Noteworthy Decision Summary

Decision: WCAT-2005-06541-AD **Panel**: Don Sturrock **Decision Date:** December 8, 2005

Appealable decision – Relief of costs – Section 39(1)(e) of the Workers Compensation Act – Section 96(2) of the former Workers Compensation Act – Policy items #114.40 and #114.43 of the Rehabilitation Services and Claims Manual, Volume I

A letter from the Workers' Compensation Board (Board) advising an employer that the Board had already provided a decision with regard to their entitlement to relief of costs under section 39(1)(e) of the *Workers Compensation Act* (Act) did not contain a new appealable decision.

The worker injured his foot in 1996 and ultimately required an excision of his right tibial sesamoid. The Board paid the worker wage loss benefits for two years. In 1996 the Board had informed the employer that it was not entitled to relief of costs under section 39(1)(e). The employer did not appeal that decision. In 2002 the employer requested the Board to provide a further decision with respect to section 39(1)(e). The Board responded by letter on November 4, 2002, stating that such a decision had already been made on the claim. The employer appealed this letter to the former Workers' Compensation Appeal Division (Appeal Division). On March 3, 2003 the Appeal Division was replaced by the Workers' Compensation Appeal Tribunal.

The employer argued the Board had not considered new medical evidence that became available after the 1996 decision. The new evidence arguably showed that pre-existing non-compensable conditions enhanced the disability resulting from the work incident. The employer also argued the precipitating event was minor. As a result, the employer requested that section 39(1)(e) be applied to relieve the employer of the costs of the claim.

The panel concluded that no new decision with regard to the application of section 39(1)(e) was made. Therefore, the November 4, 2002 letter did not contain a new appealable decision with respect to relief of costs under section 39(1)(e). It merely indicated that section 39(1)(e) has already been considered and that the employer had been provided with a decision. The letter also did not explicitly refuse to provide a reconsideration decision concerning the 1996 decision.

The panel noted the Board has large discretion in its application of section 39(1)(e) to individual cases. Policy items #114.40 and #114.43 of the *Rehabilitation Services and Claims Manual, Volume I* did not indicate that the Board was obliged, by policy, to provide the employer with a second decision on the application of section 39(1)(e), or a reconsideration of a prior decision to deny such relief. Section 96(2) of the Act, as it read prior to the March 3, 2003 amendments, provided the Board with the discretion, at any time, at its direction, to reopen, rehear and re-determine any matter. It did not give the employer a legal right to a reconsideration of a previous decision to deny relief of costs under section 39(1)(e). Thus, the panel concluded that, even if the letter did contain an appealable decision, it did not contain an error of law or contravention of published policy.

The employer's appeal was denied.

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WCAT Decision Number: WCAT-2005-06541-AD
WCAT Decision Date: December 08, 2005
Panel: Don Sturrock, Vice Chair

Introduction

The employer appeals a November 4, 2002 letter issued by an employer cost relief officer (ECRO) of the Workers' Compensation Board (Board). That letter advised the employer's representative, Mr. Howard, that, in a letter dated October 3, 1996, the Board had already provided a decision with regard to the employer's entitlement to relief of costs under section 39(1)(e) of the *Workers Compensation Act* (Act).

In a submission dated September 12, 2005, Mr. Howard argued that the evidence received on file after the October 3, 1996 decision supported his position that section 39(1)(e) is applicable.

Although notified of the employer's appeal, the worker did not file a notice of participation, or otherwise participate in this appeal.

An oral hearing has not been requested and, following my review of the evidence on file I do not find that an oral hearing would assist me. My findings in this case rely primarily on the medical evidence on file and the law and policy of the Board. Credibility is not an issue.

Issue(s)

The scope and resolution of this appeal involves the proper characterization of the November 4, 2002 letter. That is:

1. Does the November 4, 2002 letter contain an appealable decision concerning the application of section 39(1)(e) of the Act?

2. If the November 4, 2002 letter does contain an appealable decision, did the ECRO err in law, fact or contravene publish policy by refusing to provide the employer with the second decision on relief of costs under section 39(1)(e) of the Act or a reconsideration of the prior October 3, 1996 decision?

Jurisdiction

This appeal was filed with the Appeal Division. On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). Section 39(1)(a) of the transitional provisions contained in Part 2 of Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, provides that all appeal proceedings pending before the Appeal Division on March 3, 2003, are continued and must be completed as proceedings pending before WCAT (except that no time frame

applies to the making of the WCAT decision). This means that WCAT will consider this application under the former section 96(6) or (6.1) of the Act, including the requirement for the grounds of appeal of error of law, fact or contravention of a published policy. In his September 12, 2005 submission Mr. Howard argues that the November 4, 2002 decision contains an error of fact, law and policy.

Preliminary Matters

The November 4, 2002 letter was issued in response to a July 2, 2002 letter from Mr. Howard indicating that it was unclear whether a decision had already been provided with regard to the application of sections 39 and 42 of the Act. The letter went on to request a decision with regard to whether section 39(1)(e) or section 42 was applicable and, if a decision had been made earlier, that the issue be considered with regard to medical evidence received after the initial decision.

In his September 12, 2005 submission Mr. Howard makes no reference to, or argument in support of, the application of section 42 of the Act. His submission deals solely with the application of section 39(1)(e). Unfortunately, in the transition from the Appeal Division to WCAT, Mr. Howard's initial notice of intention to appeal was misplaced; however, in a letter dated August 17, 2005, Mr. Howard has confirmed that it was his intention to appeal the decision dated November 4, 2002, and requests that the November 4, 2002 "decision" be overturned. The November 4, 2002 decision made no specific reference to section 42 of the Act. In accordance with item #14.30 of the WCAT *Manual of Rules of Practice and Procedure*, the scope of my decision will be limited to the application of section 39(1)(e), as identified in Mr. Howard's submission of September 12, 2005.

In this submission Mr. Howard indicated that the initial October 3, 1996 decision is under appeal and also requested the application of section 39(1)(e) to the "PFI [permanent functional impairment] awarded under this claim". The October 3, 1996 decision was not appealed nor was I able to find evidence that a request for an extension in time to appeal that decision had been made. As such, it does not form part of this appeal.

With regard to the application of section 39(1)(e) to the worker's PFI, my review of the evidence on file indicates that no PFI was awarded.

Background and Evidence

On July 5, 1996 this than 48-year-old checker/loader suffered an injury to his right foot when he tripped over a guide bar, landing awkwardly on his right foot. He was seen the same day by his attending physician, Dr. Lim, who diagnosed a sprain.

In July of 1996 x-rays and a bone scan were completed, none of which demonstrated any significant pathology.

As a result of the worker's ongoing symptoms, he was seen by orthopaedic surgeon, Dr. Bhachu, who felt the worker had metatarsalgia as a result of the work incident. He recommended metatarsal arch supports.

When seen on November 6, 1996, Dr. Bhachu recommended a graduated return to work which the worker commenced on November 10, 1996. Unfortunately, he was unable to continue and booked off work effective November 17, 1996. Between then and October 1997 the worker was seen again by Dr. Bhachu, as well as by Dr. Lam, podiatrist, Dr. K, a Board orthopaedic consultant, Dr. R, another Board orthopaedic consultant, and Dr. Patel, an orthopaedic surgeon. Ultimately, on October 27, 1997, Dr. Patel performed an excision of the right tibial sesamoid.

In February of 1998 he was referred to a work-conditioning program, however, at assessment it was felt that his condition was too acute and further physiotherapy was recommended. He was subsequently admitted to a work-conditioning program on March 23, 1998 where he attended until his discharge in May of 1998. During the latter period of the work-conditioning program, the worker commenced a graduated return to work. Ultimately, the worker was able to return to his pre-injury employer.

Wage loss benefits were paid from July 6, 1996 through May 31, 1998, and again from June 8, 1998 through June 21, 1998.

In February of 2000 the worker was assessed for a PFI, and, in a letter dated April 7, 2000, was advised that the Board did not consider that he had an impairment in function that would, in the long term, affect his earning capacity and as a result, no permanent disability award was granted.

In a letter dated July 2, 2002, Mr. Howard requested the Board provide further decisions with regard to the application of sections 39 and 42. In response to that letter the ECRO issued the November 4, 2002 decision. That letter states in its entirety:

> You have requested a review of the above claim for consideration of relief of costs to the employer under Section 39(1)(e) of the *Workers Compensation Act*.
>
> This issue has already been addressed on this claim. The Claims Adjudicator's decision in this respect was communicated to the employer. A copy of this letter of October 3, 1996 is enclosed for your information.

In his submission of September 12, 2005, Mr. Howard reviewed the medical information received after the initial October 3, 1996 decision, and argued there was evidence of pre-existing non-compensable conditions that enhanced the disability resulting from the July 19, 1996 work incident, and the precipitating event could only be considered minor. As a result, he requested that section 39(1)(e) be applied from the 13-week point of the claim.

Reasons and Findings

I quoted the November 4, 2002 decision in its entirety as I find the wording of that letter makes it clear that no new decision with regard to the application of section 39(1)(e) was made. I find, therefore, that the November 4, 2002 letter does not contain a new appealable decision with respect to relief of costs under section 39(1)(e) of the Act. It merely indicates that section 39(1)(e) has already been considered and that the employer had been provided with a decision. The November 4, 2002 letter also does not explicitly refuse to provide the employer with a reconsideration decision concerning the prior October 3, 1996 decision.

I did consider writing Mr. Howard and inviting him to provide further submissions on the issue of whether the November 4, 2002 letter contained an appealable decision concerning the application of section 39(1)(e). However, as explained in the analysis to follow, even had I concluded that the November 4, 2002 letter contains an appealable decision, I would not be able to identify an error of law and/or contravention of published policy. As a result, I find it is not necessary to request further submissions.

Mr. Howard's July 2, 2002 letter requested a further decision concerning relief of costs with regard to the medical evidence received on file after the October 3, 1996 decision. Given the wording of the November 4, 2002 letter, it is debatable as to whether that letter implicitly constitutes a refusal to render a second decision concerning the application of section 39(1)(e), or a reconsideration decision of the prior October 1996 decision, based on new medical evidence.

Section 39(1)(e) of the Act outlines that the Board:

> provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability

It is evident from the wording of section 39(1)(e) that it is not an "entitlement" provision. It does not specifically direct the Board as to how the reserve to be administered. *Appeal Division Decision #95-0062* (11 WCR 95 page 297) further explored the provisions of section 39(1)(e) and found that:

> Subsection 39(1)(e) may be interpreted, therefore, as leaving implicitly a substantial amount of discretion for policy making as regards its potential application to individual cases.

Further, a review of the applicable Board policy (item #114.40 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) and *Decision #271* (4 WCR 10) in effect at the time of the November 2002 decision do not indicate that the Board was obliged, by policy, to provide the employer with a second decision on the application of section 39(1)(e), or a reconsideration of a prior decision to deny such relief. In particular, item #114.43 of the RSCM I did not obligate the Board to provide these further decisions. This item did state that, once a decision had been made, the

employer would be notified. In the case currently before me, the employer had already been advised in the October 3, 1996 decision that the application of section 39(1)(e) had been denied.

Section 96(2) of the Act, as it read prior to the March 3, 2003 amendments, provided the Board with the discretion, at any time, at its direction, to reopen, rehear and re-determine any matter. I do not read this provision as giving the employer a legal right to a reconsideration of a previous decision to deny relief of costs under section 39(1)(e). This does not mean, however, that the Board could not have, on its own motion, provided a reconsideration decision.

I find, therefore, that even if the November 4, 2002 letter contained an appealable decision to refuse to render a second decision concerning the application of section 39(1)(e), or a reconsideration decision of the original October 3, 1996 decision, this did not constitute an error of law, and/or a contravention of a published policy that was applicable at the time the Board rendered the November 4, 2002 letter.

Conclusion

The employer's appeal is denied. I find that the November 4, 2002 letter did not contain a new appealable decision with respect to the application of relief of costs under section 39(1)(e) of the Act. Further, even if it could be concluded that the November 4, 2002 letter contained an appealable decision to refuse to provide a second decision on an application of section 39(1)(e), or a reconsideration decision of the October 3, 1996 decision, such a refusal did not constitute an error of law, and/or contravention of a published policy.

No expenses have been requested, or are apparent, and none are awarded.

Don Sturrock
Vice Chair

DS/sc/gw

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