Precedent Panel Decision Summary

Decision: WCAT-2007-04002 **Decision Date:** December 20, 2007

Three Member Panel: Herb Morton, William Duncan, Susan L. Polsky Shamash

Section 238(6) Precedent Panel Decision – Policy item #50.00 Rehabilitation Services and Claims Manual - Payment of Interest on Retroactive Compensation Benefits – Resolution of the Panel of Administrators Number 2001/10/15-03 "Calculation of Interest" – Policy found by British Columbia Supreme Court to be Patently Unreasonable – WCAT Ordered to Reconsider Prior Precedent Panel Decision – Section 38(2) of the Transitional Provisions in Part 2 of the Workers Compensation Amendment Act (No. 2), 2002

As ordered by the British Columbia Supreme Court on judicial review (in a class action proceeding), a WCAT precedent panel reconsidered their prior precedent panel decision, *WCAT-2005-03622-RB* dated July 8, 2005, concerning the payment of interest on retroactive compensation benefits.

By judgment of September 26, 2007, *Johnson v. Workers' Compensation Board*, 2007 BCSC 1410, the British Columbia Supreme Court concluded:

- The new interest policy, item #50.00 of the *Rehabilitation Services and Claims Manual* as amended on November 1, 2001 by the panel of administrators of the Workers' Compensation Board, operating as WorkSafeBC (Board), was patently unreasonable;
- It was patently unreasonable for WCAT to fail to conclude that the new interest policy was patently unreasonable;
- The procedure WCAT must follow in such circumstances is set out in section 251 of the Act.
- It was not appropriate for the court to give further direction about what interest policy might be lawful. There might be several potential policies which would be capable of being supported by the Act and its regulations.

Upon reconsideration, the precedent panel declined to initiate a referral of the new interest policy to the WCAT chair under section 251 of the *Workers Compensation Act* (Act). The worker had originally appealed a Board officer's decision on the payment of interest to the (former) Workers' Compensation Review Board, and the appeal had been transferred to WCAT for completion following the March 3, 2003 changes to the Act.

The precedent panel stated that a party may not be required to exhaust their avenues of review and appeal under the Act, including the process set out in section 251 of the Act for addressing an issue concerning the lawfulness of Board policy. The court may in certain circumstances address an issue regarding the lawfulness of policy, in a fashion which supersedes such consideration under the process set out in section 251 of the Act. The precedent panel found that, in this case, the court's decision was determinative and the section 251 referral process would be moot. The precedent panel also found it had the authority to determine whether a policy was applicable in the circumstances of this case. Given that the new interest policy was found by the court to be unlawful, the precedent panel found it was not applicable to the worker's appeal. Accordingly, it was not necessary, appropriate or possible to refer the new interest policy to the WCAT chair under section 251 of the Act. The precedent panel read the

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court's reference to following the section 251 referral process as meaning this procedure should have been followed by the precedent panel in its July 8, 2005 decision, rather than as directing them to now initiate a referral under this section.

The precedent panel found that the worker's request for interest was one which could not reasonably be determined on the basis of the statutory provisions alone, in the absence of policy. Given the binding effect under section 250(3) of the Act of a precedent panel's decision on other WCAT panels, any determination by the precedent panel regarding the worker's eligibility for interest in such a policy vacuum would run the risk of improperly infringing on the board of directors' policy-making authority under section 82 of the Act.

The precedent panel referred the Board decision back to the Board under section 38(2) of the transitional provisions of Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*. The precedent panel directed the Board to make a fresh decision concerning the worker's entitlement to interest in light of the court decision and any further policy direction which might be provided by the board of directors of the Board.

This decision has been the subject of a BC Court of Appeal decision. See 2008 BCCA 232.

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Susan L. Polsky Shamash, Vice Chair

Introduction

This is a reconsideration of *WCAT Decision #2005-03622-RB* of the Workers' Compensation Appeal Tribunal (WCAT), "Precedent Panel - Payment of Interest on Retroactive Benefits", 21 W.C.R. 205. That decision was issued as a precedent panel decision under section 238(6) of the *Workers Compensation Act* (Act). The decision was the subject of a petition for judicial review, in a class action proceeding. By judgement of September 26, 2007, *Johnson v. Workers' Compensation Board*, 2007 BCSC 1410, the British Columbia Supreme Court concluded:

> [105] The common issue has been determined, that the New Interest Policy is patently unreasonable in the face of s. 5 of the ***WCA***. It was patently unreasonable for WCAT to fail to conclude that the New Interest Policy is so patently unreasonable that it is not capable of being supported by the ***WCA*** and its regulations. The procedure the WCAT must follow in such circumstances is set out in s. 251 of the ***WCA***.
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> [106] In my view, it is not appropriate for the court to give further direction about what interest policy might be lawful. There may be several potential policies which would be capable of being supported by the ***WCA*** and its regulations.
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> [107] As a result, the WCAT Precedent Panel must reconsider the petitioner's appeal in light of the determination that the New Interest Policy is so patently unreasonably that it is not capable of being supported by the ***WCA*** and its regulations.
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> [reproduced as written]

Accordingly, the prior WCAT decision has been returned to the precedent panel for reconsideration. We remain a precedent panel under section 238(6) of the Act.

By memorandum dated October 15, 2007, we invited comments from the parties regarding the manner in which we should proceed in implementing the court's decision. That memorandum set out five possible options, and invited comments from the parties. Written submissions were provided from the worker's lawyer. The Employers'

Advisers Office and the Workers' Advisers Office were invited to participate as interested persons, and both provided written submissions. These submissions were disclosed to the worker's lawyer, who waived the right to provide a reply. The employer is not participating, although invited to do so.

We find that this reconsideration involves questions of law and policy which can be properly considered on the basis of written submissions without an oral hearing.

Issue(s)

Is the worker entitled to interest on his retroactive compensation benefits?

Jurisdiction

Our jurisdiction to rehear the worker's appeal is based on the court decision. That decision requires us to reconsider the petitioner's appeal in light of the court's determination that the New Interest Policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Background and Evidence

The worker appealed a decision dated May 17, 2002 by a client services manager of the Workers' Compensation Board, now operating as WorkSafeBC (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 (the New Interest Policy) which made "blatant Board error" a prerequisite for awarding interest.

In *WCAT Decision #2005-03622-RB*, we found that the worker's eligibility for interest was properly addressed under the Board's New Interest Policy (which applied to the initial adjudication after November 1, 2001 of his claim to interest). We concluded that the policy was correctly interpreted and applied in his case. As no blatant Board error was identified, the worker was not eligible for interest under the New Interest Policy.

The worker filed a petition for judicial review. By decision dated September 26, 2007, Madam Justice Gray found that the New Interest Policy is not capable of being supported by the Act and its regulations, and it was patently unreasonable for the WCAT to conclude otherwise. The worker's appeal has been remitted to us for reconsideration in light of the court's determination.

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Submissions

The worker's lawyer submits that the precedent panel must immediately refer the New Interest Policy to the WCAT chair as so patently unreasonable that it is not capable of being supported by the Act and its regulations. He submits:

> It is imperative that the 90 day time limit for the board of directors to review their policy under section 251(6) of the WCA be started immediately.

The worker's lawyer further submits that, as a matter of proper public administration, the Board must not continue to adjudicate claims and implement WCAT appeals applying unlawful policy.

The employers' adviser submits that the court has effectively usurped WCAT's jurisdiction by declaring policy at #50.00 of the *Rehabilitation Services and Claims Manual* to be patently unreasonable. The lawfulness of the policy was not addressed as an issue in the prior WCAT decision. As a result of the court's decision, the panel is no longer in a position to examine the issue of the New Interest Policy's reasonableness. The employers' adviser further submits:

> A further difficulty is the Court's conflicting directions as to how this matter is to proceed in light of its ruling. On the one hand, the Court indicates that the procedures set out in section 251 must be followed (paragraph 105). On the other hand, the Court has directed the Precedent Panel must reconsider the petitioner's appeal in light of the fact that the policy has been found unlawful (paragraph 107).
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> It is difficult to see how the tribunal can follow a section 251 proceeding when the Policy has already been declared unlawful. The issue is moot. However, equally difficult to see is how the Precedent Panel can reconsider the petitioner's appeal before the Board has been given the opportunity to establish new policy regarding the payment of interest on retroactive awards, particularly given its statutory obligation under section 250(2) to apply policy when making its decision.

The employers' adviser submits that the panel should follow the course of action taken in *WCAT Decision #2007-03099*, and cancel the May 17, 2002 decision by the client services manager. Proceeding in that way would allow the Board to determine a response to the court's decision, and to put a further interest policy in place. In *WCAT Decision #2007-03099*, a WCAT panel reasoned:

> In light of the court's decision, it is evident that a policy vacuum exists with respect to when it is proper to pay interest. While the Board will be weighing various options, and depending on the option which is exercised,

> new policy will be created, at the present time, I am unable to provide a decision on the worker's entitlement to interest.
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> Under the circumstances, I find the Review Division decision denying payment of interest should be cancelled. This will leave the way clear for the Board to provide a decision concerning entitlement to interest at a later date, when its response to the Supreme Court decision is known and policy is once again in place.

The director, Workers' Advisers Office, submits that the panel should refer the New Interest Policy to the WCAT chair under section 251 of the Act. She submits this course of action would reflect the applicable procedure to follow in order to properly implement the court's decision. She cites the following points from the court decision in support of this argument: the New Interest Policy is patently unreasonable, it was inappropriate for the court to provide further direction on the type of interest policy that may be lawful, and the appropriate procedure for WCAT to follow in the circumstances is set out in section 251 of the Act. She further argues:

> We submit that the effect of the Court's finding that the New Interest Policy is patently unreasonable is to render the policy inoperable. In the absence of policy making authority, WCAT must proceed under the framework established by the Act where there is a finding that the policy is patently unreasonable. In this case, the Chair's power under section 251(3) of the Act to determine whether the policy should be applied has been superseded by the decision of the Court. The section 251 process, specified under subsection 5(b), provides a mechanism for addressing the legal vacuum created by the finding that a policy is patently unreasonable; allowing for suspension of affected cases.

Reasons and Findings

Section 250(2) of the Act provides:

> The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

Section 251 of the Act further provides, in part:

> **251** (1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.
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> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair

> and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.

In the text *Administrative Law in Canada*, Fourth Edition (Ontario: LexisNexis, 2006), Sara Blake states at page 99:

> If a statute requires the application of policies or directives issued by the Minister or by another tribunal, then they must be applied because they have the status of law. However, the decision maker retains discretion to consider whether the policy applies in the circumstances of the case before it.

Subsection 250(2) of the Act requires a WCAT panel to apply a policy of the board of directors "that is applicable in that case". We interpret this provision as meaning that the WCAT panel has jurisdiction to determine whether the policy is applicable in the circumstances of the case before it. This is consistent with the analysis provided by Blake.

Under section 251 of the Act, a WCAT panel has no jurisdiction to provide a final determination regarding the lawfulness of policy under the Act. Section 251 provides a set of procedures, whereby a WCAT panel may refer a policy to the WCAT chair on the basis that the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If the WCAT chair reaches the same conclusion, the matter is referred to the board of directors. In terms of decision-making authority within the workers' compensation system, the board of directors has final authority for determining whether a policy is lawful, and WCAT is bound by that determination.

However, parties may not be required to exhaust their avenues of review and appeal under the Act, including the process set out in section 251 of the Act for addressing an issue concerning the lawfulness of policy. In *Western Stevedoring Co. Ltd. v. W.C.B.*, 2005 BCSC 1650, [2005] B.C.J. No. 2599, 45 Admin. L.R. (4th) 305, the British Columbia Supreme Court held that parties may seek a judicial ruling regarding the legality of an impugned policy without exhausting the internal review and appeal procedures under the Act. In that case, Mr. Justice Groberman reasoned:

> [41] I am not convinced that the internal review provisions in the ***Workers Compensation Act*** furnish an adequate alternative remedy to judicial review where the matter in issue is legality of a policy issued by the board of directors of the Board. Throughout the process, decision-makers are

> required to defer to the policies of the board of directors. Even where the policies are found to be patently unreasonable, there is no certainty that the decision-makers will be allowed to depart from them.
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> [42] I am not satisfied that, where the sole issue is the legality of a policy, the aggrieved party should be required to follow the ***Act's*** lengthy and inconclusive procedures of review and appeal. Such a course would be time-consuming, and even if the petitioner succeeds in convincing the WCAT that the policies are *ultra vires*, there is no certainty that those policies will not be applied.
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> [43] The Board argues that the internal processes ought to be followed, in any event, in deference to the expertise of the reviewing officers and the Appeal Tribunal. I am unable to accept that argument. The reviewing officers have no jurisdiction to even inquire into the validity of policy. It is clear that the statute does not intend that decisions as to the jurisdiction of the board of directors to implement a particular policy be made at their level.
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> [44] While the ***Act*** does allow the WCAT limited authority to address the validity of policy, it does not do so in a manner suggestive of expertise. The WCAT is allowed to review policy only on a standard of "patent unreasonableness", the narrowest of all possible standards of review. It is evident that on judicial review, the court itself would be entitled to review policies of the board of directors on the same standard – it would owe no deference at all to any finding of the WCAT on the issue.
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> [45] The very limited powers of the WCAT to review board of directors' policy, and their impotence to make any binding determination that the policy is *ultra vires* convinces me that the internal remedies set out in the ***Workers Compensation Act*** are not adequate alternative remedies to judicial review where the sole issue is one covered by policies of the board of directors.

Mr. Justice Groberman concluded, in paragraph 51:

> For reasons I have given, I am not satisfied that the review and appeal process under the ***Workers Compensation Act*** constitutes an "adequate alternative remedy" such that this court should refuse to hear the issue until the administrative review mechanisms have been exhausted.

It is evident, therefore, that the British Columbia Supreme Court may in certain circumstances address an issue regarding the lawfulness of policy, in a fashion which supersedes such consideration under the process set out in section 251 of the Act.

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Upon careful consideration, we find that the decision of the court regarding the lawfulness of the policy is determinative. Given the court's conclusion that the New Interest Policy is unlawful, that issue is not before us for determination. We consider that the section 251 referral process, which serves to obtain determinations regarding the lawfulness of policy by the WCAT chair, and the board of directors, would serve no useful purpose in the context of a prior determination by the court that the policy is unlawful. We consider that the section 251 referral process no longer constitutes an available option for us. As an "external" determination regarding the lawfulness of the New Interest Policy has been provided by the court, the procedures for obtaining such a determination within the workers' compensation system are moot. As a matter of law, we are obliged to give effect to the court decision.

As explained above, we have jurisdiction to determine whether a policy is applicable in the circumstances of the case before us. Given that the New Interest Policy has been found by the court to be unlawful, we find it is not applicable to the worker's appeal. Accordingly, we do not consider it necessary, appropriate or possible to refer the New Interest Policy to the WCAT chair under section 251 of the Act.

In reaching this conclusion, we have considered the effect of the court's reasoning in paragraph 105. The court found:

> It was patently unreasonable for WCAT to fail to conclude that the New Interest Policy is so patently unreasonable that it is not capable of being supported by the ***WCA*** and its regulations. The procedure the WCAT must follow in such circumstances is set out in s. 251 of the ***WCA***.

While ambiguous, we read the latter sentence as relating to the former. In other words, our prior decision was flawed in failing to determine that the New Interest Policy was patently unreasonable, and in failing to invoke the process set out in section 251 of the Act. We interpret this passage as concerning the error in our prior decision, rather than as directing us to now initiate a referral under section 251 of the Act.

We consider, in this regard, that the Board is bound by the British Columbia Supreme Court decision (subject to an appeal to the Court of Appeal). It would not be open to the board of directors to reach a different decision regarding the lawfulness of the policy. Accordingly, the section 251 referral process would be moot.

We also note that section 251(6) of the Act provides:

> Within 90 days after receipt of a notice under subsection (5) (a), the board of directors must review the policy and determine whether the appeal tribunal may refuse to apply it under subsection (1).

In the event the board of directors wishes to consider the revision of a policy, the section 251 referral process does not require the board of directors to provide any

revised policy within the 90-day time frame stipulated in section 251(6) of the Act. This provision only requires the board of directors to determine whether WCAT may refuse to apply the impugned policy. Accordingly, the section 251 referral process does not necessarily advance the worker's case in terms of obtaining an earlier policy response from the board of directors.

It is evident, in any event, that the September 26, 2007 court decision would have had the effect of bringing the "interest" policy issue before the board of directors. A section 251 referral is not necessary to achieve that objective.

For the foregoing reasons, we decline to initiate a referral of the New Interest Policy to the WCAT chair under section 251 of the Act.

Our prior decision concerned the worker's appeal of a decision dated May 17, 2002 by a client services manager of the Board. The worker's appeal was initially filed to the former Review Board, and was transferred to WCAT for completion following the March 3, 2003 changes to the Act. In reconsidering the worker's appeal in light of the court decision, we find that the May 17, 2002 decision was made on the basis of an unlawful policy. Accordingly, the May 17, 2002 decision must be set aside.

It is then necessary to consider the worker's claim for interest. At the present time, there is a policy vacuum. We do not consider that the worker's request for interest is one which can reasonably be determined on the basis of the statutory provisions alone, in the absence of policy. The fact that the New Interest Policy has been determined to be unlawful does not have the effect of resurrecting, or bringing back into force, any prior interest policy which had been repealed. The court held that there may be several potential policies which would be capable of being supported by the Act and its regulations. Responsibility for policy-making rests with the board of directors under section 82 of the Act. The Board will be weighing various options and new policy may be created. We do not consider that this is a situation in which it would be appropriate to proceed to address the worker's appeal on the merits. Given that we have been appointed as a "precedent panel" under section 238(6) of the Act, and our decision would be binding on other WCAT panels to the extent set out in section 250(3) of the Act, any determination by us regarding the worker's eligibility for interest in such a policy vacuum would run the risk of improperly infringing on the board of directors' policy-making authority under section 82 of the Act.

Section 38 of the transitional provisions contained in Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) included the following:

> **38** (1) Subject to subsection (3), all proceedings pending before the review board on the transition date are continued and must be completed as proceedings pending before the appeal tribunal except that section 253 (4) of the Act, as enacted by the amending Act, does not apply to those proceedings.

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> (2) In proceedings before the appeal tribunal under subsection (1), instead of making a decision under section 253 (1) of the Act, as enacted by the amending Act, the appeal tribunal may refer a matter back to the Board, with or without directions, and the Board's decision made under that referral may be reviewed under section 96.2 of the Act, as enacted by the amending Act.

Accordingly, we may refer the May 17, 2002 decision back to the Board under section 38(2) of the transitional provisions.

Section 253(1) of the Act further provides that:

> On an appeal, the appeal tribunal may confirm, vary or cancel the appealed decision or order.

Accordingly, we may also cancel the May 17, 2002 decision, as having been made on the basis of a policy which has been found to be unlawful. Item #14.40 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) defines the term "cancel" as follows:

> The panel disagrees with the determinations made on every issue covered by a decision under appeal and determines that the decision should be set aside without providing a new or changed decision. Cancellations will normally only be ordered on prevention decisions.

The March 3, 2003 changes to the Act contained in Bill 63 were based in large measure on the recommendations contained in the March 11, 2002 *Core Services Review of the Workers' Compensation Board* (the Winter Report). At page 26, the core reviewer concluded there was "an overwhelming need for the current appeal processes and structures within the workers' compensation system to be reformed." One of the reasons listed in support of this conclusion was as follows:

> Fourth, the existing multiple levels of appeal on claims issues foster a lack of finality with respect to a worker's claim. There are many examples where, after going through one or more levels of appeal, a worker's claim is referred back to the WCB for further adjudication – which then leads to the potential of further appeals. This process has been referred to as the "treadmill" effect.

Having regard to the concern regarding the "treadmill" effect, and the legislative decision not to provide WCAT with the authority to refer a matter back to the Board (such as was provided to the Review Division under section 96.4(8)(b)), WCAT normally attempts to provide a final decision on the merits of an appeal. Nevertheless, we find that this is a circumstance in which it would be best to set aside or cancel the May 17,

2002 decision by the client services manager, so that the worker's request for interest may be adjudicated in light of any new policy of the board of directors.

As our decision in this case concerns an appeal under Bill 63's transitional provisions, we consider it appropriate to exercise the statutory discretion provided to us under section 38(2) of Bill 63. Accordingly, we refer the May 17, 2002 decision by the client services manager back to the Board, with the direction that the Board make a fresh decision concerning the worker's entitlement to interest in light of the court decision that the New Interest Policy is unlawful, and in light of any further policy direction which may be provided by the board of directors. This preserves the worker's right to request review and appeal of any new decision which is provided to him. The worker's appeal is allowed on this limited basis.

No expenses were requested, and it does not appear that any expenses were incurred related to this reconsideration of the worker's appeal. We make no order regarding expenses.

Conclusion

Pursuant to section 38(2) of Bill 63's transitional provisions, we refer the May 17, 2002 decision by the client services manager back to the Board. We direct that the Board make a fresh decision concerning the worker's entitlement to interest in light of the court decision that the New Interest Policy is unlawful, and in light of any further policy direction which may be provided by the board of directors.

Herb Morton
Vice Chair

William J. Duncan
Vice Chair

Susan L. Polsky Shamash
Vice Chair

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