

## Decision of the Appeal Division

**Number:** 92-0489  
**Date:** February 26, 1992  
**Panel:** Cassandra Kobayashi, Walter N. Peain, Derrick Spooner  
**Subject:** Section 100 – Costs

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In a decision of this panel dated December 4, 1991, we denied the employer's appeal, and advised we would hear argument from the worker's counsel concerning costs.

The issue on appeal is whether the worker is entitled to receive legal costs and disbursements.

The worker's counsel argued that Section 100 allows the Board to "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 he has been put to by reason of or incidental to the contest."

The worker's counsel asks that the panel exercise its discretion based on the particular facts of this case. He submits that the Referral Committee set up by the Workers' Compensation Board to review Review Board findings had already determined there were no grounds for an appeal. Counsel describes the economic consequences of the Board's initial denial of the claim, and the worker's two appeals to the Review Board. He suggests the appeal to the Appeal Division

came about as a consequence of the employer's lack of involvement in the earlier stages of this matter. When the worker won his second appeal before the Review Board, only then did the employer become interested in the proceedings. The worker was then forced to re-argue the earlier appeal in front of this tribunal on the same evidence. The identical issues were argued before this tribunal that were already addressed by the Review Board. In short, the worker had to win his case on two occasions; once before the Review Board, when the employer chose not to participate, and once before this tribunal as a consequence of the employer's appeal.

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Counsel says the employer did not advance new evidence at the hearing and simply re-argued the issues previously addressed by the Review Board and the Referral Committee. He says that despite the Referral Committee's conclusion that these grounds were not "the proper basis for an appeal" the employer filed the Notice of Appeal with the very same grounds.

The worker's counsel also suggests the worker and employer are on unequal financial footing. He suggests the employer did not suffer from two years of disability nor the humiliation of going on social assistance.

The employer's response says in part,

We wish to point out that it is the employer's *right* to appeal. We sought to have an orderly, complete examination of medical evidence which is something we did not feel the Board had adequately pursued. We obtained a specialist's opinion and attempted to have medical histories put forth, but our attempts were, for the most part, thwarted.

The employer responded to the allegation of unequal financial footing between the worker and employer by pointing out that the employer utilized the services of the Employers' Advisory Service of the Ministry of Labour, free of charge. As well, the employer's representative had offered on October 18, 1991 to postpone the date of the hearing if the worker wished to access similar representation through the Workers' Advisory Service.

The employers' adviser referred to Board policy in item #100.40 of the *Rehabilitation Services and Claims Manual* (the *Manual*) and his reading of Decisions No. 69 and 208 (*Workers' Compensation Reporter* (*Reporter*), Vol. 1: p. 285–286 and *Reporter*, Vol. 3: p. 24–28). He argues that the reasoning in Decision No. 69 should be adopted in considering whether the Board should order costs under Section 100 of the *Workers Compensation Act* (the *Act*).

Decision No. 69 suggests legal advice and advocacy is unnecessary in the compensation system and that lawyers' advice is not required when union officials and the Workers' Advisory Service can provide representation. If lawyers were paid, the decision says, this would encourage more lawyers and features of the adversarial system with increased costs and delays.

The employers' adviser submits that the issues under appeal were extremely complex and describes the history of the appeals. He says the employer did not participate in the first Review Board appeal because they believed the appeal would be denied. Similarly they expected the second appeal to the Review Board would be

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denied. The employer sought to have additional medical information obtained including the motor vehicle accident in 1979, the worker's history of back problems, and non-compensable considerations.

The submission also details the issues considered by the panel on the merits of the decision and concludes that the employer "launched this appeal on legitimate and meritorious grounds."

The worker's counsel reply dated January 28, 1992 submits "that without counsel it is unlikely that [the worker] would have succeeded with respect of his claim." It is pointed out that the worker did not have a union official to assist him, he is not seeking to recover costs from the accident fund, the appeal was not a result of the enquiry system but of the employer's appeal, and that if the employer was required to pay costs in this case it would not increase costs or delays throughout the system. The worker's counsel argues that each application for costs should be judged on its own merits and seeks to distinguish the commissioners' reasoning in *Reporter* Decision No. 208 on the grounds that at the time there was no statutory equivalent to Section 96(4) referral from a Review Board decision to the commissioners.

The worker's counsel submits that the employers' adviser is incorrect in saying that "under no circumstances will an award be made to pay the fees of lawyers and other persons for advice and advocacy in connection with a claim for compensation," and Section 100 specifically provides for an award to the successful party in a contested claim for compensation.

In response to the employer's suggestion that they would have agreed to an adjournment if the worker wished to obtain assistance from the Workers' Advisory Service, the panel is asked to take judicial notice of the fact that the Workers' Advisory Service has limited resources with which to assist workers. The worker's counsel submits that legal counsel was necessary "given the tactics adopted by the employer as regards to the late production of medical evidence. [The worker] needed to have his rights protected from the employer's method of appeal by ambush."

Board policy on Section 100 awards is stated in item #100.70 of the *Manual*,

An award under Section 100 might be made on an appeal but only in unusual cases. The section is limited to cases where the worker or employer abuses his rights under the *Act*. For instance, the worker or employer may put the opposite party to the expense of an appeal for no good reason. In other words, it may appear that an appeal was pursued simply because the right of appeal existed and without any substantial grounds on which the position could be argued.

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Section 100 of the *Act* provides,

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 he has 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 judgement of the court in which it is filed and may be enforced accordingly.

Board policy distinguishes the payment of expenses by the Board and the awarding of costs under Section 100 of the *Act*. The Board will not pay expenses for any advocate, although item #100.50 of the *Manual* authorizes reimbursement of certain expenses incurred in obtaining evidence.

*Reporter* Decision No. 208 dealt with an application by a widow for a reimbursement of expenses including her solicitor's fees after her husband's death was accepted by the Board of Review as compensable. As the commissioners point out in the decision, the widow is neither a worker nor employer under the *Act*. Although Section 83 (now Section 100) would allow an award to be made against the employer, the commissioners found it would be unfair to make such an award if the employer could not get a like award against the dependant. The decision also sets out the commissioners' views on the application of Section 83 much of which is now incorporated in the *Manual*.

We have considered the worker's counsel's argument, and agree the worker's claim was based on a somewhat novel approach. We also agree that the Workers' Advisory Service is generally busy and cannot provide individual representation on all cases. However we have no evidence before us as to whether the worker would have received representation for this appeal. We also note that the employer chose not to participate in the previous two Review Board hearings.

We have also considered the employer's right to appeal under the *Act*. According to Board policy, exercising that right in good faith is not sufficient reason to award costs under Section 100.

We have also considered the argument that the employer should have known they would not succeed because the Referral Committee determined that the Review Board findings should not be referred to the appeal commissioners under Section 96(4). The Referral Committee believed there were insufficient grounds under the *Act*, that is, there was no error of law or contravention of a published policy of the governors to

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warrant such a referral. The panel notes that the Appeal Division may overturn Review Board findings on broader grounds than error of law or contravention of Board policy. On an appeal from a Review Board finding, the Appeal Division may reopen, rehear and redetermine any matter that has been dealt with by the Review Board.

We also note that the employer's participation in the appeal stimulated the acquisition of medical evidence in particular regarding the 1979 motor vehicle accident. This information was useful in the determination of this appeal.

We have also considered the worker's representative's submission that the worker required a lawyer to assist him in this appeal in view of the tactics adopted by the employers' adviser, namely appearing at the hearing with a specialist's medical report which could have been disclosed in advance to the worker. We believe that justice would have been served even if the worker had not been represented and even if the employer's specialist report was entered as an exhibit at the hearing. However, the employer chose to withdraw that report in view of the panel's inclination to grant an adjournment.

The panel is concerned that the chairman of the employer corporation seems to believe they were thwarted in their attempt to present the specialist's opinion and medical histories. We cannot agree. The decision to withdraw the report was made by the employers' adviser and employer representative.

We find this is not a case where the appellant, the employer, has abused its right to appeal. The statutory scheme encourages the participation of employers and workers in appeals to the Review Board and Appeal Division. We find the criteria set down by the commissioners and adopted by the Board of Governors have not been met for an award under Section 100.

*Editors' note: This decision has been edited for publication.*

