Noteworthy Decision Summary

Decision: WCAT-2005-02568-RB **Panel:** Guy Riecken **Decision Date:** May 19, 2005

Jurisdiction – Relief of costs in transitional appeals – Sections 39(1)(e) of the Workers Compensation Act – Section 38 of the transitional provisions in the Workers Compensation Amendment Act (No. 2), 2002

WCAT does not have jurisdiction over relief of cost issues in appeals transferred from the Workers' Compensation Review Board (Review Board) on March 3, 2003. Under former section 90 of the *Workers Compensation Act* (Act), it was not possible for the employer's appeal to the Review Board to include the issue of relief of costs. Section 38(1) of the *Workers Compensation Amendment Act (No. 2), 2002* (amending Act) does not expressly provide for WCAT to address issues that were not within the Review Board's jurisdiction before the appeal was transferred on March 3, 2003. Accordingly, when the appeal was transferred to WCAT on March 3, 2003, it did not include an appeal on relief of costs.

The worker was awarded a permanent partial disability award. The employer appealed to the Review Board, seeking relief of costs under section 39(1)(e) of the Act. On March 3, 2003, the Review Board and the Appeal Division were replaced by WCAT. As the appeal had not been considered by the Review Board before that date, it was decided as a WCAT appeal, pursuant to section 38(1) of the amending Act. An issue was whether WCAT had jurisdiction to decide the issue of relief of costs in this appeal.

In the circumstances of this case, WCAT was without jurisdiction to decide the issue of relief of costs. When the employer filed the appeal of the Workers' Compensation Board (Board) decision, the Review Board did not have jurisdiction over section 39(1)(e) relief of costs matters. Under section 90 of the Act, as it then read, only decisions with respect to workers could be appealed to the Review Board. As decisions under section 39(1)(e) only relate to the how the costs of a claim are attributed to the employer and the employer's class, and do not affect the worker's entitlement to compensation, they could not be appealed to the Review Board. At that time, the Appeal Division had jurisdiction to consider relief of cost appeals under section 96(6) of the former Act.

Accordingly, when the appeal was transferred to WCAT on March 3, 2003, it did not include an appeal on that issue. Section 38(1) of the amending Act does not expressly provide for WCAT to address issues that were not within the Review Board's jurisdiction before the appeal was transferred on March 3, 2003. The language of section 38 in the amending Act and of sections 239(1) and 254 of the current Act do not have the effect of giving WCAT jurisdiction over the issue of relief of costs in this appeal. The panel also rejected the argument that if WCAT did not take jurisdiction over relief of costs in this appeal, the employer's right to appeal on this issue would be abrogated by the amendments to the legislation; the panel noted that the employer had filed an appeal with respect to relief of costs to the Appeal Division but chose not to pursue it.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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Introduction

On June 11, 1997, the worker was employed as a millwright when he injured his right knee. The Workers' Compensation Board (Board) accepted the claim for a right knee strain, a lateral meniscus tear and related repair surgery. The Board granted the worker a permanent partial disability (PPD) award based on a permanent functional impairment (PFI) of 4.99% of total disability.

The employer appeals two decisions of the Board:

1. The March 22, 2001 decision to refer the claim to the Board's Disability Awards Department; and

2. The March 13, 2002 decision granting the worker a PPD award based on 4.99% of disability.

Initially the Workers' Compensation Appeal Tribunal (WCAT) registry set the two appeals to be heard together at an oral hearing scheduled for November 29, 2004. The employer requested that the appeals be decided on a "read and review" basis instead, and I granted the request. The representatives for the employer and the worker have both provided written submissions, which I have considered together with the material in the claim file. The appeals do not raise significant issues of credibility, and involve the assessment of medical evidence and the application of law and policy. An oral hearing is not required to fairly decide the issues in the appeal.

Issue(s)

The following issues arise in this appeal:

1. Whether the Board case manager properly referred the claim to the Disability Awards Department to assess a PFI award;

2. Whether the March 13, 2002 PPD award appropriately compensates the worker for the effect on his earning capacity of the permanent disability; and

3. Whether WCAT has jurisdiction to decide the issue of relief of costs in this appeal, and if so, whether the Board should have relieved the employer of the costs of the PPD award under section 39(1)(e) of the *Workers Compensation Act* (Act).

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Jurisdiction

The two appeals were filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Review Board and the Appeal Division of the Board were replaced by WCAT. As these appeals had not been considered by a Review Board panel before that date, they have been decided as WCAT appeals. (See the *Workers Compensation Amendment Act (No. 2), 2002* (amending Act), section 38.)

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (See: section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it (section 254 of the Act).

These appeals are by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its decision for the decisions under appeal.

Because the worker's injury and PFI occurred before June 30, 2002, unless otherwise indicated in this decision, the provisions of the Act and of Board policy that were in effect prior to amendments on that date have been applied to the issues in the appeal relating to the worker's entitlement to compensation. (See: section 35.1 of the Act).

Background and Evidence

On June 11, 1997, the worker was squatting in a confined space at work for about ten minutes connecting a cylinder to a feed roll. As he straightened up from this position, his right knee locked with a clicking sound. He experienced excruciating pain in the lateral aspect of his knee.

The June 11, 1997 report from Dr. Bohn, the worker's attending physician, indicates a diagnosis of a possible lateral meniscal tear. Dr. Bohn's reports indicate that he referred the worker for x-rays and physiotherapy and followed his progress, and referred him to Dr. Porter, an orthopedic surgeon.

The June 23, 1997 x-ray report indicates no fracture or dislocation of the right knee and no loose body.

Dr. Porter's November 4, 1997 consultation report indicates that the worker had symptoms for about three weeks after the injury, but they settled. Since then he had few symptoms. Dr. Porter considered the worker's history consistent with a lateral meniscal tear that was currently asymptomatic except for some effusion. Dr. Porter

recommended that the worker avoid activities that require a lot of flexion, such as squatting, but that he otherwise return to activities as tolerated.

The next medical information received by the Board was a report dated September 2, 1999 from Dr. Filatov, the worker's new attending physician. The worker reported that for several months he had been experiencing pain in the lateral side of his right knee. Dr. Filatov queried a meniscal tear and referred the worker for x-rays and a consultation with Dr. Porter.

The September 7, 1999 x-ray revealed no bone or soft tissue abnormality.

Dr. Porter's August 14, 2000 consultation report indicates symptoms of a meniscal tear, probably in the lateral compartment. Dr. Porter recommended an arthroscopy.

In a memo dated August 31, 2000, Dr. C, a Board medical advisor, opined that it would be reasonable to consider the torn meniscus a consequence of the June 11, 1997 work injury. If Dr. Porter proceeded with the arthroscopy, the Board should provide authorization.

Dr. Porter's January 24, 2001 operation report describes a right knee arthroscopy and lateral meniscectomy. The procedure revealed a small area of Grade 2 chondromalacia in the femoral condyle that was otherwise in good condition.

Dr. Porter's March 5, 2001 consultation report indicates the worker continued to have aching symptoms, but not a great deal of pain. The bulk of his symptoms were gone. There was still effusion.

In a memo dated March 7, 2001, the case manager reviewed the medical evidence and decided to accept the torn meniscus and January 24, 2001 surgery in the claim.

Memos dated March 7 and 15, 2001, from the case manager indicate that the worker had been working at modified duties since the surgery, and that on March 12, 2001 he returned to his regular duties at work.

A memo dated March 22, 2001 from the case manager indicates that at a team meeting attended by Dr. C, it had been determined that the chondromalacia found at the time of the surgery was incidental and not related to the injuries accepted in the claim. It had also been determined that the worker will have a PFI resulting from the injuries accepted in the claim, and that the file would be referred to the Disability Awards Department.

In another memo dated March 22, 2001 the claim was referred to the Disability Awards Department.

The PFI evaluation by Dr. Dahlstrom dated March 1, 2002 recorded the following laxity findings with respect to the worker's knees:

	MCL	LCL	ACL	PCL
Right	2	2	1	0
Left	0	0	0	0

The evaluation indicates that the laxity findings are based on the following rating scale:

0 = 0 to 4 mm opening;
1 = 5 to 9 mm opening;
2 = 10 to 14 mm opening; and
3 = more than 14 mm opening.

The evaluation also recorded the range of motion (ROM) findings for the worker's knees. The ROM of the right knee was the same as the uninjured left knee. The evaluation also indicates that the worker reported the following intermittent subjective complaints: numbness distal to the right kneecap when walking for a long period of time, shooting pain in his right knee in cold weather and a dull ache in the medial and lateral aspects of his right knee. Dr. Dahlstrom opined that the ROM values recorded for the right knee were likely reliable and consistent with the diagnosis.

The PFI memo by the disability awards officer (DAO) dated March 11, 2002 indicates the DAO calculated the right knee laxity findings using the Board's computerized ARCON protocol as follows: MCL – 1.66%, LCL – 1.66%, ACL – 1.67%, PCL – nil, for a total impairment rating of 4.99%. The DAO did not grant anything for reduced ROM or for the worker's reported subjective complaints.

Findings and Reasons

Issue #1 – Referral to the Disability Awards Department

In the June 17, 2001 notice of appeal of the Board's March 22, 2001 decision, the employer stated that the worker "had knee problems prior to 1997," and that "Any PFI did not result from [the compensable] injury." In written submissions dated December 15, 2004 and February 2, 2005, the employer's representative did not address the March 22, 2001 decision to refer the claim to the Disability Awards Department.

Rehabilitation Services and Claims Manual, Volume II (RSCM II) item #96.20, which applies to all decisions, including appellate decisions, made on or after July 2, 2004, provides that:

> The Board officer determines when temporary total disability or temporary partial disability benefits are concluded, and whether an actual or potential permanent disability is accepted on the claim. These decisions are generally made on the basis of information supplied by a treating physician, qualified practitioner, consulting specialist and/or the injured worker. Treating physicians and qualified practitioners are required to send periodic reports to the Board outlining the worker's condition and restrictions.
>
> A decision is provided to the worker, setting out whether an actual or potential permanent disability is accepted on the claim.
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> If an actual or potential permanent disability is accepted on the claim, the Board officer will refer the file to the Disability Awards Department for assessment. As part of the referral, the Board officer will prepare a memo, clearly setting out the status of the claim and confirmation of what permanent conditions have been accepted.

The March 22, 2001 memo from the case manager indicates that at a team meeting attended by Dr. C, a Board medical advisor, it was confirmed that the chondromalacia revealed in the arthroscopy is not accepted in the claim. It was also determined that the worker will have a PFI as a result of the compensable meniscal tear, and that the file would be referred to the Disability Awards Department.

In light of the March 22, 2001 memo recording what took place at the team meeting, including Dr. C's participation, and the evidence in the medical reports on the worker's progress, I find that the case manager's decision to refer the file to Disability Awards for assessment of a PFI of the right knee was consistent with the evidence and with RSCM II item #96.20. There was sufficient evidence that the worker would be left with a potential PFI to support the referral to Disability Awards.

The employer's appeal with respect to the case manager's decision to refer the claim to Disability Awards is denied.

Issue #2 – PPD Award

Section 23(1) of the Act provides that where a PPD results from the worker's injury, the Board must estimate the impairment of earning capacity from the nature and degree of the injury and pay compensation based on 75% of the estimated loss of average earnings resulting from the impairment.

Section 23(2) authorizes the Board to compile a rating schedule of percentages of impairment of earning capacity for specified injuries to be used as a guide in determining the compensation payable for permanent disability. The Board has established the permanent disability evaluation schedule (PDES) in Appendix IV of the

Rehabilitation Services and Claims Manual, Volume I (RSCM I). The impairment rating for immobility of the knees is found in items 66 and 67 of the PDES. Item 66 provides for up to 25% of total disability for knee immobility, and item 67 provides for 5% where knee flexion is limited to 90 degrees. There is no specific rating for knee ligament laxity in the PDES.

RSCM I item #39.10 provides that the PDES is a set of guide-rules, not a set of fixed rules. The decision-maker is free to apply other variables relating to the degree of physical impairment. Item #39.10 also provides that where the PDES covers the body part being assessed, but does not have a rating for the specific type of impairment, then the decision maker must first determine the percentage loss of function of the damaged area and then calculate the portion of the percentage allocated in the PDES for the body part. Because the PDES is used in calculation, this type of award is considered a "scheduled" award.

The DAO's March 11, 2002 PFI memo, which was attached to the March 13, 2002 pension letter and forms part of the decision under appeal, addressed seven issues under the heading "decision," namely: the effective date of the award, the wage rate, the percentage of disability, proportionate entitlement, relief of costs, loss of earnings and interest. Of these issues, the appellant has disputed only proportionate entitlement and relief of costs in the notice of appeal and written submissions.

In the June 17, 2002 notice of appeal of the March 11, 2002 Board decision, the employer stated that the worker "had knee problems prior to 1997" and that "Section 5(5) should be applied to the PPD."

In written submissions dated December 15, 2004 and February 2, 2005, the employer's representative states that the sole issue of concern for the employer is the chondromalacia in the knee joint which was not accepted in the claim. The representative argues that this was a pre-existing non-compensable condition or disability of the worker's right knee. The employer's representative submits that the PFI evaluation erroneously recorded the effects of the chondromalacia in the femoral condyle as a compensable condition. The representative refers to eight references to pain, weakness, soreness and irritation of the knee, and argues that pain was a factor noted in the ROM findings which were fed into the Board's computerized assessment program to determine the level of disability. Because the effects of the chondromalacia were erroneously put into the program, no deduction was made from the PFI calculation for pain and swelling due to the chondromalacia.

The worker's representative submits that the PFI evaluation recognizes that the small area of Grade 2 chondromalacia that was revealed during the surgery on the worker's right knee is not accepted as a compensable condition in the claim. The disability award was correctly calculated. The worker's representative submits that there is no evidence that the worker's disability was enhanced by a pre-existing condition.

Section 5(5) of the Act states that:

> (5) Where the personal injury or disease is superimposed on an already existing disability, compensation must be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease must, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease.

RSCM I item #44.10 provides that the mere fact that the worker suffered from some weakness, condition, disease, or vulnerability which partially caused the personal injury or disease is not sufficient to bring proportionate entitlement under section 5(5) into operation. The pre-existing condition must have amounted to a disability prior to the occurrence of the injury or disease. Where there are no indications of a previously reduced capacity to work, and no indications that prior ongoing medical treatment had been requested and rendered for the pre-existing condition, proportionate entitlement is not applied.

In this case there is no indication that the worker required ongoing treatment of his right knee or had a reduced capacity to work as a result his right knee chondromalacia prior to the June 11, 1997 work injury. The claim file includes the following information:

- In his first report, from the day of injury, in response to a question in the form about relevant pre-existing or related conditions, Dr. Bohn indicated “none.”

- In his July 7, 1997 application for compensation, the worker answered “no” to questions 13 and 14 in the application form, which ask about previous pain or disability in the area of injury, and about any defect or disability before the injury occurred.

- The employer’s July 9, 1997 report of injury indicates the employer did not know of any disability the worker had prior to the date of injury.

- Dr. Porter’s November 4, 1997 report indicates the worker’s past medical history was unremarkable.

As noted by Dr. C in his August 31, 2000 memo, there is no evidence that the worker had problems with his right knee prior to the incident at work on June 11, 1997. The employer has not provided evidence in this appeal that the worker had any right knee disability or that he sought medical treatment for his right knee prior to the June 11, 1997 injury.

Having reviewed all of the medical and other information in the claim file, I find that the worker's non-compensable right knee chondromalacia did not give rise to any disability prior to the June 11, 1997 work injury. The compensable right knee injury was not superimposed on a pre-existing disability as contemplated by section 5(5) and RSCM I item #44.10. The DAO's decision that proportionate entitlement is not applicable to the worker's PPD award is consistent with the evidence, the Act and Board policy.

In his submissions the employer's representative suggests that the PFI physician and the DAO mistakenly included impairment due the non-compensable chondromalacia in the PFI measurements and calculations. I do not find that this reflected in the referral to Disability Awards, the PFI evaluation or the DAO's PFI memo, all of which clearly indicate that the permanent condition accepted in the claim is the torn lateral meniscus with surgical repair. The PFI evaluation also states that chondromalacia is not accepted in the claim as a compensable condition. The contents of the PFI evaluation and the DAO memo do not suggest that either Dr. Dahlstrom or the DAO were under the mistaken impression that chondromalacia was accepted in the claim.

The employer's representative also submits that the PFI award erroneously includes a percentage for the worker's pain resulting from his chondromalacia. This is not reflected in the DAO's memo which rejects a possible increased award for subjective complaints. The award is based only on the objective right knee laxity findings.

The employer has not provided evidence or submissions that the values recorded in the PFI evaluation for right knee laxity are not accurate, that the laxity rating scale used by the physician was not appropriate or the DAO did not correctly calculate the impairment rating from the laxity measurements.

I find that the DAO correctly entered the laxity findings into the Board's computerized PFI calculator and that the resulting 4.99% rating of impairment for right knee ligament laxity is consistent with the worker's injury and surgery. The PPD award is consistent with the section 23(1) of the Act and with RSCM I item #39.10.

The employer's representative did not address the wage rate used to calculate the award, the effective date of the award or the denial of a loss of earnings pension, and I do not consider those aspects of the PPD award to be in dispute in this appeal. I make no findings with respect to them.

The employer's appeal with regard to the amount of the PPD award is denied.

Issue 3 – Relief of Costs

The employer's representative argues that because pain and swelling due to the chondromalacia were included in the assessment of the worker's disability, the employer and his class of employers should be relieved of costs related to that condition pursuant to section 39(1)(e) of the Act.

When the employer filed the appeal of the March 11, 2002 Board decision, the Review Board did not have jurisdiction over section 39(1)(e) relief of costs matters. Under section 90 of the Act, as it then read, only decisions with regard to workers' entitlement could be appealed to the Review Board. As decisions under section 39(1)(e) only relate to the how the costs of a claim are attributed to the employer and the employer's class, and do not affect the worker's entitlement to compensation, they could not be appealed to the Review Board. At that time, section 96(6) provided for appeals by employers respecting notices of decisions under section 39 to the Appeal Division of the Board. Accordingly, prior to its transfer to WCAT on March 3, 2003 under section 38 of the amending Act, the employer's Review Board appeal did not include the issue of relief of costs.

After the employer's representative raised the issue of relief of costs in his December 15, 2004 submission, WCAT wrote to the employer's representative to invite further submissions on the issue of whether WCAT has jurisdiction to decide the issue of relief of costs in this appeal. In submissions dated April 2, 2005, the employer's representative argues that because the Appeal Division and the Review Board both have been replaced by WCAT, and there is no provision for the Review Division to hear this issue, the employer should not have their right to appeal the issue of relief of costs extinguished by the restructuring of appeal bodies that took place as a result of the March 3, 2003 legislative changes.

The worker's representative provided a submission that supports the employer's argument that WCAT has jurisdiction to deal with relief of costs in this appeal.

Section 38 of the amending Act provides that:

> 38(1) Subject to subsection (3), all proceedings pending before the review board on the transition date are continued and must be completed as proceedings pending before the appeal tribunal except that section 253 (4) of the Act, as enacted by the amending Act, does not apply to those proceedings.

Section 38(1) of the amending Act does not expressly provide for WCAT to address issues that were not within the Review Board's jurisdiction before the appeal was transferred on March 3, 2003.

I have also considered whether the words in section 38(1), "must be completed as proceedings pending before the appeal tribunal," imply that in dealing with an appeal transferred from the Review Board, WCAT has jurisdiction over all of the issues it can normally deal with, regardless of whether the Review Board had jurisdiction over them. For example, under section 239(1) of the current provisions of the Act, which authorize appeals from decisions of review officers at the Board, a party affected by a review officer's decision on relief of costs is able to appeal to WCAT. In such an appeal, relief

of costs would be before WCAT, and under section 254 WCAT would have jurisdiction to "inquire into, hear, and determine all those matters and questions of fact, law and discretion arising or required to be determined" in relation to that appeal. Does this imply that, since the employer's appeal to the Review Board is to be completed as a WCAT proceeding, I have jurisdiction to deal with relief of costs? I conclude that it does not.

Under the current provisions of the Act there is no right to appeal a Board decision on relief of costs directly to WCAT. For a party to appeal such a decision under section 239(1), the matter must first have been the subject of a decision by a review officer. That prerequisite is not present in this case. The employer's representative has not referred to any provision in either the amending Act or the current provisions of the Act that indicate that I have jurisdiction over relief of costs in this appeal.

I conclude that it would require a very strained interpretation of section 38 of the amending Act and of sections 239(1) and 254 of the current Act to do as the employer wishes and deal with relief of costs in this appeal.

The argument by the employer's representative is essentially that if WCAT does not deal with the issue in this appeal, the employer will have been deprived of the right to an appeal on relief of costs because of changes in the legislation. I note, however, that the employer did file an appeal with respect to relief of costs to the Appeal Division. That appeal was, however, not pending on March 3, 2003 when the Appeal Division appeals were transferred to WCAT under section 39(2) of the amending Act. On June 4, 2002, an appeal officer in the Appeal Division wrote to the employer's representative and informed him that the March 13, 2002 letter from the DAO was not considered an appealable decision on relief of costs. The appeal officer advised the employer's representative to contact the Board's Disability Awards Department to request a reasoned decision on relief of costs. If the employer was dissatisfied with that decision, an appeal could then be filed with the Appeal Division. There is no indication in the claim file that the employer followed up on the letter from the Appeal Division either by requesting a further decision on relief of costs from the Disability Awards Department or by trying to persuade the Appeal Division to accept the appeal that was already filed. After the June 2, 2002 letter from the Appeal Division, the employer next raised the issue of relief of costs in the December 15, 2004 written submission to WCAT. Accordingly, I do not accept the argument of the employer's representative that if WCAT does not take jurisdiction to address relief of costs in this appeal, the employer's right to an appeal on this issue will have been abrogated by the amendments to the legislation. Between June 2002 and March 3, 2003 the employer had the opportunity to request a reasoned decision on relief of costs from the Board and to pursue an appeal with the Appeal Division. There is no indication the employer took such steps between June 2002 and March 3, 2003.

I conclude that in the circumstances of this case I am without jurisdiction to decide the issue of relief of costs. Under the former section 90, it was not possible for the

employer's appeal to the Review Board to include the issue of relief of costs. Accordingly, when the appeal was transferred to WCAT on March 3, 2003, it did not include an appeal on that issue. I also conclude that the language of section 38 of the amending Act and of sections 239(1) and 254 of the current Act do not have the effect of giving WCAT jurisdiction over the issue of relief of costs in this appeal.

As I am without jurisdiction to do so, I make no findings with respect to the DAO's statement in the March 13, 2002 PFI memo that relief of costs under section 39(1)(e) is not applicable to the worker's PPD award.

Conclusion

March 22, 2001 Decision

I confirm the Board's March 22, 2001 decision.

March 13, 2002 Decision

I confirm the Board's March 13, 2003 decision to grant the worker a PPD award based on a PFI of 4.99% of total disability without making any findings with respect to issue of relief of costs.

The employer's representative did not request reimbursement of expenses associated with this appeal and I do not make an order for reimbursement.

Guy Riecken
Vice Chair

GR/rb