Noteworthy Decision Summary

Decision: WCAT-2010-02437 **Panel:** G. Riecken **Decision Date:** September 9, 2010

Section 6 of the Workers Compensation Act Appeal Regulation – Section 4(5) of the Government Employees Compensation Act - Costs - Withdrawal of appeal

This decision considers the application of section 6 of the *Workers Compensation Act Appeal Regulation* (Appeal Regulation) to parties whose claims are made under the *Government Employees Compensation Act (GECA).*

The worker, who was employed as a correctional officer, had a claim for mental stress that arose from two incidents involving an inmate in June 2009. The claim was accepted by the Workers' Compensation Board, operating as WorkSafeBC (Board). The employer filed an appeal to WCAT and requested an oral hearing. The worker's representative submitted a report dated June 14, 2010 by a registered psychologist who provided a DSM-IV diagnosis of the worker's psychological condition and an opinion that supported the causative significance of the June 2009 workplace events. A copy of the psychological evaluation was disclosed to the employer's representative, following which the employer's representative wrote to WCAT to request the withdrawal of the appeal.

The panel granted the withdrawal of the appeal. The worker requested an award for costs incurred in preparing for the appeal and submitted that the costs provision under GECA, not section 6 of the Appeal Regulation, should be applied. The worker argued that under section 4(5) of GECA the law of the province respecting costs between the private parties in the civil courts should be applied. It was submitted that this conflicted with the narrower test for costs under the Appeal Regulation, and that where a specific provision of GECA conflicts with a provision of the provincial law, the provincial provision is not incorporated into GECA.

The WCAT panel did not accept the worker's argument. The panel found that section 4(5) of GECA did not conflict with section 6 of the Appeal Regulation. Rather, section 4(5) of GECA applies to federal employees, and their employer, the provincial law over costs that would apply to other parties in the provincial workers' compensation system. The panel concluded that it follows that the jurisdiction of WCAT to award costs under GECA is the same as is conferred on WCAT by section 6 of the Appeal Regulation. The panel noted that it would be incongruous with the underlying purpose of the no-fault worker's compensation system to import a provision similar to that in the courts by which the successful party automatically receives costs paid by the unsuccessful party.

In considering whether to apply section 6 of the Appeal Regulation and award costs in this case, the panel discussed the meaning of the terms "frivolous" "vexatious" and "abusive" as used in the Appeal Regulation. The panel found that the employer's actions in filing the appeal, or the manner in which the employer conducted the appeal, did not warrant an award of costs in this case. In this regard the panel noted that the record, and the information and arguments provided by the worker, did not establish that the appeal was so lacking in merit that it was obviously bound to fail, that the employer was not serious about the appeal, or that the employer was using the appeal process in bad faith for some reason other than a genuine disagreement with the Board's decision. Moreover, the panel found that the timing of the

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employer's request to withdraw, coming a few days after the worker provided the psychological assessment, seemed consistent with the employer having reassessed the decision to appeal based on all the evidence.

The panel did find that it was reasonable for the worker to have obtained the psychologist's opinion and ordered reimbursement of that expense pursuant to section 7 of the Appeal Regulation.

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WCAT Decision Number: WCAT-2010-02437
WCAT Decision Date: September 09, 2010
Panel: Guy Riecken, Vice Chair

Introduction

[1] This is a summary decision respecting the appellant's request to withdraw the appeal and the respondent's request to be reimbursed for expenses and costs associated with the appeal.

[2] The worker, a federal corrections officer, submitted a claim for compensation for mental stress in relation to events at work in June 2009. A case manager at the Workers' Compensation Board (Board), operating as WorkSafeBC, denied the worker's claim in a decision letter dated August 14, 2009. The worker requested a review of that decision by the Board's Review Division. In a decision dated January 15, 2010 (*Review Decision #R0108391*), a review officer varied the case manager's decision and found that the worker was entitled to compensation for her mental stress resulting from the June 2009 events. The employer filed an appeal of the review officer's decision.

[3] A lawyer represents the employer and an advisor from the worker's union represents the worker.

[4] The employer requested an oral hearing, and a hearing was scheduled for July 6, 2010. In a letter dated June 28, 2010 the employer requested the withdrawal of the appeal.

[5] The worker requests reimbursement of expenses and costs associated with the appeal. The worker argues that this issue should be decided solely in accordance with the applicable federal statute, the *Government Employees Compensation Act*, R.S.C. 1985, c G-5 (GECA), because the provision in the provincial workers' compensation scheme for payment of costs is inconsistent with the GECA and should not apply.

Issue(s)

[6] The following issues are to be decided:

1. Whether the employer's request to withdraw the appeal should be allowed.

2. Whether the worker should be reimbursed by the employer for costs associated with the appeal. This involves the question of whether section 6 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/2002 (Appeal Regulation) applies to parties whose claims were made under the GECA.

3. Whether the worker should be reimbursed by the Board for the expense of obtaining expert opinion evidence in relation to the appeal.

Jurisdiction

[7] As the worker is a federal government employee, the GECA applies to her claim. Section 4(1) of the GECA provides for the payment of compensation to a federal employee who is caused personal injury by an accident arising out of and in the course of his employment. Section 4(2) of the GECA provides that an employee referred to in section 4(1) is "entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen...." The worker in this case is usually employed in British Columbia.

[8] Section 239(1) of the *Workers Compensation Act* (Act) provides for appeals to the Workers' Compensation Appeal Tribunal (WCAT) from most final decisions of review officers. As noted in item #4.9 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), the GECA does not contain an appeal provision. In light of section 4(2) of the GECA, however, federal employees and their employers have the same appeal rights as other workers and employers.

[9] 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).

[10] Section 4(5) of the GECA provides the following with respect to the award to costs:

> (5) Any compensation awarded to an employee or the dependants of a deceased employee by a board, officer, authority or court, under the authority of this Act, shall be paid to the employee or dependants or to such person as the board, officer, authority or court may direct, **and the board, officer, authority or court has the same jurisdiction to award costs as is conferred in cases between private parties by the law of the province where the employee is usually employed.**
>
> [emphasis added]

[11] Section 6 Appeal Regulation authorizes WCAT to award costs related to an appeal only if WCAT determines that:

(a) another party caused costs to be incurred without reasonable cause, or caused costs to be wasted through delay, neglect or some other fault;
(b) the conduct of another party has been vexatious, frivolous or abusive; or
(c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

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[12] Subject to section 7(2), section 7(1) of the Appeal Regulation authorizes WCAT to order the Board to reimburse a party to an appeal 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 WCAT required the party to travel to the oral hearing or other proceeding;
(b) the expenses associated with obtaining or producing evidence submitted to WCAT;
(c) the expenses associated with attending an examination required by an independent health professional under section 249(8) of the Act.

[13] Section 7(2) of the Appeal Regulation provides that WCAT 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.

Background and Evidence

[14] Given the narrow issues in this summary decision it is not necessary to set out the background and evidence in detail.

[15] By way of context, it is sufficient to explain the following. The worker had a pre-existing medical condition and depressive symptoms. The employer was accommodating the worker because of that pre-existing condition, but the nature and extent of the accommodation were the subject of some dispute between the worker and the employer. The present claim arose from two incidents in June 2009 when the employer posted the worker to work in a segregation unit in a correctional facility. In the first incident an inmate was screaming, yelling death threats at correctional officers, smashing items in her cell and throwing urine under her cell door. The review officer found that the worker was not directly dealing with this inmate on that occasion, but had witnessed the events involving that inmate. An ERT (emergency response team) attended the unit later during that shift to deal with the disruptive and threatening inmate, shortly after the worker left for the day. When the worker was next posted to the segregation unit later in June 2009 she dealt directly with the same inmate who had been disruptive in the previous incident. When the worker denied a request by the inmate, the inmate screamed obscenities at the worker. The worker reported feeling "totally overwhelmed and horrified" and felt she had to leave the unit immediately. In addition to seeing an employee assistance counsellor, the worker saw a registered psychologist, who diagnosed an acute stress disorder.

[16] The review officer referred to previous Review Division decisions and concluded that section 5.1 of the Act (which sets out criteria of acceptance of mental stress claims) did not apply to the worker because she was a federal employee, and that the case was to be decided under section 4 of the GECA. Instead of the criteria in section 5.1 of the Act, the review officer applied criteria developed in previous Review Division decisions regarding mental stress claims under the GECA.

[17] The review officer accepted that the worker had been diagnosed by her treating psychologist with a mental disorder recognized in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders,* 4th edition (DSM-IV), namely an acute stress disorder. The review officer considered the worker's claim to fall somewhere between a gradual onset stress claim and a specific traumatic event claim. The review officer found it appropriate in this context to consider the "nature of the work incident or incidents that are alleged to have caused [the] condition" in terms of "whether they involved unusual circumstances or stimuli reasonably capable of causing the worker's diagnosed mental stress condition as well as whether the[y] were emotionally shocking and clearly and objectively identifiable."

[18] The review officer found that the first event in June was unusual, even in the context of the specific work environment. The review officer thought that if the second 2009 incident was the only event, it would not be considered unusual, but when taken together with the first June 2009 event, which the worker had witnessed, the worker had experienced unusual stimuli in her workplace. The review officer also considered that the events were emotionally shocking and clearly and objectively identifiable.

[19] The review officer found that the events of June 2009 formed part of the worker's employment and were of causative significance in producing the mental stress reaction. She accepted that the work events did not have to be the sole cause of the worker's condition, but had to be causally significant. The review officer found that the worker was emotionally vulnerable prior to the incidents in question. The employer was already accommodating her to some extent, but the worker's physicians had expressed concerns about her continuing in that capacity. The review officer found, however, that this was not a basis to deny the claim, since there was a significant causal connection between the unusual workplace events and the diagnosed acute stress reaction.

[20] The employer filed an appeal on February 16, 2010 and requested an oral hearing to allow the employer to call witnesses. On March 9, 2010 the employer's legal counsel informed WCAT that she was assigned to represent the employer in the appeal. The worker filed a notice of participation indicating that her union advisor would represent her.

[21] On about May 13, 2010 the WCAT Registry scheduled an oral hearing for July 6, 2010 with the agreement of both representatives. Subsequently, the employer requested a postponement of the hearing so that an independent medical examination (IME) of the worker could be arranged. Initially, the employer had proposed that the IME be conducted by Health Canada, and after the worker disagreed, suggested it be conducted by a mutually agreed specialist. The worker did not agree and wished to proceed with the scheduled hearing.

[22] In the meantime, both parties submitted documentary evidence in relation to the appeal. The documents submitted by the worker's representative on June 15, 2010 included a

report dated June 14, 2010 by a registered psychologist who undertook a psychological evaluation of the worker at the request of the worker's union. The psychologist provided a DSM-IV diagnosis of the worker's psychological condition (post-traumatic stress disorder) and an opinion that supported the causative significance of the June 2009 workplace events. A copy the psychological evaluation was disclosed to the employer's representative.

[23] For reasons explained in a memo dated June 18, 2010, I denied the employer's request for a postponement of the hearing.

[24] On June 28, 2010 the employer's representative wrote to WCAT to request the withdrawal of the appeal.

Reasons and Findings

(1) Withdrawal of appeal

[25] MRPP item #8.5 provides that a request for withdrawal of an appeal will normally be granted.

[26] Having considered the matter, I see no reason to depart from the normal practice in this case. I grant the employer's request to withdraw the appeal.

(2) Costs

- *Submissions*

[27] The worker's representative and the employer's representative both provided written submissions that I will refer to as the worker's submissions and the employer's submissions respectively.

[28] The worker submits that it is easy to recognize a conflict between the Appeal Regulation provision on costs and the provision in the GECA. The provision in section 4(5) of the GECA is more permissive than section 6 of the Appeal Regulation. The worker refers to an earlier WCAT decision (*WCAT-2010-00098*) in which the panel determined that when there is a substantial difference between the language of the GECA and the Act, the provincial statute should not be applied, and the federal statute should prevail. Based on that WCAT decision, the worker submits that a decision of the former Appeal Division of the Board (*Appeal Decision #2002-0292*) should apply in this case. In that decision the appeal commissioner found that the Board's policy on ordering one party to pay another party's costs was patently unreasonable because it was inconsistent with the GECA provision on costs.

[29] As the worker pointed out in her submissions, the employer did not address the worker's argument on the inconsistency between section 6 of the Appeal Regulation and section 4(5) of the GECA. The employer provided submissions with respect to section 6 of the Appeal Regulation, however, and it is implicit in those submissions that the employer believes section 6 should apply to the worker's request for an award of costs.

- *Does section 6 of the Appeal Regulation apply to the parties under the GECA?*

[30] The Appeal Division decision cited by the worker (*Appeal Decision #2002-0292*) dealt with an employee of a federal crown corporation whose claim for compensation for personal injury was made under the GECA. The appeal commissioner who originally decided the appeal (the original panel) reviewed the provisions of the GECA and some previous case law (including *Societe Canadienne des Postes v. Quebec,* (1966) 136 DLR (4th) 187 (Que. C.A.)), and concluded that the selective incorporation of provincial law into the GECA means that, although aspects of the provincial scheme are adopted in general, insofar as a specific provision of the GECA conflicts with a provision of the provincial law, the provincial provision is not incorporated into the GECA. The original panel analysed the language in section 4(5) of the GECA and in section 100 of the Act. Section 100 provided then (as it does now) that:

> 100 The Board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses the party has been put to by reason of or incidental to the contest, and an order of the Board for the payment by an employer or by a worker of a sum so awarded, when filed in the manner provided for the filing of certificates by section 45 (2), becomes a judgment of the court in which it is filed and may be enforced accordingly.

[31] The original panel concluded that section 100 of the Act must be interpreted as applying to claims under the GECA only insofar as it does not displace or otherwise conflict with the costs provision in section 4(5) of the GECA. He found that there are aspects of section 100 of the Act which do not conflict with section 4(5) of the GECA, but there are significant areas of inconsistency in which the GECA prevails, primarily in the qualification on the jurisdiction to award costs. He concluded that the intention of Parliament in creating a jurisdiction to award costs in section 4(5) of the GECA that was the "same jurisdiction to award costs as is conferred in cases between private parties by the law of the province," was to incorporate the provincial law of costs that applied to civil actions in the province. To the extent of a conflict between section 100 of the Act and section 4(5) of the GECA, the GECA provision had amended section 100 of the Act.

[32] The original panel in *Appeal Decision #2002-0292* went on to consider the Board's policy on the application of section 100 (item #100.70 of the *Rehabilitation Services and Claims Manual*, as it read at that time). The policy provided (as it does now) for the award of legal costs paid by one party to another only in unusual cases. The panel found that the policy could not be supported by reference to section 100 of the Act, because section 100 had been amended by section 4(5) of the GECA, and section 4(5) did not contain a similar qualification on the power to award costs. The panel found that the Board's policy regarding the award of costs under the GECA was patently unreasonable. The panel (who had allowed the worker's appeal on the substantive issue of his entitlement to compensation for a knee injury) went to make an order under section 4(5) of the GECA that the employer pay the worker's costs, and that these would be determined as if the costs were awarded in an action in court.

[33] The employer requested a reconsideration of that decision. In *Appeal Decision #2003-0558* a different appeal commissioner (the reconsideration panel) allowed the reconsideration application with respect to the issue of costs. The reconsideration panel considered the original panel's approach to be antithetical to the underlying principles of the workers' compensation scheme as enunciated in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* [1997] 2 S.C.R. 890 at paragraph 27, namely that:

> (a) compensation paid to injured workers without regard to fault;
> (b) injured workers should enjoy security of payment;
> (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
> (d) compensation to injured workers provided quickly without court proceedings.

[34] At paragraph 62 of her decision the reconsideration panel questioned in particular how a costs scheme proposed by the original panel, where the "winner" is rewarded with costs, fits into the compulsory no-fault mutual insurance scheme administered by the state.

[35] At paragraph 64 of her decision the reconsideration panel concluded that the reference to private parties in section 4(5) of the GECA is intended to place the employer (the federal government) in a similar position to other employers (private parties) under provincial workers' compensation schemes. It was not intended to import the law regarding cost between private parties that applies in court proceedings into the workers' compensation scheme. The reconsideration panel also noted that to import into the GECA a scheme of costs similar to that used in court proceedings would have the effect of treating federal employees differently from other workers in a particular province, a result which would be inconsistent with section 2 of the GECA (which provides for federal workers to receive compensation on the same conditions as provided under the law the province where the worker is normally employed.

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[36] The reconsideration panel also found that section 4(5) of the GECA did not confer a special jurisdiction over costs, since it said that the Board has the "same jurisdiction," and that this must be read in the context of the statute. "Same" in this context refers to the same jurisdiction as may be exercised in relation to workers employed by the private sector in the province. Under section 4(5) the Board has the "same" jurisdiction to award costs as is conferred on the Board in cases between private parties. The reconsideration panel also reasoned at paragraph 80 that administrative tribunals do not generally have authority to award costs. Such tribunals derive their authority from statute. Any authority to award costs must be found in the statute. For this reason it seems unlikely that the intention of section 4(5) of the GECA is to import the costs authority of the courts into the administrative tribunal. Rather it is to provide federal employees and the employer with the same rights as to costs as private parties have in the workers' compensation system generally. The panel commented that "If the elaborate scheme set out by the [original] panel were to apply I would expect to see more specific legislative authority for that scheme." The reconsideration panel concluded that the original panel erred in interpreting section 4(5) of the GECA, and that section 100 of the Act and the related Board policy applied to the case under appeal.

[37] The worker also referred to a recent WCAT decision, *WCAT-2010-00098*, in which a three-member non-precedent panel determined that when there is a material difference between the GECA and Act, the inconsistent part of the Act does not apply, and the claim is decided on the basis of the relevant provision in the GECA. In that decision the panel found that section 5.1, which is the provision governing mental stress claims under the Act, was substantially inconsistent with section 4 of the GECA (the section that establishes entitlement to compensation for personal injury under the GECA). The worker argues that, based on the reasoning in *WCAT-2010-00098*, the original panel's decision in *Appeal Decision #2002-0292* is correct and should apply in this case with respect to the issue of costs.

[38] In *WCAT-2010-00098* the panel acknowledged the principle stated by Abella, J.A., as she then was, in *Canada Post Corp. v. Smith* (1998), 159 D.L.R. (4th) 283 (Ont. C.A.), that the purpose of the GECA was to ensure uniformity in compensation between injured employees within any given province, rather than to provide a homogenous approach for federal employees across Canada. I note that the reconsideration panel in *Appeal Decision #2003-0558* also referred to Justice Abella's reasoning in support of her decision.

[39] In *WCAT-2010-00098* the panel also referred to *Morrison (Estate) v. Cape Breton Development Corp.*, 2003 NSCA 103, [2003] N.S.J. No. 353, in which the Nova Scotia Court of Appeal considered the issue of whether a provision in the provincial workers' compensation legislation, which required an issue on which the disputed possibilities were evenly balanced to be decided in the worker's favour, also applied to the determination under the GECA of whether a federal worker was entitled to compensation. The Nova Scotia Court of Appeal held that the provision in the provincial statute applied to the federal worker. In doing so the Court accepted the argument that

the provincial workers' compensation scheme governs claims submitted under the GECA provided that:

- The provision at issue is reasonably incidental to a "rate" or "condition" governing compensation under the law of the province, and
- The provision is not otherwise in conflict with the GECA.

[40] The panel in *WCAT-2010-00098* went on to refer to a number of court decisions that addressed the interaction between provisions for compensation for mental stress under provincial workers' compensation statutes and section 4(2) of the GECA, including the following: *Canada Post Corp. v. Workers' Compensation Appeal Tribunal* (N.S.), 2004 NSCA 83, [2004] N.S.J. No. 242 (NSCA); *Rees v. Canada (Royal Canadian Mounted Police*), 2005 NLCA 15, [2005] N.J. No. 103; *Embanks v. Nova Scotia (Workers' Compensation Appeals Tribunal),* 2008 NSCA 28, [2008] N.S.J. No. 133; *Bishop v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 29, [2008] N.S.J. No. 134; and *Stewart v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2008 NBCA 45, [2008] N.B.J. No. 216. In those cases the courts found that, unlike the GECA, the provincial statutes expressly excluded compensation for gradual onset mental stress or chronic mental stress. Those provincial provisions were therefore inconsistent with the GECA, and did not apply to mental stress claims by federal workers.

[41] Finally, the panel in *WCAT-2010-00098* noted that in *Canadian Broadcasting Corporation v. Luo*, 2009 BCCA 318*,* Saunders J.A. made the following comment:

> [27] While in general I agree with the approach taken in *Morrison,* I do not agree the provincial body is bound to apply the provincial legislation where it is materially different from the *Act*. The decision of *Rees* is helpful. In *Rees* the Newfoundland Court of Appeal considered a claim for gradual onset stress. The court found the task of the provincial body is to consider the language of the federal scheme, saying in a passage with which I agree:
>
> > [28] We agree. Before section 4(2) of the Act is engaged, thereby triggering compensation "at the same rate and under the same conditions as are provided under the law of the province", the provincial workers' compensation authority must first determine whether Mr. Rees is eligible, by virtue of section 4(1), to make a claim under the Act. This requires an interpretation of the word "accident" to ascertain whether it includes gradual onset stress.
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> [28] *Rees* is consistent with *Canada Post Corp. v. Worker's Compensation Appeals Tribunal (N.S)*, 2007 NSCA 129.

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[42] The panel in *WCAT-2010-00098* considered the language in section 4 of the GECA and found that it did not exclude gradual onset mental stress claims, and that therefore section 5.1 of the Act was inconsistent with the GECA and did not apply to the worker's claim.

[43] I turn to consider the interaction between the language in section 4(5) of the GECA respecting the jurisdiction of a provincial workers compensation tribunal to award costs, and section 6 of the Appeal Regulation.

[44] The worker is correct in noting that section 6 of the Appeal Regulation differs from the law of costs that would apply in an action for damages for personal injury before the B.C. Supreme Court. Instead of a presumption (subject to the court's discretion to order otherwise) that a successful party will normally receive costs, section 6 allows costs to be awarded only in certain circumstances. Rule 57(9) of the B.C. Supreme Court Rules provides that "costs shall follow the event unless the court otherwise orders." Under section 6 WCAT's jurisdiction to award costs is limited. WCAT may award costs only if it determines that at least one of the criteria in section 6(a), (b) or (c) applies. As seen from the reasons that follow, however, the difference between section 6 of the Appeal Regulation and Rule 57(9) of the Supreme Court Rules does not lead to the conclusion that section 6 is inconsistent with section 4(5) of the GECA.

[45] I pause to note that not all civil court proceedings for damages for personal injury in the province attract awards of legal costs. Under section 3(1)(a) of the *Small Claims Act*, RSBC 1996 c. 430, the Provincial Court has jurisdiction over a claim for damages if the amount claimed is less than an amount set by regulation (currently $25,000). Under section 19, while the Court may order a party to pay costs, section 19(4) provides that the Provincial Court must not order that one party in a proceeding under the Act or the rules pay counsel or solicitor's fees to another party to the proceeding. In her submissions the worker did not address this part of provincial law regarding the jurisdiction of the courts to award costs. I do not rely on this provision of the *Small Claims Act* in the following reasons, but note it for the sake of completeness.

[46] According to the interpretation of the section 4(5) of the GECA argued by the worker, the "same jurisdiction to award costs as is conferred in cases between private parties by the law of the province where the employee is usually employed" means a jurisdiction to award costs that is the same as is set out in Rule 57 of the Supreme Court Rules. That is, as I understand the worker's position, because the worker could be considered as successful in this appeal, she would automatically be entitled to an award of costs associated with the appeal payable by the employer, unless there was a reason for WCAT to decide otherwise. Under this interpretation, the more restrictive requirements of section of 6 of the Appeal Regulation would not have to be satisfied for there to be an award of costs.

[47] I do not accept the worker's argument. For the following reasons I find that, unlike section 5.1 of the Act (which was addressed in *WCAT-2010-00098*), section 6 of the Appeal Regulation is not inconsistent with the GECA.

[48] The situation in this case is not analogous to the one addressed in *WCAT-2010-00098*. In that case the panel found that the provincial workers' compensation law respecting mental stress was inconsistent with section 4 of the GECA because the provincial law excludes gradual onset stress or chronic stress, while the GECA does not exclude it. In this case the difference between provincial law and the GECA that the worker relies on is the difference between the costs provision in Rule 57(9) of the B.C. Supreme Court Rules and the costs provision in section 6 of the Appeal Regulation. A similar result to the one in *WCAT-2010-00098* would only follow here if, as the worker argues, "the same jurisdiction to award costs as is conferred in cases between private parties by the law of the province where the employee is usually employed" (from section 4(5) of the GECA) means the law of the province respecting costs between the private parties in the civil courts. I do not think that that is what it means.

[49] Previous WCAT decisions and decisions of the former Appeal Division are not binding in me. I agree, however, with the reasoning of the reconsideration panel in *Appeal Decision #2003-0558* with respect to the meaning and purpose of the language in section of 4(5) of the GECA regarding the jurisdiction to award costs, and I adopt that reasoning here. I understand the intention of Parliament in enacting section 4(5) of the GECA was not to import the costs authority of the provincial civil courts into the jurisdiction of the Board (or WCAT), but was to provide federal employees and their employer with the same rights as to costs as private parties have in the workers' compensation system in the province generally. I agree that this interpretation is consistent with the four underlying principles of the various provincial workers' compensation schemes as described in *Pasiechnyk*. I consider that in enacting the GECA Parliament intended to incorporate those principles into the provision of workers' compensation to federal employees. I also conclude that it would be inconsistent with those principles (particularly the fourth principle regarding the absence of court proceedings from the no fault compensation system) to import into the workers' compensation system the scheme for awarding costs as between private parties from the civil court system. In particular it would be incongruous with the underlying purpose of the no-fault worker's compensation system to import a provision by which the "winner" automatically receives costs paid by the "loser."

[50] I understand from the language of section 4(5) of the GECA, and its place in the overall context of section 4, that the jurisdiction to award costs is treated as incidental to the jurisdiction of the provincial body to pay compensation to injured federal employees. Section 4 deals with the payment of compensation generally to workers covered by the GECA. Section 4(2) provides that an employee covered by section 4(1) is entitled to receive compensation "at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by

persons other than Her Majesty." Section 4(5) addresses the jurisdiction of the provincial body to determine to whom the compensation is to be paid. It is to be paid by the provincial body to the "employee or dependants or to such person as the board, officer, authority or court may direct." Section 4(5) then adds that the provincial body has "the same jurisdiction to award costs as is conferred in cases between private parties by the law of the province where the employee is usually employed." I conclude that a provincial body's jurisdiction to award costs under section 4(5) of the GECA is not in addition to the jurisdiction over costs that exists in provincial workers' compensation law. Rather, section 4(5) applies to federal employees and their employer the provincial law over costs that would apply to other parties in the provincial workers' compensation system (that is, the provincial law that applies to "workmen, employed by persons other than Her Majesty"). It follows that the jurisdiction of WCAT to award costs under the GECA is the same as is conferred on WCAT by section 6 of the Appeal Regulation.

[51] It also follows that section 6 of the Appeal Regulation is not inconsistent with section 4(5) of the GECA. The inconsistency that the worker has emphasized, between section 6 of the Appeal Regulation and Rule 57(9) of the B.C. Supreme Court Rules, is not pertinent to the worker's request for costs in this case. This is because Rule 57(9) is not part of the jurisdiction to award costs as between private parties that is conferred by the law in the province that pertains to the workers' compensation system.

[52] Accordingly, section 6 of the Appeal Regulation applies to the worker's request for an award of costs in the present appeal.

- *Should the worker be awarded costs?*

[53] The worker asked to be "heard" in the event that I concluded that section 6 of the Appeal Regulation applies to this appeal. I have considered whether to give the worker a further opportunity to be heard, whether orally or by way of written submissions, but have decided that this is not necessary.

[54] Because MRPP item #8.5 provides that where an appeal is withdrawn, a party may request to be reimbursed for expenses, I invited submissions from the worker in response to the employer's request to withdraw the appeal. While item #8.5 refers only to expenses, I consider that WCAT may also award costs to a party under section 6 of the Appeal Regulation where an appeal is withdrawn. The worker has provided an initial written submission that addressed the criteria for an award of costs under section 6 of the Appeal Regulation. The worker also included an argument that section 6 should not apply. The worker also provided a written submission in reply to the employer's submission in which she further addressed the section 6 criteria. This is not a situation where the worker has provided a submission limited to a preliminary issue of jurisdiction, and seeks to be heard further on a substantive issue once the preliminary issue has been decided. The worker had an opportunity to make written submissions on any issue related to the withdrawal of the appeal, and chose to address both WCAT's jurisdiction to apply section 6 of the Appeal Regulation to federal workers

under the GECA, and the question of whether the worker satisfies the criteria for an award of costs under section 6 of the Appeal Regulation. In these circumstances I decline to allow the worker a further opportunity to address the issue of costs under section 6 of the Appeal Regulation.

[55] The worker requests (in the alternative) that the panel order the employer to reimburse the worker (or the worker's union) for legal costs associated with the appeal in accordance with section 6 of the Appeal Regulation. The worker submits that as the employer is represented by legal counsel, the worker felt it was necessary to have assistance from legal counsel as well in preparing for the hearing. The worker submits that she was very diligent in limiting legal costs and that the lawyer's mandate was limited to reviewing the case and offering advice and feedback. While the worker has not received an invoice, the lawyer has advised verbally that the amount would not exceed $2,000.00.

[56] The worker also submits that another reason supporting an order for costs resides in the fact that in the circumstances, the employer's appeal was "abusive or an abuse of the process." The worker explains that once the Review Division decision was issued, the worker's union contacted the warden of the correctional institution and discussed the employer's intentions. The warden made a verbal commitment at that time to write a letter to the Board advising that no appeal was going to be sought. The union then followed up by e-mail. The worker attaches the e-mail and the reply to her written submission. The worker did not hear back from the employer until she learned that the appeal was filed on the last possible date. The worker learned this when the union representative checked on the WCAT Internet site to see if an appeal had been filed. This lack of courtesy prompted an e-mail from the regional president of the union to the warden. That e-mail is also attached to the worker's written submission.

[57] The worker also submits that the employer's appeal was abusive based on other facts. The initial employer's report of injury to the Board indicated there was no objection to acceptance of the claim. Later a second version was sent under the direction of the deputy warden. After the Review Division decision, the warden indicated that some officials felt strongly about an appeal. The worker submits that in spite of those strong feelings, the employer put minimal effort in gathering facts and evidence to support their position. The employer never asked any doctor for a medical opinion from the time between filing the appeal up to the point of withdrawing the appeal some days before the hearing.

[58] The worker submits that the employer's conduct caused the worker (or the worker's union) to incur costs while the employer had no real intention to proceed with the hearing. This, the worker submits, speaks to the frivolity of their appeal. Whether the employer's conduct resulted from procrastination, ill intent or unfamiliarity with the compensation system is irrelevant. The worker submits that these circumstances satisfy the requirements of item #16.1.3 of the MRPP and that the employer should be ordered to reimburse the worker for the legal fees associated with the appeal.

[59] The employer's position is that this is not an appropriate case in which to award costs under section 6 of the Appeal Regulation or item #16.2 of the MRPP, because the conditions under which WCAT may award costs are not established in this case. In addressing the worker's various arguments the employer makes the following submissions.

[60] First, with respect to the need to retain legal counsel, the employer had the right to retain counsel and the worker's decision to retain counsel was her own.

[61] The decision to appeal the Review Division decision does not establish abusive, frivolous or vexatious behaviour, since the employer had a right to appeal, and to consult with appropriate advisors or counsel before making a final decision on whether to file an appeal.

[62] Concerning the employer's efforts in preparing the case, the employer states that the worker is incorrect in stating that the employer did not seek any medical opinion from the time it filed the appeal to the week before the hearing. The employer made good faith attempts to arrange an IME to assist the tribunal in making a decision on the appeal. The employer asked whether the worker would consent to an IME, but the worker declined. The employer then asked the worker to put forth a list of doctors so the parties could choose one to conduct an IME. The worker did not agree. The employer submits that the medical evidence in the existing record was not sufficient to provide a basis for a medical legal opinion (by a doctor retained by the employer) without a personal examination of the worker.

[63] The worker provided a reply to the employer's submission in which she addressed the application of section 6 of the Appeal Regulation in the event the panel decides that there is no material conflict between section 4(5) of the GECA and the provincial law. The worker argues that it is trite law that having a legal right does not necessarily make its exercise reasonable, abuse-free and not frivolous or vexatious. An appreciation of the circumstances in which the right to appeal was exercised is necessary. The worker also submits that the employer did not dispute or contradict any of the facts submitted in the worker's initial submission. In addition the employer has not provided any evidence of factual assertions made in the employer's submissions.

[64] The worker disagrees with the employer's view that the employer made good faith attempts to arrange an independent medical examination. From daily labour relations matters, the employer would be aware of the union's opposition to referring workers to Health Canada because of a lack of independence. The worker notes that in 2009 the employer asked the worker to be seen by Health Canada with regard to the worker's request for accommodation, but the worker refused and instead obtained medical evidence from her own physician. Since the employer was aware of the worker's position, it could not have been a good faith attempt to arrange an IME when the employer proposed that the IME be performed by Health Canada for the purposes of

the appeal. The worker also points to the lateness of the employer's request. With regard to the employer's suggestion that the worker provide a list of physicians' names, the worker states that appeal process does not require the parties to mutually agree on how to proceed. The worker states that she was on disability benefits and did not have access to the treatment she needed, and was suffering financially, mentally and physically, and any delay (related to an IME) would not have been in her interests. It was in her interests to proceed with the hearing as expeditiously as possible.

[65] The worker reiterates that no evidence was presented that the employer ever attempted to obtain a medical opinion by a physician, psychologist or a psychiatrist, but was unable to do so because of the inability to have the worker examined. Nor is there any evidence that the employer submitted the psychological opinion provided by the worker to any doctor for an opinion.

[66] I note that the terms "frivolous" "vexatious" and "abusive" are not defined in the Appeal Regulation.

[67] The *Concise Oxford English Dictionary* (10th edition, revised) defines "abusive" as follows:

> 1. Extremely offensive and insulting. 2. Characterized by illegality or physical abuse.

[68] "Frivolous" is defined in the same dictionary as follows: "not having any serious purpose or value."

[69] The same dictionary provides the following definition of "vexatious":

> 1. Causing annoyance or worry. 2. Law (of an action) brought without sufficient grounds for winning, purely to cause annoyance to the defendant.

[70] In *Freshway Speciality Foods v. Map Produce LLC, et al,* 2005 BCSC 1485, the Court provided a review of the indicia of vexatious actions in the context of an application to dismiss an action on the grounds that the action was vexatious and otherwise an abuse of process. The Court's discussion included the following:

> [49] In *Re Lang Michener et v. Fabian et al* (1987), 59 OR (2d) 353 at 358-359 (H.C.), the court summarized the indicia of vexatious actions as follows:
>
> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
> (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
> (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
> (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.
>
> Our Court of Appeal approved these indicia in *Dempsey v. Casey*, [2004] B.C.J. No. 1467 (C.A.).

[71] The Court went on to make the following comment about abusive proceedings:

> [52] There is no bright line dividing a vexatious proceeding from one that is an abuse of the court's process. In my view, the factors that signal a vexatious proceeding also signal an abusive process. Abuse of process is a wider concept however and may extend beyond vexatious proceedings to capture any circumstance in which the court's process is used for an improper purpose. As pointed out by Baker J., in *Babavic v. Babowech,* [1993] B.C.J. No. 1802 (S.C.), a decision not referred to by counsel, the categories of abuse of process remain open and include, for example, "proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression" (para. 18).

[72] In *R. v. Hanna*, 1991 CanLII 891 (BCCA) (Vancouver Registry CA013877), in the context of an application for bail pending appeal, the Court made the following comments about the meaning of "frivolous":

> Crown counsel argued with considerable force and ability that there is no merit in any of the grounds of appeal described in the material filed in support of this application. I would agree with her assessment to the extent

> that, as described and presented, I see little likelihood that any of them will succeed. But the section uses the word "frivolous", and even though the onus is put on an appellant to establish affirmatively that his or her appeal is not frivolous, I do not think that is equivalent to establishing that the appeal will succeed. The word "frivolous" has a special meaning in the law. I am of the view that it is, or should be, reserved for those proceedings of which it could properly be said there was absolutely no possibility of success. To put it another way, a frivolous ground of appeal is one the unsuccessful outcome of which is so obvious that it cannot reasonably be said to be arguable.
>
> While I do not think that the grounds of appeal, as described in this application, are likely to succeed, I cannot say that they are unarguable. Thus the appellant has established that his appeal is not frivolous.

[73] I recognize that the foregoing judicial considerations of the terms "frivolous", "vexatious" and "abusive" arose in contexts that are different from the Appeal Regulation. In addition, they are not binding on me. Nonetheless, I find them helpful in considering the terms as used in the Appeal Regulation. It is apparent that the terms are not entirely discrete concepts, but that to some extent they overlap. I consider the situations contemplated by section 6(b) of the Appeal Regulation would include, but not be limited to, the following: where a party brings an appeal so obviously lacking in substance or merit that it is bound to fail; where a party acts in bad faith or for an ulterior motive, such as by bringing an appeal or taking steps in an appeal only to annoy or upset another party; or where a party conducts an appeal in such way that the process itself is an abuse.

[74] Having considered the worker's submissions and the criteria in section 6 (a), (b) and (c) of the Appeal Regulation, I am not persuaded that the employer's actions in filing the appeal, or the manner in which the employer conducted the appeal, warrant an award of costs.

[75] The worker referred to the fact that the warden of the correctional facility initially told the worker that the employer would not appeal the Review Division decision, but other officials of the employer apparently overruled the warden. I do not consider a possible disagreement among officials of the employer about whether to pursue an appeal to amount to circumstances that would justify an award of costs under the provisions of section 6 of the Appeal Regulation. It may be unusual that the worker became aware of that internal disagreement because the warden told the worker the employer would not appeal, and was then apparently overruled. However, that one official of an employer may have overruled another at some point does not establish that an award of costs is justified.

[76] The worker also mentioned that the she only found out that the employer had filed the appeal on the last possible day when she checked the WCAT Internet site. While it may have been more courteous for the employer to have advised the worker that an appeal

was being filed, there was no requirement to do so. Under WCAT practice, once an appeal is filed, WCAT notifies the respondent and invites them to participate. In this case it appears that the worker found out about the appeal before receiving formal notice from WCAT. I understand that the worker may have been upset or disheartened to learn that the employer filed the appeal after the warden said they would not appeal. However, the manner in which the worker learned of the appeal in this case is not the kind of circumstance that would justify costs under the section 6 of the Appeal Regulation.

[77] The worker has referred to the fact that the employer retained legal counsel and that as a result the worker's union felt compelled to retain legal counsel to provided advice on the issues in the appeal. I agree with the employer's submission on this issue. The worker and her union were free to retain counsel. It is not necessary to have a representative, whether legal counsel or otherwise, in a WCAT appeal. Parties often participate in appeal without a representative, and many workers have union representatives who are not lawyers. It is not uncommon for one party to be represented by a lawyer, and the other party to be unrepresented. There is nothing unusual or untoward about the employer deciding to retain legal counsel, and the worker and her union were not required to retain counsel as a result. The employer did not cause the worker to incur costs unreasonably simply because the employer chose to appeal and then retained counsel to handle the appeal.

[78] The worker has also referred to the fact that the employer delayed until after the oral hearing was scheduled to try to arrange an IME, and should have known that the suggestion of an examination by Health Canada would be rejected by the worker. When the employer then suggested an IME by a psychologist from a list provided by the worker, it was too late to arrange without postponing the hearing, and the worker declined.

[79] The worker also points to the fact that after the postponement request was denied, and only some days before the hearing date, the employer decided to withdraw the appeal. In the meantime the worker continued with preparations for the appeal. This included obtaining an assessment by a registered psychologist.

[80] While I agree that the employer did not act promptly in trying to arrange for an IME with the worker's consent, and it would have been preferable for the employer to broach the topic with the worker earlier in the appeal process, I do not consider the employer's conduct to justify an award of costs. In particular, as I noted in the June 18, 2010 memo in response to the employer's postponement request, it was open to the employer to submit its own medical opinion based on the material in the record, and it would have been possible to request time to do so after the evidence was heard at the oral hearing. The worker also argues that the fact that the employer did not obtain such an opinion, and has not explained what steps it took to attempt to obtain such an opinion, shows the employer was not serious about pursuing the appeal, and is evidence of frivolity.

[81] I do not agree. The record, and the information and arguments provided by the worker, do not establish that the appeal was so lacking in merit that it was obviously bound to fail, that the employer was not serious about the appeal, or that the employer was using the appeal process in bad faith for some reason other than a genuine disagreement with the review officer's decision. Moreover, the timing of the employer's request to withdraw, coming a few days after the worker provided the psychological assessment, seems consistent with the employer having reassessed the decision to appeal based on all the evidence.

[82] Having considered the matter, including the review decision, the materials provided by the parties in relation to the appeal and the parties' submissions on the issue of costs, for the foregoing reasons I find that the circumstances in this appeal do not satisfy the criteria in section 6 of the Appeal Regulation for an award of costs.

(3) Expenses

[83] In light of the substantive issue in the appeal and the limited expert opinion evidence in the claim file with respect to the worker's psychological diagnosis and the question of causation, I find that it was reasonable for the worker to have obtained the formal assessment of the worker by a registered psychologist in relation to the appeal. Accordingly, pursuant to section 7 of the Appeal Regulation I find that the Board should reimburse the worker (or her union) for the June 14, 2010 psychological assessment.

[84] The worker seeks reimbursement of the full amount of the registered psychologist's invoice (dated June 15, 2010) for $2,625.00, which exceeds the fees established by the Board for such a psychological assessment when undertaken by a registered psychologist retained by the Board.

[85] Item #16.1.3.1 of the MRPP provides that WCAT will usually order reimbursement of expert opinions at the rate established by the Board for similar expenses. 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.

[86] Excerpts from the Board schedule of fees for expert medical and psychological evidence are found in Appendix 11 of the MRPP. The psychologist fee schedule in Appendix 11 sets out the "WCAT flat fees" for psychologist assessments. The schedule provides for payment of a flat fee of $1,882.00 (plus a $100.00 fee for a report prepared within 10 business days) where the assessment was done after June 1, 2010. That

amount is equivalent to the amount established in the Board's schedule of fees for psychology assessments, which provides for $156.76 per hour up to a maximum of 12 hours, plus $100.00 where the report is provided within 10 days of a confirmed appointment. The report in this case was completed within 10 days of the psychologist's appointment with the worker. The total available under the Board's schedule would be $1,982.00.

[87] The worker submits that that the union does not have the ability to negotiate preferential or discounted fees as the Board does. The worker also points out that there was no formal psychological assessment on file as the Board had not obtained one before denying the claim. The worker also points out that the psychologist retained by the union had to conduct and administer psychometric tests, and these required several hours for the psychologist to score. The worker also emphasizes the number of documents the psychologist had to review from the claim file and from the clinical records from the worker's physicians.

[88] I would not agree to award the full amount of the psychologist's fees in the circumstances of this case solely on the basis of the worker's argument that the union does not have the access to the same preferential fees the Board has been able to negotiate with a number of psychologists that it uses to provide assessments. I note that the worker and the psychologist retained by the union are located in a region of the province where I would not assume there to be a severely limited number of psychologists available. Nor has the worker suggested that she was hampered in that regard in finding a psychologist to undertake the assessment. The worker has not explained whether the union made efforts to retain other psychologists at the rates set out in the appendix to the MRPP, but was unable to do so.

[89] I have reviewed the union's letter to the psychologist requesting the assessment, the psychologist's report and her invoice. These show that aside from various claim documents and medical reports from physicians that were in the claim file, the psychologist reviewed the clinical records from two or more of the worker's physicians (which were included with the worker's submission in support of the appeal), as well as some other consultation reports and letters from physicians to the worker's private disability insurer.

[90] It is not usual for psychologists retained by the Board to undertake assessments to review claim documents and medical records. When undertaking an assessment at the request of the Board it is also normal for a psychologist to employ psychological tests, interview the worker and prepare a written report. At the same time, I conclude that although the matter on which the union was seeking an assessment was not exceptionally complex, the psychologist had to review an unusual amount of medical records related to the worker's background. This is in part related to the fact that the worker has a pre-existing medical condition and related depressive symptoms (which are the subject of a separate claim but are not before me in this appeal). The psychologist retained by the union was asked to review clinical records from the

worker's physicians pertaining to the pre-existing medical condition and depression as part of her assessment, particularly so she could provide an opinion on the question of the causative significance of the work place events of June 2009. In addition, I consider it relevant that the Board had not previously obtained an independent psychological assessment as part of its adjudication of this claim.

[91] Having considered the matter, I order the Board to reimburse the full amount charged by the registered psychologist as set out in the June 15, 2010 invoice for the report dated June 14, 2010.

Conclusion

[92] The employer's request to withdraw the appeal of *Review Decision #R0108391* is granted. Section 6 of the Appeal Regulation applies to the worker's request to be reimbursed for costs. Because the criteria in section 6 of the Appeal Regulation are not satisfied, I decline to make an order that the employer reimburse the worker for costs related to the appeal. I order the Board to reimburse the full amount of the registered psychologist's June 15, 2010 invoice for her psychological assessment of the worker dated June 14, 2010.

Guy Riecken
Vice Chair

GR/cv/ml