

### Noteworthy Decision Summary

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**Decision:** WCAT-2004-01152      **Panel:** Teresa White      **Decision Date:** March 3, 2004

***Interest – What constitutes a blatant error<sup>1</sup> – Difference of opinion does not constitute a blatant error as defined in policy #50.00***

The worker sustained an injury. The Workers' Compensation Review Board (Review Board) found she was entitled to a 100 percent loss of earnings award instead of an award based on the Workers' Compensation Board (Board) estimate that she was able to work 32 hours per week at minimum wage in 1992. The Board implemented the 100 percent loss of earnings award as directed by the Review Board but did not pay any interest on the resulting retroactive amount. The Review Division of the Board upheld the Board's refusal to pay interest on the retroactive payment on the basis that the failure of the Board's disability awards committee to approve the 100 percent loss of earnings was not a blatant error. The worker appealed.

In denying the appeal, the panel said it did not consider that the error could not be characterized as more than a misjudgment. It was not a "glaring error that no reasonable person should make". There was no obvious or overriding error, such as might occur, for example, if the wrong date or some other incorrect data was used to calculate the worker's permanent disability award. The Review Board simply reweighed the evidence. Such reweighing is common in the worker's compensation system, where the exercise of judgment is required and decision-makers must apply law and policy that is open to interpretation. A difference of opinion cannot be called a blatant error as defined in policy item #50.00 of the *Rehabilitation Services and Claims Manual*.

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<sup>1</sup> 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-2004-01152

**WCAT Decision Date:****March 03, 2004****Panel:**Teresa White, Vice Chair

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## Introduction

The worker, who sustained a compensable back injury in June of 1991, is in receipt of a permanent disability award based on 100 percent loss of earnings. This award was implemented as a result of findings of the Workers' Compensation Review Board (Review Board) dated January 23, 2002. The Review Board found that the worker was entitled to 100 percent loss of earnings award instead of an award based on the Workers' Compensation Board's (Board) estimate that the worker was able to work 32 hours per week at minimum wage in 1992.

The Board implemented the 100 percent loss of earnings award as directed by the Review Board but did not pay any interest on the resulting retroactive amount, on the basis that interest was not payable because there had been no "blatant error" as required by applicable published policy.

The worker requested a review of the Board's refusal to pay interest by the Review Division of the Board. In a decision dated September 29, 2003 the review officer denied the worker's request, and found that the decision of the Board that the worker could work 32 hours per week at minimum wage was not a blatant error. Rather, it was based on an exercise of judgement and the application of law and policy that was open to various interpretations and left room for considerable discretion. The review officer noted that there was considerable scope for differences of opinion on matters of interpretation and application.

The worker now appeals to the Workers' Compensation Appeal Tribunal (WCAT). She is represented by her union representative. The employer, although notified, is not participating.

No oral hearing was requested, and I agree that the issue can be properly considered and resolved without an oral hearing. I have also considered the oral hearing criteria found in the *WCAT Manual of Rules, Practices and Procedures* and consider that they do not mandate an oral hearing in this case.

## Issue(s)

The issue is whether the worker is entitled to interest on the retroactive payment that resulted from the Review Board findings of January 23, 2002.

## **Jurisdiction**

This appeal was filed with the WCAT under section 239(1) of the *Workers Compensation Act* (Act).

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). The WCAT must make its decision on the merits and justice of the case, but in so doing must apply a policy of the Board's board of directors that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. The WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

The worker's entitlement in this case is adjudicated under the provisions of the Act that preceded amendments made by the *Workers Compensation Amendment Act, 2002* (Bill 49). WCAT panels are bound by published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002*. Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM), in effect on the date of the Board's decision underlying this appeal, and relate to the pre-Bill 49 provisions of the Act.

## **Background and Evidence**

The chronology leading to the worker's 100 percent loss of earnings award can be simply stated as follows:

- On May 31, 1993 the Review Board denied the worker's appeal from decisions of the Board to suspend her wage loss benefits when she declined to attend the Board's Rehabilitation Centre in September 1991, and found the worker was not entitled to further wage loss benefits after June 7, 1992.
- The worker appealed to the former Appeal Division and in a decision dated February 21, 1994 a panel found that the suspension of wage loss was inappropriate when the worker did not attend the clinic in September 1991, and that although the worker was no longer temporarily disabled on June 7, 1992, she had not returned to her pre-injury status and was entitled to an assessment regarding a potential permanent disability.
- The Board assessed the worker and awarded her a permanent disability award based on functional impairment of 1.5 percent of total. This functional award remained undisturbed throughout the appellate processes.

- Review Board findings of April 7, 1997 allowed the worker's appeal respecting loss of earnings, and directed the Board to reassess the worker's employability or provide adequate training to allow her to secure alternate employment.
- A vocational rehabilitation consultant (VRC) completed the employability assessment, and concluded that the worker was unemployable given her age (then 63 years), limited transferable skills and functional restrictions, which were both compensable and non-compensable.
- The claims adjudicator in Disability Awards (CADA) agreed with the VRC's conclusions concerning the worker's employability, and recommended a 100 percent loss of earnings award.
- Policy and procedure required that the disability awards committee (DAC) approve the recommendation of the CADA before it could be implemented. The DAC disagreed that the worker was 100 percent unemployable and directed that the worker's loss of earnings award be determined based on the worker being capable of working 32 hours per week at minimum wage.
- The worker again appealed to the Review Board. In the findings dated January 23, 2002 the Review Board allowed the worker's appeal and directed the Board to implement a 100 percent loss of earnings award.
- The 100 percent loss of earnings award was implemented retroactively, but the CADA specified that interest was not applicable because there was no blatant Board error that led to the retroactive adjustment. The CADA said, in a memo dated December 10, 2002 that this was in keeping with policy item #50 in the RSCM.

The Review Division, in the findings under appeal, reviewed the applicable policy item #50 in the RSCM, as it read before March 3, 2003. It stated that except in situations where the Act required the payment of interest (which are not applicable here), interest will be paid only if the worker is entitled to lump sum retroactive benefits that resulted from a blatant Board error. The review officer noted that "blatant" was defined by the applicable policy item #50 in the RSCM as follows:

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.

The review officer noted that the review turned on whether the failure of the DAC to approve the 100 percent loss of earnings award was a blatant error, and found that it was not. The review officer responded to a submission by the worker's representative that the DAC either blatantly disregarded the opinions of the CADA, or may not even have reviewed policy item #40.20 in the RSCM, the previous appellate decisions or opinions from a trained specialist in the field (presumably a reference to the VRC's opinion regarding employability).

The review officer, as noted above, found that the DAC's decision involved an exercise of judgement and the application of law and policy that was open to various interpretations and left room for considerable discretion. There was scope for differences of opinion. The review officer found that the reweighing of evidence by an appellate body such as was done by the Review Board in this case, cannot be said to be addressing a glaring error no reasonable person should make, nor can it be said to be an obvious and overriding error.

In this appeal proceeding the worker's representative referred me to a May 27, 2003 submission to the Review Division, which I have reviewed. In that submission, the representative noted that following several appeals the worker was eventually awarded the 100 percent loss of earnings award. The representative pointed to the January 23, 2002 Review Board findings, in which the panel stated:

In the result and notwithstanding wishful or arbitrary speculation to the contrary, the weight of evidence as discussed establishes that the worker was, to all intents and purposes, unemployable when her permanent partial disability took effect in 1992. She is therefore entitled to 100% loss of earnings award for the period specified in the March 12, 1999 letter.

The worker's representative submitted that there had indeed been a blatant error. The representative pointed to the underlying facts, including the worker's age, the vocational rehabilitation provided and the circumstances relating to her employability. The representative made reference to the employability assessment set out in the December 1998 memo of the VRC, which concluded that the worker's age, physical condition, employment opportunities in the worker's area, and a lack of transferable skills left the VRC with no alternative but to conclude that a full loss of earnings had been sustained.

The representative submitted that the DAC must apply Board policy, and pointed specifically to policy item #40.12 in the RSCM which provided that an "available job" means one that is reasonably available to the worker in the long run. If the worker with a particular disability is not likely to obtain a particular job, then it is not a reasonably available job. The DAC should have reviewed and referenced the Review Board finding that the "best case scenario would be minimum wage," and the fact that there were

three current opinions (including one from a job search consultant) that the worker was unemployable.

The representative submitted that the DAC blatantly disregarded these opinions or may not even have reviewed policy item #40.12 in the RSCM.

Finally, the representative submitted that the Review Board findings of January 23, 2002 referred to "arbitrary speculation".

### **Findings and Reasons**

As noted above, the WCAT (subject only to section 251 of the Act), and indeed all Board decision-makers, are bound to apply an applicable published policy of the board of directors. In this case, policy item #50.00 in the RSCM is applicable, and it requires that there have been a "blatant error".

As was noted by the review officer, a blatant error is defined as an "obvious and overriding error". The example given is an error that, had the Board officer known she was making the error, it would have caused the officer to change the course of reasons and the outcome. A blatant error cannot be characterized as an understandable error based on misjudgement, but rather describes a glaring error that no reasonable person should make.

I acknowledge the worker's and her representative's perspective on the course of events in this case. It could certainly be argued that the DAC in this case made a decision that was based on their interpretation of the worker's circumstances but did not take into account a substantial body of evidence respecting the worker's employability. The Review Board disagreed with the DAC's decision, which under those circumstances must be viewed as being in error.

However, I do not consider that the error can be characterized as more than a misjudgement. It was not a "glaring error that no reasonable person should make." There was no obvious or overriding error, such as might occur, for example, if the wrong date or some other incorrect data was used to calculate the worker's permanent disability award.

I agree with the review officer that the Review Board simply reweighed the evidence. Such a reweighing is common in the worker's compensation system, where the exercise of judgement is required and decision-makers must apply law and policy that is open to interpretation, particularly in the context of an individual worker's circumstances. There is consequently scope for differences of opinion, and such a difference of opinion cannot be called a blatant error as such is defined in policy item #50.00 in the RSCM.

On that basis, I deny the worker's appeal. She is not entitled to interest on the retroactive payment made to implement the Review Board findings of January 23, 2002.

**Conclusion**

The Review Division decision of September 29, 2003 is confirmed.

Teresa White  
Vice Chair

TW/hba