WCAT Decision Number: WCAT-2004-00129-RB
WCAT Decision Date: **January 13, 2004**
Panel: Nora Jackson, Vice Chair

Introduction

In a decision letter dated April 8, 2002, a Workers' Compensation Board (Board) disability awards claims adjudicator (CADA) advised the worker that no interest would be paid on the amount paid to the worker as a result of the Review Board's May 9, 2001 finding. The worker appeals that decision (Appeal C).

Issue(s)

Was the worker entitled to interest on the amount awarded to him as a result of the Review Board's May 9, 2001 finding?

Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). Pursuant to Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, the former Review Board and Appeal Division have been replaced by the Workers' Compensation Appeal Tribunal (WCAT) effective March 3, 2003. Section 38 of the legislation provides that all Review Board appeals are to be transferred to WCAT to be completed as WCAT appeals, unless a panel of the Review Board had completed an oral hearing, or unless written submissions were completed and a panel of the Review Board had commenced deliberations, before March 3, 2003.

As this appeal was not considered by a Review Board panel by March 3, 2003, it was transferred to WCAT and has been considered as a WCAT appeal except that no statutory time frame applies to the making of this decision. One effect of this change is that WCAT must apply policies set by the board of directors and the former governors of the Board.

Evidence

I have reviewed the evidence in the claim file, any submissions made by the worker and the accident employer in support of their respective positions, the *Workers Compensation Act* (Act) in effect at the time of the events here in question, and applicable Board policy as set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM). Interested parties have received full disclosure of the claim file, and the medical and claim history will not be repeated in detail here except as relevant to the current appeal.

On September 28, 1994, the worker was injured. He submitted an application for compensation to the Board, his claim was accepted. Wage loss and health care benefits were paid, and a pension was awarded (see decision letter dated November 21, 1995). The pension was made effective July 16, 1995. The worker appealed that pension decision, and his appeal was allowed. The worker's chronic pain syndrome was later accepted and his pension reassessed.

The worker appealed the second pension decision, and in its findings of May 9, 2001, the Review Board panel found that the worker was entitled to an additional 2.5 percent for his chronic pain disorder pursuant to item #39.01 of the RSCM. The Review Board further found that the worker was entitled to a loss of earnings award based on the difference between the worker's pre-injury earnings and what he was then currently earning from his home-based business. The worker's claim file was referred back to the Board for calculation of the benefits flowing from that decision.

In a memo dated January 15, 2002, some seven months later, a Board CADA referred the Review Board's findings for calculation of the increased pension award, and wrote to the worker requesting income information from 1995 to 2001, in order to make a determination as to the extent of the worker's loss of earnings. In his memo, the CADA noted that no interest would be payable, as there had been no blatant Board error.

In a decision letter dated January 16, 2002, the Board implemented the Review Board's May 9, 2001 decision. The CADA asked the worker for the necessary earnings information. In a letter to the Board dated February 27, 2002, the worker's representative requested that interest be paid on the amount paid to the worker as a result of the Review Board's May 9, 2001 finding.

In a decision letter dated April 8, 2002, a Board CADA advised the worker that no interest would be paid, as the decision with regard to interest was made on January 15, 2002. For that reason, the Board's new interest policy, which had come into effect as of November 1, 2001, applied. That policy required that in order for interest to be paid, it would have to be determined that there had been a blatant Board error. In the opinion of the CADA, there had been no blatant Board error; therefore, no interest would be paid.

Subsequent to the decision letter here being appealed, the Board received earnings information from the worker. On April 17, 2002, the CADA informed the worker that, based on the earnings information provided, no loss of earnings award would be made. The worker subsequently provided further earnings information; again, on July 11, 2002, the CADA advised that the worker was not eligible for a loss of earnings award. The worker's representative wrote to the CADA pointing out an error in his calculations, and asking that a recalculation be undertaken. Finally, in a decision letter dated August 19, 2002, some 16 months after the Review Board's decision, the CADA awarded the worker the loss of earnings pension mandated by the Review Board's May 9, 2001 finding.

In support of his appeal of the April 8, 2002 decision, the worker has provided a submission from his representative dated August 28, 2002. The worker's representative argued that the worker's file sat inactive at the Board for a period of over eight months after the Review Board's finding. That delay was entirely within the Board's control; once the file was activated, it took only one day to implement the functional part of the worker's award. Although the loss of earnings portion of the file took somewhat longer to implement, had the file been activated immediately upon the Review Board's decision, it too could have been implemented well prior to the November 1, 2001 change in Board policy with regard to interest.

The worker's representative drew the panel's attention to Decision #36, dated March 1, 1993, found in vol. 9 of the *Workers Compensation Reporter*. That decision discusses the retroactive application of policy, and notes that when a policy change occurs as a result of a reconsideration and rethinking of existing lawful policy, the presumption is that the changed policy will not apply retroactively before the date on which the new policy was approved.

The worker's representative argued that unless the presumption has been rebutted, the Board is bound to apply the old interest policy. He argued that although the decision not to award interest was made after November 1, 2001, the matter was certainly under adjudication prior to November 1, 2001. He cited the Board's Practice Directive which refers to interest decisions made after November 1, 2001. However, Decision #36 (cited above) provides that a new policy may not be retroactively or retrospectively applied where the issue was "under adjudication" prior to the enactment of the revised policy. He argued that was the case here, and the worker's request for the payment of interest should be determined under the older, less restrictive, policy.

Reasons and Findings

Board policy with regard to the payment of interest is set out in item #50.00 of the RSCM. It sets out the rate of interest to be paid, the method of calculation, and the scope of entitlement. Prior to November 1, 2001, the policy provided for interest to be paid if a payment was made by the Board for a condition that was previously overlooked or for which the Board had previously decided that no payment was due.

On October 15, 2001, the Board's Panel of Administrators approved a resolution amending the Board's policy with regard to interest. The new policy provides that interest will only be paid where it is determined that a blatant Board error has been made.

The resolution regarding interest came into effect November 1, 2001, and stated in part:

> … The amended policies are effective November 1, 2001, and will apply to all decisions to award or charge interest on or after that date. When

> calculating the amount of interest payable, the new method for determining the applicable rate of interest will apply retrospectively and will be used for the entire entitlement period and will not be limited to entitlement for time periods after November 1, 2001.

A number of decisions of the Appeal Division have addressed the question of whether the October 15, 2001 resolution was intended to apply if a worker's entitlement was originally considered prior to November 1, 2001. The Appeal Division, in Decision #2002-1488, acknowledged Decision #36, cited above. The Appeal Division panel concluded that the purpose of the new policy was to move away from paying interest using a compound rate of interest and to use a different, more stringent, criteria for establishing eligibility for interest, for the purpose of reducing the cost to the Board associated with the payment of interest.

The Appeal Division thought that purpose would best be achieved if the policy revision was interpreted to mean that the new rules for eligibility to interest and the calculation of that interest were applicable as of November 1, 2001. The Appeal Division acknowledged that there is a presumption against the retroactive application of changes in policy, but thought that presumption was rebutted by the concerns associated with the application of two interest policies simultaneously, i.e., if the new policy was found not to be fully retroactive and the old policy continued to be applicable to decisions regarding entitlement rendered before November 1, 2001.

In short, the Appeal Division considered that the resolution was intended to apply to all decisions on or after November 1, 2001 concerning whether there is entitlement to interest, regardless of whether those decisions are made in the first instance by a Board Officer, a Review Board panel or an Appeal Division panel.

I accept the Appeal Division's reasoning. Since the decision regarding entitlement to interest was made by a Board officer after November 1, 2001, I find that the new, more restrictive, interest policy should apply in this matter. That being the case, it remains to be determined whether the Board decision here in question was the result of a blatant error by the Board.

On that matter, I allow the worker's appeal. Although the initial pension decision made by the Board was not a blatant error, the Board's failure to implement the Review Board's May 9, 2001 decision for eight months was. New workers' compensation legislation has been enacted since the events here in question. The thrust of that legislation, among other things, is that workers' compensation matters must be decided in a timely matter, both on the part of the Board itself and on the part of the appellate bodies. That is the clear intent of the legislation, and is of obvious benefit to all parties involved, the worker, the employer and the Board.

In this case, the worker should not be penalized for the Board's failure to act in a reasonable and timely fashion, a matter totally beyond the worker's control. The worker

is entitled to interest on his increased pension award. Furthermore, although not directly before me, I strongly suggest to the Board that the worker is entitled to interest on the amount of his retroactive loss of earnings award implemented in August 2002. Again, the Board's failure to implement the Review Board's decision on that matter in a timely fashion is a blatant error; the worker should be entitled to interest on that award as a result.

Conclusion

With regard to the issue of whether the worker is entitled to interest on his retroactive functional pension award, I allow the worker's appeal, for the reasons set out above. The Board's April 8, 2002 decision is varied. The panel awards no expenses in this matter.

Nora Jackson
Vice Chair

NJ/jkw

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