

## Precedent Panel Decision Summary

**Decision:** WCAT-2005-03622-RB

**Decision Date:** July 8, 2005

**Precedent Panel:** Herb Morton (Presiding Member), William Duncan, Susan Polsky Shamash

***WCAT Precedent Panel Decision – Application of Policy – Meaning of “all decisions” in policy item #50.00 – Payment of Interest on Retroactive Benefits – Resolution of the Panel of Administrators Number 2001/10/15-03 “Calculation of Interest” – Retroactivity – Retrospectivity – Immediate Effect – Blatant Board Error – Decision of the Governors #36 “Retroactivity of Policy Changes”***

**This precedent panel decision was set aside on judicial review in *Johnson v. Workers' Compensation Board, 2007 BCSC 1410*, where the B.C. Supreme Court found the Board's new interest policy, item #50.00 of the *Rehabilitation Services and Claims Manual, Volumes I and II*, was patently unreasonable. The precedent panel issued a second decision WCAT-2007-04002 as directed by the B.C. Supreme Court. The B.C. Supreme Court decision has since been quashed by the B.C. Court of Appeal in *Johnson v. Workers' Compensation Board, 2008 BCCA 232*. The Court of Appeal referred the matter back to the B.C. Supreme Court for consideration of the issues in the petition that remain to be determined.**

**Note:** This decision is now of historic interest only, as the board of directors of the Workers Compensation Board (Board) approved another amendment to policy item #50.00 in resolution #2006/02/21-04 on February 21, 2006. Although the amendment dealt primarily with interest on survivors' benefits, it states that the entire interest policy in both volumes of the *Rehabilitation Services and Claims Manual* applies to all decisions, including appellate decisions, made on or after March 1, 2006.

The full resolution of the Board of Directors may be found on the Board's website at:

[http://www.worksafebc.com/regulation\\_and\\_policy/policy\\_decision/board\\_decisions/2006/february/assets/20060221-04.pdf](http://www.worksafebc.com/regulation_and_policy/policy_decision/board_decisions/2006/february/assets/20060221-04.pdf)

- New policy item #50.00 (*Rehabilitation Services and Claims Manual, Volumes I and II*) (RSCM I and II) applies to all initial interest decisions on or after November 1, 2001. The term “all decisions” in the Resolution means all initial interest decisions.
- An initial interest decision is distinct from a decision regarding a worker's entitlement to retroactive benefits generally. The Board has the authority to make new policy which applies immediately to the initial adjudication of a particular subject matter.
- New policy item #50.00 (RSCM I and II) does not apply to an appellate decision unless the new policy applied to the interest decision that is being appealed. Thus, on appeal, the former policy applies where the initial interest decision was made before November 1, 2001. The new policy applies where the initial interest decision was made on or after November 1, 2001.

The Resolution of the Panel of Administrators Number 2001/10/15-03 “Calculation of Interest” (Resolution) amended Board policy item #50.00 relating to the payment of interest. The

Resolution provided that the effective date of the new policy item #50.00 is November 1, 2001 and that it “will apply to all decisions to award or charge interest on or after that date”.

The precedent panel concluded that “all decisions” in the Resolution means all initial interest decisions. The panel agreed with the interpretation provided in Appeal Division Decision #2002-1383. Although the panel thought that the literal meaning of the phrase includes both initial adjudicative decisions as well as appellate decisions, it determined that the phrase as found in the Resolution was not intended by the Board to include appellate decisions. The panel gave the following reasons in support of its conclusion:

- (1) as some application sections of other Board resolutions expressly include appellate decisions, the absence of an express reference in the Resolution indicates a Board intention not to apply the new policy to appellate decisions,
- (2) given that the Board variously includes or exclude appellate decisions from policy application statements, the Board often intentionally requires the worker’s compensation system to apply different policies to the same issue, and
- (3) Decision of the Governors #36 “Retroactivity of Policy Changes” (which continues to be binding policy) established or recognized a presumption that a changed policy will not apply retroactively before the date on which the new policy was approved.

Given the precedent panel’s conclusion that the former policy continues to apply to workers whose entitlement to interest has already been initially determined, it found that the policy change was retrospective, not retroactive, in its application. Given the panel’s conclusion that the Resolution was not retroactive, the panel did not need to address the worker’s submission that the Board has no authority under the Act to approve retroactive policy changes.

In this case, the worker suffered a low back disc herniation 15 years after a work related back injury. The disc herniation was not accepted on the claim. On review, the former Review Board, prior to the effective date of the new interest policy, accepted the condition and awarded the worker retroactive wage loss benefits. The Review Board did not expressly decide whether the worker was entitled to interest on the retroactive benefits. After the effective date of the new interest policy, the Board implemented the Review Board decision but did not address whether interest was payable. After the implementation decision, the worker requested interest on the retroactive wage loss benefits. The Board applied the new interest policy and denied the worker’s request (the “Board Decision”). The Board Decision was made on the basis that there was no “blatant Board error” when the Board decided not to accept the disc herniation on the claim.

The worker requested a review of the Board Decision. As a result of the *Workers Compensation Amendment Act, (No.2), 2002* (Bill 63) the worker’s review was continued and completed as a WCAT appeal. The WCAT chair appointed a precedent panel under section 238(6) of the Act to hear the appeal.

On appeal, the precedent panel confirmed the Board Decision and denied the worker’s appeal. Thus, the worker was not entitled to interest on the retroactive wage loss benefits. On the issue of which interest policy to apply, the Board correctly applied the new interest policy as the Board

Decision was the initial decision concerning interest and the date of the Board Decision was after the effective date of the new interest policy. On the issue of whether there was a “blatant Board error”, the WCAT panel found that although the initial decision not to accept the disc herniation on the claim was reversed by the Review Board, the decision to accept the condition involved merely a different judgment with respect to the weighing of the evidence, with the benefit of new evidence from the neurosurgeon who operated on the worker.

**This decision has been the subject of a BC Supreme Court decision on application for judicial review. [See 2007 BCSC 1410](#) and [2007 BCSC 24](#)**

**This decision has been the subject of a reconsideration application. See WCAT Decision 2007-04002, dated December 20, 2007.**

**This decision has been published in the *Workers' Compensation Reporter*: 21 WCR 205, #2005-03622, Precedent Panel - Payment of Interest on Retroactive Benefits**

**WCAT Decision Number :** WCAT-2005-03622-RB  
**WCAT Decision Date:** July 08, 2005  
**Panel:** Herb Morton, Vice Chair  
William J. Duncan, Vice Chair  
Susan L. Polsky Shamash, Vice Chair

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## 1. Introduction

The worker has appealed a decision dated May 17, 2002 by a client services manager of the Workers' Compensation Board (Board). In a prior decision dated December 4, 2001 by a case manager, the worker was paid 170 days of retroactive wage loss benefits, in implementation of a Workers' Compensation Review Board (Review Board) finding dated September 19, 2001. The December 4, 2001 decision did not grant interest to the worker on his retroactive wage loss benefits. The manager's May 17, 2002 decision expressly denied the worker's request for payment of interest. It applied an amended policy (effective November 1, 2001) which made "blatant Board error" a prerequisite for awarding interest.

While the worker has appealed both the December 4, 2001 and May 17, 2002 decisions, only his appeal of the May 17, 2002 decision has been assigned to this "precedent panel". The May 17, 2002 decision concerned the denial of interest, which is the subject of this appeal. The worker's appeals from the December 4, 2001 decision, and from *Review Decision #11209* concerning his pension award, will be considered by other WCAT panels.

The worker submits that he is entitled to interest, as the September 19, 2001 Review Board finding to allow his appeal was issued prior to the November 1, 2001 policy change regarding interest. He argues that this policy change does not apply in his case as the policy was not intended to apply retroactively. He submits that if the policy change was intended to apply retroactively, then the policy is unlawful as the panel of administrators did not have the legal authority to amend the policy retroactively. Additionally, by letter dated May 20, 2004, the worker's previous union representative submitted that the case manager had made a decision to pay interest when the worker spoke to the case manager by telephone on October 22, 2001.

In his notice of appeal, the worker requested an oral hearing. Following a preliminary review by the Workers' Compensation Appeal Tribunal (WCAT) Registry, the worker was advised that his appeal would be heard on a "read and review" basis. The employer is not participating in this appeal, although invited to do so. The worker's union representative has provided a written submission. We find that the issues of law

and policy raised by the worker's appeal can be properly considered on the basis of written submissions without an oral hearing. There is no significant issue of credibility requiring an oral hearing.

All references in this decision to statutory sections are to the *Workers Compensation Act* (Act) unless otherwise specified.

## **2. Issue(s)**

A "precedent panel" has been appointed to consider the worker's eligibility for interest on his retroactive benefits. This requires consideration as to the meaning of the November 1, 2001 effective date contained in the October 15, 2001 policy resolution concerning interest. This involves both the intent of the policy, and the authority of the policy-makers under section 82.

## **3. Precedent Panel**

This "precedent panel" was appointed by the WCAT chair under section 238(6), and is composed of three vice chairs. One member was appointed as the presiding member under section 236(a). Under section 238(9), the decision of the majority is WCAT's decision, but if there is no majority the decision of the presiding member is WCAT's decision.

As this was the first appointment of a WCAT panel under section 238(6), we consider it useful to begin by addressing the effect of this section.

Where the chair determines that the matters in an appeal are of special interest or significance to the workers' compensation system, the chair may appoint a panel under section 238(6). Item #8.20 of WCAT's *Manual of Rules of Practice and Procedure* uses the term "precedent panel" to describe a panel appointed under section 238(6). A precedent panel may consist of three to seven members. A precedent panel may also include "extraordinary members" (see section 231 and section 232(2)(c)). Not all three member panels are precedent panels — under section 238(5), a three member panel may also be appointed which is not a precedent panel.

Section 250(3) provides that WCAT is bound by a decision of a precedent panel unless:

- (a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the panel's decision, or
- (b) subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised.

Under section 250(2), WCAT must apply a policy of the board of directors that is applicable in that case. If a “precedent panel” addresses an interpretive issue regarding a policy, that interpretation is binding on future WCAT panels subject to one of the exceptions set out in section 250(3) being met. Section 250(3) represents an exception to the more general wording of section 250(1), which states that WCAT is not bound by legal precedent.

The provision of statutory authority for “precedent panels” was one of the novel features of the March 3, 2003 restructuring of the workers’ compensation appeal bodies under the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). A recommendation for such authority was contained in the March 11, 2002 *Core Services Review of the Workers’ Compensation Board* (the Winter Report), accessible on the internet at: <http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf>. The core reviewer reasoned (at page 54):

(d) The use of “Super Panels”

I have no doubt that the Appeal Tribunal will be called upon to adjudicate matters of policy or law which are of significant importance to the workers’ compensation system as a whole. In such circumstances, the Chair of the Appeal Tribunal should have the discretion to appoint a “Super Panel” to determine the issue. Such “Super Panels” would consist of more than 3 persons, and should generally have the Chair as the presiding person of the Super Panel (although the Chair would have the authority to assign another Vice-Chair to preside as Chair of the Panel).

The Chair of the Appeal Tribunal would also have the authority to conduct an “open” hearing (either by written submissions or an oral hearing) into the issues before the “Super Panel.” Such an “open” hearing would provide invited stakeholders with the opportunity to present submissions to the Super Panel.

Finally, it is my view that decisions rendered by the Super Panel must generally be followed by subsequent Panels of the Appeal Tribunal. The rationale for establishing a Super Panel is to provide leadership and direction for other decision-makers with respect to adjudicative issues of importance to the workers’ compensation system. Accordingly, subsequent Panels of the Appeal Tribunal should not have the discretion to reach a different conclusion on the same issue which had previously been determined by a Super Panel, unless the circumstances of the subsequent appeal before the Appeal Tribunal Panel clearly distinguish its case from that determined by the Super Panel.

The terms “super panel” or “precedent panel” are not contained in the Act. These terms describe the legal effect of a decision made by a panel which has been appointed under section 238(6).

A precedent panel decision is binding in relation to future decision-making by WCAT. However, it will normally not provide a basis for reconsideration of a prior WCAT decision given the high level of deference to be accorded to a WCAT decision. The fact that prior decisions have reached differing conclusions on an interpretive issue does not mean they were “patently unreasonable”. Differing interpretations may be possible or viable under the Act (see *Appeal Division Decision #00-1596*, “Reconsideration of an appeal division decision – consistency and ‘Hallmarks of Quality Decisions’”, 16 W.C.R. 349, and *WCAT Decision #2004-04221*). A decision which is a possible or viable interpretation (i.e. not patently unreasonable) is not subject to reconsideration simply because it took a different approach.

#### **4. Participation**

Section 246(2)(i) gives WCAT authority to request any person or representative group to participate in an appeal if WCAT considers that this participation will assist it in fully considering the merits of the appeal. As a precedent panel decision has significance beyond the particular case, and is binding on future WCAT panels subject to section 250(3), broader participation was invited. By letter of November 30, 2004, the following groups were notified of the appointment of a “precedent panel” and invited to participate in this appeal:

- B.C. Federation of Labour
- Business Council of B.C.
- Coalition of B.C. Businesses
- Employer’s Forum to the WCB
- Employers’ Advisers
- Workers’ Advisers
- Workers’ Compensation Advocacy Group

Submissions were received from the Employers’ Adviser (January 19, 2005) and Workers’ Adviser (January 21, 2005). They both replied to the submission of the other on March 11, 2005. These submissions were disclosed to the worker, and his union representative provided a submission dated May 2, 2005.

#### **5. Jurisdiction**

The worker’s appeal was filed to the former Review Board. As this appeal had not been considered by a Review Board panel prior to March 3, 2003, it is being decided as a

WCAT appeal (under section 38(1) of the transitional provisions contained in Part 2 of Bill 63).

WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (section 250(2)). Section 42 of Bill 63's transitional provisions states:

As may be necessary for the purposes of applying sections 250 (2) and 251 of the Act, as enacted by the amending Act, in proceedings under sections 38 (1) and 39 (2) of the amending Act, published policies of the governors are to be treated as policies of the board of directors.

Accordingly, in connection with the requirement of section 250(2) that WCAT "must apply a policy of the board of directors that is applicable in that case", we will apply the former policies of the board of governors (whose authority under section 82 was being exercised by a panel of administrators under section 83.1 during the time frame relevant to this appeal).

## **6. Background and Evidence**

The worker suffered a back injury at work on August 15, 1985. In March 1999, he underwent surgery for an L5-S1 discectomy. This was initially not accepted under his claim. His appeal to the Review Board was allowed. By finding dated September 19, 2001, the Review Board found that the worker's L5-S1 disc herniation was causally related to his 1985 work injury "and therefore the surgery of March 31, 1999 along with all associated medical aid and time loss resulting therefrom should be accepted as a Board responsibility." As the Review Board finding did not mention interest, we read that finding as leaving this issue to be adjudicated by a Board officer (rather than implicitly granting or denying interest).

By decision dated December 4, 2001 (in implementation of the Review Board finding), the case manager reopened the worker's claim for 170 days of wage loss benefits from March 27, 1999 to August 29, 1999, and from September 1, 1999 to November 23, 1999. The worker was also referred for a permanent functional impairment assessment. The December 4, 2001 decision did not include any express reference to interest.

One of the questions raised in this appeal concerns whether a decision concerning interest was made under the former policy. Accordingly, we have reviewed in detail the information on file concerning the consideration given to the worker's claim for interest. The case manager partially completed a form 25B3 entitled INTEREST

CALCULATIONS FOR RETROACTIVE WAGE-LOSS PAYMENTS, *Compensation Services Division*. This included the following information:

<b>Payment Periods</b>	<b>Amount</b>
March 27, 1999 to June 30, 1999	\$ 7,545.93
July 1, 1999 to August 29, 1999	\$ 4,660.72
Sept. 1, 1999 to November 23, 1999	\$ 6,658.18
TOTAL	\$18,864.83

An entry on the form indicated that the “date payment made” was December 3, 2001. A space on the form for the “Interest Decision Date” was left blank. This term was defined on the bottom of the printed form as follows:

\* The “Interest Decision Date” is the date on which the Claims Adjudicator, Disability Awards Officer, or other Board officer, or Appeals Commissioner, makes the decision to pay interest which is to be calculated. It is NOT the date of a Review Board decision. In accordance with Item #50.00 of the Claims Manual, Actuarial will calculate interest on the above amounts to the end of the calendar month preceding the Interest Decision Date.

A copy of the form, completed except for the Interest Decision Date, was retained on the claim file.

In a telephone memo dated February 4, 2002, a compensation services manager noted:

I spoke with [the worker] and explained the change in policy regarding interest. He does not agree with the change and intends to appeal. I advised him that he can appeal the December 4, 2001, implementation letter as it did not award interest. He was advised to request [sic] a letter, I told him if someone wants to make a written submission we would provide a written response but I believe he should be able to appeal the implementation letter.

By letter dated February 4, 2002, the worker wrote to his union representative, noting:

As to our discussion in early December, 2001, I requested a letter from WCB with regards as to why they didn't pay interest on my appeal... I was told by [name], WCB manager that they don't pay interest on claims settled after November 2, 2001 [sic]. I stated that I would like a letter regarding that discussion to give to my Worker Advocate. His reply was if my advocate wanted a letter, he would have to request it.

On May 2, 2002, the worker's union representative wrote to the area office manager, enclosing a copy of the worker's letter and requesting that the worker be paid interest. He submitted:

It appears that your refusal to pay interest to [the worker] is based upon the November 1, 2001 policy change regarding interest. That policy was enacted after the award in this case and thus the previous policy should be applied. The November 01, 2001 policy ought not to be applied retroactively to disentitle [the worker] from the monies he was entitled to at the time of the award.

The client services manager replied with a decision dated May 17, 2002. He noted that a manager's review had been requested of the decision that the worker was not entitled to interest on his retroactive wage loss benefits. The manager cited the current policy at item #50.00 of the *Rehabilitation Services and Claims Manual* (RSCM), which included the requirement for a "blatant Board error". He further cited *Practice Directive #28*, "Interest on Retroactive Wage Loss and Permanent Disability Lump-Sum Benefits". This provided, in part:

The amendments to the policies apply to interest decision dates on or after November 1, 2001. The "interest decision date" is the date that a Board officer decides that interest is payable.

The manager's May 17, 2002 decision expressly denied the worker's request for payment of interest.

## **7. Policy Resolution of October 15, 2001**

*Resolution of the Panel of Administrators Number 2001/10/15-03*, "Calculation of Interest", dated October 15, 2001, is published at 17 W.C.R. 465. The background recitations to this policy amendment noted that under prior policy:

Interest is provided on retroactive wage-loss and pension lump-sum payments where the benefit is for a condition which was previously overlooked or for which the Board previously decided that no payment was due;

Paragraph 2 of the October 15, 2001 policy resolution provided:

Policy item #50.00 is also amended to provide new criteria for determining when it is appropriate for the Board to pay interest in situations other than those expressly provided for in the Act. The amended policy will provide for interest on retroactive wage-loss and pension lump-sum payments where it is determined that a blatant Board error necessitated the

payment. For an error to be "blatant" it must be an obvious and overriding error.

Paragraph 6 of the policy resolution concerned the effective date of the policy changes:

The amended policies are effective November 1, 2001, and will apply to all decisions to award or charge interest on or after that date. When calculating the amount of interest payable, the new method for determining the applicable rate of interest will apply retrospectively and will be used for the entire entitlement period and will not be limited to entitlement for time periods after November 1, 2001.

## **8. Prior Appellate Decisions**

The effect of the wording of the October 15, 2001 policy resolution with respect to its effective date has been addressed in prior Appeal Division and WCAT decisions. Three notable decisions illustrate the different manner in which the policy has been interpreted.

### **(a) Interpretation #1**

*Appeal Division Decision #2002-1488* dated June 14, 2002 is accessible at: [http://www.worksafefbc.com/appeal\\_decisions/appealsearch/advancesearch.asp](http://www.worksafefbc.com/appeal_decisions/appealsearch/advancesearch.asp). The Appeal Division decision concerned a March 7, 2001 decision in which the worker had been granted a loss of earnings pension retroactive to 1991, without interest. The denial of interest was under the former policy. The worker appealed to the Review Board, which issued a finding dated November 6, 2001. In its finding to deny the worker's appeal, the Review Board also applied the former policy concerning interest. However, the Appeal Division panel found that as its decision was being made after November 1, 2001, the new policy on interest should be applied. The Appeal Division panel reasoned in part (at paragraphs 23-25):

The submission that the new policy does not apply is not persuasive. We consider there is no doubt that the formula for calculating interest applies to any decision on or after November 1, 2001 to pay interest regardless of who the decision-maker is and at what stage in the appeal proceedings the decision-maker is situated. The language of the policy seems sufficiently broad to ensure that the new formula applies to those decisions.

The submission that the new policy does not apply could be based on an argument that the reference in the resolution to all decisions to award or

charge interest means that it is only the formula for calculation of interest which applies to all decisions after November 1, 2001 and that whether interest is payable is determined according to the policy in effect when the initial decision as to interest eligibility is made. This would mean that eligibility for interest is determined by the old policy in cases when the initial decision pre-dated November 1, 2001. Such an interpretation would mean that two policies would apply to interest until an initial decision on a claim concerning interest was made on or after November 1, 2001. That would mean that all the interest decisions in the appellate system would have to be completely processed before only one policy would be applicable to interest issues. That strikes us as an unwieldy set of circumstances. We appreciate that it would be open to the Panel of Administrators to create such a situation as it would likely not be contrary to the *Act*. Yet we would want persuasive evidence in their resolution that that was their intention before we would interpret the resolution in that manner.

In interpreting policy it is appropriate to keep in mind the purpose of the policy revision as revealed by the resolution. Among other matters, the policy was revised to move away from paying interest using a compound rate of interest and to use different, more stringent criteria for establishing eligibility for interest. The policy revision seeks to limit costs associated with the payment of interest. We consider that such a purpose is achieved if the policy revision is interpreted in a simple straightforward manner, that is, the new rules for eligibility to interest and the calculation of interest are applicable as of November 1, 2001. The retention post-November 1, 2001 of part of the old policy applicable to eligibility for interest would be inconsistent with the purpose of the policy revisions. As well, it would mean that the application of policy to interest issues would be needlessly complex.

In that case, the initial decision to deny interest was made on March 7, 2001. The Appeal Division panel rejected the argument that eligibility for interest is determined by the policy in effect at the time of the initial decision concerning interest. It interpreted the phrase "all decisions" as including appellate decisions.

## **(b) Interpretation #2**

*WCAT Decision #2004-03816* dated July 19, 2004 concerned a claim on which the worker had appealed to the Review Board concerning decisions dated July 16, 1998 and March 27, 2001 (which denied her claim). The Review Board held an oral hearing on October 26, 2001. On March 28, 2002, the Review Board issued its finding allowing the worker's appeal. Implementation decisions dated August 22, 2002 and

September 12, 2002 were issued, which awarded retroactive benefits to the worker without interest. The worker appealed these decisions to the Review Board, and the

appeals were transferred to WCAT on March 3, 2003. The WCAT panel found the worker was entitled to interest, notwithstanding that her appeal regarding the acceptance of her claim was not decided by the Review Board until after the policy change concerning interest, and the first decision to address interest was made after November 1, 2001. The WCAT panel reasoned in part, in connection with the reasoning in *Appeal Division Decision #2002-1488*:

The panel concluded that this wording was broad enough to bear an interpretation that the policy change applied to all decisions, appellate or not, made after November 1, 2001. I accept that such is the case. That is, the above statement does allow for such an interpretation. However, it also is broad enough to allow for the contrary interpretation. That is, it may be read that the policy applies only to new initial decisions made after November 1, 2001 which are later overturned at the appellate level and therefore would attract consideration for interest payment on the retroactive payment of benefits. This second interpretation seems more likely to be the intent of the governors when one considers that the method of determining the applicable rate of interest was specifically identified as applying retrospectively. On a plain reading of the paragraph quoted above, I cannot find that the retrospective application can apply to anything other than the applicable rate of interest. Any other reading of the paragraph is necessarily tortured.

I therefore conclude that the governors specifically turned their minds to the retrospectivity of the policy and chose to explicitly make it applicable only to the method of calculation of interest.

The panel in *Decision #2004-1488* [sic] said that one of the purposes of the changed policy was to establish more stringent criteria for eligibility and that phased implementation of the policy would be inconsistent with that desire. Again with respect, I cannot agree with my colleagues reasoning in this regard. It seems to me that if the governors had sought to change the policy because it was an incorrect application of the law, they would have been required to, and indeed eager to, make the policy retroactive in order to avoid further applications of an unlawful policy. There is no suggestion here that the pre-November 1, 2001 policy was unlawful. Rather, the panel in 2002 simply concluded that the governors wanted to establish a more restrictive policy for, presumably, economic reasons. There is, however, no suggestion that there was an urgent or dire economic circumstance that the Board faced in November 1, 2001 that required retroactivity of the policy change. Rather, the governors were taking an orderly and, in their view timely, step to continue the

operations of the Board on a sound financial footing. There is simply no evidence that the financial impact of a change of policy item #50.00 was such that it required retrospective application to all cases.

[underlining in original]

The WCAT panel found the October 15, 2001 policy change only affected claims where the initial adjudication regarding entitlement to benefits was conducted subsequent to November 1, 2001.

### **(c) Interpretation #3**

A third interpretation of the October 15, 2001 policy resolution was provided in *Appeal Division Decision #2002-1383* dated June 4, 2002. In that case, the panel found that as the Board officer's decision to deny interest was made prior to November 1, 2001, the former policy (in effect at the time the decision to deny interest was made) should be applied in the appeal. The Appeal Division panel reasoned:

Although the decision not to award interest was made by the Board on December 17, 1999, if I decide that an award of interest should be paid now, this would be a decision to award interest made after November 1, 2001. Decision #36 of the Governors [now the Panel of Administrators] 9 WCR, No. 2 147 addresses the retroactivity of policy changes. It states that a policy change may occur as a result of a reconsideration and rethinking of existing lawful policy. The presumption in these cases is that the changed policy will not apply retroactively before the date on which the new policy was approved. It is not clear to me that the Panel's resolution is referring to Board decisions made on or after November 1, 2001 or any decision, including a decision upon appeal, made after November 1, 2001. In light of this uncertainty, I find that the prior policy item #50 applies in this case and not the amended policy.

*Appeal Division Decision #2002-1383* is also accessible on the Board's website (cited above). A similar interpretation was provided in *WCAT Decision #2004-05710* dated October 28, 2004. While these decisions have not been followed in other cases, and were not part of the package of materials on which submissions were invited, we consider it appropriate to include this third approach in our consideration for completeness.

## **9. Submissions**

The workers' adviser and employers' adviser have provided detailed submissions. These submissions include the following key points.

The workers' adviser submits that the Board is a creature of statute, and only has those powers conferred on it by its enabling statute. The Act does not contain any express provision giving the Board the authority to pass retroactive policy. She submits the Board has no jurisdiction to pass policy with retroactive effect, unless the policy is conferring a benefit or is in some other way permissive or beneficial. She submits, therefore, that any retroactive aspect of the November 1, 2001 amendments to policy in RSCM item #50.00 is unlawful, and should be referred to the WCAT chair under section 251 of the Act. Alternatively, the workers' adviser submits that the approach set out in *WCAT Decision #2004-03816* (Interpretation #2) is the correct interpretation to be given to the policy change, as it limits the retroactive application of the policy.

The employers' adviser submits the plain meaning of the October 15, 2001 policy resolution was that, on or after November 1, 2001, all decisions as to whether interest should be paid on retroactive benefits shall be made in accordance with the new policy. She submits that *WCAT Decision #2004-03816* (Interpretation #2) has interpreted "all decisions" as meaning all "initial" decisions, suggesting that the policy in effect at the time of the original decision to deny a particular benefit should govern, and that it is only the calculation of interest which was intended to have retrospective application. She submits that in order to give effect to this interpretation, two words must be read into the paragraph. First, the word "initial" must be read in after the word "all". Second, it requires that a qualifying word such as "however" be read in after the beginning of the second sentence dealing with the calculation of interest. She submits this differs from the intention of the panel of administrators, and that if the intention had been to have only those initial decisions regarding the payment of interest to be affected by the new policy, that wording as to the application date would have been included. The employers' adviser further argues that the presumption against retroactivity in *Decision No. 36* is rebutted, primarily by the wording of the policy resolution itself.

The worker's union representative expresses agreement with the submission by the workers' adviser. In the alternative, she submits that the case manager had already made the decision to pay interest on the worker's retroactive entitlement before the November 1, 2001 policy change.

## **10. Reasons and Findings**

### **(a) Effective Date Wording**

We will consider, first of all, the meaning or effect of the wording used in the October 15, 2001 policy resolution regarding its effective date. For this purpose, we will focus our attention on the wording of the resolution within the context of other policy resolutions. In this part of our decision, we seek to identify the intent of the policy-makers. We defer consideration, until later in our decision, as to whether there are legal principles (concerning retroactivity or retrospectivity) requiring a different approach.

**(i) Literal reading**

On a literal reading, there would not appear to be any difference in meaning between the phrase “all decisions”, and the phrase “all decisions, including appeal decisions”. For example, if one referred to “all residents of British Columbia”, and “all British Columbia residents, including Vancouver Island residents”, the meaning would be the same. The use of the word “all” would encompass both mainland and island residents. As well, the use of the word “including” normally serves to identify specific subgroups for the sake of clarity. It is evident that *Appeal Division Decision #2002-1488* (Interpretation #1) found that the phrase “all decisions” has just such an effect, namely, of including initial adjudicative decisions and appeal decisions (so as to include situations where the initial interest decision was made under the former policy). Upon examining the wording of the October 15, 2001 resolution alone, this would appear to be the literal effect of the wording regarding its effective date.

**(ii) Other Policy Resolutions – Effective Date Wording**

Rather than focussing solely on the wording of the October 15, 2001 resolution, we consider it useful to examine the wording of the October 15, 2001 resolution in the context of other policies, and other “effective date” wordings used by the policy-makers, to assist in considering the effect of the October 15, 2001 resolution. A range of different wordings has been utilized by the policy-makers regarding the effective date of policy changes. While multiple examples exist in relation to the various categories shown below, we will show only one example in each category (except for the category which specifically refers to appellate decisions).

Many policy resolutions simply state that the resolution is effective on a specified date:

- September 11, 1998      Re: Hand-Arm Vibration Syndrome (HAVS)  
The amended policies are effective September 11, 1998.

Other policy resolutions state that the policy change applies to all decisions made on or after a specified date:

- October 26, 2004      Re: Policy Item #31.20 - Hearing Loss  
This resolution is effective December 1, 2004, and applies to all decisions made on or after that date.

Other policy resolutions state the policy change applies to all adjudicative decisions after a specified date:

- October 16, 2002 Re: Recurrence of Disability  
The amended policies are effective October 16, 2002, and will apply to all adjudication decisions made on or after that date.

Other policy resolutions use different terminology, but also appear to be referring to all adjudicative decisions after a specified date:

- November 19, 2002 Re: Chronic Pain  
This resolution applies to new claims received and all active claims that are currently awaiting an initial adjudication.

Other resolutions state that the policy change applies to all adjudicative and appellate decisions made on or after the specified date:

- March 16, 2000 Re: Loss of Earnings Pensions Past Age 65  
The amended policy item #40.20 is effective on April 1, 2000, and will apply to all pensions adjudicated by a Board officer or **appell body** on or after that date.
- January 24, 2004 Re: The Status of Treatment Injuries  
Amendments to policy items #22.00, #22.10, #22.11, #22.15 and #22.21 of the *RS&CM*, Volume II, attached as Appendix A, are approved and apply to all decisions, **including appellate decisions**, made on or after February 1, 2004, regardless of the date of the original work injury or the further injury.
- May 18, 2004 Re: Statutory Presumption and Diseases with Long Latency Periods  
Amendments to policy item #26.21 of the *RS&CM*, Volumes I and II, attached as an Appendix, are approved and apply to all decisions, **including appellate decisions**, made on or after June 1, 2004.  
This resolution is effective June 1, 2004 and applies to all decisions, **including appellate decisions**, made on or after that date.
- May 18, 2004 Re: Adjudication of Hernia Claims  
This resolution is effective June 1, 2004 and applies to all decisions, **including appellate decisions**, made on or after that date.
- June 22, 2004 Re: Referral to Disability Awards  
This resolution is effective July 2, 2004, and applies to all decisions, **including appellate decisions**, made on or after that date.

[emphasis added]

Other policy resolutions state that the policy change only applies to applications for compensation received by the Board after a specified date:

- December 17, 1999      Re: Schedule B Item 12 Bursitis and Item 13 Tendinitis, tenosynovitis  
The above amendments to Schedule B and to Sections 27.10, 27.11, 27.12, 27.20, and Appendix 2 of the *Rehabilitation Services and Claims Manual* shall be effective 30 days after publication of the above Regulation in the British Columbia Gazette. The amendments to Schedule B and to the above policies shall apply only to those claims where the initial application for compensation has been received by the Board on or after the effective date of such amendments.

Other policy resolutions have used particular wording to establish a specific prospective effective date:

- July 12, 1999      Re: Compensation Benefits and Incarceration  
The amendments are effective on the date this resolution is approved. Workers incarcerated as of that date who have had their benefits cancelled will be reassessed under this policy. The policy will have effect prospectively with respect to future ongoing entitlement. There will be no retroactive effect.

Other policy resolutions are stated to be effective from some past date:

- April 28, 2000      Re: Bladder Cancer in Aluminum Smelter Workers  
The amended Section 30.10 is effective on April 28, 2000. This policy will apply to all claims adjudicated on or after March 13, 1989 (the date the original bladder cancer policy was approved).

### **(iii) Policy on Retroactivity**

As indicated in *Decision of the Governors Number 28*, "Approval of Retroactive Implementation of Changes in W.C.B. Policy Necessitated by *Appeal Division Decision No. 91-0850* and *Appeal Division Decision No. 92-1210*", October 26, 1992, 8 W.C.R. 691, the board of governors proceeded to adopt a general policy regarding retroactivity. *Decision of the Governors No. 36*, "Retroactivity of Policy Changes", March 1, 1993, 9 W.C.R. 147, was primarily concerned with the following question:

How then shall the Board decide whether, or to what extent, a policy change necessitated by a finding by the courts, the Appeal Division or another administrative tribunal that Board policy under the *Workers Compensation Act*, the *Criminal Injury Compensation Act*, the *Workplace Act* or other statute is unlawful applies to cases decided before the change?

*Decision No. 36* established several guidelines to be applied where a policy is found to be unlawful. As the October 15, 2001 policy change concerning interest did not follow a finding that the prior interest policy was unlawful, those guidelines are not applicable to the issue before us. However, *Decision No. 36* also briefly addressed two other situations. It specified:

The policy change may occur as a result of a reconsideration and rethinking of existing lawful policy. The presumption in these cases is that the changed policy will not apply retroactively before the date on which the new policy was approved.

*Decision No. 36* further noted:

The policy change may occur as a result of an amendment to the *Workers Compensation Act*, the *Criminal Injury Compensation Act*, the *Workplace Act* or some other statute. The presumption in these cases, unless expressly or necessarily implied from the language, purpose or circumstances of the statute, is that the changed policy will not apply retroactively before the date on which the statute came into force.

*Decision No. 36* was adopted as a policy of the board of directors by *Resolution of the Board of Directors Number 2003/02/11-04*, "Policies of the Board of Directors", 19 W.C.R. 1 (accessible at: [http://www.worksafebc.com/publications/wc\\_reporter/default.asp](http://www.worksafebc.com/publications/wc_reporter/default.asp)). Paragraph 1.1 included the following as policy of the board of directors:

- (g) Policy decisions of the former Governors and the former Panel of Administrators still in effect immediately before February 11, 2003.

*Decision No. 36* was published in Volume 9 of the W.C.R., and was not part of the collection of decisions published in Volumes 1 to 6 of the W.C.R. which have recently been retired.

As the October 15, 2001 resolution involved a reconsideration and rethinking of existing lawful policy, the policy presumption contained in *Decision No. 36* is that the changed policy will not apply retroactively before the date on which the new policy was approved.

#### (iv) Interpreting Application Statement in the October 15, 2001 Resolution

Upon consideration of the foregoing, certain questions or concerns arise regarding the interpretation of the effective date of the October 15, 2001 policy resolution.

*Appeal Division Decision #2002-1488* (Interpretation #1) found that the new policy applied to a case in which the initial decision to deny interest had been made under the former policy. One of the key reasons provided for that conclusion was that the policy-makers would likely not have intended to have two policies apply to interest, with the new policy only applying to initial interest decisions made on or after November 1, 2001. The panel expressed concern that this would mean that all the interest decisions in the appellate system would have to be completely processed before only one policy would be applicable to interest issues. The Appeal Division panel found that this would produce “an unwieldy set of circumstances”, which was likely not the intent of the policy-makers. We consider, however, that this inference is not supported by a review of the various wordings used to specify effective dates. Given the number of resolutions in which just such distinctions are clearly made by the wording of the effective dates, we consider that this reason has little force. As well, *Decision No. 36* establishes or recognizes a presumption that a changed policy will not apply retroactively before the date on which the new policy was approved.

In several instances, the policy-makers have utilized wording to specify that a policy is to apply to cases which are under appeal, notwithstanding the fact that the initial adjudication decision was rendered under a prior policy. The summary of effective date wordings set out above includes five examples of policies which were expressly stated to also apply to appellate decisions. The first of these examples occurred prior to the October 15, 2001 policy resolution (i.e. the March 16, 2000 policy regarding Loss of Earnings Pensions Past Age 65). Accordingly, a question arises as to the significance, if any, regarding the lack of reference to appellate decisions in the October 15, 2001 resolution regarding its effective date.

The policy-makers could not use the phrase “all decisions, excluding appeal decisions”, as decisions rendered under the new policy would be subject to appeal. A question arises as to whether the phrase “all decisions” has any difference in meaning from the phrase “all decisions, including appellate decisions”. Is the phrase “all decisions” intended to mean all new adjudicative decisions, but not including appeal decisions regarding decisions made under the former policy? If, for example, the policy-makers’ operating assumption is that appeal bodies will apply the policy that was in effect at the time of the original decision, then the addition of the phrase “including appellate decisions” would be necessary and meaningful, where they wished to rebut such a common law presumption. Otherwise, there would be no distinction between the phrases “all decisions” and “all decisions, including appellate decisions”.

The reasoning in *Appeal Division Decision #2002-1488* (Interpretation #1) was a reasonable interpretation of the literal wording of the October 15, 2001 policy when read in isolation. As noted above, however, that interpretation has the effect of making meaningless the distinction in various policy resolutions between those policy changes which apply to “all decisions”, and those which apply to “all decisions, including appellate decisions.” Taking into account the presumption set out in *Decision No. 36* (that a changed policy will not apply retroactively before the date on which the new policy was approved), and giving meaning to the distinction in various policy resolutions between those which apply to “all decisions”, and those which apply to “all decisions, including appellate decisions”, we consider that the intent of the wording in the October 15, 2001 resolution regarding its effective date was that it would only apply to initial decisions concerning interest on or after November 1, 2001 (and not to appeals of interest decisions made prior to November 1, 2001 under the former policy).

With respect to *WCAT Decision #2004-03816* (Interpretation #2), we consider that it is inconsistent with the plain wording of the October 15, 2001 policy resolution regarding its effective date. The policy specified that it applied effective November 1, 2001, “and will apply to all decisions to award or charge interest on or after that date.” The WCAT panel interpreted this wording to mean the policy only applies to claims where the initial adjudication regarding entitlement to benefits was conducted subsequent to November 1, 2001. Thus, it found the former interest policy applied even where a worker’s entitlement to benefits was not established until after November 1, 2001. We consider that if the policy-makers had intended such a restriction to apply, it would have been more clearly stated in the wording of the resolution. We consider our interpretation to be consistent with the further wording of the resolution which stipulates that “when calculating the amount of interest payable, the new method for determining the applicable rate of interest will apply retrospectively and will be used for the entire entitlement period and will not be limited to entitlement for time periods after November 1, 2001.” We consider that the issue of eligibility for interest, and the method of calculating the interest, are separate questions.

It is apparent from the reasoning in *WCAT Decision #2004-03816*, that the panel was concerned with the retroactive effect of the policy. The panel may have found that a strained interpretation of the policy was required, so as to not to contravene common law presumptions against retroactivity or retrospectivity. The question as to whether the panel’s interpretation was correct requires consideration of these common law principles, which we will address later in our decision.

In sum, as a matter of interpretation of the October 15, 2001 policy resolution regarding its effective date, we agree (subject to further consideration of the common law as set out below), with the interpretation provided in *Appeal Division Decision #2002-1383* dated June 4, 2002 (Interpretation #3).

## **(b) Policy-making Authority and the Common Law**

### **(i) Policy-making Authority**

At the time of the October 15, 2001 policy resolution, section 82 of the Act established the authority of the board of governors as the policy-making body under the Act. Section 82 provided that:

The governors must approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health....

The analysis in the first part of our decision is based primarily on the “effective date” wording in the October 15, 2001 and other policy resolutions. It is, however, also necessary to take into account certain common law principles of statutory interpretation.

Under section 99(1) and 250(1), the Board and WCAT are not bound by legal precedent. This means that the policy-makers and decision-makers have considerable scope and flexibility in addressing matters under the Act. However, this does not mean that the Board and WCAT operate in a legal vacuum. The policy-makers or appeal bodies are entitled to interpret provisions in the Act differently than a court might. Such decisions must, however, take into account the general legal framework within which the Board and WCAT have been established. This framework is implicit to administrative tribunals being part of a society governed by the rule of law. We cannot determine the correct interpretation of the effective date of the October 15, 2001 policy resolution on the basis of its wording alone. Before reaching a final decision, it is necessary to take into account the common law regarding retroactivity and retrospectivity (in order to consider whether this requires the policy resolution be interpreted differently so as to better accord with the common law, or whether the policy should be referred to the WCAT chair under section 251(1) and (2) of the Act as being so patently unreasonable that it is not capable of being supported by the Act and its regulations).

### **(ii) Retroactivity and Retrospectivity**

Policy in *Decision No. 36* recognized a presumption that a changed policy will not apply retroactively before the date on which the new policy was approved. It did not, however, identify any restriction regarding the retrospective application of new policy.

In *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, (1997) 143 D.L.R. (4<sup>th</sup>) 577, Mr. Justice Iacobucci (of the Supreme Court of Canada) reasoned:

39 The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264, at pp. 268-69, has offered these concise definitions which I find helpful:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

[Emphasis in original.]

In the text *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed. (Markham: The Butterworth Group of Companies, 2002), Professor Ruth Sullivan adopts the following terminology and distinctions (pages 548-549):

- *retroactive application*: legislation which changes past effects of a past situation, that is, changes the legal character of the past transaction;
- *retrospective application*: legislation which changes the future effects of a past situation; and
- *prospective application*: legislation which changes the future effects of an ongoing situation (immediate application), or which changes the future effects of a future situation (future application).

Retroactive application occurs when the effect of applying law to particular facts is to deem the law to be different from what it actually was when the facts occurred: *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 SCR 271, (1975) 66 D.L.R. (3d) 449 (*Gustavson Drilling*). Although legislatures are permitted to create law with retroactive application, doing so is a serious violation of the rule of law because people are entitled to govern their affairs according to the law. To do so, they must have advance knowledge of what the law is. It is arbitrary and unfair to change the law retroactively. There is therefore a strong presumption that legislation is not intended to be retroactive unless such construction is expressly, or by necessary implication, required by the language of the statute.

According to Mr. Justice Dickson, writing for the court in *Gustavson Drilling*, legislation that changes the future effects of past or ongoing situations is not retroactive because there is no attempt to reach into the past and alter the law as of an earlier date. Mr. Justice Dickson found that such legislation is prospective and should receive an immediate effect.

Sullivan and Driedger conclude that a statutory provision should be given immediate effect unless to do so would change the past or interfere with vested rights (page 557). Sullivan and Driedger classify this as retrospective application of legislation. They point out that if there was a presumption against the retrospective application of legislation, it would be much weaker than the one against retroactive application and would probably be easy to rebut, particularly in circumstances involving long-term relationships (page 559).

### **(iii) Application of Common Law Principles to October 15, 2001 Resolution**

The workers' adviser submits the policy-makers have no authority under the Act to approve retroactive policy changes (subject to the caveat that the presumption against retroactivity does not arise when the retroactive change is beneficial). She cites the Alberta Court of Queen's Bench decision in *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*, [2001] 10 W.W.R. 651, (2001) 34 Admin. L.R. (3d) 289, July 23, 2001, in which the court reasoned:

62 Because statutorily-authorized policies can have the force of law, there is a general presumption that such policies cannot be made to apply retroactively. Citizens are entitled to know what the law is as of the date they are making decisions about their conduct. Even the legislature rarely enacts regulations with retroactive effect, because of this constitutional principle. Accordingly, the power to make retroactive policies will not be inferred unless the statute requires it: *Western Decalta Petroleum Ltd. v. Alberta (Public Utilities Board)* (1978) 6 Alta. L.R. (2d) 1, 86 D.L.R. (3d) 600 (C.A.); *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; and *N.W.T.T.A. v. Northwest Territories (Commissioner)* (1997), 153 D.L.R. (4th) 80. The statute need not expressly permit retroactivity if the context implies it: *Paton v. The Queen*, [1968] S.C.R. 341 at 358.

In the first part of our decision, we concluded that the new policy was not intended to apply to cases in which a decision concerning interest had been made under the former policy. This means, for example, that if an employer appealed a decision made under the former policy to award interest to a worker, an appellate body could not use the amended policy as a basis for finding the worker was not entitled to interest. Similarly, if a worker had been incorrectly denied interest under the former policy, it would be open to the worker to pursue an appeal in reliance on the former policy. Accordingly, we consider that the policy change was not retroactive in nature. Rather, it was

retrospective in nature, dealing with initial decisions concerning interest made on or after November 1, 2001.

Having regard to the Court decisions and texts cited above, we do not consider that the common law limits the policy-makers from giving the October 15, 2001 policy resolution immediate effect, in relation to claims for interest which had not been adjudicated by November 1, 2001. We do not consider that this amounts to a retroactive policy. Accordingly, for the purposes of our decision, it is not necessary that we address the question as to whether the board of directors has authority to approve policy with retroactive effect.

### **(c) Application of Policy to Worker's Circumstances**

#### **(i) Was an Interest Decision Made Prior to the Policy Change?**

The worker submits that the case manager had made a decision to pay interest when the worker spoke to the case manager by telephone on October 22, 2001.

It is necessary to consider whether a decision had been made concerning the worker's request for interest under the former policy prior to the November 1, 2001 policy amendment. Pursuant to the interpretation set out above, if a decision had been provided to the worker concerning his claim to interest prior to the policy change, his appeal must be decided on the basis of the former policy. If, however, the initial decision concerning interest was not made until after the policy amendment, the amended policy applies to the adjudication of the worker's request for interest and the consideration of his appeal.

The circumstances of the worker's claim were not such as to involve any statutory entitlement to interest. His eligibility for interest was based solely on a policy. The worker's entitlement to compensation was established by the September 19, 2001 Review Board finding. However, under section 92(2) of the Act as it existed at that time, where a Review Board finding was appealed under section 91, or reopened or reheard under section 96, payment of retroactive compensation had to be deferred until the Appeal Division rendered its decision or redetermination. In accordance with this statutory framework, policy at RSCM item #105.30 required payment of retroactive compensation be deferred until the expiry of the 30 day time frame for an appeal or referral of the Review Board finding to the Appeal Division. The October 15, 2001 policy resolution was issued during this 30 day period. The first decision communicated to the worker concerning the benefits payable in implementation of the Review Board finding was dated December 4, 2001.

In response to an inquiry regarding implementation of the Review Board finding, the Board officer might reasonably have explained that implementation would be deferred for 30 days under section 92, but that interest would be payable on any retroactive benefits. It was routine under the former policy to award interest, where a denial of benefits was reversed on appeal. Although not explained in the claim file records, we infer from the fact that the Board officer largely completed the form for initiating payment of interest that it was initially contemplated that interest would be payable. Although not documented in any decision or other file memoranda, it would appear that the planned payment of interest was halted upon a realization that the policy had changed.

The worker may reasonably have hoped or expected to be awarded interest on his retroactive entitlement, based on the former interest policy, but this prospect had not yet been realized. To the extent the Board officer may have had occasion to contemplate implementation of the Review Board finding, the Board officer would similarly have anticipated granting interest to the worker. In any telephone discussion with the worker regarding the deferred implementation of the Review Board finding, it is likely that this expectation that interest would be granted would have been communicated. Accordingly, we have no reason to doubt the worker's claim that he was told he would receive interest, when the worker spoke to the case manager by telephone on October 22, 2001. However, no written decision was provided to the worker concerning his request for interest.

The policy concerning interest had changed by the time the Board officer was ready to proceed with the calculation of the worker's entitlement to retroactive benefits in implementation of the Review Board finding. The worker's entitlement to interest had not been established prior to November 1, 2001. While he had an expectation of payment of interest, the new policy imposed a new result in respect of a past event. We consider that the application of the new interest policy in this context is properly characterized as retrospective, rather than retroactive in effect.

Having regard to the partially completed form to award interest, we infer that the Board officer may well have intended to award interest (possibly unaware of the policy change). It may be the case that some internal "quality control" process identified the possible error, with the result that interest was not awarded when the officer's decision was issued. We do not consider that any anticipatory comments, concerning the expectation that interest would be payable under the former policy, or any draft decision to award interest based on a possible lack of awareness of the new policy, mean that the worker is thereby entitled to a decision under the former interest policy.

We are not persuaded that any decision had been made regarding the worker's eligibility to interest prior to November 1, 2001. While there might well have been a verbal explanation to the worker regarding the expectation that interest would be awarded on his retroactive benefits, in accordance with the policy which existed at the time, we do not consider that this amounted to a decision. We are not persuaded that the worker's claim to interest had moved beyond an expectation, so as to become a

vested right to receive interest under the terms of the former policy. While not necessary to our decision, we note that our reasoning is consistent with that recently expressed in *WCAT Decision #2005-02379* dated May 10, 2005.

Under sections 99(2) and 250(2) of the Act, the Board and WCAT must apply a policy of the board of directors that is applicable in a case. As we find that the worker's request for interest was not adjudicated prior to November 1, 2001, we find that the November 1, 2001 policy is the one which applies in the worker's case. We do not consider the amended policy, and its retrospective application in the circumstances of the worker's case, to be patently unreasonable. We do not consider that grounds are established for referring the policy to the chair under section 250(1), as being "so patently unreasonable that it is not capable of being supported by the Act and its regulations."

### **(ii) Was there a Blatant Board Error?**

Under the November 1, 2001 policy, interest is payable if it is determined that there was a blatant Board error that necessitated the retroactive payment. The policy states:

For an error to be "blatant" it must be an obvious and overriding error. For example, the error must be one that had the Board officer known that he or she was making the error at the time, it would have caused the officer to change the course of reasoning and the outcome. A "blatant" error cannot be characterized as an understandable error based on misjudgment. Rather, it describes a glaring error that no reasonable person should make.

The September 19, 2001 Review Board finding allowed the worker's appeal from the July 13, 1999 decision by the case manager. The case manager denied the worker's request for a reopening of his 1985 claim, in relation to his surgery in March 1999 for an L5-S1 discectomy. The July 13, 1999 decision of the case manager included a review of the worker's prior back claims (memo #12) and a medical opinion by a Board medical advisor (memo #14). The September 19, 2001 Review Board finding reasoned in part:

Based on Dr. [F's] opinion of July 22, 1999 (and clarification of August 23, 2001) that the disc injury in 1985 may remain stable and not cause any pain or may cause a disc herniation later in life, either on the same side as the initial pain or on the opposite side, the evidence is more than sufficient on balance to find that in all likelihood had it not been for the August 15, 1985 compensable low back injury the worker would not have required the L5-S1 discectomy on March 31, 1999.

While the July 13, 1999 decision was reversed on appeal, this involved a different judgment with respect to the weighing of the evidence with the benefit of new evidence

from the neurosurgeon who performed the worker's surgery. We find no basis for considering that the July 13, 1999 decision by the case manager involved a blatant error. Accordingly, the worker is not entitled to interest.

#### **(d) Summary**

We find that the correct interpretation of the October 15, 2001 policy resolution is that it applies to initial adjudicative decisions concerning interest on or after November 1, 2001, but not to appeals where the initial adjudicative decision concerning interest was made prior to November 1, 2001. This approach gives meaning to the distinction drawn in various policy resolutions between those which apply to "all decisions", and those which apply to "all decisions, including appellate decisions". As the policy change in this case applied to "all decisions", it applied to all adjudicative decisions (but not to appeals from decisions rendered under the prior policy). This interpretation is supported by the wording of other policy resolutions which specify that particular policy changes also apply to appellate decisions, by the policy presumption contained in *Decision No. 36* that a changed policy will not apply retroactively before the date on which the new policy was approved, and by common law principles of statutory interpretation as discussed above. We agree, therefore, with the interpretation provided in *Appeal Division Decision #2002-1383* and *WCAT Decision #2004-05710* (Interpretation #3).

We find that the policy-makers had authority under section 82 of the Act to create new policy, and to stipulate that it would have immediate application to matters that had not yet been decided. To the extent this adversely impacted the worker's eligibility to claim interest under the former policy, we find the policy was retrospective, rather than retroactive, in its effect. No decision had been rendered to award interest to the worker, notwithstanding any expectation on the part of both the worker and the case manager that such a decision would be forthcoming. We accept that the policy-makers have the legal authority to make new policy which applies immediately to the initial adjudication of a particular subject matter, even where this has the effect of defeating a hope or expectation that a matter would be adjudicated a particular way under the former policy. In the absence of a specific adjudication concerning the worker's claim to interest prior to November 1, 2001, we do not consider that the worker had acquired a right to consideration under the former policy.

In the present case, the worker's eligibility for compensation was determined prior to the October 15, 2001 policy resolution, but the initial decision on interest was not made until after the new policy was effective. The application of the new policy in these circumstances was retrospective, rather than retroactive, and does not offend the presumption against retroactivity. For the purposes of our decision, we did not need to consider whether the board of directors has authority to approve policy which is truly retroactive.

We consider that the worker's eligibility was properly addressed under the new policy, which applied to the initial adjudication after November 1, 2001 of his claim to interest. We find that both as a matter of interpretation of the policy resolution, and upon consideration of the common law, that the policy was correctly interpreted and applied in this case. As no blatant Board error was identified, the worker is not eligible for interest under the new interest policy. The worker's appeal is denied.

## **11. Conclusion**

The May 17, 2002 decision by the client services manager is confirmed. The December 4, 2001 decision by the case manager was correct in denying the worker's request for interest on his retroactive wage loss benefits, in implementation of the September 19, 2001 Review Board finding. The Board officers correctly interpreted the October 15, 2001 policy resolution concerning interest as applying to initial decisions concerning interest on or after November 1, 2001.

Herb Morton, presiding member  
Vice Chair

William J. Duncan  
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