WCAT Decision Number: WCAT-2010-02785
WCAT Decision Date: October 20, 2010
Panel: Heather McDonald, Vice Chair

Introduction

[1] This is a referral to the chair under section 251 of the *Workers Compensation Act* (Act). Under section 251(1) I find that section 259 of the Act, read in light of the statutory scheme as a whole, does not allow the Workers' Compensation Board (Board)[1] to significantly restrict the period for which interest will be paid on amounts refunded. I also find that therefore *Assessment Manual* (Manual) policy item AP1-39-2, as applied in the appellant's situation, is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Appeal Background

[2] This issue has arisen in the context of an assessment appeal. The background, evidence, law, policy, and the appellant's submissions, are set out in detail in *WCAT-2008-02206* (July 24, 2008) and therefore I need not repeat those details in this decision.[2] That was a previous decision involving the appellant where I concluded Manual policy item AP1-39-2 is not so patently unreasonable that it is not capable of being supported by the Act and its regulations. The appellant initiated a judicial review of *WCAT-2008-02206* with the Supreme Court of British Columbia (Court). On September 22, 2010, the Court issued its decision in *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)* 2010 BCSC 1340. The Court set aside *WCAT-2008-02206* and suggested that WCAT consider the following:

a) Whether section 259 of the Act, read in light of the statutory scheme as a whole, allows the Board to significantly restrict the period for which interest will be paid on amounts refunded, and

b) If it does, whether the Board's policy, as applied in the appellant's situation, is supported by the Act and its regulations.

[3] The Board is not a party to this appeal and did not participate in the earlier proceedings that preceded *WCAT-2008-02206*, although WCAT had invited it to do so. Accordingly, I have not found it necessary to invite the Board's participation at this stage of the appeal. For the reasons that follow, I have also not found it necessary to ask the appellant for a submission at this stage of the appeal.

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[1] Operating as WorkSafeBC
[2] A copy of *WCAT-2008-02206* is attached herewith for the convenience of the WCAT chair

Issue(s)

[4] Does section 259 of the Act, read in light of the statutory scheme as a whole, allow the Board to significantly restrict the period for which interest will be paid on amounts refunded? Is the Board's assessment policy AP1-39-2, as applied in the appellant's situation, supported by the Act and its regulations?

Analysis and Reasons

[5] Section 259 of the Act states as follows:

> **259** (1) The commencement of a review under section 96.2 or of an appeal under this Part respecting a matter described in section 96.2(1)(b) does not relieve an employer from paying an amount in respect of a matter that is the subject of the review or appeal.
>
> (2) If the decision on a review or an appeal referred to in subsection (1) requires the refund of an amount to an employer, interest calculated in accordance with the policies of the board of directors must be paid to the employer on that refunded amount.

[6] Thus section 259(2) requires the Board to pay interest on an amount refunded to an employer after the employer's successful appeal or review of a Board decision involving an assessment or classification matter, a monetary penalty or other matters specified in section 96.2(1)(b) of the Act.

[7] Assessment policy item AP1-39-2 provides for interest on an overpaid assessment in three situations, of which the third applied to the appellant's situation:

> Interest may be paid on an overpaid assessment in the following situations:
> …
> - An amount…is returned to an employer as a result of a successful review under section 96.2 or a successful appeal under Part 4 respecting a matter described in section 96.2(1)(b) of the *Act*. In these cases, interest is payable from the date the employer requests the review or files the notice of appeal.

[8] In *WCAT-2007-00744* (February 28, 2007) the appellant was successful in its appeal of a Board decision which found the appellant to be the employer of a number of supervisors and newspaper carriers involved in the appellant's distribution business during 1998 and 1999, and in determining the appellant's assessable payroll on that basis. In implementing that WCAT decision the Board refunded assessment premiums

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

of $504,936.93 paid by the appellant, plus interest of $141,382.34 calculated from May 1, 2001 to March 31, 2007. The Board chose the date when interest would be payable as the date in 2001, when the appellant filed its notice of appeal with the former Appeal Division.

[9] On appeal to WCAT, the appellant submitted that the Board should have calculated and paid interest from the date of each assessment payment made by the appellant following September 15, 1998, which was the date the appellant initially requested the Board to review its decision regarding the status of the supervisors and newspaper carriers involved in the appellant's distribution business. The appellant submitted that the Board erred in its interpretation of section 259 of the Act and assessment policy item AP1-39-2 to limit interest payable from the date in 2001 when it filed its appeal with the Appeal Division.

[10] In *WCAT-2008-02206*, from pages 18 through 23, I reviewed the reasons in some other workers' compensation appellate decisions before concluding as follows:

> In my view it is a reasonable interpretation of the Act's reference in section 259(2) to "interest calculated in accordance with" Board policies to include not only matters such as type and rate of interest but also to include the date from which interest must be calculated on refunded assessment payments. I disagree, therefore, that assessment policy AP1-39-2's phrase: "…interest is payable from the date the employer requests the review or files a notice of appeal" is a limitation that is contrary to section 259(2) of the Act or its regulations, or is otherwise patently unreasonable. Pursuant to section 250(2) of the Act, therefore, WCAT is required to apply that policy if it is applicable in this case.
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> Further, I agree with the analysis by the Appeal Division panel in *Decision #93-1164* that there are a number of options from which the Board's governing body may choose and designate, in binding policy, as to the period over which interest will be payable on assessments refunded as a result of a successful appeal. **Therefore I do not accept the appellant's view that section 259(2) of the Act requires in every case of a successful appeal that the Board pay interest on refunded assessments from the date the amount was initially paid by the employer to the Board.**
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> [bold emphasis added]

[11] In the judicial review decision *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)* 2010 BCSC 1340 the Court stated *WCAT-2008-02206* did not appear to have rational support or to be defensible in respect of the facts and the law because it did not appear to rest on a rational interpretation of section 259(2) of the Act.

In that regard the Court went further to reason as follows in paragraphs 81 through 91 of the judgement:

> [81] The term "interest" denotes payment for the use of money, as dictionary definitions make clear:
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> > Money paid for the use of money lent (the principal), or for forbearance of a debt, according to a fixed ratio (*rate per cent*): *The Oxford English Dictionary*, 2nd ed., vol.VII, *sub verbo* "interest" [*OED*].
> >
> > The compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; esp., the amount owed to a lender in return for the use of borrowed money: *Black's Law Dictionary*, 9th ed., *sub verbo* "interest".
> >
> > A sum owing in consideration for using another sum of money: Dukelow & Nuse eds., *The Dictionary of Canadian Law*, (Scarborough: Thomson Professional Publishing Canada, 1991), *sub verbo* "interest".
>
> [82] The *OED* explains also that in early times Canon Law forbade charges for the use of money, and interest was paid as a fixed sum under contract, as compensation for the creditor's loss resulting from the debtor's default. However, beginning in the early 13th century and endorsed by law in the 16th century, the modern approach took over, with interest paid as "a percentage reckoned periodically, so as to correspond to the creditor's loss".
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> **[83] Interest as we now know it thus inherently correlates with the period for which the debtor has the creditor's money. Interest on "that refunded amount" thus implies a correlation with the respective periods of those overpayments. This is because the "refunded amount" is necessarily an aggregate amount, composed of the series of overpayments the employer paid from time to time as the Board and s. 259(1) required**.
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> **[84] If the legislature had intended, in s. 259, to give the Board authority to determine whether interest will be paid on all or, rather, only a portion of the amount refunded after a successful review or appeal, s. 259 would not have expressly required interest to be paid "on that refunded amount". The phrase could have been omitted, and the Board would be required only to pay "interest calculated in accordance with the policies of the board of directors".**

[85] The Board submits that its policy has support in the very fact that it correlates the applicable periods of interest with the very circumstances s. 259(1) specifically mentions: namely, after a successful review under section 96.2 or appeal according to s. 96.2(1)(b).

[86] However, it is only in those two circumstances (after "[t]he commencement of a review under section 96.2 or of an appeal under this Part") that, in s. 259(1), any obligation to pay disputed assessments arises. Section 259 provides a right to interest on any amount refunded after either of those processes, but it does so to mitigate the effect of the requirement in s. 259(1), that the employer disputing the assessment continue to pay the assessed premiums pending resolution of the review or appeal. Section 259(1) does not by its terms require the payment of disputed assessments during the process for an informal review. But, it seems unlikely that the *Act* intended to relieve employers from the requirement to pay the assessments during an informal review process lasting several years, such as was the case for [the appellant]. Far more likely is that s. 259 makes no reference to the informal process for review -- either as not suspending the obligation to pay assessments (s. 259(1)) or as entitling the payor to interest on an amount refunded after a review (s. 259(2)) -- because the *Act* contemplates the informal process taking place over a short period of time during which these matters will have relatively little effect.

[87] Also, it is not the review or the appeal themselves that, in s. 259(2), trigger the requirement for interest: it is the decision in the review or appeal, requiring the refund of an amount that does so.

[88] And, with such a decision, made on a review or appeal (as s. 259 describes), requiring "the refund of an amount", interest must be paid "on that refunded amount". Section 259 does not say, for example, that interest is to be paid on amounts accrued after the applicant initiated the review or the appeal.

[89] I agree with the respondents that s. 259 confers on the Board the responsibility to makes policies about the calculation of interest, and that a policy concerning interest may need to include some provision concerning the period for which it applies.

[90] **I cannot agree, however, that a rational interpretation of s. 259 allows the Board to effectively stipulate, through the mechanism for calculating interest, that no interest at all will be paid for a significant portion of the period during which the amount to be refunded was with the Board, and not the employer. Such an interpretation would**

> **allow the "calculation" of interest to undermine the very obligation in s. 259 to pay it.**
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> **[91] Section 259 stipulates not the basis on which interest is to be paid, but that the Board must have a meaningful policy governing the payment of interest on amounts refunded. A meaningful policy, rationally grounded in s. 259, cannot effectively remove the very entitlement the section provides. This would run counter to a rational interpretation of s. 259 and cannot be said, in this context, to fall within a range of possible acceptable outcomes which are defensible in respect of the facts and the law.**
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> [bold emphasis added]

[12] Subsequently, at paragraph 119 of the judgement, the Court stated that any conclusion that the Board has the authority to make a policy that deprived the appellant of interest for significant periods is a conclusion that is "not self-evident, and appears difficult to sustain against the plain language of s. 259(2), or against the Board's express encouragement to [the appellant] to pursue procedural avenues to challenge the assessment that, according to Board policy, did not attract interest."

[13] The appellant had asked the Court to quash *WCAT-2008-02206* and the underlying Board decisions; to declare assessment policy item AP1-39-2 inconsistent with section 259(2) of the Act in limiting the period of interest; and to order the Board to recalculate and pay the interest owing according to the correct interpretation of section 259(2). The Court declined to grant that relief. Instead, the Court set aside *WCAT-2008-02206* and remitted the matter to WCAT for "reconsideration".

[14] Section 251 of the Act provides for a complicated process (which may often be lengthy as well) regarding when WCAT may refuse to apply a policy of the Board's board of directors. Section 251 states as follows:

> 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.
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> (3) As soon as practicable after an issue is referred under subsection (2), the chair must determine whether the policy should be applied.

> (4) If the chair determines under subsection (3) that the policy should be applied, the chair must refer the matter back to the appeal tribunal and the tribunal is bound by that determination.
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> (5) If the chair determines under subsection (3) that the policy should not be applied, the chair must
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> > (a) send a notice of this determination, including the chair's written reasons, to the board of directors, and
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> > (b) suspend any other appeal proceedings that are pending before the appeal tribunal and that the chair considers to be affected by the same policy until the board of directors makes a determination under subsection (6).
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> (6) 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).
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> (7) On a review under subsection (6), the board of directors must provide the following with an opportunity to make written submissions:
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> > (a) the parties to the appeal referred to in subsection (2);
> > (b) the parties to any appeals that were pending before the appeal tribunal on the date the chair sent a notice under subsection (5) (a) and that were suspended under subsection (5) (b).
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> (8) After the board of directors makes a determination under subsection (6), the board of directors must refer the matter back to the appeal tribunal, and the appeal tribunal is bound by that determination.
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> (9) The chair must not make a general delegation of his or her authority under subsection (3), (4) or (5), but if the chair believes there may be a reasonable apprehension of bias the chair may delegate this authority to a vice chair or to a panel of the appeal tribunal for the purposes of a specific appeal.

[15] In this case, I have decided that it would be unfair to put the appellant to unnecessary additional time and expense by requesting it to provide submissions to me on the legality of Board assessment policy AP1-39-2. Given the Court's express reasoning in *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)* 2010

BCSC 1340, in particular the excerpts quoted above in bold emphasis, I am compelled to no other conclusion than to find, for the same reasons expressed by the Court, that:

> (a) Section 259 of the Act, read in light of the statutory scheme as a whole, does not allow the Board to significantly restrict the period for which interest will be paid on amounts refunded; and that therefore
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> (b) The Board's assessment policy AP1-39-2, as applied in the appellant's situation, is inconsistent with and not supported by section 259(2) of the Act. Therefore in this case assessment policy AP1-39-2 is so patently unreasonable that it cannot be supported by the Act and its regulations.

Conclusion

[16] For the foregoing reasons, pursuant to section 251(1) of the Act, I consider assessment policy AP1-39-2, as applied in the appellant's situation, to be so patently unreasonable that it is not capable of being supported by the Act and its regulations. Pursuant to section 251(2), I refer this section 251(1) issue to the WCAT chair. I suspend these appeal proceedings, pending the outcome of the process under section 251.

Heather McDonald
Vice Chair

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Workers' Compensation Appeal Tribunal
150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898