

Noteworthy Decision Summary

Decision: WCAT-2010-00928 **Panel:** J. Callan **Decision Date:** March 30, 2010

Section 7 of the Workers Compensation Act Appeal Regulation – Invoice for Expense – Tariff – Occupational therapist's report

This decision addresses the importance of parties providing invoices to support a request that WCAT order the reimbursement of expenses, in this case for an occupational therapist's report, as well as providing submissions if an amount above tariff is being requested.

The worker applied to have a finding in *WCAT-2009-01200* (original WCAT decision) set aside and reconsidered on the basis of a jurisdictional error. In that decision, a WCAT panel held, in part, that the worker's expense of obtaining an occupational therapist's report (Expense) be reimbursed at the Workers' Compensation Board's, operating as WorksafeBC (Board), tariff that is applicable to the expense of obtaining a medical-legal opinion. (There is no similar schedule or tariff for reports and opinions provided by occupational therapists) The worker alleged that the vice chair erred in ordering reimbursement of the expense on the basis of the Board's tariff for a physician's medical-legal opinion.

The original panel was provided with a copy of the occupational therapist's opinion. At the oral hearing counsel stated that he was seeking reimbursement of the Expense under section 7 of the *Workers Compensation Act Appeal Regulation*, but did not provide the account for the Expense to the original panel. The reconsideration panel found that the original WCAT panel did not contravene the rules of procedural fairness by failing to inform counsel that he was considering awarding expenses for the occupational therapist's opinion in accordance with the Board's tariff for reimbursing expenses for obtaining medical reports. Rather the panel made counsel aware at the oral hearing that he needed to see the Expense account, and yet counsel did not meet its commitment to provide the account to the original panel. The reconsideration panel further found that the original panel acted entirely reasonably and fairly and did not fetter his discretion by granting reimbursement by reference to the tariff for medical-legal opinions. The reconsideration panel came to this conclusion after noting that the original panel was mindful that the occupational therapist's report was not a medical-legal opinion and the Expense might be in excess of the amount set out in the Board's tariff for a medical-legal opinion. However, in light of the fact that counsel had not submitted the account, and in light of the contents of the report, it was reasonable to grant reimbursement by reference to the tariff for medical-legal opinions.

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Panel: Jill Callan, Chair

Introduction

- [1] The worker applies to have a finding in *WCAT-2009-01200*, dated April 30, 2009, set aside and reconsidered on the basis of a jurisdictional error. In that decision, a Workers' Compensation Appeal Tribunal (WCAT) vice chair:
- varied a July 25, 2008 decision of the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board) (*Review Decision #R0091300*) and found that the worker's claim for left elbow symptoms had resulted from a work-related aggravation of a pre-existing extensor tendon tear; and
 - confirmed a January 23, 2009 Review Division decision (*Review Decision #R0096027*).
- [2] Regarding the worker's expense of obtaining a January 6, 2009 occupational therapist's report (Expense), the vice chair directed that the worker be reimbursed at the Board's tariff that is applicable to the expense of obtaining a medical-legal opinion. This application relates solely to the vice chair's decision regarding the Expense.
- [3] WCAT has a two-stage reconsideration process. This is the decision in the first stage of that process. In this application I will be determining only whether there are grounds for the original panel's decision to be reconsidered. If I find that there are grounds for reconsideration, the merits of this matter will be considered in another decision.
- [4] The worker is represented by his trade union. Although invited to do so, the employer is not participating in this application.
- [5] This application has proceeded by written submission. Given that it turns on questions of law, I find it can be fully and fairly considered without an oral hearing.

Issue(s)

- [6] The issue is whether the WCAT vice chair's decision regarding the expense for obtaining the occupational therapist's report should be set aside and reconsidered in order to cure a jurisdictional defect. Specifically, the worker contends that the vice chair erred in ordering reimbursement of the expense on the basis of the Board's tariff for a physician's medical-legal opinion.

Jurisdiction

- [7] Section 255(1) of the *Workers Compensation Act* (Act) provides that WCAT decisions are final and conclusive and are not open to question or review in any court. However, in limited circumstances, WCAT may reconsider one of its decisions on the basis of jurisdictional error, such as a serious error of law or fact, a breach of the rules of procedural fairness, or an improper exercise of discretion. The British Columbia Court of Appeal confirmed this authority in *Powell Estate v. Workers' Compensation Board* 2003 BCCA 470. This authority is further confirmed by section 253.1(5) of the Act.

Standard of Review

- [8] Item #20.2.2 (Reconsideration to Cure a Jurisdictional Defect) of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will apply the same standards of review to reconsiderations to cure jurisdictional defects as are applied by the court on judicial review.
- [9] Section 58 of the *Administrative Tribunals Act* (ATA) sets out the standards of review applicable when the courts deal with petitions for judicial review of WCAT decisions. It provides, in part:
- (2) In a judicial review proceeding relating to [tribunals such as WCAT]
 - (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
 - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
 - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
 - (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
 - (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

The WCAT Decision

- [10] The vice chair conducted an oral hearing of the worker's appeals on January 23, 2009. At the beginning of the hearing, the vice chair noted that, although the only appeal before him was from the July 25, 2008 Review Division decision, the Review Division was about to issue a second decision (which was, in fact, issued on January 23, 2009) and the appeals of the two decisions would be decided together by the vice chair.
- [11] The worker's appeals to WCAT that were the subjects of the vice chair's decision raised issues regarding whether he was entitled to workers' compensation benefits for his left elbow condition. Prior to the oral hearing the union had sent to WCAT a copy of their November 6, 2008 letter requesting the occupational therapist's opinion and the occupational therapist's January 6, 2009 opinion. The union did not include the occupational therapist's account for providing the opinion.
- [12] I have listened to the portion of the audio recording of the oral hearing related to the worker's request for reimbursement of the Expense. At the beginning of the hearing, counsel for the union stated that the union was seeking reimbursement of the Expense under section 7 of the *Workers Compensation Act Appeal Regulation* (Appeal Regulation). Counsel stated that she had brought the account for the Expense to the hearing. However, as the amount was higher than usual, she wanted to ensure that the amount was correct before submitting the account to WCAT. The vice chair offered counsel post-hearing time to submit the account. Counsel pointed out that some vice chairs simply make an order reimbursing the expense of obtaining an occupational therapist's report without reviewing the related account. She also noted that the Board has not established a tariff for occupational therapists' reports. The vice chair stated that he required the account in order to make the order for reimbursement of the Expense because he needed to consider the amount and what had been involved. He stated "I'm reluctant to write a blank cheque frankly". Counsel concluded the discussion by stating that she would submit the account as soon as she could.
- [13] Section 7(1)(b) of the Appeal Regulation authorizes WCAT to reimburse a party to an appeal for "the expenses associated with obtaining or producing evidence submitted to

[WCAT]”. At the time when the worker’s appeal was heard and decided, item #13.23 of WCAT’s MRPP was applicable. It stated in part:

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

WCAT will generally order reimbursement of expenses for attendance of witnesses or obtaining 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 (rather than on an adversarial basis as in the court system), reimbursement of expenses is not dependent upon the result in the appeal. However, **WCAT will generally limit the amount of reimbursement of expenses to the rates or tariff established by the Board for this purpose.**

[emphasis added]

[14] Following the oral hearing, the worker’s appeal from the January 23, 2009 Review Division decision was joined with the worker’s appeal from the July 25, 2008 Review Division decision. WCAT invited written submissions from the parties regarding the second appeal. WCAT’s February 13, 2009 letter to the union informed the parties that submissions were considered to be complete and the matter would be returned to the vice chair for his decision. By letter dated March 30, 2009, the WCAT appeal coordinator informed the parties that the statutory due date for the decision, which is established under section 253 of the Act, had been extended to April 30, 2009.

[15] The vice chair issued the decision on April 30, 2009, which was more than three months after the oral hearing. The union had not submitted the account for the Expense to WCAT following the hearing. In considering the question of reimbursement of the Expense, the vice chair stated (at paragraph 78):

I also note the report of [the occupational therapist] useful and reasonable to obtain. The worker’s union has not provided an invoice for the expense of [the occupational therapist’s] report. As I advised the worker’s lawyer at the oral hearing, I am reluctant to make a general order of reimbursement if I do not know the amount. The worker’s union will therefore be reimbursed in an amount equal to the maximum of the Board’s current tariff for a medical-legal opinion. I recognize that preparation of the report was time-consuming and required some travel, but against that I consider

that the occupational therapist, while an expert in his field, is not [*sic*] an occupational therapist, not a medical specialist.

- [16] On May 5, 2009, the union submitted the account for the Expense to the Board and noted that WCAT had ordered reimbursement. The total amount of the account was \$2,891.89. The Board reimbursed \$1,430.00 to the union in accordance with fee code 19933 (the fee code for medical-legal opinions). Accordingly, the amount reimbursed was \$1,461.89 less than the Expense. My understanding is that the fee schedule for medical reports and opinions is negotiated from time to time by the Board and the British Columbia Medical Association. There is no similar schedule or tariff for reports and opinions provided by occupational therapists.

Submissions and Analysis

- [17] The worker has alleged several errors in relation to the vice chair's decision on reimbursement of the Expense.

Was there a contravention of the rules of procedural fairness?

- [18] One of the worker's contentions is that the vice chair contravened the rules of procedural fairness by failing to inform the union that he was considering awarding expenses for the occupational therapist's opinion in accordance with the Board's tariff for reimbursing expenses for obtaining medical reports and failing to grant the worker the opportunity to make submissions on that question. Accordingly, under section 58(2)(b) of the ATA, I must consider whether WCAT acted fairly in all of the circumstances.
- [19] In the text *Administrative Law in Canada*, Fourth Ed. (Ontario: LexisNexis, 2006) Sara Blake states at page 11:

...the courts require that decisions that affect the rights of individual persons be made following procedures that are fair to the affected parties. This requirement is called the "doctrine of fairness" or the "duty to act fairly".

At a minimum, the duty to act fairly requires that, before a decision adverse to a person's interests is made, the person should be told the case to be met and be given an opportunity to respond.

[footnotes deleted]

- [20] At the heart of the appeals before the vice chair was the question of whether the worker's left elbow problems were compensable. The question of the reimbursement of expenses is an ancillary matter. However, expenses incurred in producing medical

reports and other expert evidence, such as the occupational therapist's report that was provided in this case, can be significant. In this case, the amount that the vice chair ordered be reimbursed for the Expense was more than \$1,400.00 less than the amount of the Expense. Based on the following factors, I find the vice chair acted fairly in all of the circumstances:

- At the oral hearing, the vice chair stated clearly that he would not simply order reimbursement of the Expense regardless of the amount. His rationale, which I find to be entirely reasonable, was that he needed to consider the amount of the account and the work involved in preparing the report.
- At the oral hearing, counsel committed to send the account for the Expense to WCAT.
- Subsequent to the hearing, WCAT's February 13, 2009 letter put the union on notice that the appeal was being returned to the vice chair for a decision and WCAT's March 30, 2009 letter informed the union that the statutory due date for the decision had been extended to April 30, 2009. Accordingly, the union was aware that the vice chair was in the process of making his decision and the decision would be issued on or before April 30, 2009. Although the union was aware that the vice chair had requested the account for the Expense and was in the process of making his decision, the union did not meet its commitment to provide the account.
- The vice chair was mindful that the occupational therapist's report was not a medical-legal opinion and the Expense might be in excess of the amount set out in the Board's tariff for a medical-legal opinion. However, in light of the fact that the union had not submitted the account, and in light of the contents of the report, he granted reimbursement by reference to the tariff for medical-legal opinions.

Did the vice chair's decision regarding the amount of the reimbursement involve a patently unreasonable exercise of discretion?

- [21] The worker argues that the vice chair exercised his discretion to reimburse the Expense in a patently unreasonable manner. The vice chair clearly found himself in the difficult position of considering reimbursement of the Expense without knowing the amount. He was aware that the tariff for medical-legal opinions was not applicable but provided a clear rationale for determining that, in the circumstances, he would order reimbursement of the amount established by the tariff. I do not find that the vice chair exercised his discretion arbitrarily, in bad faith, for an improper purpose, or based predominantly on irrelevant factors. In addition, I do not find that he failed to take statutory requirements into account. I do not find that the vice chair exercised the discretion to reimburse expenses in a patently unreasonable manner. In fact, I find that he acted entirely reasonably and fairly given that he was in the difficult position of not having the account for the Expense. I also find that his unwillingness to order total

reimbursement of the Expense without being aware of the amount was the responsible course of action.

Did the vice chair unlawfully fetter his discretion in awarding the scheduled amount for medical-legal opinions?

- [22] The worker submits that the vice chair fettered his discretion. This amounts to an argument that the vice chair simply applied the usual practice outlined in item #13.23 of the MRPP of restricting the reimbursement of the Expense to the Board's rate or tariff without considering whether he should depart from that practice and exercising judgment that was appropriate in the circumstances.
- [23] A useful discussion of the general common law principles regarding fettering of discretion is found in *Sullivan and Driedger on the Construction of Statutes*¹ at pages 92 to 93. Professor Sullivan states, in part:

Discretion, once conferred, may not be restricted or fettered in scope.

Often, for ease of administration and in the interest of consistency, tribunals have issued guidelines indicating the considerations and criteria by which they will be guided in the exercise of their discretion. A policy may be issued to explain how a tribunal interprets a particular statutory provision. The publication of policies and guidelines is an admirable practice. It gives those in the industry advance knowledge of the tribunal's opinion on various subjects so that they may govern their affairs accordingly. ...

However, care must be taken so that guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost. A balance must be struck between ensuring uniformity and allowing flexibility in the exercise of discretion. The tribunal cannot fetter its discretion by treating the guidelines as binding rules and refuse to consider other valid and relevant criteria. "The discretion is given by statute and the formulation and adoption of general policy guidelines cannot confine it". ...

Conversely, because people may arrange their affairs in reliance on published policy, departures from policy in specific cases should be explained.

[footnotes deleted]

¹ Ruth Sullivan, ed., *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002).

[24] In this case, the vice chair considered whether he could order reimbursement of the full amount of the Expense but declined to do so because the union had not provided the account for the Expense and he did not know the amount. Apparently, he decided to order reimbursement of the scheduled amount for a medical-legal opinion because this appeared to be the best outcome given the nature of the occupational therapist's report. I do not find that he treated the general approach outlined in item #13.23 of the MRPP as a binding rule. I find that he exercised judgment that was appropriate in the circumstances.

No jurisdictional defect

[25] At the oral hearing, the vice chair clearly put the worker and the union on notice that he required the account for the occupational therapist's report in order to exercise his discretion to reimburse the Expense. He explained that he could not "write a blank cheque". Given that the account was not submitted to WCAT as requested, he determined that reimbursement would be equal to the fee schedule amount for a medical-legal opinion. He was mindful that the fee schedule was not applicable but clearly made the reimbursement order that he considered appropriate in all of the circumstances. I do not find that the vice chair's decision in this regard involved a denial of procedural fairness, a patently unreasonable exercise of discretion, fettering of discretion, or any other jurisdiction defect.

Conclusion

[26] I find that grounds have not been established for setting aside and reconsidering the decision in *WCAT-2009-01200* regarding reimbursement of the expenses for obtaining the occupational therapist's January 6, 2009 report. *WCAT-2009-01200* remains final and conclusive in accordance with section 255(1) of the Act.

Jill Callan
Chair

JC/it