

Supplement to Decision of the Appeal Division

Number: 2000-0848A

Date: February 19, 2001

Panel: David Van Blarcom

Subject: Whether Appeal Division Should Reimburse Worker for Expenses for Attending a Review Board Hearing

REIMBURSEMENT OF EXPENSES (REVIEW BOARD) (APPEAL DIVISION, JURISDICTION) – Whether the Appeal Division may provide reimbursement for the expense of attending a Review Board hearing – Section 7 of the Review Board regulation does not preclude the Appeal Division from reimbursing expenses incurred in Review Board appeal – Underlying purpose of Review Board practice is to favour reimbursement of appellants with meritorious appeals – Broad mandate to rehear under sections 91 and 96(3) of the Act gives Appeal Division authority to deal with ancillary issues arising from the merits of appeals.

Law: WCA (1996): s. 89(5), s. 89(6); *Workers' Compensation Act (Review Board) Regulation*, B.C. Reg. 22/86, s. 7(1)(2)

Policy: RSCM: #100.00, #100.12, #100.14, #100.50, #100.60, #102.46

Reimbursement of Expenses for Attending Review Board Hearing [worker appeal (rev. brd.)]
Appeal Division Decision No. 2000-0848A


17 *Workers' Compensation Reporter* [503]

Issue(s)

- (1) Should the Appeal Division reimburse the worker her expenses for attending the Review Board hearing? The worker's appeal was denied by the Review Board, but allowed by the Appeal Division. The worker also seeks reimbursement of the expense of letters her chiropractor prepared.

Background

- (2) By Decision #00-0848, dated June 7, 2000, I allowed the worker's appeal against Review Board findings dated June 3, 1999. At issue were whether the worker should have health care benefits to pay for chiropractic treatments she received for her epicondylitis and whether she should have wage loss benefits for a period between ceasing and resuming a graduated return to work program.

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- (3) The worker's representative had submitted a letter from the worker's chiropractor dated March 25, 1998 to the claims adjudicator in support of an application for reconsideration. She did not include an account for that letter or request payment for it at that time. It is not clear that the chiropractor charged for it. The application for reconsideration was unsuccessful, and the worker appealed to the Review Board.
- (4) In her written submission to the Review Board, the worker's representative did not request reimbursement of the March 25, 1998 letter or the costs of attending the Review Board hearing. No account for the March 25, 1998 letter was submitted to the Review Board. The Review Board did not mention costs or expenses in its findings.
- (5) In her submission to the Appeal Division, the worker's representative included in her summary of remedies sought:
- . . . reimbursement of costs for appropriate Section 7 benefits with respect to costs incurred to obtain [the chiropractor's] report and wage loss (if any) to attend the Review Board hearing.
- (6) In considering the appeal, I requested an opinion from the Board's chiropractic adviser and a Board medical adviser. The letter of March 25, 1998 was attached to the request. The opinion of the Board medical adviser did not support the worker, but the opinion of the Board chiropractic adviser did. The opinions received were disclosed to the worker's representative and the employer's representative.
- (7) The worker's chiropractor provided a letter dated April 13, 2000, in which he wished to substantiate his diagnosis in response to the opinion of the Board medical adviser. He said he understood the Board medical adviser had disagreed with it, but it is not clear he actually saw the opinion from the Board medical adviser, as his opinion does not cogently respond to it. He does not appear to have seen the report from the Board's chiropractic adviser, as he does not mention it in his letter. There is no account submitted with the April 13, 2000 letter. In Appeal Division Decision #00-0848, I acknowledge the letter of April 13, 2000, but it did not contribute to the result in the decision.
- (8) Unfortunately, in the Appeal Division decision of June 7, 2000, I did not discuss the worker's request for reimbursement of appeal expenses. On June 14, 2000, the worker's representative wrote the Appeal Division: ". . . to request consideration of her request for reimbursement of costs for the medical opinion in support of her appeal and any costs (if applicable) for wage loss to attend the Review Board hearing." She did not provide evidence of the cost of "the medical opinion" (by which I take she meant one or both of the chiropractor's letters). She also did not provide evidence that the worker had missed work to attend the Review Board hearing.
- (9) The worker's representative's request was disclosed to the employer's representative. The employer had not made submissions on the costs issue in the original Appeal Division appeal but, in a letter dated July 20, 2000, the employer's representative strenuously objected to reimbursing costs incurred for the Review Board hearing, as it would amount to asking for a decision on Review Board procedure. He said:

... [the worker] was not successful in her appeal before the Review Board and, in accordance with their procedure, the appellant's costs were not paid. We do not consider that such a matter can be dealt with by the Appeal Division.

- (10) In her reply dated August 14, 2000, the worker's representative said it was reasonable to request a medical opinion from the chiropractor and she thought it was highly unlikely that the appeal would have been successful without it. She submitted that, as the information was helpful, reimbursing the cost would be consistent with Review Board policy.
- (11) The apparently simple issue of reimbursing expenses therefore took on larger significance for practice and procedure beyond this case; namely, does the Appeal Division have jurisdiction to reimburse expenses incurred at an unsuccessful Review Board hearing?
- (12) Because of this larger issue careful consideration has been required, which has unfortunately delayed this decision.

Law and Policy

- (13) Section 89(5) of the *Workers Compensation Act* gives Cabinet (the lieutenant governor in council) the authority to make such regulations as are considered necessary or advisable respecting "any matter or thing for the administration and efficient operation of the review board." Section 89(6) says that, subject to the regulations, the Review Board may conduct an appeal in the manner it considers necessary.
- (14) Pursuant to that power, the lieutenant governor in council has provided the *Workers' Compensation Act (Review Board) Regulation*, which says, in s. 7:
 - 7(1) The review board may order the board to reimburse a person for the cost incurred in
 - (a) attending an oral hearing,
 - (b) obtaining a medical report submitted to the review board, or
 - (c) attending an examination required under section 6(4).
 - (2) The amount of costs authorized under subsection (1) shall not exceed the rates paid by the board for similar services.
- (15) The Review Board has published the *Workers' Compensation Review Board Policies and Procedure Manual*. That procedure manual does not claim to derive from any statutory authority, but it usefully sets out procedures that will provide consistency in the management of Review Board appeals. The Review Board has set out the following in its procedure manual:

Criteria for Awarding Costs

Section 7(1) of the Regulation allows the Review Board to authorize payment of specific types of costs. Each panel decides which costs, if any, should be awarded based on the circumstances of the appeal. The Review Board does not

authorize payment of costs incurred by a party's representative in attending a hearing. The following criteria should be considered by a panel in considering cost awards for persons attending an oral hearing:

1. Whether costs were incurred by or on behalf of a successful appellant. There may however, be circumstances in which a respondent or an unsuccessful appellant will be reimbursed.
2. Whether attendance of non-party witnesses assisted the panel in deciding the appeal.
3. Whether attendance of non-party witnesses was reasonable, based on the issues under appeal and evidence already on the worker's claim file.
4. Whether the witness attended the hearing at the request of the panel.
5. Whether the costs were incurred by a party or witness attending an oral hearing which did not proceed due to a Review Board error. For example, where a party has not been informed of a postponement, and incurs travel expenses in attending the hearing, the panel will generally award costs regardless of the outcome of the appeal.

The criteria to be considered in awarding costs for medical reports are as follows:

1. Whether the report is submitted on behalf of a successful appellant.
2. Whether the report assisted the panel in deciding the appeal.
3. Whether it was reasonable for the party to obtain the report, based on the issues under appeal and evidence already on the worker's claim file.

Workers attending examinations required by the Review Board under section 6(4) of the Regulation will be reimbursed for their costs under section 7(1)(c).

Recommendation for Payment of Costs

Panels may conclude that the Board should consider payment of costs not listed in section 7 of the Regulation, and may refer the matter back to the Board with that recommendation.

- (16) The governors of the Board are given the authority under s. 82 of the *Workers Compensation Act* to approve the policies and direction of the Board (the powers, duties, and functions of the governors are currently discharged by a Panel of Administrators). The *Rehabilitation Services and Claims Manual* is Board policy, and provides the following:

#100.00 REIMBURSEMENT OF EXPENSES

Set out below are the rules relating to the reimbursement of expenses for people attending at the Board or elsewhere in connection with claims inquiries or appeal hearings. The principles relating to expenses incurred in connection with medical examinations and treatment and vocational rehabilitation programs are dealt with in #82.00 and #83.00.

#100.12 *Claims Inquiries, Appeals to the Workers Compensation Review Board or the Appeal Division*

Where a claimant is attending on a claims inquiry, or on an appeal to the review board or to the Appeal Division, or for a decision review with a Manager, the payment of expenses is discretionary. There will be no undertaking to pay expenses and no advance.

1. Where the claims inquiry, review or appeal results in a decision for the claimant, the discretion will normally be exercised in favour of payment. But payment should be refused if it is concluded that the inquiry or appeal was brought about unnecessarily by the claimant.

For example, payment might be refused on an appeal where it is concluded that the denial of the claim in the first instance resulted from misleading information supplied by the claimant.

2. Where the claims inquiry, review or appeal results in a decision against the claimant, payment of expenses will normally be refused.

But payment may be allowed if there is special reason. An example might be, where, although the claim was unfounded, the bringing of the appeal resulted from misleading reasons for the decision being given in the first instance.

These provisions apply only where people are notified to come for a formal claims inquiry, an appeal or for a decision review with a Manager. Expenses are not reimbursed for people coming to the Board to make enquiries, or for ordinary discussions.

There is one exception to the foregoing. In the case of appeals to the Appeal Division, if an oral hearing is to be held outside the area in which a party resides, the Appeal Division may on request make provision for travel costs in advance of the oral hearing. This would include transportation and accommodation in the Board's Richmond Residence for the appellant and respondent, and would be provided without regard to the outcome of the appeal. Other costs in connection with attending the hearing will be determined in the normal fashion at the discretion of the panel.

#100.14 *Amount of Expenses*

The amount of expenses paid is calculated in accordance with the rules set out in #82.20 (transportation), #83.20 (meals and accommodation) and #83.13 (lost time from work where the worker is not already in receipt of temporary disability or vocational rehabilitation benefits from the Board).

#100.50 **Expenses Incurred in Producing Evidence**

Where a claimant incurs expense in producing evidence of a kind which the Adjudicator would have sought had it not been produced by the claimant, 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. However, confusion should not be made between the expenses incurred by the lawyer or other representative on behalf of the claimant and the fees of the lawyer or representative for work done. Only the former are reimbursable.

The cost of medical reports obtained by a claimant or employer will also be paid by the Board where, following the inquiry or appeal, it appears reasonable for them or their representative to have assumed, prior to the inquiry or appeal, 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.

The Board, in a decision on a claim, refused to pay for medical reports obtained by a claimant's lawyer. Although it was a normal and prudent action on the part of a responsible lawyer to seek information in order to acquaint himself properly with his client's problem before pursuing it before the Board, the information contained in the reports could have been obtained from the claimant's attending physician at no cost. A simple request to the attending physician, together with a release from the claimant, would have been sufficient.

It is not the Board's intention that claimants or employers should incur costs in obtaining evidence, for example, accountants' fees for producing earnings information. Rather, the general approach is that the claimant or employer should advise the Board of possible sources of information and the Board should carry out the necessary inquiries.

#100.60 **Decision on Expenses**

With regard to claims inquiries, any necessary decisions relating to expenses would be made by the Adjudicator.

With regard to appeals, the review board or the Appeal Division, as the case may be, will decide on the eligibility for expenses, and where expenses are payable, may either:

1. determine the amount payable, or
 2. refer the file back for the amount payable to be determined by the Adjudicator, or
 3. determine the amount on some items and refer the file back to the Adjudicator for determination of the amount on other items.
- (17) The *Rehabilitation Services and Claims Manual* contains a number of items with that refer to procedure at the Review Board. For example, policy item #102.46 recites s. 7 from the regulation, and references the Board's policy in #100.00.
- (18) S. 85.1 of the *Workers Compensation Act* authorizes the chief appeal commissioner to determine practice and procedure for the conduct of appeals by the Appeal Division, subject to Board policy. The practice and procedures of the Appeal Division do not refer to the reimbursement of expenses, but they are under review.

Analysis

- (19) The discussion of costs in the *Rehabilitation Services and Claims Manual* draws a distinction between expenses incurred in producing evidence (#100.50) and the payment of costs of attending the hearing (travel, meals and accommodation, lost wages) (#100.12 and #100.14).

Expense of Producing Evidence

- (20) I do not see any conflict with Review Board procedures when the Appeal Division provides reimbursement for medical reports (or other such reports, including chiropractic) if the Appeal Division finds the reimbursement justified by #100.50. Such reimbursement relates solely to the Appeal Division's use of the evidence and does not necessarily relate to the use of the reports at other levels of adjudication, including the Review Board.

Expense of Attending a Hearing

- (21) There is obviously no issue with respect to the Appeal Division providing reimbursement to a worker for the expense of attending a hearing at the Appeal Division. The issue is whether the Appeal Division may provide reimbursement for the expense of attending a hearing at the Review Board and, if so, whether it should, as a matter of practice or in a particular case.

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- (22) Section 7 of the Review Board regulation provides the necessary power to the Review Board to award expenses, but I do not find granting such a power to the Review Board necessarily precludes the Appeal Division from exercising a jurisdiction to pay expenses incurred in the Review Board appeal.
- (23) The Review Board practice manual stresses that the success of the appellant is an important consideration in reimbursing expenses, although it does provide that an unsuccessful applicant may be reimbursed in certain circumstances.
- (24) Policy item #100.12 also indicates that success is a factor. With respect to appeals to the Appeal Division, the policy says expenses will normally be paid if the appellant is successful, and denied if unsuccessful. Exceptions against payment are suggested when the worker provided misleading information, and in favour of payment when bringing the appeal resulted from misleading information from the Board.
- (25) The significance of success indicates an underlying purpose to support meritorious appeals and not to support appeals that are not meritorious. In pursuance of that purpose, the Review Board practice would deny expenses where an unsuccessful appeal would be viewed as not having merit in that context. However, if that appeal is subsequently allowed at the Appeal Division and it is found to have been meritorious after all, why should the worker not be reimbursed for costs at the Review Board as well? Such reimbursement would not be contrary to the underlying purpose of the Review Board practice, which favours reimbursement of appellants with meritorious appeals. I therefore do not see that such reimbursement would be an interference in Review Board practice.
- (26) Moreover, the jurisdiction of the Appeal Division in an appeal from the Review Board is pursuant to sections 91 and 96(3) of the *Workers Compensation Act*. It is a rehearing by the Appeal Division and the Division has the discretion “to initiate and to conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it” (Governors’ Decision No. 75, 10 *Workers’ Compensation Reporter* 753). That broad mandate empowers the Appeal Division to deal with the merits of appeals before it, and is capable of extending to ancillary issues arising from those merits, such as costs.
- (27) There might be cases in which the Review Board has expressly refused expenses because the appellant misled the Review Board or abused its process or for some other such reason, and the Appeal Division would then have to decide on the facts of the particular case whether it was appropriate to reimburse expenses contrary to the express finding of the Review Board. However, that is a different situation from declining to reimburse because of lack of merit.
- (28) Although the statutory basis is different, I do note that it is not uncommon for the B.C. Court of Appeal to award costs to a successful appellant “both here and in the court below.” The notion of an appeal tribunal reimbursing costs incurred in the first instance is therefore a familiar one.

This Circumstances of the Case

- (29) The worker has not yet provided the invoices for the chiropractor's letters. In general it is preferable for a number of reasons to provide invoices for an opinion letter at the time the opinion letter is provided that indicate whether the invoice has been paid and by whom. The Appeal Division panel does not want ancillary issues such as costs to require time that can better be spent determining the merits of appeals.
- (30) Firstly, without the invoice there is no evidence the expert has billed for the letter. There are a few experts who will provide such letters at no cost, and in such cases there would be nothing to reimburse. Secondly, providing the invoice with the letter gives the panel the option of determining whether there should be an exception to limiting payment of the opinion letter to the Board's tariff. Thirdly, without the invoice, we do not know whom we should order to be reimbursed, the worker or the representative.
- (31) Fourthly, caution may be indicated in reimbursing invoices that were only billed after the appeal was successful. While such billings may be made in good faith to assist a financially disadvantaged party, there may be cases in which such a billing procedure gives the expert a financial interest in the success of the appeal: as the expert would only expect payment if the opinion were supportive, this could undermine the objectivity that is expected of an expert opinion.
- (32) In the present case, I find the letter of March 25, 1998 and (to a lesser extent) the letter of April 13, 2000 meet the guidelines of policy #100.50. The worker or her representative will be reimbursed the cost of the chiropractor's letters of March 25, 1998 and April 13, 2000, according to the Board's tariff for medical legal letters, upon the worker's representative producing invoices that were made out before the date of the Appeal Division decision. The letter of April 13, 2000 was not very useful because it was not very responsive to the opinions at hand; at the same time, it was reasonable to seek an opinion in response to the potentially damaging opinion from the Board medical adviser.
- (33) As the worker's appeal has ultimately been found to have merit, the worker will be paid her expenses for attending the Review Board hearing, in accordance with policy item #100.14. The file is returned to the claims adjudicator pursuant to policy item #100.60 to determine and pay the amounts payable.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.

