

Noteworthy Decision Summary

Decision: WCAT-2004-00890-RB **Panel:** Michelle Gelfand **Decision Date:** February 20, 2004

Interest – Interpreting “blatant error¹” in policy item #50.00 of the Rehabilitation Services and Claims Manual

The worker successfully appealed a pension award to the Workers' Compensation Review Board (Review Board), which found the worker was entitled to an increased functional award, assessment of a loss of earnings award, and an earlier effective date for the entire award. The Review Board also recommended that the Workers' Compensation Board (Board) consider paying interest on any retroactive payment resulting from the finding. The Board implemented the Review Board findings and concluded there was no blatant error in the Board's consideration of the worker's pension entitlement that warranted the payment of interest. The worker appealed. The issue was whether he was entitled to interest on his retroactive lump sum pension award.

New Board policy at item #50.00 of the Rehabilitation Services and Claims Manual restricts the payment of interest to situations where there is a blatant Board error that necessitated the retroactive payment. It became effective November 1, 2001 and applies to all decisions to award or charge interest on or after that date. As the Review Board and Board decisions were all issued after November 1, 2001, the new policy applied.

Item #96.20 states that Board officers are responsible for referring a worker's claim to the Disability Awards Department where a medical report indicates a permanent disability or the possibility of a permanent disability. Although a specialist's 1990 and 1992 reports clearly indicated that the worker had a permanent disability related to his compensable condition, there was no evidence that the Board considered referring the worker for a pension assessment until 1996. Although the Board took preliminary steps to follow up on 1990 report by contacting the doctor's office for test results, that contact did not lead to receipt of those results. The panel found the Board's failure to refer the worker for pension entitlement following receipt of the 1990 and 1992 reports constituted a blatant error within the meaning of item #50.00. The oversight was an error that the Board officer would not have made had he/she been aware of the situation at the relevant times. The errors could not be characterized as “understandable errors based on misjudgement” as there was no evidence that any judgement was exercised regarding referral of the worker for pension assessment. The oversights constituted “glaring errors that no reasonable person should make”. In reaching its conclusion, the panel considered the examples of “blatant error” set out in Appendix A of Practice Directive #28, and said that example 3, which refers to missed evidence regarding a worker's employment earnings affecting the worker's wage rate, was analogous to the present case.

¹ The blatant Board error test will continue to apply to decisions made before January 1, 2014 but does not apply to decisions made on or after that date. See WCAT-2015-00701.

WCAT Decision Number:**WCAT-2004-00890****WCAT Decision Date:****February 20, 2004****Panel:****Michelle Gelfand, Vice Chair**

Introduction

In a decision of November 29, 1999, the Workers' Compensation Board (the Board) awarded the worker a pension for red cedar asthma. The worker successfully appealed that award to the Workers' Compensation Review Board (the Review Board). In findings of March 6, 2002, a Review Board panel found the worker entitled to an increased functional award, assessment of a loss of earnings award, and an earlier effective date for the entire award. The panel also recommended that the Board consider paying interest on any retroactive payment resulting from the finding. The Review Board finding was not appealed.

In letters of July 15, 2002 and January 10, 2003, the Board implemented the Review Board findings with respect to the worker's functional and loss of earnings entitlement. Those decisions were silent with respect to interest entitlement. At the request of the worker's representative, a claims adjudicator considered the worker's entitlement to interest in a January 23, 2003 decision. He concluded that there was no blatant error in the Board's consideration of the worker's pension entitlement that would warrant the payment of interest.

The worker applied for review of that decision by the Review Division. In a decision of June 24, 2003, a review officer confirmed the Board's decision. The worker now appeals that decision.

The worker was represented on this appeal by a union representative. The employer did not participate although invited to do so. I have considered this appeal based on a review of the file material and the representative's April 30, 2003 submission to the Review Division.

Issue(s)

The general issue arising on this appeal is whether the worker is entitled to interest on his retroactive lump sum pension award. The worker, however, has received three such awards, and the first issue arising on this appeal is which of those awards is under consideration with respect to interest entitlement.

The initial pension decision of November 29, 1999 was based on a November 17, 1999 memo which noted that interest on the pension award was "not applicable". The claims adjudicator established two effective dates for the pension: 3% of the award was effective January 24, 1986, with the remaining 3% effective January 20, 1996. The November 29, 1999 decision informed the worker that he was entitled to a retroactive lump sum award of \$16,827.10 (the original award).

In its March 6, 2002 findings, the Review Board panel noted the worker's submission that interest on the pension should be awarded, "as the Board had overlooked the pension entitlement in 1990" (final paragraph of page seven). The panel did not address the issue of entitlement to interest on the original award, but recommended that the Board consider awarding interest on any retroactive payment resulting from its finding (first full paragraph on page 12).

Implementation of the Review Board finding resulted in retroactive lump sum pension awards of \$37,520.50 and \$53,709.75 (the increased awards) granted in letters of July 15, 2002 and January 10, 2003, respectively.

I have considered whether the scope of the interest issue before this panel is limited to interest entitlement on the increased awards only. The basis of this position would be that the Review Board panel, by not explicitly deciding interest entitlement on the original award, either failed to consider that issue or implicitly denied that aspect of the appeal. In the latter case, the issue would be *res judicata*, or already decided, and could not properly be revisited by the Board, the Review Division or this panel. In the former case, the remedy would be to return the issue to the panel for adjudication.

An alternative and, in my view, preferable approach is to view the claims adjudicator's January 23, 2003 letter as both a reconsideration of the prior decision to deny interest on the original award, and a denial of interest on the increased award. As the Review Board finding was silent with respect to interest on the original award, I find that it was open to the adjudicator to reconsider the prior adjudicator's conclusion on interest. Based on the issues identified by the adjudicator, and the specific evidence which he considered, I interpret his January 23, 2003 decision to be a reconsideration and denial of interest on both the original award and the increased awards. I therefore conclude that any prior decisions regarding interest on the original award were superseded by the January 23, 2003 decision. The issue before me is therefore entitlement to interest on both the original and the increased awards.

Law and policy

Pursuant to section 250(2) of the *Workers Compensation Act* (the Act), WCAT must apply Board policy.

There are no express provisions in the Act regarding payment of interest by the Board in the circumstances relevant to this appeal.

The policy relevant to payment of interest on compensation entitlement is set out at #50.00 of the *Rehabilitation Services and Claims Manual, Volumes 1 and 2* (RSCM). The policy in effect prior to November 1, 2001 (the former policy) provided for payment of interest on retroactive wage loss or pension lump sum payments where the payment was 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 panel of administrators amended #50.00 by way of resolution. The new policy restricts the payment of interest to situations where there is a blatant Board error that necessitated the retroactive payment. A "blatant" error is described as follows in #50.00:

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 officer known that he or she was making the error at the time, it would have caused the officer to change 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.

Item 6 of the panel of administrators' resolution states as follows regarding the effective date of the amendments:

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

The worker's representative has argued that the former policy should apply, and the worker should be entitled to interest on his entire pension award on the basis that his entitlement was overlooked.

Of the series of decisions relevant to this appeal, only the initial November 29, 1999 pension decision was made while the former policy was in effect. The Review Board finding, the three subsequent Board pension decisions, and the review officer's decision were all issued after November 1, 2001. As noted above (see "Issues"), I have concluded that the November 29, 1999 decision, to the extent that it addressed interest entitlement on the original award, is essentially moot as it was replaced and superseded by the January 23, 2003 decision. I therefore find that Board policy requires the application of the current policy on interest to my consideration of this appeal.

Analysis

1. Interest on original award

The Board was first alerted to the worker's compensable condition by way of January 1986 medical reports. His claim was accepted for red cedar dust asthma, and he was paid wage loss benefits for several weeks. The Board received no further information about his claim until January 1990, when the worker was reimbursed for asthma medication.

In mid-July 1990, the Board received a June 25, 1990 report from Dr. Yeung, respirologist, referring to the worker's "definite residual impairment" related to his asthma. According to a telephone memo on file, the Board was awaiting test results. Dr. Yeung's office apparently advised a Board staff member that the worker would follow up as well. There is no evidence of further contact from the worker or the medical office related to those test results, and there was no further relevant file activity in 1990 or 1991.

The next contact with the Board was on September 15, 1992, when the Board received Dr. Yeung's August 27, 1992 report stating that the worker had not recovered from his asthma, and recommending that he apply to the Board for a permanent disability pension. A follow-up report of September 14, 1992 indicated a dramatic improvement in the worker's condition following an increase in his medication. There is no evidence that a Board officer reviewed those reports, nor did the worker contact the Board at that time.

There was no further activity on the file until the Board received Dr. Yeung's January 20, 1996 report. The worker was then referred for assessment of his functional impairment. In a memo of December 31, 1996, Dr. Fast, a Board internal medicine consultant, noted that the August 27, 1992 report indicated that the worker's condition was "moderately severe" at that time and was unchanged in January 1996.

The pension assessment process culminated in a November 29, 1999 decision letter, in which the worker was advised of his entitlement to 6% of total disability; 3% of which was effective January 24, 1986, and 3% effective January 20, 1996.

The issue then is whether the Board committed a blatant error within the meaning of #50.00 by not assessing the worker for permanent impairment in either 1990 or 1992 based on medical reports submitted in those years.

Item #96.20 of the RSCM states that Board officers are responsible for referring a worker's claim to the Disability Awards Department where a medical report indicates a permanent disability or the possibility of a permanent disability. Dr. Yeung's 1990 and 1992 reports clearly indicated that the worker had a permanent disability related to his

compensable condition. Although the Board took preliminary steps to follow up on the June 25, 1990 report by contacting Dr. Yeung's office for test results, that contact did not lead to receipt of those results. There is no evidence that the Board considered referral of the worker for pension assessment until January 1996.

I find that the Board's failure to refer the worker for pension entitlement following receipt of the 1990 and 1992 reports constitutes a "blatant error" within the meaning of #50.00. The oversight is an error that the Board officer would not have made had he or she been aware of the situation at the relevant times. The errors cannot be characterized as "understandable errors based on misjudgement" as there is no evidence that any judgement was exercised regarding referral of the worker for pension assessment. I find that the oversights constitute "glaring errors that no reasonable person **should** make" (my emphasis). It is probable that these errors occurred as a result of oversight by reasonable people. However, the fact that inadvertent errors are an unfortunate feature of every large organization does not, in my view, mean that reasonable people "should" make these type of errors.

In reaching my conclusion, I have considered the examples of "blatant error" set out in Appendix "A" of Practice Directive #28. Example 3 refers to missed evidence regarding a worker's employment earnings that would have affected the worker's wage rate. In my view, that example is analogous to the situation before me.

2. Interest on increased awards

The Review Board's decision to increase the worker's award and to amend its effective date did not, in my view, result from blatant errors in the Board's initial assessment of the worker's pension. On careful review of the evidence on file, the Review Board panel found that it was more appropriate to establish 1986 as the effective date for the worker's full functional award. Similarly, the decision to allow other aspects of the appeal was based on their reweighing of evidence. There is therefore no basis for awarding interest on the increased award.

Summary

I vary the review officer's decision, and allow the worker's appeal with respect to the payment of interest on the original award. I note that #50.00 requires the calculation of interest "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". Were it not for that policy, I would conclude that interest entitlement in this case should commence in July 1990, when the Board received Dr. Leung's June 25, 1990 report, and end in January 1996, when the Board embarked on its assessment of the worker's permanent disability. I will leave it to the discretion of the Board to decide the appropriate start and end dates for the payment of interest in this case.



No costs on this appeal were requested and none are awarded.

Michelle Gelfand
Vice Chair

MG/dlh