November 26, 2003

Memo To: Jill Callan, Chair WCAT

Memo From: Daphne Dukelow, Vice Chair, WCAT

Re: Section 251 of the Act and Policy Item #50.00

By this memorandum I am referring an issue to you under section 251(2) of the Act.

In the case of the worker, deceased, the worker's widow and son have been provided with a large lump sum retroactive payment of benefits to which they are entitled under section 17 of the Act. This sum was paid to implement a decision of the Appeal Division. The first decision under appeal is dated April 12, 2002 and implements the Appeal Division direction to pay a large retroactive sum. It states that interest is not payable. The second decision under appeal is dated May 7, 2002 and confirms the first and clarifies that widow and son are not entitled to interest because they were not workers or employers within the meaning of Item #50.00 of the RSCM, Volume I. No decision was made as to whether there was a "blatant error" although the case manager acknowledged that the representative's argument that there had been a "blatant error" had merit.

The widow's representative has raised the argument that the policy is discriminatory, in an administrative law sense. He has not raised a Charter argument. I am of the view that the current version of Item #50.00 which applies to decisions made on or after November 1, 2001 is the version which applies in this case since the decision declining to pay interest was made on April 12, 2002.

In order to receive interest under Item #50.00 two criteria must be met. There must be a "blatant error" and the person seeking the interest must fall within the other criteria set out in the Item. It clearly applies to wage loss or pension payments made to workers or employers under sections 22, 23, 29 or 30. It makes no provision for interest payment to any other class of person.

I have considered whether there has been a "blatant error" within the meaning of the policy. I consider that there was a blatant error which caused the long delay in the widow and son receiving the compensation to which they were entitled. In the end it is the delay which gives rise to the need to address the issue of the interest payment.

As a result, I must address the issue of whether the policy is discriminatory vis à vis the widow and her son. If it is discriminatory then, in my view, it is likely that it is patently unreasonable within the meaning of section 251(2) of the Act.

Therefore, I am formally referring this issue to you under section 251(2) of the Act.

The current version of Item #50.00 is more explicit in its reference to workers and employers and to sections 22, 23, 29 and 30 of the Act than the previous version of Item #50.00. The representative points out that, like benefits under the four enumerated sections of the Act, the benefits the widow and her son received were ones to which they were entitled under the Act. The benefits were not ones paid on a discretionary basis.

The following are the reasons which lead me to consider that the limitation, to workers and employers, in Item #50.00, should not apply in this case and that the widow and son should be awarded interest on the retroactive sum.

I accept that the Board has discretionary authority to make policy concerning the payment of interest on benefits which it must pay under the Act. The question is whether that authority has been properly exercised and whether the discrimination between classes of benefit-recipients is authorized.

In the text *Administrative Law* (Ontario: Irwin Law, 2001) at 119, D. Mullan notes that the majority in *Montréal (City of) v. Arcade Amusements Inc.,* [1985] 1 S.C.R. 368, stated that discrimination in the exercise of discretionary power can, without bad faith, be a stand alone ground for a claim:

While conceding that any one of these grounds or any of them in combination could give rise to invalidity, Beetz J. also, reinforced the existence of a free-standing or "neutral" principle against discrimination. Under this principle, absent explicit statutory authorization, discriminatory by-laws could be condemned by the courts even if "the distinction on which they are based is perfectly rational or reasonable in the narrow or political sense, and was conceived and imposed in good faith, without favouritism or malice."

Macaulay and Sprague, *Hearings Before Administrative Tribunals, supra* at 5B-19, clearly states that discretionary decisions are not immune from discrimination claims:

Unless the enabling grant of power otherwise provides (and this can be either express or implied in the legislation), a discretion-holder cannot exercise his or her

discretion in a discriminatory fashion or for the purpose of discriminating against a person or group of persons.

The Supreme Court of Canada discussed the issue of discrimination is *R.* v. *Sharma*, [1993] 1 S.C.R. 650.[1] Iacobucci J., writing for the court, quoted from the definition of discrimination put forward in dissent by Arbour J.A. in the Court of Appeal, as follows:

She defined discrimination in the administrative law sense as the drawing of a distinction by a subordinate authority that is not authorized by the enabling legislation, relying upon the decision of this Court in *Montréal (City of) v. Arcade Amusements Inc.*, *supra*. In her view, the issue to be addressed was not whether the distinction in the by-laws was reasonable given the context of the nuisance involved, but whether the distinction is authorized. She noted that what has been called the "neutral rule of discrimination" has often been used to strike down seemingly innocuous municipal legislation.
…
I agree with Arbour J.A. that this case is governed by the decision of this Court in Montréal (City of) v. Arcade Amusements Inc., supra, with respect to the discrimination in the by-law scheme. In that case, the Court held that the power to pass municipal by-laws does not entail that of enacting discriminatory provisions (i.e., of drawing a distinction) unless in effect the enabling legislation authorizes such discriminatory treatment.

D. Mullan in his text *Administrative Law, supra* at 117 – 120, goes on to note several problems with common law discrimination claims, including the lack of clarity as to how far this principle applies in relation to interests other than those that have achieved the status of rights and freedoms in the Charter. As well, he refers to the fact that discrimination is most often asserted in the realm of by-laws and regulations and as one moves away from those areas it is questionable if discrimination is an available ground for a claim. While this point is noted, discrimination has been applied in the past to the policies of administrative bodies, thus it is presumed that it is a legitimate ground for review in this instance. (*See*, for example, *Waldman* v. *British Columbia (Medical Services Commission)* (1999), 67 B.C.L.R. (3d) 21 (C.A.) and *Bingo Enterprises Ltd.* v. *Manitoba (Lotteries Gaming Licensing Board)* (1983), 2 Admin. L.R. 286 (Man. C.A.)).

[1] *Shell Canada Products Ltd.* v. *Vancouver (City)*, [1994] 1 S.C.R. 231 also comments, in *obiter*, on this type of claim.

Policy item #50.00 provides for the payment of interest in certain situations "to a worker or employer." The policy is silent about whether interest payments on retroactive benefits can be made to survivors.

Practice Directive #28, although not binding, further provides that interest cannot be paid to an estate of deceased workers, but does not specifically exclude payment of interest to survivors. It states, in part:

Interest is payable only to workers or employers. Therefore, interest cannot, for example, be paid to private or other disability benefit plans, or to estates of deceased workers.

The clear interpretation of the words of the policy is that it provides for payment of interest on retroactive payments to a worker or an employer, but does not permit payment of to widows and other dependants. This interpretation is supported by the fact that "workers" are defined under section 1 of the Act separately from "dependents" and "members of family". It is unlikely that surviving spouses are included within the term "worker" in Item #50.00. Moreover, current policy item #50.00 of the RSCM specifically refers to the payment of interest where a retroactive payment is made under sections 22, 23, 29 or 30 of the Act.

In Appeal Division Decision # 2001-2137, the panel considered the wording of the policy in effect at that time and concluded that the reference to the payment of interest to a "worker" included survivors:

I also find that Item #50.00's other criteria for payment of interest are met in this case. The phrase "interest is paid to workers …on retroactive wage-loss and pension lump sum payments" is broad enough to include arrears of monthly pension entitlement for survivors.

Decision #2001-2137 was based on a version of the policy that did not specify the four sections of the Act. Section 17, which provides for payments to surviving spouses, is not included in the list of sections. The Board apparently did not intend to pay interest to this group.

It addition, neither Decision 346 or 384, which were replaced by policy item #50.00, made a reference to limiting the payment of interest on retroactive awards to "workers and employers". These words were added in a January 1986 amendment to the policy.

The Board has exercised its discretion by adopting a policy whereby there must be a blatant board error necessitating an award for retroactive payments and an award

has been granted, in order to attract the payment of interest. These two requirements are consistent with the structure and purpose of the Act as the potential costs of paying interest on a large number of historical claims could jeopardize the viability of the accident fund and is a valid reason for limiting the type of case where interest is payable. Thus, the Board has restricted payment to those cases where the opportunity to have immediate access to monies has been wrongly denied due to blatant board error.

Within the class of persons that meet these requirements the policy goes on to draw a distinction between workers and employers on the one hand and survivors, dependants and estates on the other.

D. Mullan, *Administrative Law, supra* states at 120:

As for the question that Sopinka J. left open in *Shell Canada* - whether discriminations within a class are justified – Iacobucci J. stated in *Sharma* that claims of discrimination could be made with respect to by-laws discriminating among members of a class and also with respect to discriminations between or among different classes. While this distinction is not without its own problems, this would seem to indicate that the Court will not tolerate distinction among members of the same class or, to put it another way, in situations where there are no relevant distinctions to justify treating the relevant persons as members of different classes.

There is no evidence that this distinction was made in bad faith. Yet, as noted in the quote above, it may be discriminatory if it is not authorized by the Act.

One interpretation is that this distinction is authorized by the Act. In this regard, several arguments may be made. It can be argued that the authority under section 82 is broad enough to permit the Board to make choices that distinguish between classes. Limitations on the payment of interest are consistent with the flexibility required to administer the workers compensation system, safeguard the integrity of the accident fund and limit the burden on current contributors. In response to this, it is notable that the Board can restrict the cases where interest is payable, but must do so based on *relevant* distinctions. For example, limiting the payment of interest to cases where delay is caused by blatant board error is a relevant distinction because it directly relates to the reason for the delay. As both groups experience the same deleterious effects from the delay in payment, it is difficult to find a rationale related to the issue of interest that would justify treating survivors differently than workers.

Second, the Act itself makes distinctions between workers and survivors. For example, the compensation for workers is calculated under sections 22, 23, 29 and

30 of the Act, while benefits for survivors are predominantly calculated under section 17. The calculation formula in these cases may differ as section 17 calculations are affected by the age of the claimant and the number of dependants. Distinctions are also made between claimants that fall under section 17 and surviving spouses that have had a pension reinstated under section 19(2)(c) of the Act. These instances of differential treatment give support to the position that the scheme of the Act implicitly authorizes the Board to make distinctions between these classes when setting policy. In response to this it is important to note that these sections provide for different amounts of compensation, they do not state that workers should receive compensation and survivors should receive nothing. In addition, interest is paid for a different reason than a compensation award, namely, to offset the deleterious effect of delayed payment and ensure that the amount awarded maintains its time value. It is not clear that the existing statutory framework, which permits distinctions based on fair compensation, can be taken to imply that the Board has the authority to completely prohibit certain groups, that would otherwise meet the criteria in item #50.00 of the RSCM, from receiving interest.

Third, policy item #48.41 of the RSCM refers to recovering payments where there is fraud or misrepresentation by the "worker", thus the Board may not be protected as far as recovering monies in the case of fraud by survivors. This may be an indication that compensation paid to survivors should be limited. This, however, is not a strong argument as it would mean that all payments to survivors, not just interest payments, would be affected and this is not evident in the Act. Further, if a survivor was fraudulent or misrepresented relevant facts, the Board is entitled to redetermine the matter. Therefore, this does not appear to be a legitimate reason for making such distinctions.

An alternative interpretation is that once a decision has been made to pay interest to a certain class of persons, who meet the criteria in policy item #50.00, payment should be made to everyone that falls within that class. This is supported by the following indications that, in this situation, workers have the same legally relevant characteristics as survivors:

1. Both workers and survivors who are awarded retroactive compensation for delayed payment are in the same position of having been left without the use of the award for some period and potentially having to borrow money or deplete savings as a substitute for benefits.[2]

[2] Disability benefit plans and estates may be distinguishable in this regard as, unlike workers and survivors, they cannot be said to have had to borrow money or erode savings while awaiting overdue payment.

2. In both cases it can be argued that the accident fund should not derive a benefit (accumulated interest) from the improper withholding of money due to blatant board error.

3. The payment of interest to survivors and workers would have the same effect in that it would not result in a windfall for survivors in excess of the level of compensation that the deceased worker would have received had the accident not been fatal.

4. One of the former provisions in the Act that specifically provided for the payment of interest treated workers and survivors the same. Namely, former section 92(3) provided that the "worker or his dependants" were entitled to interest on compensation that had been delayed because of an appeal, in cases where the appeal was decided in their favour.

5. Some subsections in section 17 describe the method of calculation of payment in terms of the compensation that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability. Payment to a totally disabled worker would, in these circumstances, attract interest if made retroactively.

Under this interpretation it is arguable that once the Board has decided that a certain class will be granted interest on retroactive payments, it cannot make distinctions among members of the same class where there are no relevant differences to justify differential treatment. In this case, there does not appear to be relevant differences that rationalize treating surviving spouses as members of a different class than workers. Rather, it seems arbitrary to have a goal of putting injured workers in a financial position similar to what they would have been if there had not been a blatant board error delaying payments, but not to have this same goal for survivors. In addition, the decision not to pay interest appears inconsistent with the decision that the surviving spouse was entitled to retroactive benefits due to blatant board error.

Overall, the second argument, that the policy includes an arbitrary distinction that is not expressly or impliedly authorized by the enabling legislation and is thus discriminatory, is supported by the context of the Act. The first argument does not stand up this scrutiny.

Pursuant to section 251(1) and (2) of the Act, if an appeal tribunal has determined that a policy should not be applied in the adjudication of the worker's appeal

because it is patently unreasonable, the tribunal can refer the issue to the chair to make a determination about the lawfulness of the policy. Section 251(1) states:

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.

The standard of patent unreasonableness has been defined in several Supreme Court of Canada decisions, as follows:

- "Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?" (*CUPE Local 963* v. *New Brunswick Liquor Corp.,* [1979] 2 S.C.R. 227.)

- "It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational." (*Canada (A.G.)* v. *Public Service Alliance of Canada*, [1993] 1 S.C.R. 941.)

- "Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. …A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. … A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (Southam, supra, at para. 57)." (*Law Society of New Brunswick v. Ryan* (2003), 223 D.L.R. (4th) 577 (S.C.C.) at 596.)

The test to be applied is, therefore, not whether the policy is a "correct" interpretation of the Act or "best reflects" the intent of the legislation, but whether the policy involves a patently unreasonable interpretation of the Act.

In this case, in the absence of limiting wording, the language of section 82 is very general and appears to allow the Board to establish some restrictions with regard to entitlement to interest. However, these restrictions must be authorized by the Act. Policy item #50.00 of the RSCM creates an arbitrary distinction between workers and survivors that is not so authorized. This could be classified as an unreasonable exercise of the Board's authority under the Act as it cannot be supported after a probing examination of the Act, but the error was not immediately apparent. In my view, however, to the extent that the policy creates a distinction

that is not authorized by and is inconsistent with the Act, a stronger argument can be made that the defect in the policy is immediately apparent and is not only unreasonable, but is patently unreasonable as it cannot be rationally supported by the relevant legislation.

I have considered whether the policy constitutes an unlawful fettering of discretion. A discretionary power connotes choice over a course of action as opposed to a duty to take action (D. Mullan, *Administrative Law, supra* at 105). It is a general principle of law that policies will be regarded as an unlawful fetter upon discretion if they are elevated to the status of an inflexible rule (*Testa* v. *British Columbia (Workers' Compensation Board)* (1989), 58 D.L.R. (4th) 676, *Van Unen* v. *Workers' Compensation Board*, (2001) 87 B.C.L.R. (3d) 277 (B.C.C.A.)). Jones and de Villars, *Principles of Administrative Law*, 3rd ed. (Ontario: Carswell, 1999) at 177, notes:

Because Administrative Law generally requires a statutory power to be exercised by the very person upon whom it has been conferred, there must necessarily be some limit on the extent to which the exercise of a discretionary power can be fettered by the adoption of an inflexible policy … . After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits.

Policy item #50.00 of the RSCM is more appropriately reviewed in terms of discrimination than fettering of discretion. The legislature has conferred the governing body of the Workers' Compensation Board with the authority to adopt policy with regard to entitlement to interest for situations other than those enumerated in the Act. In turn, one cannot point to a provision in the Act and state that the policy unlawfully limits the discretion of a decision maker set out in that provision. In the absence of a clear discretion contained in the statute giving decision makers the choice as to which classes are entitled to the payment of interest, it is questionable whether the prohibition against the fettering of discretion can be applied in this case. The authority of a decision maker cannot be fettered if it is not a matter on which the decision maker has discretion. For this reason, this type of situation is more appropriately dealt with as a question of whether the Board has lawfully exercised its discretionary authority.

Having determined that policy item #50.00 of the RSCM is patently unreasonable and should not be applied in this case it is not necessary to go a step further and consider whether the fact that the tribunal must apply the policies of the Board under section 250(2) of the Act is valid. A few comments in this regard will, however, be made.

If policy guidelines are absolutely binding, an argument can be made that there is a fettering of discretion. The current scheme appears at first glance to fall into this trap. It may, however, be saved by the existence of a mechanism under section 251 of the Act to have the policy reviewed by the chair and the board of directors, as well as the requirement under section 250(2) that decisions be made according to the merits and justice of the case. These factors support the notion that the policies are not absolutely binding on decision-makers as they can refuse to apply patently unreasonable policy. Further, it is significant that the binding nature of policy is not merely authorized, but required by the statute.[3] As stated in D. Mullan, *Administrative Law, supra* at 115:

Nonetheless, this tolerance does not permit an agency to establish formal rules to govern in particular cases. That requires a specifically legislated, rule-making power. …

In this case, the statute provides the Board with the power to make binding policy. While this issue is not fully canvassed here, the requirement to apply Board policy may be valid in light of these factors.

The claimant has not made an argument under the Charter of Rights and Freedoms (the "Charter") in this case. Had this issue been raised it is unlikely that the argument would have been viable.

Section 15 sets out the equality provision in the Charter. R. Sharpe, *The Charter of Rights and Freedoms*, (2nd ed.) (Ontario: Irwin Law, 2002) at 258, sets out the criteria for making a section 15 argument:

… a section 15 violation would require proof of discrimination on an enumerated or analogous ground, and substantive discrimination that violated human dignity.

An economic disadvantage, on its own, is not sufficient grounds to successfully make a section 15 charter challenge. As stated in *Burnett* v. *British Columbia (Workers' Compensation Board)* (2003), 228 D. L. R. (4th) 551 (BCCA):

Taking a broad view of Law and subsequent decisions, the Supreme Court of Canada has been at pains to limit the application of s. 15(1) to cases where the individuals affected by the impugned legislation suffer more than economic

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[3] *See* also *Friends of the Oldman River Society* v. *Canada (Min. Of Transport*), [1992] 1 S.C.R. 3, for a discussion of guidelines that are mandatory in nature.

detriment or disadvantage. Something more is required to find that economic disadvantage is constitutionally significant.

Although the policy here treats survivors differently it is not likely that being a member of this group has resulted in a "pre-existing disadvantage" or a violation of human dignity within the meaning of s. 15 of the Charter, rather the disadvantage appears to be strictly economic. As economic disadvantage is not sufficient to successfully bring oneself with the protection of section 15 of the charter, there does not appear to be any need to raise the constitutional validity of policy item #50.00 with the parties.

In conclusion, I consider that the Board has the discretion under section 82 of the Act to set out the circumstances in which it will pay interest. It cannot, however, create arbitrary distinctions that are not authorized by the legislation when exercising this power. In this case, policy item #50.00 has been framed in a manner that addresses the issue of workers and employers who have been subject to delays in payment of compensation through a blatant board error, but fails to treat survivors similarly despite the fact that they are in an analogous situation to workers. I consider that there is no clear statutory authority for this distinction which, in turn, supports a conclusion that it is discriminatory. I consider that the application of this policy, which I consider to be discriminatory, is patently unreasonable as it cannot be rationally supported by the legislation.

I do not consider this an appropriate case for a fettering of discretion argument as the prohibition against the fettering of discretion only applies if there is a discretion contained in the statute, which has been fettered, and that is not the case here. Nor is there a viable charter argument in this instance.