fees for medical-legal opinions.

[reproduced as written]

[2] In *WCAT-2012-01531* dated June 8, 2012 the reconsideration panel stated:

Since the original panel decided that he would not order reimbursement of the expense of the report in full, I consider that it was unfair not to seek submissions as to how the decision about the quantum of the amount to be reimbursed should be determined. I consider this to be unfair since there is no schedule of fees for such reports. In the absence of such a standard, the expectation would be that the expense would be reimbursed in full. (I refer to the parties to *WCAT-2010-00930* where a similar result occurred and to the reconsideration, *WCAT-2011-00522*. I am not bound by these decisions and point them out, only, as being similar to this situation.)

Once the original panel decided that he would not reimburse the expense in full, I consider that it was a requirement of fairness to request submissions from both parties on how to determine what amount of the expense should be reimbursed and on what basis. In the absence of such a request, the parties would expect the decision to be made in accordance with the factors set out in the MRPP [*Manual of Rules of Practice and Procedure*] and would expect the full amount to be reimbursed or no amount. In this case, as the original panel noted, there is no fee schedule and therefore there would be no expectation by the parties that anything less than the full amount would be reimbursed, in the absence of submissions to the contrary.

Issue(s)

- [3] This is a second stage reconsideration decision which will address only the issue of the reimbursement of the expense incurred in obtaining the November 5, 2010 ergonomic report submitted by the worker's union in the worker's appeal.

Jurisdiction

- [4] Section 7(1) of the *Workers Compensation Act Appeal Regulation* provides that the Workers' Compensation Appeal Tribunal (WCAT) may order the Workers' Compensation Board, operating as WorkSafeBC (Board), to reimburse a party to an appeal for the expenses associated with obtaining or producing evidence submitted to WCAT.

Reasons and Decision

- [5] I invited submissions from the parties which address the basis upon which reimbursement of the ergonomic report should be considered, including whether the ergonomic report should be reimbursed in full or some amount less than this figure. I have considered all of these submissions but will not summarize them in their entirety. I will refer to these submissions to the extent necessary in explaining my decision set out below.
- [6] The worker's union seeks full reimbursement of the expense of \$2,642.68 incurred by the union in obtaining the November 5, 2010 ergonomic report.
- [7] The worker's representative agrees that the amount to be reimbursed should be what the panel considers to be a reasonable amount. The amount should not be set by the Board's past practice of \$1,000.00 as indicated on the WCAT external website. The decision should be based "on the merit and justice of the case" and not on a predetermined inflexible and unexplained dollar amount. Also, this information about the Board's practice was not available on WCAT's website at the time the ergonomic report was completed.
- [8] The worker's representative submits that the British Columbia Society of Occupational Therapists' fee guidelines should be used. The Board's British Columbia Medical Association fee schedule should not be used as there is nothing in the fee schedule that is similar to the nature and extent of a work site ergonomic assessment. Item #16.1.3.1 of the MRPP is not applicable as there is no Board rate or fee. However, the examples of the limited circumstances when a greater amount than the rate or fee will be reimbursed are relevant to the costs, nature and production of an ergonomic assessment. The parameters which should be used to determine the amount are the criteria set out in item #16.1.3. It would not be appropriate to predetermine costs to be applied because the nature and complexity of the adjudication of activity-related soft tissue disorder (ASTD) injuries varies.

- [9] The worker's representative submits that there is no direction concerning what is not required in an expert opinion and no suggestion that reimbursement will be adjusted to reflect only those parts of the opinion that a vice chair considers necessary or useful. The overriding message to appellants is the best evidence is evidence that is "sufficiently complete and reliable to arrive at a sound conclusion with confidence." There are no guidelines specifying the particular requirements of an ergonomic assessment or any indication that costs associated with information that WCAT considers is not required will not be reimbursed. It would be unjust to burden an appellant worker with the onus of ensuring that evidence is produced in the most economical manner possible. In the absence of glaring errors, perhaps mathematical, he submits that without specialized knowledge in ergonomics, as well as in the equipment and computerized analysis utilized by the ergonomist, most appellants are not competent to criticize the hours claimed by the ergonomist to carry out this very specialized work. To impose financial restraints on the worker's ability to seek the best evidence (if they have sufficient funds to) is a breach of procedural fairness and a denial of access to justice. This is not to say that the cost of any ergonomic report should be reimbursed regardless of its contents and relevance.
- [10] The employer requests that WCAT deny the request for full reimbursement of the ergonomic report. Although either party may provide evidence as they deem appropriate, it would be unreasonable for the Board to pay for evidence that goes far beyond that which may be required to support their arguments. The original WCAT panel noted the request for full reimbursement was disproportionate to the nature of the claim. Much of the analysis and presentation was not necessary for the resolution of this matter. The reimbursement using the fee schedule for medical-legal opinions was well thought out and creates a level playing field for both parties. The amount in the fee schedule is greater than the \$1,000.00 the Board has paid for such reports in the past.
- [11] The employer's representative cited *WCAT-2011-00625* dated March 9, 2011 as an example of reducing the amount reimbursed where much of the analysis and presentation was not necessary and comparing it to a medical-legal opinion. The circumstances in this case do not meet the limited circumstances where a greater amount should be reimbursed. It is not reasonable to provide evidence that goes far beyond that which is required to support an argument.
- [12] The worker's representative subsequently provided a June 7, 2012 letter from an associate professor in the department of kinesiology of a major university. He had sent the associate professor a copy of a different ergonomic report prepared by the same individual to critique it. The associate professor confirmed that the use of videotaping, electromyography (EMG), and wrist electrogoniometry are acceptable tools in an ergonomic analysis (the latter two being advanced techniques which require additional training and due to their expense are generally used by only a few ergonomists). The worker's representative submits it was reasonable to incur expenses associated with this type of testing. He submits that the hourly rate charged by the qualified expert was

less than that provided for by the more recent 2011 fee schedule for occupational therapists.

- [13] The employer's representative states that the associate professor was not asked to review the November 5, 2010 ergonomic report but a different report involving a different person, circumstances, and injuries. Not all of the background information provided to the associate professor has been provided to us. He reviewed some of the responses made by the associate professor to the questions posed to him (in particular the use of surface EMG and electrogoniometry) which illustrate the limited use of the associate professor's responses because they were made with respect to a different claim/ergonomic report. Further, the length of this other ergonomic report given to the associate professor to critique is unknown.
- [14] The employer's representative does not question the expertise, integrity or professionalism of the qualified expert who prepared the November 5, 2010 ergonomic report or that of the associate professor. He submits that if a party commissions an ergonomist to provide evidence and the cost far exceeds what is normally paid or what is considered reasonable by the WCAT panel, it should be no surprise that a decision is made not to reimburse the full cost of the ergonomic report.
- [15] The employer's representative also states it is unclear whether the worker is also seeking reimbursement of the associate professor's report. I did not interpret the submission made by the worker's representative to have made such a request. Even if I were to interpret such a request, I restrict the scope of this second stage reconsideration to the reimbursement of the November 5, 2010 ergonomic report which was submitted to the original WCAT panel.
- [16] Section 246(1) of the Act authorizes WCAT to make rules, practices and procedures. Section 11 of the *Administrative Tribunals Act* authorizes a tribunal to control its own processes and make rules respecting practice and procedure.
- [17] The WCAT MRPP states:

16.1.1 General

....

WCAT's authority to reimburse a party's appeal expenses is derived from the Appeal Regulation. Thus, there is no board of directors' policy on reimbursement of appeal expenses. Notwithstanding this, WCAT will generally be guided by Board policy at item #100.14 of the RSCM [*Rehabilitation Services and Claims Manual*], regarding the amount and type of expenses the Board will pay. These are calculated in accordance with the rules set out in items #82.20 (transportation), #83.20 (meals and accommodation) and #83.13 (lost time from work where the

worker is not already in receipt of temporary disability or vocational rehabilitation benefits from the Board).

Where a panel determines that appeal expenses will be reimbursed at a different rate or on a different basis than set out in Board policy, the panel will provide reasons in its decision.

...

16.1.3 Expense of Obtaining or Producing Evidence (Section 7(1)(b))

WCAT will generally order reimbursement of expenses for attendance of witnesses or obtaining or producing written evidence, regardless of the result in the appeal, where:

- (a) the evidence was useful or helpful to the consideration of the appeal; or**
- (b) it was reasonable for the party to have sought such evidence in connection with the appeal.**

As the workers' compensation system functions on an inquiry basis, reimbursement of expenses is not dependent upon the result in the appeal. WCAT will generally limit the amount of reimbursement of expenses to the rates or fee schedule established by the Board for this purpose.

16.1.3.1 Expert Evidence

WCAT may direct reimbursement for different types of expert evidence (items 11.4 and 11.6). Most commonly, this involves additional medical evidence obtained for an appeal. It may also include other forms of expert evidence such as ergonomic assessments, employability assessments and functional capacity assessments.

When seeking reimbursement of an expert opinion, in addition to the opinion, the requesting party must also provide a copy of their request and the expert's bill or account. **WCAT will usually order reimbursement of expert opinions at the rate established by the Board for similar expenses. The balance is the responsibility of the party who obtained the report.**

A WCAT panel has the discretion to award reimbursement of an expert opinion in an amount greater than the fee schedule in limited

circumstances. If the bill or account exceeds the Board fee schedule, the party seeking reimbursement of the full amount must explain the reasons the account exceeds the fee schedule and why the panel should order reimbursement of the full amount. In the absence of a request and a satisfactory explanation of the circumstances, WCAT will limit reimbursement to the fee schedule amount.

Examples of the limited circumstances include whether the case is so difficult that it required significant time and effort, the length of the report, and/or whether the detail and analysis of the report is uncommon.

[emphasis added]

- [18] I find that the worker's union should be reimbursed by the Board for the full amount of the November 5, 2010 ergonomic report. Item #16.1.1 of the MRPP states that WCAT may order reimbursement where the party's representative has actually paid the account.
- [19] I find that the November 5, 2010 ergonomic report was both useful and helpful in considering the appeal, as well as it being reasonable for the worker to have sought this expert evidence in connection with this appeal.
- [20] It is not disputed that the individual who provide this ergonomic report was qualified as an expert to provide such a report. This report provides his qualifications which appear to go beyond being an occupational therapist (Bachelor of Science (Anatomy/ Psychology) and a Master's of Science and Technology in Ergonomics, as well as Certification in the Assessment of Motor and Process Skills.
- [21] The vice chair in his decision relied in part on the November 5, 2010 ergonomic report in deciding whether the worker's right lateral epicondylitis was due to the nature of his employment as a biomedical engineering technologist (for examples of this reliance see paragraphs 63, 64, and 66 of *WCAT-2011-00625*; in fact in paragraph 70 the vice chair states he found some of the ergonomic report helpful). This reliance shows the ergonomic report was at least in part useful or helpful in this appeal. This opens the way to exercising my discretion to order reimbursement on this basis.
- [22] Even if an ergonomic report is not useful or helpful, as long as it was reasonable for the worker to have sought it for purposes of the appeal reimbursement of the expense involved in obtaining it may be ordered.
- [23] The decisions of the Board and the Review Division in this case were based, in part, on the work site visit/ASTD work site evaluation conducted by the Board. The worker submitted that the work site evaluation conducted by the Board was flawed and it was reasonable for the worker to have sought his own work site risk assessment to provide this expert evidence to WCAT.

- [24] WCAT proceedings combine many features. They are hybrid in nature. They are partly inquiry based and are reliant on evidence and arguments provided by the parties to the appeal.
- [25] As item #16.1.3.1 of the MRPP indicates, ergonomic assessment reports are considered expert evidence. Normally, the amount of the expense incurred in obtaining expert evidence would be limited to the Board rate or fee schedule. In this case that is not possible because the Board has no rate or fee schedule for ergonomic assessment reports. The reason for this is because these risk assessments are performed within the Board, primarily by case managers.
- [26] Although the Board has in practice paid up to \$1,000.00 in the past for ergonomic reports it is not clear on what basis this amount was determined and what it was meant to cover. Further, the MRPP does not state I need consider the past practices of the Board. I also agree with the worker's representative that this information about the Board's practice was not posted on WCAT's website until July 2011 (after the ergonomic report was completed in October/November 2010).
- [27] As previously stated, there is no Board rate or fee schedule for an ergonomic assessment report. *WCAT-2012-01531* states that: "In the absence of such a standard, the expectation would be that the expense would be reimbursed in full." With respect, I disagree with this statement. I find that I still have the discretion to determine what amount should be reimbursed. The MRPP does not direct me to pay the full amount in the absence of a Board rate or fee schedule. In fact, the MRPP provisions appear to indicate that the amount reimbursed for expert evidence will generally be limited (albeit to a Board rate established by the Board for similar expenses). The balance of any amount not reimbursed is the responsibility of the party. A WCAT panel has the discretion to award reimbursement of an expert opinion in an amount greater than the fee schedule in limited circumstances.
- [28] In the absence of a Board rate or fee schedule I find that the amount charged by an expert needs to be assessed as to its reasonableness. This view was shared by the former WCAT chair. In *WCAT-2010-00930* dated March 30, 2010 she stated:
- ...In my view, even when the type of expense claimed is not the subject of a fee schedule or tariff, the party requesting reimbursement ought to submit the invoice to WCAT because the panel has an obligation to ensure the amount claimed is reasonable.
- [29] Although this decision is not binding on me, I agree with this approach when exercising my discretion to order the reimbursement of an appeal expense where there is no Board rate or fee schedule. A somewhat similar approach (albeit not referred to as assessing the reasonableness of the amount) was adopted in *WCAT-2010-01002* dated April 8, 2010.

- [30] Further, I acknowledge that it might be difficult for a party to determine what a reasonable market rate might be for such expert evidence (particularly in the absence of a Board rate or fee). It may be difficult to negotiate the expense incurred in obtaining such expert evidence (even with a Board rate or fee). It may be difficult to know whether the final bill is in fact reasonable
- [31] I have the itemized invoice of \$2,642.68 provided for this ergonomic report.
- [32] The charges are based on an hourly rate of \$135.00 which is the minimum hourly rate recommended by the Fee Guidelines for Private Practice Occupational Therapy (Fee Guidelines). These guidelines were developed in consultation with the private practice members of the British Columbia Society of Occupational Therapists (BCSOT)¹.
- [33] The hourly rate used is based on the Fee Guidelines approved by the BCSOT board of directors in 2007. The risk assessment was prepared in October-November 2010. The BCSOT Fee Guidelines applicable at that time were set in December 2009 and indicated a minimum hourly rate of \$140.00 per hour (a greater amount per hour than charged).
- [34] In *WCAT-2010-01012* that panel also relied on the BCSOT Fee Guidelines to addressing the issue of the amount to reimburse for an occupational therapist's report. Although I am not bound by this prior WCAT decision, I find this is one way of determining whether the amount charged is reasonable (see also *WCAT-2010-00908* dated March 29, 2010 which also used the BCSOT Fee Guidelines in determining the amount to reimburse for ergonomic assessment).
- [35] Based on the BCSOT Fee Guidelines the \$135.00 per hour charge was a reasonable rate to charge. It is one indicator of what the market rate might be for such an assessment (albeit it is not a negotiated rate).
- [36] It was reasonable to charge for reviewing the documents, interview/email/telephone, travel time to the work site, car travel expense, work site assessment time, and video preparation time. I think it is reasonable to charge for the time to take and analyze the video during a work site assessment to determine the risk factors involved in the employment. The Board took video and photographic evidence when it conducted its work site visit. The case manager considered this evidence in making the decision to deny the claim (February 23, 2010 Board decision letter). This portion of the invoice illustrates that the money charged was not just for preparing the report.

¹ The WCAT appeal coordinator wrote to the director of the Canadian Association of Occupational Therapists – British Columbia (CAOT-BC). He indicated that the BCSOT ceased operations in September 30, 2011 and the CAOT-BC began operations on October 1, 2011. The "Private Practice Fee Survey for occupational therapy services in British Columbia (2011)" was created and posted to the CAOT-BC website in October 2011. Prior to this the BCSOT private fee schedule for December 2009 was used. The survey is updated every two years.

- [37] The use of and time to analyze the results from the vocational surface electromyography (SEMG) equipment (electrodes, battery, maintenance) of \$100.00 has been questioned as not being necessary.
- [38] Although the claim/ergonomic report for which the associate professor was asked to critique was not the one in question (so his comments are of limited value in assessing the November 5, 2010 ergonomic report), he does provide general comments about the use of SEMG being a well-accepted tool in an ergonomic analysis. He states that SEMG has been used in the field for years to assess superficial muscles. He states that SEMG is a very appropriate tool for ergonomic assessment. This is considered a validated technique for relating muscle activity to musculoskeletal injury. As previously mentioned, he also indicates that this is a more advanced technique requiring additional training, and due to the expense is generally used by only a few ergonomists.
- [39] Further, the qualified expert explained on page 16 (and page 33) of the ergonomic report that he used the SEMG to measure the electrical activity emanating from selected forearm muscles of the worker. The qualified expert states that the SEMG is an effective method of measuring exposure throughout the entirety of the work activity. His conclusions which include the results from the SEMG are summarized on page 22 of his report. It does appear that the vice chair relied upon this conclusion in his decision (paragraphs 63 and 64 refers to the benefit of the analysis of the worker's work motions provided by the ergonomic report).
- [40] I note that the ergonomic report provides an index, professional qualifications, a glossary of abbreviations, and an executive summary before detailing the information gathered and analyzed. Pages 37 to 53 provide references to articles and an appendix of raw data.
- [41] Even if it were unnecessary to conduct such testing or provide such a detailed lengthy ergonomic report, this detail does help to explain how the qualified expert made his findings (conclusions). It may allow for a better opportunity to test the validity of this evidence. It also provides the basis upon which to determine what weight to place on this evidence. Also, a party has a right to seek out and provide relevant expert evidence in an appeal. A party may rely on the expertise of the professional providing the expert evidence to ensure it is relevant (useful or helpful). A party may rely on the expert to take the reasonable steps necessary in order to provide an opinion/report appropriate in the circumstances. It might also be difficult for a party to know how much evidence or the extent of the evidence needed (or how it will be weighed) to ensure that the decision-maker finds in their favour.
- [42] I do not agree that the degree of usefulness of the ergonomic report should be used to determine the amount of reimbursement which should be ordered. I find that this method of determining whether the amount charged was reasonable would be too arbitrary in nature. Further, as mentioned above, you can have an ergonomic report

reimbursed even if it was not useful or helpful provided it was reasonable for the party to have sought it for the appeal.²

- [43] The MRPP does not suggest that the Board's negotiated fee schedule for medical-legal opinions by a medical expert is an appropriate way to determine whether the amount charged by an occupational therapist for an ergonomic risk assessment is reasonable. I find the BCSOT Fee Guidelines is more appropriate in assisting in this task.
- [44] It appears that minimum compensation was paid under the worker's claim for a right lateral epicondylitis. However, this does not mean that the amount of the reimbursement for the expert evidence submitted to WCAT should be reduced because of this fact. A claim is for life. It is always open to a worker to seek further compensation. Further, the MRPP does not suggest that a proportionality test based on the actual or estimated compensation to be paid out on a claim should be used to determine the amount to be reimbursed for expert evidence submitted to WCAT in order to have the claim accepted. Again, I find this method of determining whether the amount charged is reasonable would be arbitrary in nature.
- [45] In closing, I acknowledge that where a party is represented their representative may be able to use their understanding of what is relevant to an appeal to set out questions for the expert to response to in providing the evidence/report. I acknowledge that the November 5, 2010 ergonomic report is quite detailed. If the worker's representative plans on retaining the same qualified expert in the future he might want to discuss with the qualified expert whether there is a need to include the appendix of raw data. The worker's representative might want to indicate to a future WCAT panel that this raw data is available if the WCAT panel feels it is necessary (requests it). Further, in as much as the qualified expert findings are set out in great detail I found the executive summary easier to follow as a lay person than the more technically detailed material which followed it. Again, the worker's representative might want to discuss with the qualified expert a way to convey his findings in a more abbreviated less technical manner.
- [46] Further, I emphasize that I am not suggesting that parties should expect to be reimbursed for the expense of expert evidence no matter what the amount. A party should ensure that an itemized invoice is provided to the vice chair to assist them in determining whether the amount charged is reasonable.

² I am aware that another WCAT panel (WCAT-2012-00069 dated January 10, 2012) questioned the relevancy of part of an ergonomic report written by this same qualified expert and that he might have reduced the amount reimbursed on this basis if the invoice had not been reduced in any event. With respect I do not agree with this approach as I find it would be difficult to determine how useful an ergonomic report was or was not and then how much should be reduced from any amount charged. I find this type of determination would be arbitrary. Further, an ergonomic report may be reimbursed even if it is not useful or helpful.

Conclusion

- [47] I order the Board to reimburse the worker's union for the full amount of the expense incurred in obtaining the November 5, 2010 ergonomic report.

James Sheppard
Vice Chair

JS/gl/jd