As of July 17, 2012, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number: WCAT-2012-01018
WCAT Decision Date: April 18, 2012
Panel: Jill Callan, Chair

Workers' Compensation Appeal Tribunal
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1. Introduction

[1] I am the panel of the Workers' Compensation Appeal Tribunal (WCAT) assigned to decide two appeals initiated by two workers. Each of the two workers seeks a decision requiring the Workers' Compensation Board (Board), which operates as WorkSafeBC, to pay interest on retroactive compensation benefits. Pursuant to section 248 of the *Workers Compensation Act,* R.S.B.C. 1996, c. 492 (Act), the Employers' Advisers Office is participating in one of the appeals as the deemed employer. The employer of the other worker is not participating in that worker's appeal.

[2] The applicable policy of the board of directors of the Board is the current item #50.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). The same policy appears in RSCM I. The current item #50.00 came into effect on November 1, 2001. When I refer to the interest policy that existed prior to that date, I will refer to it as the "previous interest policy" or the "previous item #50.00." I will refer to the current interest policy as either the "interest policy" or "item #50.00."

[3] Item #50.00 limits the circumstances in which the Board will pay interest on retroactive compensation benefits to situations where "a blatant Board error" resulted in the need for the retroactive payment. Each of the workers contends that item #50.00 is so patently unreasonable that it is not capable of being supported by the Act and seeks a determination to that effect under section 251 of the Act. The deemed employer's position is that item #50.00 is not patently unreasonable.

[4] Pursuant to section 37 of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45, I combined the hearing of the issue regarding the lawfulness of item #50.00 that is the common part of the two workers' appeals and convened an oral hearing to hear submissions on whether item #50.00 is patently unreasonable. Although I have issued separate numbered decisions (*WCAT-2012-01017* and *WCAT-2012-01018*) regarding each worker's appeal, the two decisions are identical.

[5] The oral hearing was held on December 15 and 16, 2011. Section 246(2)(i) of the Act authorizes WCAT to request representative groups to participate in an appeal if that participation will assist WCAT to fully consider the merits of the appeal. Pursuant to that provision, I invited the following representative groups to attend the oral hearing and make submissions on the question of whether item #50.00 is patently unreasonable:

- B.C. Federation of Labour
- Business Council of B.C.
- Coalition of B.C. Businesses

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- Employers' Forum to the WCB (Employers' Forum)
- Workers' Compensation Advocacy Group (WCAG)
- Workers' Advisers Office (WAO)

[6] It was unnecessary to invite the Employers' Advisers Office to participate under section 246(2)(i) because they were already participating as the deemed employer in one of the appeals. The Business Council of B.C. and the Coalition of B.C. Businesses declined to participate.

[7] Mr. F. Andrew Schroeder and Ms. Monique Pongracic-Speier are counsel for the two workers. The deemed employer is represented by Ms. Kim Fournier.

[8] Ms. Nina Hansen appeared at the hearing on behalf of the president of the B.C. Federation of Labour. Mr. James Sayre attended on behalf of the WCAG. The WAO was represented by Mr. Stephen Bergen, Mr. Paul MacFarland, and Ms. Ramona Soares. Ms. Soares attended the first day of the hearing only.

[9] Mr. Alan Winter appeared as counsel for the Employers' Forum. Mr. Bill Blackler attended the second day of the hearing as a representative of the Employers' Forum.

[10] The representative groups, other than the Employers' Forum, support the positions of the two workers and submit that item #50.00 is so patently unreasonable that it is not capable of being supported by the Act. The Employers' Forum's position is that item #50.00 is not patently unreasonable. To the extent that the positions and arguments of the representative groups, other than the Employers' Forum, are consistent, I will refer to them as positions and arguments of the workers' community.

[11] No party or participant takes the position that the Board may only pay interest to workers, surviving spouses, and dependants in circumstances where the Act specifies that the Board must pay interest. In *Appeal Division Decision #97-0857*, 13 WCR 443, a panel of the Appeal Division, which was the final level of appeal (except in relation to medical issues) in the workers' compensation appeal system that existed prior to March 2003, concluded that the governing body of the Board was authorized to make policy for the payment of interest in circumstances beyond those that were specifically identified in the Act.

[12] Since the appeals that are under consideration have been initiated by two workers, much of my discussion of the interest policy will focus on interest payable to workers. However, item #50.00 is also applicable in determining whether interest is payable to surviving spouses and dependants of workers and, in certain circumstances, employers.

[13] Section (d) of *Assessment Manual* policy AP1-39-2 establishes a blatant Board error test for determining whether interest will be paid to employers on overpaid assessments and on prepaid administrative penalties that are set aside by the Review Division of the Board or WCAT. I will not consider whether the blatant Board error test in that policy is patently unreasonable because that matter is beyond the scope of the question raised by the appeals of the two workers.

2. Issue(s)

[14] The issue that arises under the appeal of each of the two workers is whether the worker is entitled to interest under item #50.00. However, since each of the workers contends that item #50.00 is unlawful, pursuant to section 251 of the Act the first question I must decide is whether item #50.00 is so patently unreasonable that it cannot be supported by the Act.

[15] If I determine that item #50.00 is patently unreasonable, I must refer my determination to the board of directors of the Board under section 251(5) of the Act. If I determine that item #50.00 is not patently unreasonable, WCAT must apply it under section 251(4) of the Act in deciding the question of whether the two workers are entitled to interest under item #50.00.

3. The December 15 and 16, 2011 oral hearing

[16] At the oral hearing, each of the parties and participants made oral submissions regarding the lawfulness of the interest policy. With the exception of the Employers' Forum, each of the parties and participants also provided written submissions in advance of the hearing. At the hearing, the Employers' Forum submitted a one-page outline of the matters covered by their oral submission.

[17] In order to protect their privacy, during the course of the hearing we referred to the two workers whose appeals are the subject of this matter by their first names. Neither worker was present at the hearing. However, one of them testified by telephone at the beginning of the hearing.

4. The claims of the two workers

[18] The worker who testified at the oral hearing had been employed as the manager of a pet supply store when she injured her right foot in 1999. The injury occurred when she dropped a 24-can case of dog food on her foot. The Board originally accepted her claim for right foot reflex sympathetic dystrophy, otherwise known as complex regional pain syndrome (CRPS), and in a November 25, 2002 decision granted her a permanent partial disability award equal to 5.82% of total disability for the restricted range of motion in her right ankle and foot.

[19] A summary of some of the subsequent history of her claim is contained in *WCAT-2009-00692*. Subsequent to a 2005 WCAT decision, the Board increased the worker's permanent partial disability award by an additional 2.5% of total disability for chronic pain and noted that WCAT had accepted that the CRPS had extended to the worker's left foot, ankle, and leg. Although the worker had sought an award on a projected loss of earnings basis under section 23(3) of the Act, the Board had determined that suitable employment was reasonably available to her and declined to grant an award under section 23(3).

[20] In *WCAT-2009-00692,* the WCAT panel concluded that the worker was entitled to a 100% award under section 23(3) of the Act, which was effective as of May 2001. As the question of the lawfulness of item #50.00 was before the courts, the panel severed the question of whether the worker was entitled to interest.

[21] By decision dated April 6, 2009, the Board informed the worker of the details of her award under section 23(3) and the amount of the retroactive award, which the Board paid to her in a lump sum. The question of her entitlement to interest on the award remains within WCAT's jurisdiction due to the decision of the 2009 WCAT panel to sever that issue. I am the panel assigned to decide whether the worker is entitled to interest.

[22] At the oral hearing, the worker testified that she suffered significant financial hardship following the termination of her temporary disability benefits under her claim. When those benefits stopped, she borrowed from family members and friends and pawned various possessions in order to pay her bills and rent. Her credit cards were "maxed out" at very high interest rates. She received calls from collection agencies and eventually was provided with some financial support under a government program. To reduce her living expenses, she relocated from the Lower Mainland to a smaller community. The two workers and the workers' community submit that the difficulties the worker experienced are common to workers whose compensation is delayed and that a less restrictive interest policy would help to compensate for such difficulties.

[23] The other worker did not testify at the oral hearing. Some of the background to his claim is summarized in *WCAT-2007-03897.* He was employed as a hydraulic log loader operator when he suffered injuries to his neck and upper back during the course of his employment on April 5, 2001. The Board accepted his claim for an aggravation of cervical spine degenerative disc disease at C6-7, a thoracic region strain, and chronic pain, and assessed his permanent partial disability at 5.2% under section 23(1) of the Act.

[24] The Board declined to grant the worker a projected loss of earnings award under section 23(3) because he had received retraining under a vocational rehabilitation plan. In the 2007 WCAT decision, the panel concluded that the occupation identified by the

Board was not suitable. As the result of the WCAT decision, the Board granted the worker an award under section 23(3) effective December 2002 and made a retroactive lump sum payment to him. The Board did not grant any interest on the retroactive payment. A review officer upheld the Board's decision because the evidence did not establish a blatant Board error as required by item #50.00. The worker submits that his circumstances demonstrate that item #50.00 is "unprincipled and irrational" because he was denied interest in a situation in which his benefits were delayed by adjudicative delays at the Board and a series of appeals.

5. Authority for making policies under the Act

[25] Since January 1, 2003, the Board has been governed by a board of directors. The governing bodies prior to 2003 included the commissioners, the board of governors, and the panel of administrators.

[26] Under section 82(1)(a) of the Act, the board of directors is required to "set and revise as necessary the policies of the board of directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety." The board of directors does not have unfettered policy-making power. However, the use of the word "including" at the beginning of the list of policy categories indicates that the areas in which the board of directors must set policy under section 82 are non-exhaustive. Section 82 grants the board of directors the flexibility to make policy in matters arising under or related to the four listed categories.

[27] Section 250(2) of the Act requires WCAT members to apply the applicable policies of the board of directors in deciding appeals and other applications. In *Western Stevedoring Co. Ltd. v. W.C.B.,* 2005 BCSC 1650, the Court observed the following regarding those policies:

> [10] … The word "policy" may be somewhat misleading, since the "policies" are effectively inflexible rules. Their existence is authorized by statute, so as long as the policies adopted are within the board of directors' jurisdiction, no issues of unlawful fettering of discretion arise.

[28] In *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 329, the Court stated:

> [107] Whether [the policy of the board of directors under consideration] can be regarded as a regulation, as defined under the *Interpretation Act* or the *Regulations Act*, R.S.B.C. 1996, c. 402, it is subordinate legislation. Section 82 of the *Workers Compensation Act* grants the board of directors the mandatory authority, "to set and revise as necessary the policies ... including policies respecting compensation, assessment, rehabilitation

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> and occupational health and safety ...". Both the WCB and WCAT, as the adjudicative divisions of the workers' compensation system defined by the *Workers Compensation Act*, are bound by the policies enacted by the board of directors and must apply them when adjudicating claims. Section 251 of the *Workers Compensation Act* provides a very limited exception to the binding nature of policies passed by the board of directors; however, ultimately it is the board of directors that must decide whether a policy is patently unreasonable and must therefore be revised.

[29] In establishing the exception to section 250(2), section 251 sets out a process for determining if the applicable policy must be applied. It refers to WCAT as the "appeal tribunal" and provides, in part:

> (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.
>
> (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.
>
> (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.
>
> (5) If the chair determines under subsection (3) that the policy should not be applied, the chair must
>
> > (a) send a notice of this determination, including the chair's written reasons, to the board of directors, and
> >
> > (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).

> (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).
>
> (7) On a review under subsection (6), the board of directors must provide the following with an opportunity to make written submissions:
>
> > (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).
>
> (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.

[30] Section 251 does not specifically establish a process for circumstances in which the chair is the WCAT member who is hearing an appeal and who determines that a policy should not be applied in that appeal. These circumstances can arise given that, as a member of WCAT, the chair may hear and decide any appeal, and given that the section 251 process can be invoked in any appeal. For this reason the legislature could not have intended that the chair only decide appeals where the section 251 process would not be invoked. In these circumstances, it is my view that the chair need only make one decision, which will fall under sections 251(2) and (3).

[31] The test set out in section 251 significantly limits the WCAT chair's authority to find policies unlawful. At the oral hearing, I stated that, if there is a rational interpretation of the Act that supports a policy of the board of directors, that policy cannot be said to be patently unreasonable.

6. The meaning of "patently unreasonable" in section 251

[32] The meaning of "patently unreasonable" is established by various court decisions. In *Speckling v. British Columbia (Workers' Compensation Board),* 2003 BCSC 1487, confirmed in 2005 BCCA 80, the Court defined patently unreasonable as "openly, clearly, evidently unreasonable." In *Davidson v. British Columbia (Workers' Compensation Board) et al.,* 2003 BCSC 1147, the Court cited a series of authorities regarding the meaning and application of the standard of patent unreasonableness, including the following:

> [47] The patently unreasonable test requires that a decision under review to [*sic*] be "openly, evidently, clearly" unreasonable. In

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the ***Canada (Director of Investigation and Research)* v. *Southam Inc.*,** [1997] 1 S.C.R. 748, Iacobucci J. stated at ¶57:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

…

[50] Another description of this standard is that enunciated by Beetz J. in ***Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*,** [1984] 2 S.C.R. 412:

> A mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it. As Dickson J. (as he then was) described it, speaking for the whole Court in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at p. 237, it is
>
> > …so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review...

[33] The discretion to set and revise policies conferred upon the board of directors under section 82 is broad. The board of directors is not required to apply the correct interpretation of the Act in establishing policies. A policy is not patently unreasonable under the Act if it applies a rational interpretation of the Act. Therefore, in considering whether policies of the board of directors are patently unreasonable under the Act, I accept that statutory provisions are often capable of more than one interpretation and that there may be a variety of rational policy options through which a statutory provision may be implemented.

7. The former item #50.00

[34] The history of the payment of interest to workers by the Board may be summarized as follows:

- Prior to January 24, 1979, the Board did not pay interest at all on retroactive compensation.

- Effective January 24, 1979, the Board paid interest on retroactive permanent disability awards provided that the permanent disability existed for at least three years prior to the granting of the award and other requirements, similar to those in the former item #50.00, were met. Interest was compounded monthly and paid at the rate set out in the policy.

- In 1980, the rate was changed and the three-year period was reduced to one year.

- In 1981, the policy was amended so that the Board also paid interest on retroactive wage loss benefits.

- From May 7, 1984 to October 31, 2001, the former item #50.00 provided that the Board would pay compound interest at a rate linked to the return on the Board's investment portfolio. Under the policy, interest was paid on retroactive wage loss benefits and lump sum permanent disability awards in certain circumstances where the retroactive payment was made more than a year after the effective date of the entitlement for that payment.

[35] The previous item #50.00 was in effect from May 7, 1984 to October 31, 2001. The policy was amended from time to time during that period. The version that was in effect in 2001 provided, in part:

> **#50.00 INTEREST**
>
> Effective May 7, 1984, interest is paid to workers or employers on retroactive wage-loss and pension lump sum payments subject to the following conditions.
>
> 1. The decision to award interest is made by the Claims Adjudicator, Disability Awards Officer or Adjudicator in Disability Awards, as the case may be.
>
> 2. Interest is paid when the wage loss or pension is for a condition which was previously overlooked or for which the Board previously decided that no payment was due.

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3. No interest is paid unless the commencement date of the retroactive benefits is more than one year prior to the date the retroactive payment is being processed. Interest is calculated from the first day of the month following the commencement date of the retroactive benefits.

4. For each year in respect of which compensation is retroactively paid the rate of interest will equal the average return on the Board's total investment portfolio for the preceding year.

The annual effective compound rate of interest used with respect to retroactive wage loss and pension/cash award payments will be:

1994	9.20%	(for calculations made after March 31, 1994)
1995	8.40%	(for calculations made after March 31, 1995)
1996	9.70%	(for calculations made after March 31, 1996)
1997	10.50%	(for calculations made after March 31, 1997)

8. The consultation process that preceded item #50.00

(a) The April 27, 2000 interest policy discussion paper

[36] The history of the interest policy is set out in the Board's April 27, 2000 discussion paper entitled "Calculation of Interest" (2000 Discussion Paper), which was circulated to facilitate the Board's consultation regarding possible amendments to the former interest policy. The 2000 Discussion Paper is available on the Board's website. Its focus was the rate and method by which the Board should calculate interest payable by it.

[37] The 2000 Discussion Paper provided, in part:

> **8.1 The rationale for paying interest**
>
> None of the published decisions of the former Commissioners, which created the interest policy, describes the rationale for paying interest. However, there are at least three general principles that may be applicable:
>
> - Interest may be justified on the basis that delayed compensation payments are similar to overdue business accounts on which the Board, as a corporation, pays interest.

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- Interest may be justified on the basis that it is compensation for the loss of advantage accruing from funds at the time they were originally payable.

- Interest may be justified on the basis that it is remedial - it places a person in the same position in which they would have been had the benefit been allowed in the first place. Interest remedies the expenses associated with borrowing money or expensing personal resources while awaiting the payment of benefits initially denied or over-looked.

Given the principles stated above, it appears reasonable to accept … that interest payments are intended to compensate the worker or employer for being denied the opportunity to have immediate access to money. If this premise holds true, the appropriate rate of interest should be that which provides adequate compensation for this loss.

…

8.3 Interest rate components

In financial terms, interest is the fee charged or paid for the use of money. The rate of interest is dependent upon the time value of money, the credit risk, and the inflation rate.

Inflation is the rate of increase in prices and is often measured as the rate of change of the CPI [Consumer Price Index]. Inflation is an important component given the desire of investors or lenders to preserve the "purchasing power" of their money. If inflation is high and risks going higher, lenders will require a higher interest rate before lending their money.

Interest rates may be adjusted for the expected or actual rate of inflation. Where this adjustment occurs, the rate of interest is referred to as the real rate of interest. When determining the appropriate rate of interest to be paid on retroactive awards, the real rate of interest may be an important consideration since the Board provides separate compensation for the effects of inflation.

Section 25(2) of the *Act* requires the Board to provide Consumer Price Index adjustments to all periodic payments of compensation every six months. This adjustment is also made when a retroactive payment is

> made to a worker. For example, if a worker today receives a retroactive award back to 1995, biannual inflationary adjustments are provided for periodic payments that the worker would have received had the Board originally implemented the award in 1995.
>
> To the extent that nominal (market) interest rates contain a component representing the expected rate of inflation, it may be argued that the Board overcompensates for the effects of inflation when making retroactive payments.
>
> If interest were to be calculated using the real rate of interest, the rate may be determined in a manner consistent with the Board's valuation of benefit liabilities. As provided in Board policy, pension reserves and commutations are converted to a lump sum by deriving the present value of the award. This value is determined using a discount rate that represents historical differences between interest rates and inflation. For this purpose, the Board currently uses a real rate of interest of 3%.
>
> [footnotes deleted]

(b) The April 20, 2001 interest policy discussion paper

[38] At the oral hearing, the WCAG submitted a second discussion paper entitled "Calculation of Interest." The paper is dated April 20, 2001 and the Board's cover letter to the WCAG is dated April 25, 2001. I had not discovered this discussion paper prior to the oral hearing because it was not on the Board's website. As of April 10, 2012 the paper was still not on the Board's website. I will refer to the second discussion paper as the 2001 Discussion Paper.

[39] The April 25, 2001 cover letter said that the 2001 Discussion Paper was being distributed for comments because an issue had arisen in relation to "the period of time that interest may accrue" and because of "the development of new options for consideration." The paper discussed the interest rate options and the question of whether the Board should pay simple or compound interest.

[40] Section 8.6 of the 2001 Discussion Paper is entitled "Financial implications." It sets out examples of situations in which the Board paid relatively large amounts of interest under the former item #50.00 and then sets out various policy options. Specifically, it states:

> The Administration [of the Board] has raised concern regarding the amount of interest payable on relatively old claims involving retroactive decisions. The following examples are intended to help demonstrate the financial implications associated with this type of claim:

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- A 1973 functional pension was recently re-adjudicated, resulting in a retroactive payment of $129,498.00. The award attracted interest amounting to $373,177.60.

- A 1992 functional pension was recently re-adjudicated, resulting in a retroactive payment of $279,871.40. The award attracted interest amounting to $192,138.69.

- A functional pension on a 1968 claim was recently re-adjudicated, resulting in a first payment of $482,735.72, of which $288,277.04 was interest.

Where interest is paid over a relatively long period of time, there is a concern that the current rate may provide a "windfall" or overcompensate for the loss of opportunity to immediate access to money [*sic*]. As noted earlier, entitlement to interest under the *Act* is limited in that it involves relatively short periods of time. To address financial concerns and concerns regarding overcompensation, consideration may be given to amending Board policy to further restrict the payment of interest in situations other than those expressly provided for in the *Act*.

One option may be to establish a separate and more conservative rate for discretionary interest payments. Another option may be to maintain a single rate of interest, but limit the length of time it may accumulate. For example, Board policy may stipulate that interest, except where otherwise provided for in the *Act*, will only commence from the date on which an appeal is filed, rather than the commencement date of the retroactive benefit.

Another alternative may be to implement a stronger test for determining if interest is payable in situations other than those expressly provided for in the *Act*. **For example, the Board may amend policy to only provide interest past the date of appeal if the delay in payment is due to a "blatant Board error".** Interest would not be provided back to an earlier date if the proper policies and procedures were followed. This is currently the test for interest on an overpayment of assessment. For an error to be "blatant" it must be an obvious, extraordinary circumstance. Similarly, the Board may choose to pay interest back to an earlier date if it determines that a Board decision created undue delay resulting in significant financial hardship.

[emphasis added and footnotes deleted]

[41] Section 9 at the end of the paper invited the members of the workers' compensation community to express their preferences regarding the following possible options:

> - The Board should establish a separate and more conservative rate where interest payments are made at the discretion of the Board. For example, back to the date of the original decision rather than the date of appeal.
>
> - The Board should maintain a single rate of interest but limit its application by only paying interest within the time frame expressly provided for in the *Act*. Therefore, interest would not be paid past the date of appeal.
>
> - **The Board should only provide interest past the date of appeal if the delay in payment is due to a "blatant Board error" or there is undue delay resulting in significant financial hardship. Therefore, interest would not be provided outside the framework of the *Act* if the Board staff followed the proper policies and procedures.**
>
> - In addition to any of the previous options, the Board should limit the payment of interest to decisions that are made on or after January 24, 1979 (the effective date of the Board's first policy on interest).
>
> [emphasis added]

[42] It is notable that the option of basing interest solely on the blatant Board error test was not included in the list of possible options for comment by the workers' compensation community. The option presented for comment provided that the Board would pay interest where there was a "blatant Board error" or "undue delay resulting in significant financial hardship."

9. Item #50.00

[43] Following the consultation process, the governing body of the Board passed Resolution 2001/10/15-03, which established item #50.00. The recitals to the resolution indicate that the Board's Policy and Regulation Development Bureau had conducted "extensive consultation" with the workers' compensation community regarding the criteria for entitlement to interest and the method of interest calculation.

[44] As noted earlier, the board of directors became the governing body of the Board in January 2003. Pursuant to the board of directors' Resolution 2003/02/11-04 (Policies of

the Board of Directors) the board of directors approved a bylaw through which most policies in the RSCM I and II, including item #50.00 of RSCM I and II, became policies of the board of directors as of February 11, 2003.

[45] The 2001 version of item #50.00 was amended in March 2006 to provide for interest payments to dependants whose benefits under section 17 were delayed due to a blatant Board error and in June 2009 to delete references to Board officers. The interest policy now provides:

> **#50.00 INTEREST**
>
> With respect to compensation matters, the *Act* provides express entitlement to interest only in the situations covered by sections 19(2)(c) and 258. In these situations, the Board will pay interest as provided for in the *Act* (see Item C8-61.10 and policy item #100.83).
>
> The Board has discretion to pay interest in situations other than those expressly provided for in the *Act*. In these situations, interest may be paid subject to the following conditions:
>
> - The retroactive payment is:
>
> - To a worker or employer in respect of a wage loss payment provided under sections 29 and 30 of the *Act.*
>
> - To a worker or employer in respect of a permanent disability lump sum payment provided under sections 22 and 23 of the *Act.*
>
> - To a dependant of a deceased worker in respect of a payment provided under section 17 of the *Act.*
>
> - **It has been determined that there was a blatant Board error that necessitated the retroactive payment. 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 known that it was making the error at the time, it would have caused a change to 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.**

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- Interest will be calculated from the first day of the month following the commencement date of the retroactive benefit and up to the end of the month preceding the decision date. Notwithstanding, in no case will interest accrue for a period greater than twenty years.

In all cases where a decision to award interest is made, the Board will pay simple interest at a rate equal to the prime lending rate of the banker to the government (i.e., the CIBC [Canadian Imperial Bank of Canada]). During the first 6 months of a year interest must be calculated at the interest rate as at January 1. During the last 6 months of a year interest must be calculated at the interest rate as at July 1.

For practical reasons, certain mathematical approximations may be used in the calculations.

The rate of interest provided in this policy will also be used in the calculation of overpayments as outlined in policy item #48.42

[emphasis added]

10. The adequacy of the consultation regarding item #50.00

[46] There is an obvious and significant inconsistency between the 2001 Discussion Paper and item #50.00 because the discussion paper facilitated consultation on the option of coupling the "blatant Board error" test for payment of interest with payment of interest where the delay in payment of workers' compensation benefits to which a worker is entitled can be characterized as an "undue delay resulting in significant financial hardship." However, in the absence of a blatant Board error, the interest policy does not provide for the payment of interest where there is such an undue delay.

[47] The WCAG contends that consultation was especially important prior to the 2001 interest policy amendment because that amendment eliminated the existing entitlement of workers to interest. They note that the amendment occurred at a time when adjudication was delayed by a variety of circumstances such as the appeals backlog at the Workers' Compensation Review Board (a tribunal in the appeal system that existed prior to March 3, 2003), delays in the medical system, and the Board's delays in providing vocational rehabilitation.

[48] The B.C. Federation of Labour observes that, although they are a major stakeholder, the Board did not consult with them regarding the blatant Board error test or provide them with an explanation regarding the discrepancy between the 2001 Discussion Paper and item #50.00.

[49] The WCAG submits that item #50.00 is unlawful because of the inconsistency between the list of policy options included in the 2001 Discussion Paper and item #50.00. They say the Board has a longstanding practice of consulting with the worker and employer communities regarding compensation policies. They note that the duty to consult is becoming well established in relation to government policies that affect First Nations and submit that, similarly, the board of directors has a duty to consult with the workers' compensation community regarding policy matters.

[50] I recognize that the Board usually engages in consultations prior to introducing new or amended policies and consultation is beneficial to the workers' compensation community and to the Board. The consultation process that preceded the introduction of item #50.00 was flawed. The 2001 Discussion Paper did not provide adequate notice of the option that became the blatant Board error test. The option in the discussion paper regarding the blatant Board error test was coupled with "or there is undue delay resulting in significant financial hardship." The workers' community did not have an opportunity to address the impact of a policy change that has eliminated interest payments to workers except in those exceptional cases in which there has been a blatant Board error. However, the WCAT chair does not have general supervisory authority over the policy-making function of the board of directors. The authority of the WCAT chair to review policies of the board of directors is limited to reviews under section 251.

[51] Section 225 of Part 3 (Occupational Health and Safety) of the Act establishes that the Board may make regulations regarding occupational health and safety. Section 226 sets out various steps that the Board must take before making a regulation. Those steps include holding a public hearing and the option of conducting "additional consultations with representatives of employers, workers and other persons the Board considers may be affected by the proposed regulation." Accordingly, it is clear that the legislature considered circumstances in which consultation would be required. While the Act requires the Board to consult regarding regulations, it is silent on consultation regarding policy.

[52] I do not find that the Board had an obligation under the Act to consult regarding the changes to the previous interest policy. If the legislature had intended that the Board be obligated to consult regarding policies under Part 1 of the Act, it would have enacted consultation provisions in Part 1 similar to those related to regulations contained in Part 3.

[53] Although I consider the consultation process to have been flawed, I do not find that it follows that the interest policy is patently unreasonable under the Act. I do, however, recommend that, in establishing policies, the board of directors be mindful of whether the consultation process has been complete and fair. I also suggest that, for the sake of

completeness, the Board should post the 2001 Discussion Paper on the page of the Board's website that contains the other archived policy consultation papers.

11. Meaning of blatant Board error

[54] At the oral hearing, the Employers' Forum referred to the following discussion of the meaning of "blatant Board error" in *WCAT-2004-01290-RB*:

> In *The Concise Oxford Dictionary* (9th ed.), blatant is defined to mean "flagrant, unashamed *(blatant attempt to steal*)" and flagrant is defined to mean "glaring; notorious; scandalous". Accordingly, it is clear that, in order for interest to be payable, the Board officer must have made an extraordinary error and disregarded appropriate adjudicative practices.

[55] I asked whether a gross delay or significant omission, such as the Board failing to adjudicate a claim in a timely manner because the application for compensation was lost, would constitute a blatant Board error. The Employers' Forum responded that a gross delay or significant omission could be characterized as a blatant Board error.

[56] I have reviewed the definitions of "error" and "omission" in the *Concise Oxford English Dictionary* (Tenth Edition, Revised). In addition to defining error as "a mistake," it defines it as "the state of being wrong in conduct or judgement." Omit is defined as "leave out or exclude" or "fail to do." Based on these definitions, I am satisfied that "error" and "omission" are not mutually exclusive terms. The definition of error is very broad and "the state of being wrong in conduct" could certainly include various omissions of Board officers. I conclude that there are circumstances in which an omission can reasonably be characterized as a blatant Board error under item #50.00.

[57] The Compensation Practice and Quality Department of the Board issues practice directives which Board officers are required to consider and apply. Although members of WCAT are not required to consider and apply the practice directives, they provide guidance as to the manner in which Board officers are interpreting and applying policies. The Practice Directives page of the Regulation & Policy section of the Board's website provides:

> Practice Directives are issued by the Compensation Practice and Quality Department to address specific compensation matters. These directives serve to support quality decision making by highlighting key adjudicative considerations consistent with the objective/principle of a particular legislative and/or policy requirement. Where necessary, Practice Directives will also provide for a supporting business process and will include adjudicative examples or job aids to demonstrate appropriate application.

[58] Practice Directive #28 entitled “Interest on Retroactive Wage Loss and Pension Lump-Sum Benefits” came into effect on November 1, 2001. This was replaced by Practice Directive #C7-2 entitled “Interest,” which was issued on March 1, 2006 and amended on June 21, 2011. Appendix “A” to these practice directives describes circumstances in which there is a blatant Board error and circumstances in which there is not such an error as follows:

> **Blatant Board Errors**
>
> 1. A document belonging to another worker's claim file was used in the adjudication of the worker's claim. Had the Board officer disregarded the erroneous information, it would have caused the Board officer to change the course of reasoning and the outcome.
>
> 2. The wrong body part was adjudicated. For example, a decision was made to disallow a claim for a left knee injury. It was evident that the worker's claim was for a right knee injury. Had the Board officer adjudicated entitlement for an injury to the correct knee, it would have caused the Board officer to change the course of reasoning and the outcome.
>
> 3. The worker submitted evidence that clearly substantiated further employment earnings. It was evident that the Board officer had missed or not seen the information when calculating the worker's wage rate. Had the Board officer reviewed the earnings information, it would have caused the Board officer to change the course of reasoning and the outcome.
>
> **No Blatant Board Error**
>
> 1. A decision or finding of an appellate body, based on new evidence or a re-weighing of existing evidence, does not constitute blatant Board error.
>
> 2. Occasionally it is argued that, upon retrospective review of a decision, it might seem that a Board officer did not correctly weigh or consider a piece of information in reaching the decision. Simply re-weighing the evidence and reaching another conclusion does not constitute a blatant Board error. While a situation might occur where a Board officer did not formally document his or her consideration of a specific piece of information, this does not constitute blatant Board error.

12. Provisions of the Act granting interest to workers, surviving spouses, and dependants

[59] Section 258 of the Act, which is in Part 4, and section 19 of the Act, which is in Part 1, require the Board to pay interest to workers, surviving spouses, and dependants in specific circumstances. There are no express provisions in the Act that provide that workers, surviving spouses, and dependants are entitled to interest outside of these two provisions.

[60] Section 258 provides, in part:

> (3) If a review officer has made a decision … the Board must defer the payment of any compensation applicable to the time period before that decision
>
> > (a) for a period of 40 days following the review officer's decision, and
> >
> > (b) if the review officer's decision is appealed under section 239, for a further period until the appeal tribunal has made a final decision or the appeal has been withdrawn, as the case may be.
>
> (4) Subsection (3) applies despite section 19.1, 22 (1), 23 (1) or (3), 29 (1) or 30 (1).
>
> (5) If the appeal tribunal's decision on an appeal requires the payment of compensation, all or part of which was deferred under subsection (3), interest must be paid on the deferred amount of that compensation as specified in subsection (6).
>
> (6) Interest payable under subsection (5) must be calculated in accordance with the policies of the board of directors and begins
>
> > (a) 41 days after the review officer made his or her decision, or
> >
> > (b) on an earlier day determined in accordance with the policies of the board of directors.

[61] Section 19(2)(c) grants interest to surviving spouses who were affected by the former section 19(1) that came into force on April 17, 1985 or the former section 19(4), which was repealed in 1994.

[62] Item #100.83 of the RSCM II (Implementation of Review Division Decisions) provides that the Board will pay interest under section 258 calculated in accordance with item #50.00. Under section 258 the Board is required to pay interest calculated from the 41st day after the date of the review officer's decision. Interest for an additional period will be payable in accordance with item #50.00 if a blatant Board error is established.

13. *Bank of America Canada v. Mutual Trust Co.*

[63] Various parties and participants referred to the Supreme Court of Canada judgment in *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 (*Bank of America*), which establishes general principles regarding the foundation for the payment of interest and the purpose of interest.

(a) Interest recognizes the time-value of money

[64] In *Bank of America*, the Court recognized the relationship between interest and the time-value of money and stated:

> 21 The value of money decreases with the passage of time. A dollar today is worth more than the same dollar tomorrow. Three factors account for the depreciation of the value of money: (i) opportunity cost (ii) risk, and (iii) inflation.
>
> 22 The first factor, opportunity cost, reflects the uses of the dollar which are foregone while waiting for it. The value of the dollar is reduced because the opportunity to use it is absent. The second factor, risk, reflects the uncertainty inherent in delaying possession. Possession of a dollar today is certain but the expectation of the same dollar in the future involves uncertainty. Perhaps the future dollar will never be paid. The third factor, inflation, reflects the fluctuation in price levels. With inflation, a dollar will not buy as much goods or services tomorrow as it does today (G. H. Sorter, M. J. Ingberman and H. M. Maximon, *Financial Accounting: An Events and Cash Flow Approach* (1990), at p. 14). The time-value of money is common knowledge and is one of the cornerstones of all banking and financial systems.
>
> 23 Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for

> the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal.
>
> 24 Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the western world and is the standard practice of both the appellant and respondent.

[65] In relation to the three factors that the Court cited as resulting in depreciation of the value of money, I note that section 25 of the Act provides for some adjustment of compensation in accordance with the Consumer Price Index for Canada and therefore addresses depreciation due to inflation to some extent. In addition, when entitlement to compensation is established, the risk that the Board will be unable to pay it is minimal because the Board is funded by employer assessments and the Act authorizes the board of directors to change the assessment rates. In my view, the significant depreciating factor that interest payments to workers address is the "opportunity cost" associated with delayed payments of compensation. Such delays can result in workers facing financial problems and interest charges.

(b) Interest is compensatory rather than punitive

[66] The Court also recognized that the law has evolved from characterizing interest awards as punitive to characterizing them as compensatory stating:

> 36 In *The Law of Interest in Canada* (1992), at pp. 127-28, M. A. Waldron explained that the initial theory underpinning an award of judgment interest was that the defendant's conduct was such that he or she deserved additional punishment. The modern theory is that judgment interest is more appropriately used to compensate rather than punish. At pp. 127-28, she wrote:
>
> > Compensation is one of the chief aims of the law of damages, but a plaintiff who is successful in his action and is awarded a sum for damages assessed perhaps years before but now payable in less valuable dollars finds it quite obvious that he has been shortchanged. Equally obviously, payment of interest on his damage award from some relevant date is one way of redressing this problem.
> >
> > The overwhelming opinion today of Law Reform Commissions and the academic community is that interest on a

> claim prior to judgment is properly part of the compensatory process. [Citations omitted.]
>
> 37 After acknowledging that historically compound interest was not available at common law, Waddams, *supra*, at p. 437, concludes that an award of compound interest should be available to courts so as to allow them to award full compensation to a plaintiff.
>
> > [T]here seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest.
>
> 38 Although not historically available, compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid.

[67] The two workers and the workers' community submit that item #50.00 is inconsistent with *Bank of America* because the interest policy is punitive rather than compensatory. It is possible to characterize item #50.00 as punitive because the policy could be said to deny interest for delayed compensation payments in all cases except those in which the Board deserves to be punished due to a blatant Board error. However, it is also possible to characterize item #50.00 as compensatory in the very limited circumstances in which there is a blatant Board error because it compensates workers for the delay in the payment of benefits in those limited circumstances. Therefore, it is rational to characterize item #50.00 as consistent with the Court's conclusion that interest is compensatory.

14. General principles of statutory interpretation

[68] The question before me is whether item #50.00 is rationally supported by the Act. In order to interpret the Act, it is necessary to consider and apply the principles of statutory interpretation.

[69] Statutory interpretation in Canada is governed by the "modern principle." This principle was formulated in 1974 by Professor Elmer Driedger in the first edition of *The Construction of Statutes* (Toronto: Butterworths, 1974 at p. 67) as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary

> sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[70] In 1998, the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd*. *(Re)*, [1998] 1 S.C.R. 27 (at paragraph 21), declared the modern principle as the preferred approach to statutory interpretation. In 2002, in *R. v. Jarvis,* 2002 SCC 73 the Court restated the modern principle in this way (at paragraph 77):

> The approach to statutory interpretation can be easily stated: one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.

[71] Recently, in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, Cromwell J., for the majority of the Supreme Court of Canada, referred to the modern principle with approval and provided the following description, which is consistent with the statements of the principle set out in the Court's previous judgments:

> [64] Following the modern approach to statutory interpretation, the words of a provision are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.
>
> …
>
> [200] As with any question of statutory interpretation, the Court must interpret the words of this statute in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[72] The types of external contextual factors to consider vary from case to case, but often include information about the legislative evolution and history of the statute and provision in question, such as previous versions of the provision in question, legislative debates about its enactment, and government commissioned reports related to the proposed amendments.

[73] In British Columbia, the modern principle is buttressed by section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 which provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

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[74] In applying the modern principle for the purposes of this determination, it is necessary to consider the fundamental principles of workers' compensation, the provisions of the Act that specifically provide for the payment of interest, and the authority of the board of directors to establish policies.

[75] There are a number of maxims of statutory interpretation that may be applicable in interpreting the Act. One maxim relevant to the issue in this determination is the presumption against tautology, which is discussed by R. Sullivan at page 210 of *Sullivan on the Construction of Statutes*, 5th ed. (Ontario: LexisNexis Canada Inc., 2008) as follows:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. In *Hill v. William Hill (Park Lane) Ltd.,* [[1949] A.C. 530, at 546 (H.L.)], Viscount Simons wrote:
>
> > [Al]though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.

[76] Another relevant maxim is *expressio unius est exclusio alterius* (to express one thing is to exclude another), which is commonly referred to as the "implied exclusion" principle. Professor Sullivan comments (at page 244):

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. … The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

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[77] Two common ways in which an expectation of express reference may arise are a failure to mention comparable items, and a failure to follow an established pattern. With respect to the first, Professor Sullivan notes (at page 244):

> When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned.

[78] With respect to the second, Professor Sullivan explains (at pages 246 and 247):

> ... consistent expression is an important convention of legislative drafting. As much as possible, drafters strive for uniform and consistent expression, so that once a pattern of words has been devised to express a particular purpose or meaning, it is presumed that the pattern is used for this purpose or meaning each time the occasion arises. This convention naturally creates expectations that may form the basis for an implied exclusion argument.

[79] Implied exclusion must be applied with caution, as it may be rebutted or outweighed by other indicators of legislative intent. Professor Sullivan states (at page 252):

> While it is true that implied exclusion arguments are often rightly rejected, it does not follow that implied exclusion is unreliable or less reliable than the other maxims or other techniques for analyzing legislative text. Implied exclusion is frequently invoked because it is an essential tool of efficient communication and is likely to play a role in most successful communication efforts. In legal contexts, it is reinforced by the conventions of consistent expression and no tautology. Like all arguments based on these presumptions, its weight depends on a range of contextual factors and the weight of competing considerations.

15. The foundational principles of workers' compensation

[80] Statutory workers' compensation schemes are founded on the "historic compromise" under which workers gave up the right to sue employers in exchange for a system that enabled them to claim workers' compensation benefits without regard to fault. The system is funded by employers who benefit from the elimination of workers' rights to sue them for injuries or death that arise out of and in the course of their employment and occupational diseases or death which arise due to the nature of their employment.

[81] In many circumstances, the amount of the financial benefits payable under the workers' compensation system is less than the damages that a court might award in a civil

action. However, the workers' compensation system is beneficial to workers because there is no need to sue for damages or collect on a judgment and factors that might decrease the amount of damages in a civil action, such as contributory negligence, are generally not relevant to a claim for workers' compensation.

[82] In *Pasiechnyk v. Saskatchewan (W.C.B.)*, [1997] 2 S.C.R. 890, the Supreme Court of Canada said the following regarding the history of workers' compensation and its fundamental principles:

> 24 Workers' compensation is a system of compulsory no-fault mutual insurance administered by the state. Its origins go back to 19th century Germany, whence it spread to many other countries, including the United Kingdom and the United States. In Canada, the history of workers' compensation begins with the report of the Honourable Sir William Ralph Meredith, one-time Chief Justice of Ontario, who in 1910 was appointed to
>
> study systems of workers' compensation around the world and recommend a scheme for Ontario. He proposed compensating injured workers through an accident fund collected from industry and under the management of the state. His proposal was adopted by Ontario in 1914. The other provinces soon followed suit. Saskatchewan enacted *The Workmen's Compensation Act, 1929*, S.S. 1928-29, c. 73, in 1929.
>
> 25 Sir William Meredith also proposed what has since become known as the "historic trade-off" by which workers lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay. Similarly, employers were forced to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability. …
>
> 26 The importance of the historic trade-off has been recognized by the courts. In *Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.), Goodridge C.J. compared the advantages of workers' compensation against its principal disadvantage: benefits that are paid immediately, whether or not the employer is solvent, and without the costs and uncertainties inherent in the tort system; however, there may be some who would recover more from a tort action than they would under the Act. Goodridge C.J. concluded at p. 524:
>
> > While there may be those who would receive less under the Act than otherwise, when the structure is viewed in total, this is but a

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> negative feature of an otherwise positive plan and does not warrant the condemnation of the legislation that makes it possible.

I would add that this so-called negative feature is a necessary feature. The bar to actions against employers is central to the workers' compensation scheme as Meredith conceived of it: it is the other half of the trade-off. It would be unfair to allow actions to proceed against employers where there was a chance of the injured worker's obtaining greater compensation, and yet still to force employers to contribute to a no-fault insurance scheme.

27 Montgomery J. also commented on the purposes of workers [*sic*] compensation in *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272

(Ont. H.C.). He stated at p. 279 that the scheme is based on four fundamental principles:

> (a) compensation paid to injured workers without regard to fault;
>
> (b) injured workers should enjoy security of payment;
>
> (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
>
> (d) compensation to injured workers provided quickly without court proceedings.

I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission, the Workers' Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. The principle of no-fault recovery assists the goal of speedy compensation by reducing the number [of] issues that must be adjudicated.

[underlining in original]

16. Discussion papers

(a) The Tysoe Commission

[83] One of the recommendations of the 1966 *Report of the Commissioner* (*Commission of Inquiry Workmen's Compensation Act*), Mr. Justice Charles W. Tysoe (Tysoe Report), was that permanent disability awards be tied to the cost of living. This has been addressed, at least in part, by the enactment of section 25.

[84] Interest is only mentioned in relation to the return on the Board's investments and setting pension reserves. There is no discussion of interest as it relates to the opportunity cost of delayed compensation.

(b) The Munroe Advisory Committee

[85] The sections of the Act that were the precursors to section 258 were first recommended by the Advisory Committee on the Structure of the Workers' Compensation System of British Columbia, in its 1988 *Report and Recommendations to the Minister of Labour and Consumer Services* (Munroe Report). The main focus of the Munroe Report was the structure of the appeal system. The recommendations regarding interest were implemented by Bill 27, which came into effect in 1991.

(c) The Royal Commission

[86] In Chapter 8 of the 1999 *Final Report of the Royal Commission on Workers' Compensation in British Columbia, For the Common Good,* Vol. I (Victoria: Crown Publications Inc., 1999) (Royal Commission Report), the Royal Commission recommended that the Act be amended to pay interest on compensation where the initial adjudication of that compensation is delayed more than 60 days after the Board was in receipt of sufficient notice to consider the claim to have been commenced, if the circumstances that resulted in the delay were or ought to have been within the control of the Board. The Commission recommended that interest be calculated in the same manner as post-judgment interest is calculated under the *Court Order Interest Act*.

[87] In making the recommendation, the Royal Commission said the former item #50.00 was too restrictive and did not recognize the hardship created by delays or the Board's "duty to take responsibility for those delays that are within the capacity of the board to correct." The 60 day waiting period was viewed by the Royal Commission as a reasonable period to allow the Board appropriate time to thoroughly investigate claims.

(d) The 2002 Core Review

[88] The only recommendation the 2002 *Core Services Review of the Workers' Compensation Board* made regarding interest related to the inclusion of the provision that became section 258.

17. Debates of the legislature

[89] It appears that the only debate of the legislature regarding interest on workers' compensation involved the implementation of the recommendation in the Munroe Report.

18. Judgments regarding entitlement to interest under workers' compensation systems

(a) *Whitlock v. Prince Edward Island (Workers' Compensation Board)*, 2000 PESCAD 25 (*Whitlock*)

[90] In *Whitlock,* the Appeal Division of the Prince Edward Island Supreme Court considered whether the Prince Edward Island Workers' Compensation Board (P.E.I. WCB) unreasonably fettered its discretion by applying its blanket policy not to pay interest on retroactive compensation without considering the policy's application to the circumstances.

[91] The appellant was the surviving spouse of a worker who had died in an industrial accident. A provision in the applicable legislation resulted in termination of the appellant's benefits one year after she remarried. Subsequently, in *Grigg v. British Columbia* (1996), 138 D.L.R. (4th) 548, the Supreme Court of British Columbia found that a similar provision of the Act violated section 15 of the *Canadian Charter of Rights and Freedoms (Charter).* In light of *Grigg*, the P.E.I. WCB retroactively paid the appellant the benefits she would have received had they not been terminated. However, the P.E.I. WCB declined to pay interest to the appellant because its policy only provided for awards of interest in cases of staff error.

[92] In determining the standard of review, the Court considered whether it was obligated to grant deference to the P.E.I. WCB in reviewing its discretionary decision not to pay interest. The Court noted (at paragraph 8) that the appellant had a statutory right of appeal to the Court and concluded that it was not confined to "a search for jurisdictional or legal errors that are patently unreasonable." Instead the question for determination was whether the P.E.I. WCB "exercise[d] its discretion reasonably."

[93] The Court concluded that the P.E.I. *Workers Compensation Act* constituted a complete code and, therefore, there were no gaps to be filled by the common law. As a result the

Court found the P.E.I. WCB was under no obligation to pay interest. However, the Court also determined the P.E.I. WCB had discretion to pay interest, which must be exercised "in accordance with the boundaries of the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the *Charter*" (at paragraph 7). However, the Court was divided on the question of whether the decision of the P.E.I. WCB should be set aside. The majority found that the decision should be set aside because the Board was required to at least compensate the appellant for inflation. The dissenting judge decided not to interfere with the P.E.I. WCB's discretionary decision to decline interest because the P.E.I. WCB required flexibility to administer the workers' compensation system in order to maintain the financial integrity of the accident fund.

[94] The majority of the Court found:

> [12] ... apart from the issue of the inadequacy of its expressed reasons as such, the decision of the [P.E.I. WCB] to adhere to its interest policy in this case was unreasonable, contrary to the tenets of good public administration and contrary to the purposes of the Act.... The phenomenon of inflation is notorious and is a significant factor that should be taken into account in retroactively making long overdue payments. An interest payment can be used as a method to protect overdue payments against its deleterious impact. ... The decision not to pay any interest was manifestly inconsistent with the [P.E.I. WCB's] earlier decision that it was under a legal obligation to retroactively restore the appellant's benefits to the date of their termination, and it fails to recognize the confiscatory effect on the appellant's benefits of not paying interest at least at the rate of inflation. ... Therefore, interest, at least to compensate for the impact of inflation, is fair since the appellant was kept out of money due her at the time it ought to have been paid. Absent strong reasons, it would not be consistent with the purposes of the Act to pay the appellant less than the full value of the benefits to which she was entitled to receive from the [P.E.I. WCB] on a monthly basis. One of the recognized fundamental principles of workers' compensation schemes is that there should be security of the payment of benefits. *Midwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (Ont. H.C.J.) referred to by Sopinka J. in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* (1997), 149 D.L.R. (4th) 577. The decision not to pay interest in these circumstances without better reasons than the respondent gave is not consistent with this principle.

[95] The dissenting judge stated:

> [20] An award of interest has a twofold purpose: first, to compensate the

> claimant for loss of the use of money; and second, to provide compensation for the decline in the value of money. [Under the Act] the Board [has] discretion to decide whether compensation in the form of an interest award should be paid on delayed or retroactive payments, and if interest is to be paid, the amount of interest. This discretion gives the Board inherent flexibility in the overall administration of the workers' compensation fund. The rationale for such flexibility may be found in the historical trade-off whereby workers and their survivors surrendered the right to litigate against a negligent party in return for no fault benefits and the security of knowing that the source of these benefits would be guaranteed.
>
> [21] There are no limitation periods in the legislation. A claim for compensation may be made at any time and claims may be reopened for review or reconsideration at any time by the Board, on its own motion or upon the request of the injured worker. With developments in science, medicine and the law, it often occurs that claims which were at one time not compensable may subsequently be recognized and paid. The result is that claims may be reopened and paid from the fund many years after the statutory limitation in civil law for making such a claim against a tortfeasor would have expired. In these circumstances, workers' compensation boards need to have the flexibility to decide when and if to pay interest. ...

[96] He also stated the following regarding the Board's discretionary authority to pay interest:

> [32] As an independent arbiter, the Board is vested with the power to adjudicate the claims of injured workers and to deny or allow these claims on the basis of the evidence. If it allows the claim of an injured worker, in setting the amount of compensation, including interest, the Board does have discretion as I have pointed out above. Nevertheless, it must act within the objects and purposes of the legislation; and it must exercise discretionary power in accord with the tenets of good public administration. This requires that the Board be concerned about the financial integrity of the fund and fairness to those claiming from the fund.

[97] In considering the application of *Whitlock* to the matter before me, I must be mindful that the Court's authority was much broader than that of the WCAT chair under section 251 because the Court decided an appeal rather than an application subject to the patently unreasonable standard of review. In addition, the majority of the Court found that interest must be paid to the appellant to at least compensate for the appellant's loss due to inflation. In British Columbia, section 25 of the Act partially provides for the impact of inflation.

(b) *Boyle Estate v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2004 NSCA 88 (*Boyle Estate*)

[98] In *Boyle Estate*, the Nova Scotia Court of Appeal decided the appeal of the Nova Scotia Workers' Compensation Board (N.S. WCB) from a decision of the Nova Scotia Workers' Compensation Appeals Tribunal (N.S. WCAT) which required the N.S. WCB to pay interest on compensation paid retroactively to a deceased worker's estate. The Nova Scotia *Workers' Compensation Act* (N.S. Act) required the N.S. WCB and the N.S. WCAT to apply policies of the N.S. WCB's board of directors. There was no applicable interest policy. Section 10(1) of the N.S. Act, which is the equivalent of section 5(1) of the Act, provided that when a worker sustains a compensable injury "the Board shall pay compensation to the worker as provided by this Part." The words "this Part" refer to Part I of the N.S. Act.

[99] The Court determined that the applicable standard of review was correctness. It framed the issue before it as "whether 'compensation ... as provided by this Part' includes interest" (at paragraph 29). The Court considered the principles regarding the time-value of money and interest as compensation set out in the Supreme Court of Canada's judgment in *Bank of America,* applied the principles of statutory interpretation, and concluded (at paragraphs 37-41):

- The plain meaning of "compensation" clearly includes interest.
- Even when a statute does not expressly authorize an order to pay interest, that power may be implicit if the statute authorizes a tribunal to issue a compensatory remedy.
- The N.S. WCAT has jurisdiction to apply common law principles that are consistent with the N.S. Act.

[100] The Court then stated:

> [42] If s. 10(1) simply authorized the WCB and, on appeal, the WCAT to order "compensation", then in my view this would include the power to award interest.
>
> [43] But s. 10(1) does not stop with the word "compensation". The WCB and WCAT are not given the full remedial power of a court in a civil action. Section 10(1) states that the Board "shall pay compensation to the worker *as provided by this Part* ". The last five words qualify the power to order "compensation".

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> [44] What is the nature of that qualification? One possibility is that any compensation must be in a category expressly permitted elsewhere in Part I of the *Act*. Another possibility is that the unfettered power to award "compensation" is to be determined according to the procedures, ie. the filings and hearings and appeals, specified in Part I.
>
> [45] An analysis of the scheme and context of the *Act* points to the former option.

[101] Accordingly, the Court concluded that, since section 10(1) of the N.S. Act states that the Board "shall pay compensation to the worker as provided by this Part," compensation is limited to those categories expressly established in Part I or in regulations or policies authorized under Part I. However, the Court went on to conclude that the Act contemplates that the N.S. WCB "maintains some control over the expansion or refinement of specified benefits" through the regulation and policy-making process. The Court reasoned:

> [54] Because the WCB has a duty to maintain the Fund's ability to satisfy benefits, the *Act* gives the WCB leverage over the expansion and refinement of benefits formulae beyond those specified in the *Act.* If a Hearing Officer or the WCAT could award compensation based simply on common law principles, as might be applied by a court in a civil action, it could be exceedingly difficult to rate the risk, calculate the assessments, and predictably maintain the Fund's solvency. Because the *Act* directs that the Fund be solvent, the *Act* controls the benefits payable from the Fund.
>
> [55] This supports the conclusion that "compensation ... as provided by this Part" in s. 10(1) refers to compensation either specified in Part I or specified in regulations or policies authorized by Part I.
>
> [56] The result may be less than what would otherwise be full compensation. The indexing provided by ss. 69-70 is an example. Section 70(1) states:
>
> > Commencing January 1, 2000, the Board shall, as of the first day of January in each year, determine an indexing factor based on one half of the percentage change in the consumer price index for the preceding year.
>
> Section 70(2) indexes benefits by that 50% factor. The *Act* contemplates that indexed benefits do not fully account for changes in the real value of

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money. This result is inconsistent with the rationale of compensatory interest at common law stated in *Bank of America;* but this result is nonetheless the Legislature's chosen premise for the Fund's operation.

[102] The Court referred to four other cases in support of the proposition that, where a legislature has provided a comprehensive scheme for compensation, no room is left for the application of common law principles: *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *Windsor Roman Catholic Separate School Board v. City of Windsor*, (1988), 49 D.L.R. (4th) 576 (Ont. C.A.); *Zaidan Group Ltd. v. London,* [1990] O.J. No. 33 (C.A.), aff'd [1991] 3 S.C.R. 593; and *Reference re: Goods and Services Tax*, [1992] 2 S.C.R. 445. The deemed employer submits that I should follow those judgments in deciding this matter.

[103] The Court concluded that neither the N.S. WCB nor the N.S. WCAT has discretion to order interest unless such interest is authorized by the N.S. Act, a policy, or a regulation.

(c) *Johnson v. British Columbia (Workers' Compensation Board),* 2007 BCSC 1410 (the September 2007 *Johnson* judgment)

(i) The WCAT precedent panel decision

[104] When item #50.00 came into effect in 2001, the Board was in the process of implementing a decision of the Workers' Compensation Review Board, which had granted Mr. Johnson retroactive compensation benefits. The Board issued a decision which applied item #50.00 and declined to pay interest to him. The Review Division confirmed that decision and Mr. Johnson appealed to WCAT.

[105] Pursuant to section 238(6) of the Act, I assigned Mr. Johnson's appeal to a three-member precedent panel so that panel could issue a decision regarding the application date of item #50.00, which would be binding on WCAT under section 250(3) of the Act. In *WCAT-2005-03622*, the precedent panel determined that item #50.00 was applicable to Mr. Johnson's appeal and he was not entitled to interest because there was no blatant Board error. The precedent panel did not consider the lawfulness of the blatant Board error test.

(ii) The application for judicial review

[106] Mr. Johnson filed an application for judicial review of *WCAT-2005-03622* with the British Columbia Supreme Court (BCSC). For clarity, I will refer to the judgment that resulted as the September 2007 *Johnson* judgment because, in January 2007, the BCSC released another judgment in response to Mr. Johnson's application to certify a class action.

[107] In the September 2007 *Johnson* judgment, the Court framed the question before it as follows (at paragraph 61):

> The question for the court is whether it was patently unreasonable for the WCAT Precedent Panel to conclude that [item #50.00] was not itself patently unreasonable. In order to answer this question, the court must consider whether it is patently unreasonable for [item #50.00] to distinguish between claims on the basis of whether the WCB error was a question of misjudgment or was a blatant error, particularly in light of s. 5 of [the Act].

(iii) The relevant provisions of the Act

[108] Section 5 of the Act provides, in part:

> (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the Board out of the accident fund.
>
> (2) Where an injury disables a worker from earning full wages at the work at which the worker was employed, compensation is payable under this Part from the first working day following the day of the injury; but a health care benefit only is payable under this Part in respect of the day of the injury.

[109] Section 25 of the Act provides for partial annual adjustments of compensation in accordance with the Consumer Price Index for Canada.

[110] Section 35(1) provides in part that "[p]ayments of compensation must be made periodically at the times and in the manner and form the Board considers advisable."

(iv) The arguments before the Court

[111] The Court's summary of the arguments states, in part:

> [63] It was suggested in argument that [item #50.00] was reasonable for three reasons: first, it would ensure adequate funding of the accident fund; second, it would provide some incentive for the [Board] to take due care in assessing claims for compensation; and third, the nature of the evidence-gathering in workers' compensation claims often results in unavoidable delays in paying claims.

[64] Ensuring adequate funding of the accident fund is a legitimate concern for the WCB board of directors. The [Act] provides in s. 82(2) that the board of directors is responsible for establishing policies to ensure adequate funding of the accident fund, among other things. Pursuant to s. 84(1), a director exercising the powers and performing the functions and duties as a member of the board of directors [of the Board], must act with a view to the best interests and objectives of the worker's compensation system. …

[67] The concern to ensure adequate funding of the accident fund, in light of s. 25 of the [Act], would justify an interest policy that provides less than full compensation to workers for delayed payment. However, it does not provide any basis for distinguishing between workers on the basis of whether the error of the [Board] was "blatant" or otherwise.

[68] The claimants will suffer equally from not having the funds available to them, whether the disentitlement arose from blatant error, from a judgment call on considering complex medical evidence, or for some other reason.

[69] For the purpose of paying interest, theoretically at least, requiring the [Board] to pay interest in cases of "blatant error" could provide a modest incentive to the [Board] to avoid such errors. Even though the [Board] is a non-profit entity, individual decision-makers within the [Board] might be motivated to avoid such errors because they will be more obvious and embarrassing when there is a tangible result like payment of interest.

[70] However, if that theory is correct, and requiring payment of interest for "blatant" errors is a disincentive to committing such errors, then providing that the [Board] does not need to pay interest on misjudgments provides an incentive for the [Board] to delay decisions involving judgment calls. During a period while such decisions are unresolved, the [Board] has the use of funds without any corresponding responsibility to compensate the worker. This result is contrary to one of the fundamental purposes of workers' compensation legislation, to provide compensation to injured workers quickly without court proceedings, as mentioned in ***Pasiechnyk, supra,*** at para. 27.

[71] The [Board] argued that evidence considered by a Review Board may include evidence that was not available at the time of the original decision disentitling the claimant to benefits. In fact, in the petitioner's circumstances, a physician wrote a letter in 1999. About two

> years later, the [Workers' Compensation] Review Board asked the physician to clarify the letter. Fifteen days following that clarification, the Review Board allowed the appeal and held that the petitioner was entitled to benefits.
>
> [72] This argument might support a policy that distinguishes between claims in which new evidence resulted in a new decision and claims where the new decision was based on existing evidence, but does not justify a distinction of the basis of the type of error made by the [Board].
>
> [emphasis in original]

(v) The Court's conclusions

[112] The Court concluded (at paragraph 95):

> Like the [Nova Scotia Court of Appeal] in ***Boyle Estate***, I conclude that the plain meaning of "compensation" in s. 5 of the [Act] includes interest, and that the term is qualified by the phrase "as provided by this Part", referring to Part 1 of the [Act]. Section 5(2) provides that compensation is "payable" under Part 1 from the first working day following the date of injury. The term "payable" is used in the sense of "required to be paid", but is subject to the other terms of Part 1.
>
> [emphasis in original]

[113] The Court said (at paragraph 96):

> Part 1 includes s. 35, providing that payments must be made periodically at the times and in the form the [Board] considers advisable. That section does not appear to give the [Board] discretion over the amount of payment, but by giving discretion over the timing of payment, gives the [Board] some discretion regarding interest.

[114] At paragraph 100, the Court said:

> [Item #50.00] determines entitlement to interest on the basis of the type of error made by [the Board]. There is nothing in the [Act] which suggests that it is appropriate to take into account the [Board]'s conduct in determining what compensation is payable. The [Board]'s conduct is simply irrelevant to determination of what compensation a worker will receive.

[115] The Court concluded that item #50.00 is patently unreasonable under section 5 of the Act and that WCAT had erred in not concluding that item #50.00 is so patently unreasonable that it cannot be supported by the Act.

(vi) Subsequent history of Johnson

[116] The subsequent judicial history of the *Johnson* case is complicated and relates largely to various procedural and jurisdictional matters that are not relevant to the question I am required to decide. However, for the purposes of this decision, it is important to note that on June 2, 2011 the British Columbia Court of Appeal (BCCA) determined that the BCSC had lacked jurisdiction to consider the lawfulness of item #50.00 and set aside the September 2007 *Johnson* judgment (2011 BCCA 255). The BCCA did not consider the substantive question of whether the BCSC erred in determining that item #50.00 is patently unreasonable.

[117] Although the September 2007 *Johnson* judgment is no longer in effect, the Court's analysis that led to the conclusion that item #50.00 is patently unreasonable relates to the very question that I must decide. The two workers and the workers' community rely upon the Court's reasons. The deemed employer and the Employers' Forum argue that the Court erred and the case was wrongly decided.

19. Is item #50.00 so patently unreasonable that it is not capable of being supported by the Act?

[118] In their submissions, the B.C. Federation of Labour states that delays and bad judgment in the workers' compensation system can lead to injured workers being deprived of the compensation to which they are entitled for a period of years through no fault of their own. They observe that delays in payments of compensation result in injured workers losing the opportunity to immediately access their compensation benefits. They note that, as a result, injured workers suffer undue hardship and are forced to borrow money, sell assets, and use their retirement savings in order to live. Their submissions also reflect the positions of the two workers, the WAO, and the WCAG.

[119] It is clear that item #50.00 is much more restrictive than the more generous previous interest policy. In my analysis, item #50.00 cannot be characterized as a policy to pay interest when compensation benefits are delayed. It is more accurately described as a general policy to decline to pay interest to workers except in the very limited circumstances in which a blatant Board error is established. The question I must decide is whether such a restrictive interest policy is so patently unreasonable that it cannot be supported by the Act.

[120] In order to determine whether item #50.00 is so patently unreasonable, I will consider the provisions of the Act and any common law principles under which the Board is

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authorized or required to pay interest and the analysis in the September 2007 *Johnson* judgment. I will also consider the foundational principles of workers' compensation, including the historic compromise, and the fundamental principles established in *Pasiechnyk*.

(a) The statutory authority for the payment of interest by the Board

[121] Sections 19(2) and 258(5) of the Act require the Board to pay interest to workers, surviving spouses, and dependants in certain specific circumstances. None of the parties or participants argues that the Board's authority to pay interest to workers is limited to meeting the obligations established by those provisions. The parties and participants all agree that the board of directors is authorized to establish policies for the payment of interest to workers in other circumstances. However, there are differing views regarding the source of that authority and whether the Board is required to pay interest or merely authorized to pay interest at its discretion.

[122] The two workers and the participants from the workers' community rely on the analysis in the September 2007 *Johnson* judgment that the Board is required to pay interest because "compensation" under section 5 of the Act includes interest. I will consider this analysis in the next section of this decision.

[123] The deemed employer and the Employers' Forum say that the Board's authority to pay interest to workers, in circumstances other than those arising in sections 19 and 258, is found in the board of directors' general discretion to establish policies under section 82 of the Act. I agree that, if section 5 does not require the Board to include interest as a component of compensation, a policy for payment of interest in circumstances beyond those established by the Act may be made by the board of directors under the very broad discretion granted to them under section 82. If it is not a component of compensation, entitlement to interest may be characterized as a matter that is ancillary to a substantive compensation matter.

(b) Can "compensation" under section 5 and other entitlement provisions of the Act be rationally interpreted to not include interest?

[124] Section 5(1) of the Act establishes entitlement to compensation where "personal injury or death arising out of and in the course of the employment is caused to a worker." The September 2007 *Johnson* judgment dealt with compensation for personal injury under section 5(1) of the Act. The Court concluded that the only rational interpretation of section 5 is that "compensation" includes interest. If the Court was correct in this regard, it appears to follow that the compensation granted under each of the provisions of the Act that establish entitlement to compensation also includes interest. The deemed employer and the Employers' Forum submit that the Court erred in concluding that compensation includes interest.

[125] For the purpose of applying the test under section 251 of the Act, I must decide whether it is rational to interpret "compensation" in section 5 of the Act as not including an interest component. Under that test, item #50.00 need not apply the correct or best interpretation of the Act. The only limitation is the interest policy cannot be based on an interpretation of the Act that is patently unreasonable.

[126] The definition of compensation in section 1 of the Act merely provides that it "includes health care." *The Concise Oxford Dictionary* (Tenth Edition, Revised) defines "compensation" as "something awarded to compensate for loss, suffering, or injury." I accept that compensation is a term that is broad enough to include interest. If the only viable interpretation of the Act is that compensation includes interest, item #50.00 is patently unreasonable. For the reasons that follow, I conclude that it is rational to interpret the Act as not including interest as a component of compensation.

(i) Interest is specifically provided under sections 19 and 258

[127] Section 5(1) of the Act provides that the Board is required to pay "compensation as provided by this Part." "This Part" means Part 1 of the Act, which is entitled "Compensation to Workers and Dependants." Entitlement to compensation is also established by other provisions of Part 1 of the Act, including sections 5.1(1) (Mental stress), 6(1) (Occupational disease), 7(1) (Loss of hearing), and 17 (Compensation in fatal cases).

[128] Section 19(2) of the Act, which is also included in Part 1, establishes certain specific circumstances in which the Board must pay interest to surviving spouses entitled to compensation under section 17. The deemed employer and the Employers' Forum submit that, in the presence of a specific provision regarding the payment of interest in Part 1 of the Act, it is rational to interpret the Act as not requiring the Board to pay interest on compensation in other circumstances. In addition, they point out that there would be no need for the legislature to have enacted section 19(2) if entitlement to compensation includes entitlement to interest on delayed compensation.

[129] Section 258 of the Act, which is in Part 4, deals with circumstances in which the Board must pay compensation as a result of a Review Division or WCAT decision. Section 258(5) requires the Board to pay interest to workers when there is an appeal to WCAT of a Review Division decision that has granted compensation to a worker or a deceased worker's dependants and WCAT confirms that the worker is entitled to all or part of that compensation. Section 258(6) provides:

> Interest payable under subsection (5) must be calculated in accordance with the policies of the board of directors and begins
>
> (a) 41 days after the review officer made his or her decision, or

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(b) on an earlier day determined in accordance with the policies of the board of directors.

[130] The deemed employer and the Employers' Forum note section 258(6)(b) states that interest is only payable from a date earlier than 41 days after the date of the Review Division decision is made if a policy of the board of directors grants interest from an earlier date. They submit that, in the absence of such a policy, the only requirement to pay interest to a worker who is successful on appeal is that which arises under section 258(6)(a). They argue that, if section 5 required the Board to include interest as part of compensation, sections 258(5) and (6) would be unnecessary because interest would automatically be included when the compensation is ultimately paid. They rely on the presumption against tautology, which is one of the rules of statutory interpretation. It requires that the Act be interpreted in a manner that makes each provision meaningful.

[131] I am not persuaded that "compensation" in section 5 of the Act includes interest. I accept that if interest were a component of compensation, there would be no need for sections 258(5) and (6) to provide that interest must be paid on deferred compensation. In addition, I note that section 258(5) uses the terms "interest" and "compensation" as distinct terms.

[132] In relation to section 19(2), I have considered the possibility that, as a result of the *Grigg* case, the legislature wanted the obligation to pay interest to be highlighted in section 19(2) out of abundance of caution and did not intend that the Board would not be required to otherwise pay interest under Part 1. It is clear that section 19(2) was added to the Act to ensure that interest was paid to other surviving spouses whose circumstances were comparable to the circumstances in *Grigg*. However, I find that it is rational and more consistent with the principles of statutory interpretation to interpret the Act as not requiring the Board to pay interest in situations other than those established in sections 19 and 258.

[133] The implied exclusion principle supports the conclusion that, if the legislature had intended that the Board be required to pay interest in circumstances beyond those expressly established by sections 19 and 258, there would be an express provision in that regard. Even if I accept that section 19(2) is a special provision relating to payments to surviving spouses, it would be rational to interpret the Act as not requiring the Board to pay interest in circumstances beyond those established in section 258. Although it is rational to conclude that the Act does not require the Board to pay interest in circumstances that are not within the scope of the express interest provisions in the Act, it does not follow that the board of directors lacks discretion to make policies that grant interest in other circumstances.

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(ii) Interest payable from the first working day following the injury

[134] Section 5(2) of the Act provides that compensation is payable from the first working day following the day of injury. The submissions of the two workers and the Employers' Forum are consistent in stating that compensation is not payable from the day of injury because there is a one-day waiting period. They also observe that previous versions of the Act established a three-day waiting period, which was subsequently reduced to the one-day period that is currently in the Act.

[135] In the September 2007 *Johnson* judgment, the Court concluded that "compensation is required to be paid under Part 1 from the first working day following the day of the injury" (at paragraph 73) and that it follows that section 5(2) "contemplates timely payments" (at paragraph 74). I agree that section 5(2) establishes that compensation accrues from the first working day following the day of injury. Although it is not clear to me that the language in section 5(2) establishes that the Board must make timely compensation payments, I note that the nature and purpose of compensation require timely payments and that "compensation paid to injured workers provided quickly" is one of the foundational principles established in *Pasiechnyk*.

[136] In order to responsibly administer the accident fund by properly adjudicating claims, the Board, prior to accepting a claim and paying compensation, obtains information regarding the circumstances of the injury and evidence of disability (the latter is usually medical evidence). In my view, it is necessary for the Board to take these steps. Although a fundamental principle of workers' compensation is that the Board must quickly determine whether a worker is entitled to compensation, it is reasonable to assume that the circumstances in which the Board is able to responsibly pay compensation on the first working day following the injury are rare. The reality is that compensation is generally paid in arrears. Therefore, it appears that if the only viable meaning of compensation is that it includes interest, the Board would be required to pay interest on almost all compensation payments, including regular bi-weekly payments of temporary disability benefits. It seems unlikely that the legislature would have implicitly established an interest provision that is so operationally and financially onerous.

[137] In the September 2007 *Johnson* judgment, the Court interpreted section 35(1) as providing the Board some flexibility regarding periodic payments of compensation, which the Board may take into account in establishing its interest policy. I take this to mean that the Court determined that the Board is not required to include interest on all compensation paid in arrears. If interest is a component of compensation, I find it difficult to understand the Court's logic in this regard. In my view, section 35, among other things that are not relevant to this determination, grants the Board the authority to determine the manner in which compensation is paid so that it may pay compensation through periodic payments or commute certain types of compensation payments. Section 35 is not the provision that grants the Board the authority to determine whether

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compensation is payable or what compensation is payable. If I accept that the Board is obligated to pay interest because it is a component of compensation, it is not clear to me how section 35(1) would operate to limit the circumstances in which the Board is required to pay interest.

(iii) "Compensation" can be rationally interpreted as not including interest

[138] In light of all of this analysis, I do not agree that compensation necessarily includes interest. I conclude it is rational to interpret the term "compensation" in the Act as not including interest.

(c) Item #50.00 and the fundamental principles of workers' compensation

[139] The two workers and the workers' community submit that item #50.00 is inconsistent with the objects and purpose of the Act and the fundamental principles of workers' compensation that were established by the Supreme Court of Canada in *Pasiechnyk*. In particular, they argue that item #50.00 offends the principle that workers should "enjoy security of payment" and the principle that the Board must pay compensation to injured workers quickly. It follows from their position that the Board ought to pay interest to injured workers if it fails to pay compensation to them quickly because, if compensation is delayed, workers are without money to replace their employment income. I acknowledge that clearly an objective of workers' compensation is to support the financial security of injured workers so that they are able to meet their financial obligations when a compensable injury disables them from earning their wages.

[140] The task before me is not to express my view of the interest policy that would be most consistent with the fundamental principles of workers' compensation. I must determine whether item #50.00 is so patently unreasonable that it cannot be supported by the Act. If there were a provision of the Act requiring the Board to pay interest on retroactive compensation payments, the principles drawn from *Pasiechnyk* would certainly be relevant to the correct interpretation of that provision. Those principles are also worthy of consideration when an interest policy is being developed. However, in the absence of a general provision in the Act requiring the Board to pay interest on retroactive compensation payments, I am not persuaded that item #50.00 is patently unreasonable in limiting interest payments to narrow circumstances.

(d) Are there applicable common law principles that require the Board to pay interest or is the Act a complete code?

[141] The two workers and the workers' community have urged me to apply common law principles and conclude that the Board is required to pay interest on delayed compensation payments in order to compensate workers for the delay.

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[142] The WAO provided extensive submissions in this regard. They state (at paragraph 67 of their submissions) that "the common law may also provide some guidance as to the other considerations that are generally relevant when it comes to the purportedly authorized taking or retention of the property of another." They say that the relevant principles include those pertaining to unjust enrichment, constructive trust, fiduciary duty, and unauthorized expropriation. As I understand their argument, they contend that the Board must not withhold interest when paying retroactive compensation unless the Act expressly and unambiguously authorizes it to do so (at paragraph 88).

[143] In *Plesner v. British Columbia Hydro and Power Authority,* 2009 BCCA 188, the British Columbia Court of Appeal noted the comments of the Supreme Court of Canada in

Pasiechnyk regarding the fundamental principles of workers' compensation (quoted earlier in this determination) and stated:

> [12] In British Columbia the Workers' Compensation Board is created by and charged with the administration of the *Workers Compensation Act*. Sections 2-35 of the *Act* set out the Board's responsibility and authority with respect to the adjudication of claims and payment of compensation benefits. The *Act* compensates workers who are disabled by injuries or diseases arising out of employment or dependants of workers who are killed by injuries or diseases arising out of employment.
>
> [13] Sections 36-52 create an assessment structure whereby the Board collects from employers, subject to the *Act*, all funds necessary to pay compensation and fulfill the Board's other obligations. The Board is wholly funded by British Columbia employers under part 1 of the *Act*. Section 36 establishes the accident fund for the payment of compensation, outlays and expenses under Part 1 of the *Act* and for payment of expenses in administering Part 3, the workplace health and safety provisions of the *Act*.
>
> [14] Section 5 of the *Act* establishes no-fault entitlement to compensation by workers injured or killed in the course of employment. Section 5.1 (to which I return in detail) establishes no-fault entitlement to compensation for workers who develop a mental stress condition following a traumatic event at work. Sections 2-35 provide the basis for calculating the level of compensation payable. Where a worker's injury arises out of and in the course of employment, the Board must pay compensation as provided by Part 1 of the *Act*, regardless of whether the worker's employer is registered and regardless of whether the Board can collect assessments from the employer. Sections 36-52 of the *Act* distribute the

> cost of that no-fault scheme amongst the various employers of the province.
>
> [15] **The *Act* creates a complete scheme for administering the payment of compensation benefits and levying of assessments to maintain the accident fund.** …
>
> [emphasis added]

[144] Based on *Pasiechnyk* and *Plesner*, I conclude that the Act is a comprehensive statutory scheme which the board of directors may supplement through exercising their authority to make policy. To introduce common law principles regarding entitlement to interest would undermine the legislature's choice of giving the board of directors the authority to supplement the Act. To the extent that the amounts and types of payments that a worker receives under the workers' compensation scheme are less than or different from those that might be awarded through a civil action under the common law, I view the shortfall as a product of the historic compromise and not a gap that must be filled through reference to common law principles.

[145] I conclude that the Act may be interpreted as limiting interest payments to workers to circumstances in which interest is either prescribed by the Act or established in the policies of the board of directors. This is consistent with the decision in *Boyle Estate.* I find that the *Whitlock* decision is distinguishable because the Court had jurisdiction to substitute its decision for that of the P.E.I. WCB and the Court's primary concern was that interest should be paid to compensate for inflation, which is addressed in section 25 of the Act.

[146] I conclude that item #50.00 is not patently unreasonable merely because it limits the circumstances in which interest may be paid to workers on retroactive compensation. The question of whether item #50.00 is patently unreasonable because of the manner in which it limits the payment of interest (that is, through the blatant Board error test) is a separate question, which I will now address.

(e) Is the blatant Board error test patently unreasonable?

[147] Under item #50.00, two workers who suffer the same period of delay in receiving compensation to which they are entitled may be treated quite differently. If there has been a blatant Board error in adjudicating the compensation of one of the workers, the Board will pay interest but, in the absence of such an error, the Board will deny interest to the other worker. I must determine whether it is patently unreasonable to establish an interest policy under which one of the workers receives interest while the other one does not. In my view, this question turns on whether there is a rational basis for treating the two workers differently.

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[148] The two workers and the workers' community submit that there is no rational support for the blatant Board error test. They rely on the Court's statements in the September 2007 *Johnson* judgment that there is no provision in Part 1 of the Act that "provides that compensation is not payable in situations involving erroneous judgement calls by the [Board]" (at paragraph 98) and that the Board's conduct is irrelevant (at paragraph 100). They say item #50.00 is entirely inconsistent with the foundational principles of workers' compensation and the purpose of interest and it is not capable of being rationally supported under the Act. They also argue that the blatant Board error test is arbitrary and discriminatory. The WAO notes that "the [legislative] goal of treating workers alike is thwarted by the current interest policy." In their submissions, the two workers state:

> The arbitrariness of Policy #50.00 is clearly demonstrated if one attempts to answer the question: why should a worker who is denied benefits for a period due to blatant error receive interest on those benefits, while a worker who suffers long delays for any other reason, such as … Board errors, a lack of Board resources or technological failures … not receive interest? In our respectful view, there is no satisfactory answer to this question.

[149] The Employers' Forum says the blatant Board error test must be considered in the context of the broad jurisdiction and authority of the Review Division and WCAT under the Act. Review officers (under section 96.4(8)) and members of WCAT (under section 253(1)) may "confirm, vary or cancel" the decision under review or appeal. A review officer or a member of WCAT may substitute his or her decision for the decision of the previous decision-maker without expressly identifying an error in that decision. In addition, review officers and WCAT members may accept new evidence submitted by the parties to the review or appeal and may obtain new evidence on their own initiative.

[150] The Employers' Forum submits that, in this context, it makes sense to limit interest to those situations in which there is a blatant Board error because, in other situations, the Board's initial decision may change on review or appeal because the review officer or WCAT vice chair has a different opinion or the benefit of evidence that was not available to the original decision-maker. As I understand their submission, they argue there is a rational distinction between claims in which there has been a blatant Board error and those in which a worker becomes entitled to retroactive compensation for other reasons.

[151] At the hearing, I asked the Employers' Forum whether the Board is arbitrary in paying interest to a worker who has been affected by a blatant Board error but not granting interest to another worker who has been affected by a similar delay. The Employers' Forum responded that the difference is that the worker affected by a blatant Board error would have received timely compensation when the matter was initially adjudicated by the Board but for the blatant Board error. As I understand their submission, the situation in which there is a blatant Board error may be lawfully distinguished from a

situation in which the Board's initial decision changes due to new evidence being introduced during a review or appeal or new analysis by the review officer or WCAT vice chair.

[152] The deemed employer likens a blatant Board error to negligence. Since interest on retroactive compensation is discretionary, the deemed employer contends that the board of directors may establish policies that base entitlement to interest on the reason for the delay in payment of the benefits. In the deemed employer's view, the policy recognizes that delays due to blatant Board errors are inexcusable and, in those circumstances, the inclusion of interest payments in employers' claims costs is justified.

[153] I am not persuaded that the test for entitlement to interest can be characterized as patently unreasonable due to the lack of a provision in the Act authorizing such a test. I have earlier concluded that the authority of the board of directors to establish a policy granting interest in circumstances other than those specified in the Act lies in its broad discretion to make policy under section 82. The authority of the board of directors to establish the details of those policies and, in this case, the specific circumstances in which interest will be paid also arises out of section 82. The only restriction in the Act on the policy-making authority of the board of directors is that a policy cannot offend the patent unreasonableness test established in section 251. However, I must also consider whether the policy-making authority of the board of directors is restricted by the common law principles applicable to discretionary decisions of administrative bodies.

[154] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, L'Heureux-Dube J. described a discretionary decision as one "... where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries" (paragraph 52). The board of directors' authority to make policy under section 82 of the Act is characterized as discretionary because the Act does not dictate a specific outcome, but rather leaves the board of directors the flexibility to decide among possible policy options.

[155] The Federal Court of Appeal has stated that all administrative bodies must act fairly and not arbitrarily (see *Canada (Border Services Agency) v. Decolin Inc.,* 2006 FCA 417, paragraph 45, referring to *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners*, [1979] 1 S.C.R. 311). This statement of the law is consistent with the comments in *Baker* about the restrictions on the exercise of discretion. In *Baker*, L'Heureux-Dube J. stated (at paragraph 53):

> … discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but … considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the

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> decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, **discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).**
>
> [emphasis added]

[156] With respect to the general principles governing the exercise of discretion D. Jones and A. de Villars, *Principles of Administrative Law,* 5th ed., (Toronto: Carswell, 2009 at page 174), describe five types of improper exercises of discretion: (1) exercise of discretion with an improper intention in mind, which includes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations; (2) acting on inadequate material including where there is no evidence or without considering relevant matters; (3) exercising discretionary power which leads to an improper result, including unreasonable, discriminatory, retroactive administrative actions; (4) exercising discretion on an erroneous view of the law; and (5) refusing to exercise discretion by adopting a policy which fetters that discretion.

[157] Similarly, section 58(3) of the *Administrative Tribunals Act* (ATA), which is applied by the courts when a party seeks judicial review of a WCAT decision on the basis of a patently unreasonable exercise of discretion provides:

> (3) … a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

[158] Although the ATA is not applicable to the Board, in my view, it codifies the common law.

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[159] Overall, the common law and legal texts provide that administrative bodies, such as the board of directors, must not exercise discretion arbitrarily, in a manner that leads to a discriminatory result, or for an improper purpose. Discretion is not absolute and unfettered, but must be exercised taking into account the purpose and principles underlying the enabling statute. Accordingly, the board of directors' discretion to make policy regarding awards of interest must be exercised having regard to the nature and purpose of the Act and the purpose of interest under the Act. I conclude that a policy is patently unreasonable if it results from the board of directors exercising its authority under section 82 in an arbitrary or discriminatory manner.

[160] The term "arbitrary" is generally accepted to mean "capricious," that is without any reasonable cause and without reason (*Black's Law Dictionary*, 8th ed., *Words and Phrases*, p. 1-643, 1-655). Discrimination is defined as a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured (*Black's Law Dictionary*, 8th ed.).

[161] Item #50.00 cannot be characterized as arbitrary or discriminatory merely because it denies interest to some workers and grants it to others. In order to find that the interest policy is arbitrary or discriminatory, I must find that the discretion under section 82 has been exercised in a manner that results in workers being treated differently for arbitrary reasons or for purposes unrelated to the Act (*Grace v. British Columbia (Lieutenant Governor in Council)*, 2000 BCSC 923, paragraph 71).

[162] The question is whether there is a nexus between the purpose of interest and the test in item #50.00 that establishes when interest will be paid. The purpose of interest on compensation paid under the Act, as discussed earlier, is to address the loss of opportunity associated with delayed payment of compensation. The test in item #50.00 draws a distinction based on the cause of the delay (blatant Board error) even though, regardless of the cause of delay, two workers (one who is entitled to interest under the interest policy and one who is not entitled to interest) have suffered a loss of opportunity. In contrast, under the previous item #50.00, the conditions precedent to entitlement to interest applied equally to all workers who experienced loss of opportunity without making a distinction regarding the type of error. For instance, the requirement that the commencement date of the retroactive compensation had to be more than one year prior to the date that the retroactive payment was processed applied to all workers.

[163] In considering the Board's argument that item #50.00 is justified in order to ensure adequate funding of the accident fund, the Court in the September 2007 *Johnson* judgment was not persuaded that the funding issue provides "any basis for distinguishing between workers on the basis of whether or not the error of the WCB was blatant or otherwise" (paragraph 67). I agree. Regardless of whether the Board's error was blatant, the worker will suffer an opportunity cost that may be addressed, at least in part, by the payment of interest. While the board of directors may create policy that

limits interest, the manner in which it does so must not draw patently unreasonable distinctions between workers.

[164] I find that there is no rational connection between the conduct (delayed payment due to blatant Board error) and the consequences (the worker's entitlement to, and the Board's responsibility to pay, interest). By focussing on the type of error that has resulted in the delay of the compensation, the board of directors has exercised its general authority to make policy under section 82 of the Act in a patently unreasonable manner because the policy creates an arbitrary distinction not related to the purpose of interest under the Act. It follows that item #50.00 is so patently unreasonable that it is not capable of being supported by the Act.

[165] I recognize that, in establishing item #50.00, the board of directors exercised its discretion to require the Board to pay interest in circumstances in which the Board is not required to pay interest under the Act. However, in exercising the discretion to make a policy that provides for interest in such circumstances, the board of directors cannot create an arbitrary test for determining when interest will be paid.

[166] Finally, given that the Board is not required to pay interest in circumstances beyond those established by the Act, I recognize item #50.00 can be characterized as a policy through which the Board takes responsibility when there has been a significant failure to meet minimal adjudicative standards. This seems somewhat akin to various businesses, such as retailers, restaurants, and hotels, granting a benefit to a consumer when there has been a service failure. However, as a body that administers a statutory entitlement scheme, the Board does not have the latitude to treat one worker differently from another in the absence of a distinction that can be rationally supported by the Act. When the board of directors decides to exercise the discretion to pay interest beyond those circumstances established by the Act, it cannot be arbitrary.

20. Conclusion

[167] I conclude that item #50.00 of RSCM I and II is so patently unreasonable that it is not capable of being supported by the Act. In summary, I have determined:

- The Act is a comprehensive statutory scheme which may be supplemented by the board of directors of the Board through exercising their authority to establish policy.

- The Board is not required to pay interest to workers, surviving spouses, and dependants in circumstances other than those specified in sections 19 and 258 of the Act.

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- Under section 82 of the Act, the board of directors has broad authority to make policies including policies for payment of interest by the Board in circumstances beyond those prescribed by the Act.

- Subject to sections 19 and 258, item #50.00 establishes that the Board will not pay interest on retroactive compensation unless there has been a blatant Board error.

- Although the Board consulted with the workers' compensation community prior to establishing item #50.00, the options presented did not include limiting interest only to circumstances in which there is a blatant Board error. As a result, in my view, the consultation was inadequate. However, in the absence of a provision of the Act requiring the Board to consult, the failure of the Board to adequately consult does not render item #50.00 patently unreasonable.

- Although the board of directors is not required to pay interest in circumstances beyond those prescribed by the Act, when it makes a policy to pay interest in other circumstances, the policy is patently unreasonable if it is arbitrary or discriminatory.

- There is no nexus between the purpose of interest and a blatant Board error that supports the distinction made by item #50.00. It follows that, because it focuses on the type of error, item #50.00 is arbitrary. Accordingly, item #50.00 is so patently unreasonable that it is not capable of being supported by the Act.

21. The Operation of Section 251

[168] Section 251 prescribes a series of steps that must be taken as a result of my determination that item #50.00 should not be applied. Those steps include the following:

- In accordance with section 251(2), WCAT will suspend the worker's appeal.

- In accordance with section 251(5), I will send notice of this determination and my reasons to the board of directors.

- In accordance with section 251(5), WCAT will suspend the other appeal proceedings that I consider to be affected by item #50.00 until the board of directors makes a determination under section 251(6).

- WCAT will forward to the board of directors a list of parties to the appeals that WCAT has suspended under section 251(5).

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- In accordance with section 251(7), the board of directors must allow the parties to the two appeals, and the parties to all appeals suspended by WCAT, to make written submissions.

- In accordance with section 251(6), within 90 days of receipt of notice of this determination, the board of directors must determine whether WCAT may refuse to apply item #50.00.

- In accordance with section 251(8), WCAT will be bound by the board of directors' determination.

Jill Callan
Chair

JC/gn