

## CLAIM HISTORY AND APPEAL PROCEEDINGS:

I will set out only those portions of the claim history and appeal proceedings most relevant to this decision.

This is an appeal from an October 16, 2006 Hearing Officer decision. The Hearing Officer determined that the Firm was in violation of section 107(1) of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended [the "Act"] because it had not paid an ambulance bill incurred to transport an injured worker from the place of employment to a hospital. Therefore, the Hearing Officer found it was appropriate for the Board to collect the ambulance fee in the same manner as the collection of an assessment.

An employee of the Firm (the worker) suffered an injury on June 17, 2004 when she fell at the workplace. The worker suffered injuries to her head, chest area and she tore a ligament in her knee. The worker was temporarily winded, and was temporarily unable to move or speak. The Firm's general manager called an ambulance. Eventually, after discussion with the paramedics, it was decided to transport the worker to the hospital by means of ambulance.

Emergency Health Services (EHS) eventually submitted a bill of \$600.00 to the worker. At that time, the ordinary ambulance fee was \$120.00. However, the *Ambulance Fee Regulations* set out a fee of \$600.00 for the transportation by ambulance of a "stipulated third party insured". Section 2(p)(v) of the *Ambulance Fee Regulations* includes "a person with a work-related illness or injury and who is eligible for coverage under the *Workers' Compensation Act*" in the definition of "stipulated third party insured".

The Firm instructed the worker to appeal the \$600.00 bill, in accordance with the appeal procedures in place for those who wish to challenge a bill for ambulance services. The worker and the Firm were unsuccessful in their appeals. However, after communications with the Firm Representative (a Member of the Legislative Assembly), the Department of Health advised in June 29, 2006 correspondence that it would not pursue any collection proceedings against the worker at that time.

Notwithstanding the June 29, 2006 correspondence, a July 27, 2006 decision of a Manager, Assessment Services, advised the Firm that it was required to pay EHS' invoice for ambulance services, given section 107 of the *Act*. Since the Firm had not paid the invoice, the Manager advised the Firm that the Board had remitted payment to EHS, and that the Board had assessed the Firm's assessment account for that cost pursuant to section 107 of the *Act*.

The Firm appealed the July 27, 2006 Manager, Assessment Services decision by means of an August 16, 2006 Notice of Appeal to Hearing Officer. That appeal led to the October 16, 2006 Hearing Officer decision which forms the subject matter of this appeal.

This appeal was commenced by the Firm's filing of an October 23, 2006 Notice of Appeal with the Workers' Compensation Appeals Tribunal [the "Tribunal"].

This appeal proceeded by way of oral hearing. The initial hearing took place on December 5, 2006. The Firm was the only participant to attend at the hearing. The general manager of the Firm and the worker both provided testimony, and the Firm Representative provided submissions.

On February 2, 2007, the Tribunal wrote to the Board and to the Firm Representative. This correspondence briefly set out the Firm's evidence and arguments, and provided the Board with an additional opportunity to provide submissions given that the appeal potentially raised significant issues of statutory interpretation. The correspondence also provided the participants with an opportunity to address the four issues identified below. The pertinent portion of the February 2, 2007 correspondence identifying the four issues stated:

- a) Whether the provision of ambulance services constitutes a form of "medical aid" as defined in and contemplated by the *Act*, given that an assessed Firm is directly responsible for the cost of this transportation, and given that initial transportation costs are not paid (at least ordinarily) by the Accident Fund (see ss. 2(r), 102 and 104 of the *Act*). I note that the worker and apparently the Firm were directly billed in this matter (see s. 108 of the *Act*);
- b) Whether the Board has set a schedule of fees or charges payable for the provision of ambulance services, pursuant to s. 105(1) of the *Act*;
- c) Whether the Board improperly paid the bill from EHS, in the light of s. 106 of the *Act*, given that application to the Board for payment was apparently made more than six months after the provision of ambulance services on June 17, 2004. Moreover, if the Board's payment were made contrary to s. 106, would this provide a basis to reverse the assessment made against the Firm;
- d) Does this appeal raise an issue of law and general policy which warrants a referral to the Chair of the Board pursuant to s. 247 of the *Act*. In particular, at issue is the Firm's liability to pay pursuant to s. 107 of the *Act*, a fee for ambulance services established and quantified by the *Ambulance Fee Regulations*, which are made pursuant to a statute other than the *Act*. In general, at issue is the interplay of the workers' compensation system, and the broader health insurance and services regime.

In addition, the Tribunal copied the February 2, 2007 correspondence to the Attorney General of Nova Scotia further to section 10(3) of the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, as amended, because the Firm had argued that section 2(p)(v) of the *Ambulance Fee Regulations* was invalid.

The Board provided submissions dated February 20, 2007 and March 26, 2007, and the Firm provided submissions dated February 26, 2007. The Attorney General of Nova Scotia advised in March 30, 2007 correspondence that it would not be taking part in the hearing.

The oral hearing reconvened on April 20, 2007, at which time the Firm Representative provided additional submissions. The Firm Representative also filed a document entitled "Ground Ambulance Fee Review - October 31, 2005", which was prepared for the Nova Scotia Department of Health.

#### **ISSUES:**

At issue is whether the Board appropriately charged the ambulance fee to the Firm's account, for collection in the same manner as the collection of an assessment, pursuant to section 107 of the *Act*.

The Firm's appeal is denied. The Board appropriately charged the Firm's account with the cost of the ambulance fee (\$600.00), and it was appropriate for the Board to collect the cost of the ambulance fee in the same manner as the collection of an assessment.

#### **ANALYSIS:**

I have reviewed all the materials in the Board and Tribunal files, and I have reviewed the recordings of the oral hearing. In particular, I reviewed the Firm Representative's various written submissions dated August 16, 2006, November 15, 2006 and February 26, 2007, as well as a typed summary of the Firm Representative's closing arguments. I will set out only those portions of the evidence and submissions most relevant to my reasoning and conclusion.

#### Worker's Testimony

The worker testified she was walking through a narrow walkway, when she fell towards a table. The worker struck her chest, and it was difficult for her to breathe for several minutes. She suffered significant bruising on her chest. In addition, it was later determined that the worker had struck her head, though the worker only noted the bump on her head after her return from the hospital. The worker also tore a ligament in her knee.

The worker indicated that she almost lost consciousness. She was unable to move for a couple of minutes. She could hear a co-worker speak to her, but she was not able to respond to the co-worker because she could not speak. She was able to hear co-workers speaking, for a number of minutes. After a number of minutes, the worker was able to speak and to breathe. Her co-workers helped to move her off the floor and to set her down.

When the paramedics arrived, the worker was able to respond to their questions. Even though it did not seem like anything was critically wrong with her, it was decided that she would go to the hospital in the interests of safety. The worker was at the hospital for approximately an hour and a half, and she was given Tylenol 3 medication. A co-worker drove the worker from the hospital back to the workplace. The worker was able to drive her car home from the workplace, and she was able to work the next day on modified duties. The worker testified that she would not have been able to drive to the hospital after the injury, given the pain she was experiencing and the injury to her knee.

#### General Manager's Testimony

SB is the general manager of the Firm, and he is the son of the Firm's president.

SB testified that he heard the worker fall. He was approximately 30 to 50 feet away from her when the accident occurred. The worker was attended by a co-worker - D - who is trained as a licensed practical nurse. SB also has first aid training through St. John's Ambulance. SB testified that he and D spoke back and forth with the worker. The worker was groggy. Eventually they moved the worker up into a sitting position. SB was the individual who called the ambulance.

The Firm Representative asked SB whether he discussed with the paramedics the advisability of transporting the worker to the hospital by ambulance. SB indicated that he did not remember the details of the conversation. He testified that the parties agreed to transportation by ambulance in the interests of safety, to ensure the worker had not suffered any internal injuries. SB indicated that he explicitly raised with the paramedics the possibility of transporting the worker to hospital by automobile. The paramedics stated that they were already on scene and they were professionals, so they might as well transport the worker to hospital. SB testified that transportation by ambulance was suggested mainly as a matter of convenience, as the paramedics were already on site. SB further stated that the alternatives were not discussed, nor was the cost of the ambulance service discussed. The Firm learned only after the fact that no fee would have been payable if the worker had been transported by automobile.

SB indicated it was sometime later when the worker advised that she had been sent a bill for \$600.00. The Firm advised the worker to appeal the bill, and SB, his father and the worker all prepared the appeal. The letter was signed by SB's father. The Firm intended that the worker would pursue all appeals, but that the Firm would pay the bill on the

worker's behalf if the efforts to reverse the bill were ultimately unsuccessful.

SB indicated that his concern was with the \$600.00 fee, which is onerous. If he had been advised at the time that the fee was \$600.00, he would have been more aggressive in seeing that the worker was transported by automobile as opposed to ambulance. However, there was no discussion of the cost involved in transport by ambulance. In the light of all the circumstances, he would probably have agreed to have the worker transported by ambulance if the cost were only \$120.00, and the Firm probably would not have fought the bill if it were only for \$120.00.

### Firm Representative's Submissions

I have reviewed the Firm Representative's oral and written submissions in great detail. I will briefly set out the salient points.

First, the Firm Representative argued that section 107 of the *Act* applies only to those situations where an employer fails to provide necessary transportation. In the present circumstance, the employer was willing and able to transport the worker by automobile to hospital, which in the circumstances constituted adequate transportation.

Second, the Firm Representative argued that this is not a workers' compensation matter, and the Board and Tribunal are not the appropriate fora to resolve this dispute. In reality, this is a dispute between the Firm and EHS concerning the appropriate quantum of the fee for ambulance services. In this connection, the Firm argues that section 2(p)(v) of the *Ambulance Fee Regulations* is *ultra vires* the enabling statute because it deems a situation involving a workplace injury to involve third party insurance, when in fact the employer (not the Board or an insurance company) is liable for the cost. The appropriate course would have been for EHS to sue the Firm in either the Supreme Court or in the Small Claims Court, at which time the Firm could argue that section 2(p)(v) is *ultra vires*. It would not be appropriate for this Tribunal to adjudicate whether a regulation enacted pursuant to a statute other than the *Act* is *ultra vires*. This matter had proceeded for two years between the Firm and EHS without any involvement from the Board. The Board became involved primarily as a "collection agency" for EHS, thereby preventing the Firm from challenging the quantum of the ambulance fee in court. The Firm does not dispute that the ordinary fee (\$120.00) should be payable, but disputes the \$600.00 fee.

The Firm did not take a clear position on whether the ambulance fee constituted a form of "medical aid". Initially, the Firm Representative accepted that the ambulance fee would constitute a form of "medical aid" because it flowed from a workplace accident. However, at other points in the hearing, the Firm Representative questioned whether the provision of ambulance services falls within "medical aid", given that the employer bears the cost of transporting a worker to hospital, as opposed to the Accident Fund bearing the cost.

In a related vein, the Firm Representative disputed that the Board should possess exclusive jurisdiction pursuant to section 104 of the *Act* to adjudicate concerning ambulance fees as a form of “medical aid”, given that the Board does not pay for the provision of such services out of the Accident Fund. The dispute therefore belongs in the courts, not in the workers’ compensation system.

At the time of the December 5, 2006 hearing, the Firm Representative argued that it was unlikely the Board had established a fee schedule for ambulance services pursuant to section 105 of the *Act*, because the cost is borne by the employer directly and because the fee is set pursuant to the *Ambulance Fee Regulations*. However, the Board’s February 20, 2007 submissions indicated that ambulance fees are included in the schedule established pursuant to section 105 of the *Act*. At the April 20, 2007 reconvening of the oral hearing, the Firm Representative did not dispute that the schedule forwarded by the Board was indeed the schedule established pursuant to section 105 of the *Act*. However, he argued the Board’s submissions (which were prepared by a paralegal) merely stated that the schedule “recognized” the fee structure established under the *Ambulance Fee Regulations*. There is no indication that the Board turned its attention to establishing an appropriate fee for ambulance services.

The Firm Representative also argued this was an appropriate instance for a referral to the Chair pursuant to section 247 of the *Act*. He argued that the Board should not adopt the higher “third party insured” ambulance fee because it creates a disincentive for employers to call an ambulance, even when the use of an ambulance is appropriate. The Firm Representative pointed out that the consultant report filed on April 20, 2007 recommended a change in calculating the ambulance fee in workers’ compensation matters. The mere fact that ambulance fees are included in the schedule established pursuant to section 105 of the *Act* does not imply that the Board formed an independent opinion concerning the appropriate ambulance fee; rather, it appears the Board merely adopted the regime set out in the *Ambulance Fee Regulations*. Moreover, it is unclear whether the Board’s submissions (prepared by paralegal) genuinely reflect the Board’s position.

#### Board’s Submissions

The Board argued that ambulance services constitute a form of “medical aid” pursuant to the *Act*, even though the *Act* prescribes that employers are liable for the cost of transporting a worker to a hospital or a physician, and that an employer can be directly billed with respect to the same. The Board’s schedule established pursuant to section 105 of the *Act* “...recognizes the direction given in the *Ambulance Fee Regulations* fee structure, and notes the fee in its schedule of fees”. Consequently, there is no need for a referral to the Chair pursuant to section 247 of the *Act*, because there is no conflict between the Board’s schedule and the *Ambulance Fee Regulations*. Further, section 106 of the *Act* does not prevent the Board from paying EHS’ invoice, even if it were submitted more than six months after the services rendered, because section 190 of the *Act* permits

the Board to extend a time limit. In fact, the Board's practice is to pay invoices submitted more than six months after the services rendered.

### Statutory Provisions

#### Exclusive jurisdiction of Board

104 All questions as to the necessity, character and sufficiency of any medical aid furnished shall be determined by the Board.

#### Schedule of fees or charges

105 (1) The Board may set a schedule of fees or charges payable for medical aid.

#### Employer to furnish transportation

107 (1) Every employer shall, at the employer's own expense, furnish to any worker in the employer's employment, who is in need of it as the result of a workplace injury, immediate and appropriate transportation to a hospital or a physician located within the area or within a reasonable distance of the place of injury.

(2) Where the employer fails to provide transportation pursuant to subsection (1), any person, or the Board, may obtain transportation for the injured worker.

(3) Any employer failing to comply with subsection (1) is, in addition to any other penalty that may be imposed by the Board, liable to pay for the transportation provided pursuant to subsection (2).

(4) The amount described in subsection (3) may be collected by the Board in the same manner as the collection of an assessment.

### Schedule of Benefit Limits

With respect to "Ambulance Services", the Board's schedule refers to section 107 of the *Act*. It states "Initial Transportation following an injury (includes Air Ambulance) - Responsibility of Employer". It further states "Employer pays day of accident. \$600.00 (or \$150.00 for mobility challenged)".

## Reasoning

I deny the Firm's appeal, for the reasons set out below.

First, there is no dispute that the worker suffered a workplace injury, and that the ambulance services were provided with respect to that workplace injury. A workers' compensation file was opened with respect to the worker's injury, and Part I of the *Act* applies to the situation (see section 3 of the *Act*). The various sections respecting medical aid are all found in Part I of the *Act*. In short, this is a workers' compensation matter, governed by the *Act*.

Second, given that this is a workers' compensation matter, the Board and by inference this Tribunal constitute the appropriate fora for the resolution of this matter. The Legislature has substantially removed workers' compensation matters from the courts, and mandated that they be resolved within the workers' compensation system, of which this Tribunal forms a part.

Third, the provisions of the *Act* govern with respect to the fact situation. When the various sections of the *Act* respecting medical aid are read as a whole, it is apparent that transportation by ambulance to the hospital constitutes a form of "medical aid" (albeit an idiosyncratic form of "medical aid" because the cost is the direct responsibility of the employer). Therefore, it is for the Board to determine whether the use of ambulance services constituted "appropriate transportation" in the circumstances. Moreover, the schedule of fees established by the Board pursuant to section 105 of the *Act* governs with respect to establishing the quantum of the fee for ambulance services.

In the circumstances of this appeal, I find that the use of an ambulance constituted the appropriate form of transportation. When assessing whether the use of ambulance services was appropriate, one should consider the situation existing at the time the decision was made to use ambulance services. In the present situation, the worker had just suffered a serious fall which caused her to temporarily lose the ability to move and to speak. In addition, her chest injury was sufficiently severe that the paramedics considered the possibility of internal injuries. Moreover, the worker had difficulty ambulating, and in fact had suffered a torn ligament in the knee. Obviously, viewed from this perspective, the use of an ambulance constituted the appropriate form of transportation. In hindsight, one recognizes that the worker did not miss any time off work. However, in deciding which method of transportation is appropriate, it is not possible to project oneself forward in time; rather, the appropriateness of using ambulance services must be assessed in the light of the facts known at the time of the decision to use an ambulance.

I am not of the opinion that the present appeal raises an issue of law and general policy which should be reviewed by the Board of Directors pursuant to section 183 of the *Act*, and hence there is no need for section 247 referral to the Chair. (In this connection, I have

reviewed the consultant's report prepared for the Department of Health, including the recommendations relating to workers' compensation situations). The Legislature, through section 107 of the *Act*, has directed that appropriate and immediate transportation to a hospital or physician shall be provided at the employer's expense to a worker who requires such transportation. It would not be open to the Board or to the Board of Directors to enact any policy contrary to section 107 of the *Act*. Further, the setting of particular fees further to section 105 of the *Act* does not engage the Board of Directors' policy-making power under section 183 of the *Act*. Rather, the setting of fees for particular services is more in the nature of an administrative act by the Board, as opposed to the enactment of policy by the Board of Directors.

Further, the present appeal can be resolved by a straightforward application of the *Act* and the existing fee schedule. In brief, the use of ambulance services was appropriate in this situation. EHS is the sole provider of ambulance services throughout most of the Province. Hence, to provide a worker with transportation by ambulance, an employer must pay EHS to provide that service. The fee for ambulance services in a workers' compensation matter is set out in the schedule established pursuant to section 105 of the *Act*. It is irrelevant whether that schedule adopts the regime set out in the *Ambulance Fee Regulations* because, with respect to workers' compensation matters, the fee schedule is as a matter of law rooted in section 105 of the *Act*. The fee schedule set out a fee of \$600.00 for ambulance services, and the Firm is liable to pay that fee.

## **CONCLUSION:**

The Firm's appeal is denied, for the above reasons. The Board appropriately charged the Firm's account with the cost of the ambulance fee (\$600.00), and it was appropriate for the Board to collect the cost of the ambulance fee in the same manner as the collection of an assessment.