

Noteworthy Decision Summary

Decision: WCAT-2006-03016**Panel:** Teresa White**Decision Date:** July 28, 2006

Jurisdiction – Jurisdiction of WCAT to review award of expenses by Review Division of the Workers' Compensation Board –Sections 96.4, 100 and 239(2) of the Workers Compensation Act – Section 4 of the Workers Compensation Act Appeal Regulation – Item #B4.5 of the Review Division Practices and Procedures

WCAT has jurisdiction to hear an appeal from a decision by the Review Division of the Workers Compensation Board (Review Division) dealing only with the implementation a previous Review Division decision directing the Workers Compensation Board (Board) to reimburse the worker for the expense incurred in obtaining an expert opinion where the expert opinion was tendered before the Review Division and the substantive issue is not before WCAT.

The worker requested a review of a Board decision respecting his entitlement to a permanent disability award. The worker provided the Review Division with a work capacity evaluation that he paid for himself. The Review Division directed the Board to reimburse the worker his reasonable expenses associated with the work capacity evaluation. The Board subsequently reimbursed the worker \$1,150.00, based on the Board's fee schedule for a one-day functional evaluation. The worker's actual expenses for the evaluation were \$2,232.60. The worker requested a review of the Board's implementation of the previous Review Division decision and sought full reimbursement. The review officer found the Board had correctly implemented the decision. The worker appealed to WCAT.

The panel first addressed the issue of whether WCAT had jurisdiction to hear the appeal. The panel noted that section 239 of the *Workers Compensation Act* (Act) provides WCAT with jurisdiction over appeals from Review Division decisions. The panel further noted that subsection 239(2) sets out the classes of Review Division decisions that may not be appealed to WCAT, including those classes of decisions set out in section 4 of the *Workers Compensation Act Appeal Regulation*. These include decisions respecting the conduct of a review under section 96.4(2) to (5) of the Act. The panel noted that matters relating to the conduct of a review under section 96.4(2) to (5), include such things as submissions, posting of notices, and suspending a review.

The panel then addressed the issue of whether the Review Division's review of the Board's implementation of its direction to reimburse the worker related to the "conduct of a review." The panel noted that item #B4.5 of the *Review Division Practices and Procedures* (RDPP) provides guidance to review officers in awarding costs and expenses. The panel noted that the RDPP does not provide any statutory authority for the Review Division's awarding of costs. Instead, the RDPP points to published policy and section 100 of the Act, which is a general authority not limited to the Review Division. The panel also noted that section 96.4 does not address the question of costs and expenses. The panel concluded that the Review Division's jurisdiction to award expenses flows from the Board's general jurisdiction to do so and thus WCAT has jurisdiction to hear appeals from awards of costs and expenses made by the Review Division.

The panel denied the worker's appeal, concluding the Board had properly implemented the Review Division decision with reference to its fee schedule for functional capacity evaluations.

An amendment was issued for WCAT-2006-03016 and is attached to this document.

WCAT Decision Number : WCAT-2006-03016
WCAT Decision Date: July 28, 2006
Panel: Teresa White, Vice Chair

Introduction

In November 2004, the Review Division of the Workers' Compensation Board (Board) issued a decision respecting the worker's entitlement to a permanent disability award. In that Review Division proceeding, the worker had tendered a "work capacity evaluation," which the worker had paid for himself. In the November 2004 decision, the review officer said:

I find that reasonable expenses associated with the work capacity evaluation should be reimbursed by the Board. I refer the amount of the costs to be reimbursed back to the Board's Vocational Rehabilitation Department to determine the reasonable expenses to be associated with obtaining a one-day work capacity evaluation commensurate with Board's schedules or guidelines for obtaining similar evidence, but not to exceed the amount invoiced by the evaluator.

The Board implemented that direction and, in a December 10, 2004 letter to the worker, told him that he would be reimbursed the amount of \$1,150.00, based on the Board's fee schedule for a one-day functional evaluation. The worker's actual expenses for the evaluation were \$2,232.60.

The November 16, 2004 decision of the Review Division was not appealed to the Workers' Compensation Appeal Tribunal (WCAT).

The worker sought a review of the Board's implementation of the previous Review Division direction relating to the costs of the report. He sought full reimbursement.

In an April 4, 2005 decision, the same review officer that made the original direction denied the worker's request for review. He found that the Board had correctly complied with the direction with respect to the reimbursement amount for the functional evaluation in question.

The worker, who is represented by legal counsel, now appeals to WCAT, again seeking full reimbursement.

In the process of adjudicating this appeal, I disclosed the Board's schedule or guideline of fees for functional capacity evaluations to counsel for the worker and invited a further submission. None was received.

Issue(s)

The first issue is whether WCAT has jurisdiction to hear an appeal from a Review Division decision limited to the Board's implementation of a previous Review Division decision respecting the quantum of reimbursement for an expense incurred in obtaining an expert opinion where the expert opinion was tendered before the Review Division and the substantive issue is not before WCAT.

If WCAT does have jurisdiction, the second issue is whether the Board properly reimbursed the worker in accordance with the November 16, 2004 Review Division decision. It is important to note that the November 16, 2004 Review Division decision is not before me. As such, only the Board's implementation of, and not the substance of, the November 16, 2004 Review Division decision is before me.

Jurisdiction

This appeal was brought pursuant to section 239(1) of the *Workers Compensation Act* (Act). However, in this case WCAT's jurisdiction under section 239 is a fundamental issue.

Subject to statutory limitations, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (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's board of directors 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).

The law and policy applicable to this appeal is found in the Act and the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background and Evidence

The worker's file is voluminous and it is not necessary to repeat the entire chronology, with which the parties are well familiar, in this decision.

The expense claim at issue in this appeal flows from an April 13, 2004 work capacity evaluation conducted by an occupational therapist and certified work capacity evaluator (advanced). It was tendered by counsel for the worker in the context of the worker's appeal relating to his permanent disability ability. It addresses the worker's functional ability to perform the tasks involved in a number of jobs that were under consideration as suitable for the worker, despite his low back condition.

The occupational therapist tendered an account dated April 29, 2004 in the amount of \$2,232.60. This is more than the Board's tariff for a one-day functional capacity evaluation, which is \$1,150.00.

It is necessary for the purposes of this appeal to reproduce a number of statutory, regulatory and other provisions respecting the jurisdiction of the Review Division and WCAT.

Section 239 of the Act provides WCAT with jurisdiction on appeals from Review Division decisions. It states:

- 239(1) Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal.
- (2) The following decisions made by a review officer may not be appealed to the appeal tribunal:
- (a) a decision in a prescribed class of decisions respecting the conduct of a review;
 - (b) a decision respecting matters referred to in section 16;
 - (c) a decision respecting the application under section 23(1) of rating schedules compiled under section 23(2) where the specified percentage of impairment has no range or has a range that does not exceed 5%;
 - (d) a decision respecting commutations under section 35;
 - (e) a decision respecting an order under Part 3, other than an order
 - (i) relied upon to impose an administrative penalty under section 196(1),
 - (ii) imposing an administrative penalty under section 196(1), or
 - (iii) made under section 195 to cancel or suspend a certificate.

The *Workers Compensation Act Appeal Regulation* (B.C. Reg. 321/2002) (the Appeal Regulation) provides as follows:

Decisions that are not appealable

4. For the purposes of section 239(2) (a) of the Act, the following are classes of decisions that may not be appealed to the appeal tribunal:
 - (a) decisions applying time periods specified by the board under section 96(8) of the Act;
 - (b) decisions made under section 96.2 (4), 96.2(7), 96.4(2) to (5) or 96.4(7) of the Act;
 - (c) orders by the chief review officer under section 96.2(5) of the Act;
 - (d) decisions about whether or not to refer a decision back to the board under section 96.4 (8) (b) of the Act;
 - (e) decisions respecting the conduct of a review if the review is in respect of any matter that is not appealable to the appeal tribunal under section 239(2)(b) to (e) of the Act.

The Appeal Regulation also makes specific provision respecting WCAT's awarding of expenses. It states:

Expenses

Subject to subsection (2), the appeal tribunal may order the Board to reimburse a party to an appeal under Part 4 of the Act for any of the following kinds of expenses incurred by that party:

- (a) the expenses associated with attending an oral hearing or otherwise participating in a proceeding, if the party is required by the appeal tribunal to travel to the hearing or other proceeding;
- (b) the expenses associated with obtaining or producing evidence submitted to the appeal tribunal;
- (c) the expenses associated with attending an examination required under section 249(8) of the Act.

- (2) The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

Findings and Reasons - Jurisdiction

WCAT's jurisdiction is statutory. In the case of appeals from Review Division decisions, that jurisdiction is founded in section 96(1) of the Act, which provides WCAT with a broad jurisdiction to hear appeals from a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section.

Section 96(2) sets out the list of exclusions from that broad jurisdiction.

The first restriction is in respect of a decision in a prescribed class of decisions respecting the conduct of a review. That "prescribed class" is set out in the Appeal Regulation, and I will consider each in turn.

The first is decisions of the Review Division applying time periods specified in section 96(8) of the Act. Section 96(8) refers to the Board establishing practices and procedures for carrying out its responsibilities under the Act, including specifying time periods within which certain steps must be taken and the consequences for failing to comply with those time periods.

The exclusion of jurisdiction relating to section 96(8) is not applicable here.

The second is decisions made under section 96.2(4), 96.2(7), 96.4(2) to (5) or 96.4(7) of the Act.

Section 96.2(4) of the Act relates to the Review Division extending time to file a request for review. Section 96.2(7) relates to the Review Division's ability to deem an employer. Neither of these exclusions is applicable to the decision under appeal.

Section 96.4(2) to (5) relate to the conduct of a review, including such things as submissions, posting of notices, and suspending a review. Section 96.4(7) relates to the extension of time to complete a review. The matter of costs or expenses is not referred to in section 96.4 of the Act, which is titled "conduct of review."

The question flowing from those sections is whether the Review Division's review of the Board's implementation of its direction regarding the expenses of the work capacity evaluation relates to the "conduct of a review."

There is specific guidance provided to review officers in awarding costs and expenses, found in the *Review Division Practices and Procedures*, which provide as follows:

B4.5. Costs and Expenses

The Review Division may reimburse a party or a witness for reasonable expenses incurred during the course of a review. These expenses may typically be associated with attending an oral hearing or medical examination. In particular, the Review Division may reimburse the cost of providing evidence in two situations:

- (a) evidence of a kind which the Review Division would have sought had the party not produced it, and
- (b) evidence such as a medical report where it is considered reasonable for the party to have assumed that such a report would be required. The Review Division may reimburse the party even if the evidence did not specifically serve the review.

Parties are not obligated to incur costs for the collection of evidence. Parties should advise the Review Division of possible sources of information and permit Review Officers to conduct the necessary inquiries. In this way, parties avoid incurring expenses which may or may not be reimbursed by the Board. Alternatively, if a party intends to obtain evidence or arrange the attendance of a witness that has not been specifically requested by the Review Division, then the party should contact the presiding Review Officer before the expense is incurred.

Parties or witnesses may be reimbursed for the out-of-pocket expenses of attending an oral hearing or medical examination. Such expenses usually include the costs incidental to a person's physical presence at the hearing or examination (i.e. loss of wages for the time missed from work and travel expenses). The following criteria will be considered in deciding whether to reimburse these expenses:

- (a) Whether expenses were incurred by or on behalf of a successful party, although this is not itself determinative.
- (b) Whether attendance of non-party witnesses assisted in deciding the review.
- (c) Whether attendance of non-party witnesses was reasonable, based on the issues under review and evidence already available.

- (d) Whether the witness attended the hearing at the request of the Review Division.
- (e) Whether a party or witness incurred expenses to attend an oral hearing that did not proceed due to an administrative error. For example, where a party had not been informed of a postponement, and incurs travel expenses to attend the hearing, costs will generally be awarded regardless of the outcome of the review.

It is not necessary for a party to be represented during a review. If a party chooses to retain a representative for the purposes of review, they do so at their own expense. The Review Division is bound by the Board's policy respecting fees and expenses of lawyers and other advocates. As stated in Policy #100.40 of the *Rehabilitation Services & Claims Manual*, "No expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for compensation".

When a Review Officer has determined that a person is eligible for reimbursement of expenses, the Review Officer may decide the amount payable. Alternatively, in the case of claims files, the officer may refer the matter back to the Compensation Services Division to determine all or some of the amounts payable. The amounts payable are generally calculated according Policies #82.20 (Amount of Reimbursement), #83.13 (Income Loss) and #83.20 (Rates of Subsistence) of the *Rehabilitation Services & Claims Manual*. With regard to medical reports, the Review Division will normally limit reimbursement to the rate allowed by the Board's tariff or general practice.

A request for reimbursement of expenses should be made in the party's submissions during the review. The Review Division has the authority to reimburse expenses in a specific case even where no request has been made.

An award of costs is an alternative to the reimbursement of incidental expenses. An award of costs involves a Review Officer directing that one party pay the expenses of another under Section 100 of the Act. The principles governing this section are found in Policy 100.70 (The Awarding of Costs) of the *Rehabilitation Services and Claims Manual*.

The *Review Division Practices and Procedures* do not provide any statutory authority for the Review Division's awarding of costs. It points to published policy and section 100 of the Act, which is a general authority, not limited to the Review Division. Section 96.4 does not address the question of costs and expenses, which are

referenced in the *Review Division Practices and Procedures* on the basis of the Board's policies and practices respecting reimbursement of expenses.

The Review Division's jurisdiction to award expenses flows from the Board's general jurisdiction to do so. On that basis, I have concluded that awards of costs and expenses are not part of Review Division's "conduct of a review" as such is intended by section 96.4(2) of the Act listing the exclusions from WCAT's jurisdiction.

The subject matter of the Review Division proceeding was also not something excluded from WCAT's jurisdiction under section 239(2)(b) to (e) of the Act. The Review Division decision that initially ordered the Board to reimburse the expense was a decision respecting the worker's permanent disability award, which is a decision of the type that can be appealed to WCAT.

There are, as will be clear from the foregoing, certain decisions of the Review Division that cannot be appealed to WCAT. However, based on the analysis set out above, I have concluded that a Review Division decision addressing the Board's implementation of a previous Review Division decision respecting the reimbursement of expenses can be the subject of an appeal to WCAT.

However, my consideration of it is limited to whether the Board properly implemented the November 16, 2004 Review Division decision. Whether the Review Division's decision to award the expense "commensurate with Board's schedules or guidelines for obtaining similar evidence" is not the issue, which is limited to implementation of that decision.

Implementation of the November 16, 2004 Review Division Decision

The review officer directed the matter of reimbursement back to the Board's Vocational Rehabilitation Department to determine the reasonable expenses to be associated with obtaining a one-day work capacity evaluation, "commensurate with the Board's schedules or guidelines for obtaining similar evidence."

I have reviewed the Board's fee schedule for functional capacity evaluations. That schedule is not posted on the Internet. I considered whether, for the purposes of this appeal, it was necessary to disclose the fee schedule and invite submissions. Given the limited nature of this appeal, I concluded it was not necessary. The fees are clearly set out and there is no discretion involved in the calculation of the total. I have compared the payment made (\$1,150.00) to the fee schedule. This accords with a \$200.00 flat fee referral fee, a \$200.00 flat fee report fee, and a \$750.00 flat fee for a one-day functional capacity evaluation.

Conclusion

The worker's appeal is denied and the Review Division decision confirmed.

WCAT has jurisdiction to hear an appeal from a Review Division decision limited to the Board's implementation of a previous Review Division decision respecting the quantum of reimbursement for an expense incurred in obtaining an expert opinion, where the expert opinion was tendered before the Review Division and the substantive issue is not before WCAT.

The Board properly reimbursed the worker in accordance with the November 16, 2004 Review Division decision.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I therefore make no order regarding expenses of this appeal.

Teresa White
Vice Chair

TW/jd/mm

WCAT Amended Decision Number: **WCAT-2006-03016a**
WCAT Amended Decision Date: **August 29, 2006**
Panel: Teresa White, Vice Chair

Amended Decision

In *WCAT Decision #2006-03016* issued on July 28, 2006 I denied the worker's appeal regarding the Workers' Compensation Appeal Tribunal's (WCAT) jurisdiction to hear an appeal from a Review Division decision limited to the Workers' Compensation Board's implementation of a previous Review Division decision respecting the quantum of reimbursement for an expense incurred in obtaining an expert opinion where the expert opinion was tendered before the Review Division and the substantive issue is not before WCAT.

It has come to my attention that my decision contains typographical errors appearing in paragraphs two and three on page five. After reviewing the original decision, and based on the statutory authority set out in section 253.1(1) of the *Workers Compensation Act* (Act) regarding correction of decisions, I am amending paragraphs two and three of page five of the original decision as follows (changes/additions in bold):

Findings and Reasons - Jurisdiction

WCAT's jurisdiction is statutory. In the case of appeals from Review Division decisions, that jurisdiction is founded in section **239** of the Act, which provides WCAT with a broad jurisdiction to hear appeals from a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section.

Section **239(2)** sets out the list of exclusions from that broad jurisdiction.

Teresa White
Vice Chair

TW/jd