

Noteworthy Decision Summary

Decision: WCAT-2011-00522 **Panel:** Jill Callan **Decision Date:** February 25, 2011

WCAT Procedural Issues – Costs and Expenses – Policy Item 16.1.3 of the WCAT Manual of Rules of Practice and Procedure (former item 13.23)

This decision is noteworthy for its enumeration of potentially relevant factors to consider, when determining reimbursement of expenses of written evidence, such as expert reports.

In this case, the worker's union had obtained and paid for a functional capacity evaluation report. The report was prepared by an occupational therapist. The union had not provided the original WCAT panel with an invoice for the report. The original panel awarded reimbursement of the expense of the report "in accordance with the appropriate Board [tariff]." The Workers' Compensation Board, operating as WorkSafeBC (Board), provided reimbursement based on a fee schedule in a contract between it and the external service providers that perform functional capacity evaluations for it. The worker sought reconsideration of the reimbursement aspect of the original panel's decision.

The reconsideration panel accepted that, pursuant to former item 13.23 of the *Manual of Rules of Practice and Procedure* (MRPP) (item 16.1.3 at the time of the reconsideration decision), the report was helpful, and it was reasonable for the union to have obtained it. Former item 13.23 also provided that WCAT would generally limit the amount of reimbursement of expenses to the rates or tariff established by the Board.

However, the following constituted relevant considerations in determining the amount of the expense to be reimbursed:

- whether the party provided an invoice to WCAT in advance of the WCAT decision;
- whether there was a fee schedule or tariff amount established by the Board, and whether it was publicly accessible;
- whether the fee schedule or tariff was negotiated between the Board and a professional association, or simply established with certain professionals that provide services to the Board under contract;
- whether the relevant professional association has established standard fees or rates for providing reports.

In this case, it was unreasonable for the union to request reimbursement before the original panel without providing an invoice. The fee schedule relied upon by the Board was made publicly available only after the union obtained the report (and after the original panel's decision). Thus, it was not adequate to order reimbursement on the basis of a fee schedule not accessible to the public.

The report itself was overly lengthy. It would have been more useful if more concise, and focused on the worker's condition, rather than containing standard information such as detailed descriptions of the tests conducted.

The reconsideration panel varied the original panel's decision. It ordered reimbursement at the minimum hourly rate established by the guidelines in the occupational therapists' professional

society for medical legal opinions. The panel reduced the number of hours to be reimbursed for time spent on production of the report.

The panel noted that current item 16.1.3.1 of the MRPP provides greater guidance regarding reimbursement of expenses, than the provisions in effect at the time of the original decision.

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Introduction

- [1] In *WCAT-2010-00930*, I decided the worker's reconsideration application regarding *WCAT-2008-03646* (the 2008 decision). I concluded that the determination in the 2008 decision regarding reimbursement of the expense for obtaining an October 27, 2008 functional capacity evaluation report prepared by an occupational therapist (FCE report) was unfair. In all other respects, the 2008 decision remained final and conclusive in accordance with section 255(1) of the *Workers Compensation Act*.
- [2] The matter now before me is the second stage of the two-stage reconsideration process of the Workers' Compensation Appeal Tribunal (WCAT). The Practice Directive in item #20.3 (Reconsideration Applications) of the *Manual of Rules of Practice and Procedure* (MRPP) describes WCAT's two-stage reconsideration process and establishes that the second stage involves a fresh hearing of the appeal. Accordingly, I must make a new decision regarding the extent to which the union is eligible for reimbursement for the expense for obtaining the FCE report.
- [3] In the 2008 decision, the WCAT vice chair awarded reimbursement of the expense incurred in obtaining the FCE report "in accordance with the appropriate Board [tariff]." The result was that, although the union had paid \$2,126.25 to obtain the FCE report, the Workers' Compensation Board, operating as WorkSafeBC (Board), reimbursed \$1,150 leaving a short-fall of \$976.25.
- [4] In the workers' compensation appeal system, expenses for obtaining evidence are sometimes borne by a representative organization, such as a trade union or employers' association, instead of a party to the appeal. In this case, the FCE report was obtained and paid for by the worker's union. Accordingly, the worker had sought reimbursement on behalf of the union.
- [5] The worker is represented by his trade union. The current union representative is newly involved in the worker's claim and was not representing the worker at the time when the 2008 decision was made. The employer is participating and was originally represented by a consultant but is now self-represented.
- [6] This appeal has proceeded by written submissions. I find that the very limited question before me can be fully and fairly considered without an oral hearing.

Issue(s)

- [7] The sole issue is the extent to which the worker's trade union is eligible for reimbursement of the expense of obtaining the October 27, 2008 FCE report.

The Appeal Regulation

- [8] Section 7(1)(b) of the *Workers Compensation Act Appeal Regulation* (Appeal Regulation) authorizes WCAT to order the Board to reimburse "a party to an appeal ... for ... the expenses associated with obtaining or producing evidence submitted to [WCAT]."
- [9] If WCAT interpreted the Appeal Regulation literally, it would only reimburse workers, employers, and others having party status for expenses and would not reimburse representative organizations for those expenses. However, WCAT has taken an expansive approach to interpreting the Appeal Regulation because the purpose of the regulation is to encourage and enable workers and employers to provide evidence to WCAT so that the matter under appeal can be fully and fairly considered. While section 7(2) of the Appeal Regulation prohibits WCAT from reimbursing parties for expenses related to representation or attendance of a representative at an oral hearing, it does not prohibit reimbursement of the expenses incurred by a representative in obtaining evidence.

The MRPP version in place at the time of the 2008 decision

- [10] At the time of the 2008 decision, WCAT's MRPP provisions regarding expert evidence were contained in items #8.60 (Expert Evidence) and #8.61 (Rules for Expert Evidence). In item #8.60, expert evidence was defined to include evidence provided by people with a variety of qualifications, including occupational therapists and physiotherapists.
- [11] Item #13.23 of MRPP (Expense of Obtaining or Producing Evidence) was applicable to WCAT orders regarding reimbursement of expenses under section 7(1)(b) of the Appeal Regulation. It stated, in part:

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.**

WCAT may direct reimbursement for different types of expert evidence Most commonly, this involves additional medical evidence obtained for an appeal. ...

[emphasis added]

- [12] Item #13.23 went on to set out the fee codes for the various medical reports provided by physicians. Those fee codes have been set by agreement between the BC Medical Association and the Board. The fee codes do not include functional capacity evaluation reports because they are generally not prepared by physicians.

Expenses paid by the Board for expert evidence submitted during the initial adjudication and to the Review Division

- [13] Item #100.50 (Expenses Incurred in Producing Evidence) of the *Rehabilitation Services and Claims Manual Volume II* (RSCM II), applies in circumstances in which a worker obtains expert evidence when his or her claim is being initially adjudicated at the Board and where workers and employers submit medical reports to the Review Division. It provides, in part:

Where a worker incurs expense[s] in producing evidence of a kind which the Board would have sought had it not been produced by the worker, these expenses will be reimbursed by the Board as an item of administrative cost. In this connection, it makes no difference whether the expense was incurred directly or through a lawyer or other representative.

...

The cost of medical reports obtained by a worker or employer will also be paid by the Board where, following the claims inquiry or review by the Review Division, it appears reasonable for them or their representative to have assumed, prior to the claims inquiry or review by the Review Division, that the provision of the report was necessary. These costs may be paid even if, after the matter is concluded, it is determined that they had not specifically served to assist in the enquiry.

- [14] The policy goes on to provide examples of situations in which the Board will not reimburse expenses. One example establishes that the Board will not reimburse expenses incurred in obtaining reports that could have been obtained at no cost from the worker's attending physician.

The invoice for the FCE report

- [15] The invoice for the FCE report indicates that the occupational therapist billed \$825 (5.5 hours at \$150 per hour) for the functional capacity evaluation and \$1,200 (8 hours at \$150 per hour) for the preparation of the FCE report. Taxes amounted to \$101.25.

The Board's practices regarding reimbursement of the expense of obtaining a functional capacity evaluation report

- [16] By memorandum dated September 15, 2010, I asked a Board officer to provide information about the reimbursement of the expense for the FCE report that is the subject of this appeal. I also posed general questions regarding reimbursement of expenses for functional capacity evaluation reports, including questions regarding the public availability of applicable fee schedules. By memorandum dated September 27, 2010, the Board officer responded. My memorandum and that of the Board officer have been disclosed to the parties to this appeal.

- [17] The information provided by the Board officer includes the following:

- In this case, the Board's reimbursement of \$1,150 for the expense of obtaining the FCE report was based on the fee schedule (FCE fee schedule) in a contract the Board had entered into in August 2004 with the external service providers who perform functional capacity evaluation services for the Board. Since the invoice for the FCE report indicated that the evaluation took 5.5 hours, the Board had used the rate for a one-day functional capacity evaluation which was \$750. The Board also added \$200 as a referral fee and \$200 as a report fee.
- The FCE fee schedule became publicly available when it was posted to the Board's external website in November 2009.
- The Board applies the FCE fee schedule when reimbursing expenses of workers and employers pursuant to item #100.50 of the RSCM II.
- The FCE fee schedule applies to work performed by a physical therapist, occupational therapist, or kinesiologist.
- The FCE fee schedule that was applicable until September 30, 2010 provided that:
 - the fee for a one-day functional capacity evaluation requiring a minimum of six hours of work and received by the Board within five days was \$950; and
 - the fee for a two-day functional capacity evaluation report requiring eight hours of work over a two-day period and received by the Board within five days is \$1,300.

Submissions

- [18] The worker has provided submissions dated May 11 and November 19, 2010. Although participating, the employer has not provided submissions.
- [19] The worker submits that there are a variety of factors that WCAT should take into account in determining whether the reimbursement of expenses should be limited to the amounts of the rates or tariff established by the Board including:
- whether there is an established schedule that has been negotiated between the Board and the professional association representing those in the profession who provide the services;
 - whether the party and their representative were aware of the amount that would be reimbursed by the Board when they obtained the expert's report; and
 - the length and complexity of the expert's report.
- [20] The worker submits the expenses for functional capacity evaluations cannot be reimbursed in the same limited fashion as those for physicians' or psychologists' reports. He points out that, for example, the Board has negotiated with the BC Medical Association to establish the fees payable for medical reports and opinions and those rates are publicly available to physicians, parties to appeal, and their representatives. In contrast, the Board has not negotiated with professional associations to establish the rates for functional capacity evaluation reports. It has only negotiated with certain specific service providers who provide functional capacity evaluations to the Board on a regular basis. He notes the terms of the contract with those service providers were not publicly available when the union obtained the FCE report that is at issue in this appeal. Accordingly, the worker was not in a position to disclose the rates to the occupational therapist who provided the FCE report.
- [21] Regarding the FCE report that is the subject of this appeal, the worker notes that it is a 106-page report for which the occupational therapist charged \$150 per hour. The worker has provided the Guidelines for Private Practice for Occupational Therapy established by the board of directors of the BC Society of Occupational Therapists in December 2007. Those guidelines indicate that for "medical legal opinions occupational therapists will charge at least \$135 per hour." The worker submits that the FCE report "is competent, thorough, and detailed" and he contends that the fee charged for the report is neither excessive nor unreasonable. He notes that expenses of this nature have been reimbursed by WCAT panels in the past. As an example, he refers to *WCAT-2010-00908* in which the panel reasoned:

[53] The worker also asked for reimbursement for the expense of obtaining the ergonomic assessment. The worker also incurred expenses to obtain Dr. Anderson's report dated February 8, 2010.

[54] With respect to the ergonomic assessment, the occupational therapist charged an hourly rate of \$135.00, which was the minimum recommended rate according to the occupational therapist's society's guidelines (see exhibit #1). The total cost of the occupational therapist's report was \$1575.00.

[55] I note that the occupational therapist's report was lengthy, about 31 pages long. The report consisted of about 26 pages of analysis and about five pages of references. It included photographs and diagrams. These photographs and diagrams were helpful in interpreting the occupational therapist's complex analysis. The occupational therapist's fee would have also included the time that the occupational therapist spent at the worker's job site speaking to the worker, his colleagues, and the employer. I note that the *Manual of Rules of Practice and Procedure* (MRPP), item #16.1.3.1, entitled "Expert Evidence" does not provide much guidance as to the appropriate rate for an occupational therapist to charge in these circumstances. However, given the information provided by the occupational therapist's society's guidelines as well as the amount of time and effort the occupational therapist would have put in to produce his report, I find that the occupational therapist's account is reasonable at \$1575.00. Therefore, I order the Board to reimburse the worker for this expense at the amount the occupational therapist charged.

[22] The worker contends that the ultimate question that I must resolve in this case is whether the expense for the FCE report is reasonable.

[23] In my view, the following factors may be reasonably considered in ordering reimbursement of the expense for the FCE report:

- Did the party provide an invoice to WCAT in advance of the WCAT decision? In this case, during the 2008 oral hearing of the worker's appeal the union did not provide the invoice for the report or inform the vice chair of the amount of the invoice. In my view, it was unreasonable for the union to request reimbursement without providing the invoice.
- Is there a fee schedule or tariff amount established by the Board? If so, is the fee schedule or tariff publicly accessible?
- Has the fee schedule or tariff been negotiated between the Board and a professional association or has it only been established with professionals who provide services to the Board under contract?
- Has the professional association for the professional who provided the report established standard fees or rates for providing reports?

- [24] In this case, the occupational therapist assessed the worker on October 14, 2008 and produced the FCE report on October 27, 2008. As noted by the worker, the FCE report is 106 pages long. Prior to assessing the worker, the occupational therapist had reviewed medical documentation. The report contains detailed descriptions of the tests conducted and detailed test results. It appears that the descriptions of the tests may be standard to all of the occupational therapist's reports.
- [25] The vice chair who issued the 2008 decision found the FCE report to be useful in deciding the worker's appeal and found that it was reasonable to have obtained the report. The vice chair was unable to comment on whether the expense for obtaining the report was reasonable because she was unaware of the amount the union had paid for the report. I accept that it was reasonable for the union to have obtained the report and that it was helpful.
- [26] In this case, my order regarding the amount of the expense that will be reimbursed is a judgment call. I do not find it adequate to reimburse only the amount that the Board would pay to its service providers because the Board's arrangements with its service providers were not publicly accessible in 2008. In my judgment, the FCE report was overly lengthy and would have been more useful if it were more concise and if the information included was largely focussed on the worker's condition and merely supplemented by general information that was helpful in understanding the worker's functional capacity. In this way, readers of the report could establish the relevant facts without spending the time that is required to review such a lengthy document.
- [27] In all of the circumstances, I find that the union should be reimbursed for the 5.5 hours required for the functional capacity evaluation and 6 hours for producing the report at the rate of \$135 per hour (the minimum rate established by the Society of Occupational Therapists). This amounts to reimbursement of \$1,552.50 plus applicable taxes.

The current MRPP provisions

- [28] I note that the current version of the MRPP, which came into effect on November 3, 2009, has more comprehensive guidance regarding reimbursement of expenses. The former item #13.23 has been replaced by item #16.1.3 which, like the previous version, contains the statement regarding the amount of reimbursement set out in bold type in the portion of item #13.23 reproduced earlier in this decision.
- [29] The revised MRPP includes item #16.1.3.1 (Expert Evidence). It is more expansive in providing guidance regarding WCAT orders for reimbursement of expenses by the Board than the provision that was in effect in 2008. It notes that, in addition to including

medical evidence, expert evidence may include “ergonomic assessments, employability assessments and functional capacity assessments.” It provides the following guidance to parties to appeals seeking orders for reimbursement:

When seeking reimbursement of an expert opinion, in addition to the opinion, the requesting party must also provide a copy of their request and the expert’s bill or account. WCAT will usually order reimbursement of expert opinions at the rate established by the Board for similar expenses. The balance is the responsibility of the party who obtained the report. 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.

- [30] The requirements of this provision coupled with the steps the Board has taken to make the fees it pays for various reports and evaluations publicly available on its website establish a framework that parties can apply in requesting expert opinions and guidance for WCAT vice chairs in exercising their judgment to reimburse expenses. However, I note that, at this time, the Board has not established fee guidelines for all of the typical expert reports.

Conclusion

- [31] In reconsidering the aspect of the 2008 decision dealing with the reimbursement of the expense for obtaining the FCE report, I order that the reimbursement be increased to \$1,552.50 plus applicable taxes.

Jill Callan
Chair

JC/gn