

Noteworthy Decision Summary

Decision: WCAT-2005-00296

Panel: Herb Morton

Decision Date: January 21, 2005

Blatant error¹ – Exclusive authority of Workers Compensation Board to set own policy – Retroactive interest – Occupational disease – Sections 6(1) and 96(4) of the Workers Compensation Act – Policy item #50.00 of the Rehabilitation Services and Claims Manual, Volume I

The worker, a firefighter, suffered heart attacks in 1989 and 1999. The Workers' Compensation Board (Board) ultimately granted the worker a permanent disability award (award) in 2003. The Board's earlier decision to deny the worker an award was inconsistent with published decisions of the former Workers' Compensation Appeal Division (Appeal Division). The Board denied the worker's request for retroactive interest as it did not consider the earlier decision was a "blatant error". The panel concluded that, although desirable, the Board was not required to interpret its policy so as to be consistent with Appeal Division decisions. The Board policy on occupational disease was ambiguous and the initial decision could not be characterized as a "blatant error". The worker was not entitled to interest.

In 1992 the Board's president referred a decision to the former Appeal Division under (then) section 96(4) of the *Workers Compensation Act* (the Act). In a published decision the Appeal Division determined that, once a worker has demonstrated entitlement to compensation for an occupational disease under section 6(1), the worker is not required to go back through section 6(1) to be entitled to an award. The Board changed its practice between 1993 and 1996 to be consistent with the 1992 Appeal Division decision. In 1995 the Board adopted a new policy on the interpretation of section 6(1). For reasons that are unclear, the Board reverted to its former interpretation of section 6(1) in 1996 or 1997 requiring workers with occupational diseases to again meet the requirements of section 6(1) to be entitled to an award. In 2000, the president referred another decision to the Appeal Division under section 96(4). The Appeal Division again held that the worker did not have to satisfy the requirements of section 6(1) a second time in order to get an award. The issue was further addressed in the 2002 *Core Services Review of the Workers' Compensation Board*, in which the core reviewer agreed with the reasoning of the Appeal Division. The Board subsequently changed its practice.

The worker, a firefighter, sustained compensable heart attacks in 1989 and 1999. The worker applied for an award in 2001. The Board denied the worker an award as he had returned to work full-time as a firefighter. The worker appealed to the former Workers' Compensation Review Board which allowed the worker's appeal. The Board then granted the worker an award of 10% under the 1989 claim and a further 5% under the 1999 claim. No interest was payable. The worker requested a review of this decision by the Review Division of the Workers Compensation Board (Review Division). The Review Division confirmed the Board decision and the worker appealed to the Workers' Compensation Appeal Tribunal.

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.

The panel noted that the appeal raised an issue regarding the effect of decisions by the Appeal Division. Decisions of the Appeal Division with respect to the interpretation of law and policy on a president's referral under section 96(4) were intended to address issues of importance to the workers' compensation system. However, the Appeal Division did not have the authority to create new policy. Under section 99 of the Act, neither the Board nor the Appeal Division was bound by legal precedent. Thus, neither the Board nor the Appeal Division was legally bound by a published Appeal Division decision, outside of the particular case in which the decision was provided.

Policy item #50.00 of the *Rehabilitation Services and Claims Manual, Volume I* stipulates that interest is only payable in the event of blatant Board error. Item #50.00 explains that for an error to be "blatant" it must be an obvious and overriding error. It cannot be characterized as an understandable error based on misjudgment, but must be a glaring error that no reasonable person should make. For example, the error must be one that had the Board officer known that he or she was making the error at the time, the officer would have changed the course of reasoning and the outcome. The decision to deny the worker an award was made with full awareness of the 1992 and 2000 Appeal Division decisions on the proper interpretation of section 6(1). This was not a case of a Board officer overlooking relevant evidence or policy. The wording of the 1995 policy concerning section 6(1) was not so clear as to prevent the Board's change of practice in 1996 or 1997. On the spectrum between an understandable error based on misjudgment, and a glaring error that no reasonable person should make, the Board decision was closer to the former than the latter.

The worker's appeal was denied.

WCAT Decision Number : WCAT-2005-00296
WCAT Decision Date: January 21, 2005
Panel: Herb Morton, Vice Chair

Introduction

The worker has appealed *Review Decisions #9775 and #9777* dated May 6, 2004, to deny the payment of interest on the worker's permanent partial disability award. The worker's lawyer submits that the Board's refusal to assess the worker for a pension award, in the face of Appeal Division decisions in other cases which indicated the worker had met the requirements for such an assessment, constituted blatant Board error.

The worker requested that his appeals be considered on a "read and review" basis. A written submission dated October 4, 2004 was provided by the worker's lawyer. The employer is participating, but has not provided a submission. I agree that the issues raised in the worker's appeals can be properly considered upon the basis of written evidence and submissions, without an oral hearing.

Issue(s)

Did the Board's refusal to follow the guidance provided by Appeal Division decisions in other cases (regarding referrals by the President under section 96(4) of the Act, with respect to the effect of section 6(1) of the Act that a worker be "disabled from earning full wages at the work at which the worker was employed"), constitute a blatant error so as to warrant the payment of interest to the worker?

Jurisdiction

Under section 239(1) of the *Workers Compensation Act* (Act), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to WCAT. WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (section 250(2) of the Act).

Background

The worker was a firefighter, who sustained compensable heart attacks in 1989 and in 1999. Wage loss benefits were paid under both claims (from May 16, 1989 to August 19, 1989, and from August 5, 1999 until September 28, 1999).

By letter of May 29, 2001, the worker's lawyer requested that the worker be assessed for a pension. The worker's lawyer enclosed a copy of *Appeal Division Decision #00-1188/1189*, dated August 4, 2000, in support of this request. That decision was rendered by a panel chaired by the chief appeal commissioner, together with two non-representational appeal commissioners, and is published in the *Workers' Compensation Reporter* as "Section 96(4) Referral – Whether disabled at the work at which employed under section 6(1)", 16 WCR 197. The Appeal Division decision reasoned, at page 208 (paragraphs 49 and 50):

An issue raised by the President's referral is the number of times section 6(1) must be applied in a specific case. The memorandum by the Client Services manager attached to the memorandum from the President accepts that the worker "met the requirements under Section 6(1) for the two periods of temporary disability prior to his retirement". However, the submission goes on to state that the worker "must again fulfill the requirements under Section 6(1)" before a pension can be paid. Both the worker and employer in this case disagreed with this interpretation of the Act and this panel also disagrees. Section 6(1) can be seen as something of a "gateway" for entitlement to compensation because it provides a threshold test for entitlement to compensation. Put another way, compensation is not defined in section 6(1) and it is very broadly defined in section 1 of the Act to mean "includes health care". Where it is defined is in sections such as section 23 or section 16 of the Act, which deal with pensions and rehabilitation, respectively.

Once a worker has demonstrated entitlement to compensation for an occupational disease under Section 6(1), there is no requirement in the Act or anywhere else for the worker to go back through section 6(1) in order to obtain a pension, for example. Once the basic entitlement has been established, a claim for compensation is adjudicated for wage loss, rehabilitation matters, pensions and other kinds of compensation under the Act. In this regard we do not see why an application for an occupational disease should be treated any differently than an application for a personal injury (which, incidentally, includes the language at issue in this case in section 5(2)). This analogy to entitlement to personal injury claims is expressly set in section 6(1) of the Act. The memo attached to the submission on behalf of the President accepts that the first two periods of temporary disability prior to the worker's retirement in this case satisfy the requirements of section 6(1). In our view there is no further application of section 6(1) once its requirements have been met. The next legal step is to consider what form of compensation is payable and there is no requirement or need to re-determine entitlement pursuant to section 6(1).

In its August 4, 2000 decision, the Appeal Division panel referred to a prior published Appeal Division decision dated March 26, 1992 which similarly concerned a president's referral under section 96(4) of the Act. The panel noted this earlier decision "relates to the same employer, same cancer and very similar facts to this case." *Appeal Division Decision #92-0658/0659/0660*, "Section 6(1) – 'Disabled From Earning Full Wages'", 8 WCR 145, reasoned as follows (at page 147-148):

Section 96(4) Referral

The referral raises the preliminary issue of whether or not the worker satisfies the basic entitlement criteria of Section 6(1) of the Act. It was difficult to fully canvass this issue as both counsel agreed that the worker did meet the requirements of Section 6(1). As well, the Board had already accepted that conclusion as it had paid the worker temporary disability benefits in the past. The letter of the claims adjudicator dated April 23, 1987 set out Section 6(1) of the Act and said, "I am pleased to advise that your Application for Compensation has been accepted as a Board responsibility." The referral was the first time that the Board had raised this argument against the worker but Mr. Dye's letter did not fully explain the Board's argument.

We are satisfied that the worker does meet the requirements of Section 6(1) of the Act. Mr. Dye questioned whether the worker met the test of being "disabled from earning full wages." The word "disabled" is not defined in the Act and it is used, in different sections of the Act, to refer to both temporary and permanent disabilities. According to the worker's evidence, prior to his retirement, he was off work at least seven times due to his compensable industrial disease and received temporary disability benefits for at least 14 days. As well, if he had continued to work, he would have lost occasional days from work for his ongoing cystoscopies. Therefore, the worker's industrial disease did disable him from earning full wages as of 1986. **He met the test of Section 6(1) in 1986 and received temporary disability benefits. There is nothing in the Act that says he has to meet that test again to be considered for permanent disability benefits. Section 6(1) says that once the criteria are met, compensation is payable "as if the disease were a personal injury arising out of and in the course of that employment."**

We do not understand the Board's conclusion, in 1991, that the worker did not meet the requirements of Section 6(1). We do not know if the Board was saying that its original decision in 1986 to pay temporary disability benefits was wrong, or that the worker had to satisfy the requirements of Section 6(1) a second time in order to get a permanent disability award. We reject both of those arguments.

[emphasis added]

In response to the May 29, 2001 request by the worker's lawyer, the client services manager, Occupational Disease Services, noted the following in a file memo dated June 11, 2001 under the 1989 claim:

I spoke to [the worker's lawyer] on June 11, 2001 to discuss the Board's practice in this regard. I said that I was aware that the Appeal Division disagreed with the Disability Awards Dept.'s practice of not paying pensions on cases where an occupational disease may have had a period of temporary disability but that the worker was back to work at the same job. As there is no ongoing loss of income, the entitlement to a pension was disallowed. Thus, the decision of the Disability Awards Officer [is] in keeping with the current practice. I checked with the Director, LTD/ODS, and he agreed that this is the appropriate practice until such time as the policy changes.

On June 11, 2001, the worker's lawyer wrote to the Director, Disability Awards Department, requesting a further review. The worker's lawyer argued:

The Chief Appeal Commissioner has made it clear that once a worker has demonstrated entitlement to compensation for occupational disease under Section 6(1), there is no requirement in the Act or elsewhere for the worker to go back through Section 6(1) in order to obtain a pension. With respect, the requirement that a worker must appeal his claim in order to receive his due entitlement is an abuse of process.

. . . please ensure that [the worker's] two claims are processed according to existing WCB law and policy and not the practice which has been repudiated by every level of our appeal system.

By reply dated June 12, 2001, the director, Long Term Disability/Occupational Disease Services, advised:

Your concerns are understandable given that the Appeal Division have made their position on this issue clear. Notwithstanding that, the Board's long standing practice is that pensions for occupational disease

impairments will not be considered where the worker returns to earning full wages at the work at which he was employed. I cannot agree with your contention that the Board's current policy interpretation of 6(1)(a) of the Act is illegal.

Having said that the Appeal Division disagrees with the Board's interpretation of this section. The Division recognizes this and has previously forwarded this issue to the Policy Bureau as a high priority.

I agree that a resolution of these differing interpretations is a matter of some importance and continue to support the promulgation of this issue through the policy structure. I do, however, believe that that process is the appropriate one to follow in this case and that it would be inappropriate for the Compensation Services Division or the Appeal Division to usurp the policy making powers granted to the Board of Governors.

In November, 2001, the worker's lawyer requested disclosure of any internal Board practice directives concerning this subject. On December 6, 2001, a Freedom of Information Officer advised that the following record had been withheld from disclosure because it contained policy and legal advice:

September 28, 1989 Memorandum entitled, "Industrial Diseases and the Payment of Compensation Benefits".

The FOI officer disclosed a memo dated May 21, 1997 from the manager, Disability Awards Department, which stated:

The Region 3 Team was enquiring about the Board's current position with respect to Occupational Disease claims.

The Board has interpreted the current policy that, with respect to pension payments, no benefits will be paid if the worker has returned to his/her usual work. For example, if a worker is employed in a cedar mill as a sawyer and the claim is accepted for asthma with an impairment rating of 6%, and the worker returns to his usual work as a sawyer, then NO pension will be paid. This practice has been authorized at the Divisional level per memo of September 28, 1989, a copy of which is attached.

This issue has been clouded by recent Appeal Division findings which found that the worker does not have to meet the criteria of 6(1) twice. In other words, if a worker has received wage loss benefits as a result of occupational disease, then the worker is seen to have been "disabled from earning full wages at the work at which he was employed".

Compensation by way of pension benefits would be paid in that instance, notwithstanding that the worker has returned to his/her usual work.

While this Department had briefly adopted the reasoning of the Appeal Division, we have been instructed to revert to our previous practice as documented in my memo of February 14, 1996.

[L] advises that the whole issue of payment of compensation under Sec. 6(1) is currently before the Policy Bureau. Until this issue has been resolved at that level, we are to continue with our current long-standing practice of paying pension benefits only if the worker has not returned to his/her usual work.

The issue concerning the proper interpretation of section 6(1) of the Act was also addressed in the March 11, 2002 *Core Services Review of the Workers' Compensation Board* (the Winter Report), accessible on the internet at: <http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf>. The core reviewer commented:

An issue has arisen as to whether a disabled worker must meet the "economic test" in Section 6(1) of the Act on two separate occasions – the first time in order to receive any temporary wage loss benefits pursuant to Section 29 or 30 of the Act, and a second time prior to receiving any pension award under Section 22 or 23. This issue has been considered by the Appeal Division on a number of occasions. In Decision #00-1188 (2000), 16 WCR 197 (chaired by the current Chief Appeal Commissioner), the Panel described the issue on page 208:

An issue raised by the President's referral is the number of times section 6(1) must be applied in a specific case. The memorandum by the Client Services manager attached to the memorandum from the President accepts that the worker "met the requirements under Section 6(1) for the two periods of temporary disability prior to his retirement". However, the submission goes on to state that the worker "must again fulfill the requirements under Section 6(1)" before a pension can be paid.

The Panel disagreed with this interpretation of the Act. In doing so, the Panel stated the following on pages 208 and 209:

[quotation from *Appeal Division Decision #00-1188*, as above]

I fully concur in the above reasoning of the Appeal Division. Accordingly, I recommend that the WCB revise its published policies to clarify that once

a disabled worker has established entitlement, pursuant to Section 6(1) of the *Act*, to receive temporary wage loss benefits from the WCB, there is no requirement for the worker to have to reestablish that entitlement pursuant to Section 6(1) prior to receiving any pension award to which he/she may otherwise be entitled under Section 22 or 23 of the *Act*.

The worker appealed the denials of his request for a pension assessment under his two claims. By finding dated February 25, 2003 (amended May 29, 2003), the Review Board allowed the worker's appeals. The Review Board reasoned:

The worker was in receipt of temporary wage loss benefits as a result of his being unable to work **after his 1989 heart attack and again** between August 5, 1999 and September 28, 1999 **after his 1999 heart attack**. He was disabled from earning full wages at the work at which he was employed during **these periods** of time. Having met the "economic test" in Section 6(1) for the purpose of establishing his entitlement to compensation for an occupational disease, there is no requirement in the Act or in the Manual for the worker to meet that test on an ongoing basis for the purpose of being considered for a pension. The fact that the worker has returned to work at the same job and at the same rate of pay is no obstacle to his being considered for a permanent disability pension.

Therefore, the worker's claim file will be returned to the Board for a referral to the Disability Awards Department for consideration of a permanent partial disability pension under Section 23(1) of the Act **under both his 1989 claim and his 1999 claim**.

By decisions dated July 31, 2003 and August 7, 2003, the worker was granted a permanent partial disability award of 10% under his 1989 claim (effective August 20, 1989), and a further 5% under his 1999 claim (effective September 29, 1999), for the permanent impairment resulting from his myocardial infarctions. The accompanying Form 24 file memoranda stated:

Interest: Not applicable. This worker's claims were handled in accordance with Board practice therefore the claim would not qualify for a blatant Board error as per our current interest policy. Interest is therefore not applicable.

The worker requested review by the Review Division, with respect to the denial of interest. By decision of May 6, 2004, the review officer denied his request. The review officer reasoned, in part:

Over the years, the Board has varied its practice on the issue and has now adopted a practice in keeping with the second interpretation. It is not

clear what persuaded the Board to change its practice in May 2003; however, it should be noted that the Core Reviewer recommended that the Board revise its published policies to reflect the second interpretation.

I do not consider that where there is more than one interpretation of law and policy, the adoption of one option over another is a blatant Board error in the context policy of item #50.00. I do not consider that the Board Officer, in following established practice, made an extraordinary error and disregarded appropriate adjudicative practices.

The worker has appealed the Review Division decisions to WCAT.

Policy

An October 15, 2001 policy resolution of the panel of administrators (*Number 2001/10/15-03*, "Calculation of Interest") is published at 17 WCR 465. This resolution included amendments to the *Rehabilitation Services and Claims Manual* and *Assessment Policy Manual*, effective November 1, 2001. The resolution provided:

Policy item #50.00 is also amended to provide new criteria for determining when it is appropriate for the Board to pay interest in situations other than those expressly provided for in the Act. The amended policy will provide for interest on retroactive wage-loss and pension lump-sum payments where it is determined that a blatant Board error necessitated the payment. For an error to be "blatant" it must be an obvious and overriding error.

Item #50.00 of the *Rehabilitation Services and Claims Manual* was amended to include the following:

With respect to compensation matters, the Act provides express entitlement to interest only in the situations covered by sections 19(2)(c) and 92(3). In these situations, the Board will pay interest as provided for in the Act (see policy items #55.62 and #105.30).

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) or a pension lump-sum payment (provided under sections 22 and 23 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 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.
- 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.

Current policy at item #26.30 of the *Rehabilitation Services and Claims Manual*, Volume I, (RSCM I) provides:

There is no definition of “disability” in the Act. The phrase “disabled from earning full wages at the work at which the worker was employed” refers to the work at which the worker was regularly employed on the date he or she was disabled by the occupational disease. This means that there must be some loss of earnings from such regular employment as a result of the disabling affects of the disease, and not just an impairment of function. For example, disablement for the purposes of Section 6(1) may result from:

- an absence from work in order to recover from the disabling affects of the disease;
- an inability to work full hours at such regular employment due to the disabling affects of the disease;
- an absence from work due to a decision of the employer to exclude the worker in order to prevent the infection of others by the disease;
- the need to change jobs due to the disabling affects of the employment.

This version of the policy was approved effective January 1, 1995, pursuant to the November 7, 1994 policy resolution of the Board of Governors concerning a major revision of Chapter IV of the *Rehabilitation Services and Claims Manual (Decision of*

the Governors' No. 77, "Revised Chapter IV — Compensation for Occupational Disease — Occupational Disease Recognition", 10 WCR 761).

Analysis

The review officer noted in her decision that historically, there have been two interpretations of section 6(1) of the Act. She noted that under one interpretation, the economic test applies separately in relation to the different types of compensation payable for occupational diseases. Under this interpretation, a period of temporary disability satisfies the "economic test" for initial wage loss entitlement. However, a worker must still satisfy the "economic test" a second time before a section 23(1) award may be granted. The review officer noted that this interpretation supported the Board practice between 1989 and 2003 (with the exception of 1993 to 1996).

The review officer further noted that a second interpretation of section 6(1) of the Act is that the "economic test" must only be met once in order for wage loss or pension benefits to be payable. Under this interpretation, a worker meets the "economic test" through any period of temporary disability and does not need to be disabled from earning full wages over the long term to be entitled to a section 23(1) award. The review officer noted that this interpretation supports the Board practice from 1993 to 1996 and the current practice (since May 2003).

For the purposes of my decision, I will accept as accurate the information provided in the Review Division decision regarding the state of the Board's practice. Having regard to the March 26, 1992 published Appeal Division decision on a section 96(4) president's referral, I would infer that the described change in the Board practice from approximately 1993 to 1996 was based upon the guidance provided by *Appeal Division Decision #92-0658/0659/0660*. Significantly, by resolution dated November 7, 1994, the Board of Governors approved new policy regarding the effect of section 6(1) of the Act, as part of a complete revision of Chapter IV of the *Rehabilitation Services and Claims Manual*. *Governors' Decision No. 77* begins by noting (at page 761 of Volume 10(5) of the *Workers' Compensation Reporter*) that the revision of Chapter IV of the RSCM followed extensive public consultation with the worker and employer communities, including a public hearing in December 1993.

It is thus evident that following *Appeal Division Decision #92-0658/0659/0660*, the Board changed its practice to accord with the Appeal Division decision, and the Board of Governors approved new policy effective January 1, 1995, regarding the meaning of section 6(1) of the Act. Given that the Board continued to apply the revised practice from 1993 until 1996, it would seem that the new policy was not (at least initially) interpreted as signalling any change of direction from the interpretation provided in *Appeal Division Decision #92-0658/0659/0660*.

Given the new policy provided concerning section 6(1) of the Act effective January 1, 1995, it is unclear what prompted the administration of the Board to revert to its former interpretation of section 6(1) in 1996 or 1997. No explanation is apparent from the evidence before me as to what led to this change. The January 1, 1995 revision of the policy followed a decision by the Appeal Division on a president's referral, and involved extensive public consultation. A panel of administrators was appointed effective July 13, 1995, and a Board of Directors came into effect on January 2, 2003, but there were no changes to the January 1, 1995 policy concerning section 6(1) of the Act.

By memo of May 21, 1997, the manager, Disability Awards Department, noted that while the Department had briefly adopted the reasoning of the Appeal Division, it had been instructed to revert to its previous practice as documented in her memo of February 14, 1996. The worker's lawyer advises that the Disability Awards Department maintained this practice until it apparently distributed a memo on May 15, 2003, which stated:

Effective immediately, all referrals for a disability award consideration in occupational disease claims should be handled in the same manner as referrals under Section 5. This means that an ongoing economic loss need not be demonstrated before a worker is entitled to be assessed for entitlement to a permanent disability award because of an occupational disease.

The worker's appeal raises an issue regarding the effect of decisions of the former Appeal Division for the workers' compensation system. The worker's lawyer argues that the practice of the Disability Awards Department was "illegal", in light of the published Appeal Division decisions.

As summarized above, the President of the Board had referred two Review Board findings to the Appeal Division under section 96(4) of the Act, on the basis of an alleged contravention of law or policy. In both cases, the Appeal Division decisions, published in the *Workers' Compensation Reporter* to provide guidance to the community, rejected the position asserted by the president that a worker was not eligible for pension consideration, even if wage loss benefits had been paid, if the worker returned to his pre-injury employment. Notwithstanding the guidance provided by the Appeal Division decisions regarding the interpretation of section 6(1) of the Act and the policy, the Board's administration refused to accept the guidance provided by the Appeal Division decisions pending receipt of further policy.

It appears that that the Disability Awards Department ultimately accepted the interpretation of section 6(1) of the Act provided in the published Appeal Division decisions in 2003, following the recommendations contained in the March 11, 2002 report by the core reviewer. Other recommendations by the core reviewer provided the basis for the further restructuring of the workers' compensation appeal structures

contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), effective March 3, 2003.

The Appeal Division existed from June 3, 1991 until March 2, 2003. The 1991 restructuring of the workers' compensation board which resulted in the division of the powers of the Board among the Governors, the Appeal Division, and the administration/executive, was largely based on the recommendations contained in the October 31, 1988 *Report and Recommendations to the Minister of Labour and Consumer Services by the Advisory Committee on the Structures of the Workers' Compensation System of British Columbia* [the "Munroe Committee Report", 8 WCR 231]. These changes to the structures of the Board were contained in the *Workers Compensation Amendment Act, 1989*. It is evident from the Munroe Committee Report that president's referrals under section 96(4) of the Act were intended to involve issues of significance to the workers' compensation system. For this reason, the Committee recommended that authority be given to the president to refer Review Board findings to the Appeal Division for reconsideration, but that the grounds for such referrals be limited to errors of law or policy:

With respect to the grounds for an "own motion" appeal, it is fair to observe that the interests of the system (as well as of the immediate parties) may be at stake where questions of law or policy arise, but that there is no real systemic interest in questions of fact. Thus, there is no clear justification for "own motion" appeals based on alleged factual errors, while justification does exist for "own motion" appeals based on law or policy. We therefore propose that Section 96(2) be amended to limit the grounds for "own motion" appeals against findings of the Review Board to alleged errors of law or published policy.

The initiation of such appeals would be by the president/C.E.O.

Thus, decisions of the Appeal Division with respect to the interpretation of law and policy on a president's referral under section 96(4) of the Act were intended to address issues of importance to the workers' compensation system. While the Appeal Division decision was not binding on the Board beyond the particular case, and was subject to the authority of the Board of Governors to provide new policy under section 82 of the Act, it was nevertheless a conclusion provided by the highest level of appeal within the workers' compensation system with respect to issues involving the interpretation of law and policy.

Governors' Decision No. 75, "Appeal Division Administration, Practice and Procedure", 10 WCR 753, provided at page 756 and 757 (in part):

Application of Board Policy by the Appeal Division

The Appeal Division shall apply and interpret the *Act*, Regulations and existing Board published policy. The Appeal Division does not have the authority to create new policy. The Appeal Division must make its decisions according to the merits and justice of each case as directed in Section 99.

Publication of Appeal Division Decisions

While Section 99 provides that the Board and therefore the Appeal Division “. . . is not bound to follow legal precedent,” the publication of Appeal Division decisions can usefully assist in communicating and creating an understanding of the meaning of the *Act*, Regulations and Board policies, practices and procedures. Publication can also aid in the goal of having like cases treated alike and explaining the meaning and effect of changes in the law and policy under which the workers' compensation system operates.

Publication further serves the useful role of holding the system publicly accountable.

The worker's lawyer submits that the practice of the Disability Awards Department was illegal. However, in order to find that the practice was illegal, I would have to conclude that the Department was legally bound to follow the interpretation provided by the Appeal Division. Pursuant to section 99 of the *Act*, neither the Board nor the Appeal Division was bound by legal precedent. I do not consider that the Board, or the Appeal Division, was legally bound by a published Appeal Division decision, outside of the particular case in which the decision was provided. The Appeal Division's own *Hallmarks of Quality Decisions* (15 WCR 111) provided that a good decision is consistent with previous published Appeal Division decisions unless the conflict is identified and the reasons for the departure are articulated in a coherent manner. Though conflicts may occur during periods of development, over the long term a good decision supports established positions on law, medicine and science, and the interpretation of legislation, regulations and policy. While it would have been eminently desirable or reasonable for the Board to follow the interpretation provided by the Appeal Division (subject to any new policy or policy clarification being provided under section 82 of the *Act*), particularly as the Board of Governors had reviewed and revised their policies taking into account the Appeal Division's 1992 published decision, I cannot conclude as a matter of law that the Board was legally bound to do so.

While not relevant to my decision in this case, I note that even under the March 3, 2003 statutory amendments, which made provision for WCAT to appoint precedent panels under section 238(6) of the *Act* (whose decision is binding upon WCAT under

section 250(3) of the Act), a precedent panel's decision is not binding on the Board. As a matter of law, it would appear that the Board could choose not to follow a decision of a WCAT precedent panel (while recognizing that WCAT would be bound under section 250(3) to follow the precedent panel decision). The Board could persist in forcing parties to pursue appeals to obtain a predictable outcome. While this may seem to undermine the goal of promoting consistency within the workers' compensation system, the rationale for this provision might possibly have been to allow the policy-makers some period of time to respond with new policy, if necessary, before a new direction was set for the workers' compensation system.

It is not evident from the materials before me what prompted the administration's change in practice in 1996 or 1997. A significant question arises as to whether such a change in practice, following the provision of new policy direction effective January 1, 1995, not only contravened the interpretive guidance provided by the published Appeal Division decisions but also flouted the policy-making authority of the Board of Governors. The administration did not obtain clarification from the policy-makers under section 82 of the Act before proceeding to change its practice in 1996 or 1997, yet in subsequent years insisted that it could not revise its practice pending policy clarification (as it "would be inappropriate for the Compensation Services Division . . . to usurp the policy making powers granted to the Board of Governors.")

In this appeal, the worker seeks payment of interest due to the delays until 2003 in awarding pensions for his permanent partial disability (which were made effective from August 20, 1989, and September 29, 1999). *Appeal Division Decisions #97-0857*, "Authority to Award Interest", 13 WCR 443, and *#2001-0972*, "Entitlement to Interest on Retroactive Rehabilitation Benefits", 17 WCR 547, found there is no statutory entitlement to interest except in respect of the particular situations in which the Act makes express provision for this, while at the same time recognized the Board's authority to award interest in a number of situations on a discretionary basis if the policies so provide. As the worker's request for interest is based on policy, rather than a particular statutory provision, a determination regarding his eligibility to interest must be based on the terms of the applicable policy.

The policy at item #50.00 stipulates that interest is only payable in the event of blatant Board error. The error of the Board's decision to deny the worker a pension assessment was established by the Review Board finding on this claim dated February 25, 2003 (amended May 29, 2003), to allow the worker's appeals. With respect to whether the Board's error was "blatant", the normal meaning of the term "blatant" is that the action be flagrant, palpable, obtrusive, conspicuous or unashamed. It is evident from the background set out above that the decision to deny the worker a pension assessment was made with full awareness of the two Appeal Division decisions concerning the proper interpretation of section 6(1) of the Act, provided in relation to the president's referrals under section 96(4) of the Act. The June 12, 2001 decision by the Director, Disability Awards, acknowledged to the worker's lawyer from

the outset that the Department's practice was contrary to the cited Appeal Division decisions.

The rationale expressed by the Department for refusing to follow the published Appeal Division decisions, regarding the need for policy clarification, would have been more convincing were it not for the fact that the change in practice was itself made in the absence of policy clarification (following the provision of new policy guidance on January 1, 1995). The error of the Department would appear "blatant" in the sense of being flagrant or unashamed.

However, the policy has provided further particulars concerning the definition of the term "blatant", for the purposes of considering a worker's eligibility for interest. The policy states that for an error to be "blatant" it must be an obvious and overriding error. The policy indicates, by way of example, that 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.

In this case, no criticism can attach to the decision-making process followed by the particular client services manager. The review officer referred to "an adjudicative practice adopted by the Board, adherence to which a Board Officer would be obligated to follow." The client services manager, Occupational Disease Services, consulted with his director regarding the denial of the worker's request for a pension assessment. The decision of the client services manager was confirmed by his director. It is evident that the client services manager's hands were effectively tied by the practice direction which had been provided. This is not a case which involved a Board officer overlooking relevant evidence or policy.

The policy further stipulates that a "blatant" error cannot be characterized as an understandable error based on misjudgment, but must be a glaring error that no reasonable person should make. In that respect, the position taken by the client services manager may be compared to the president's referral under section 96(4) which was made to the Appeal Division, which resulted in *Appeal Division Decision #00-1188/1189* dated August 4, 2000. That referral by the president similarly involved an assertion that the requirements of section 6(1) of the Act (that a worker be "disabled from earning full wages at the work at which the worker was employed"), were not met for pension purposes by a period of compensable temporary disability, notwithstanding the published Appeal Division decision regarding the president's referral on this issue in 1992 and the subsequent policy changes effective January 1, 1995. It is evident, therefore, that a similar position was formally endorsed by the president in undertaking the second referral under section 96(4) of the Act on this issue.

The fact that the published Appeal Division decision in 1992, together with the promulgation of new policy by the Board of Directors effective January 1, 1995, were not sufficient to resolve this interpretive issue, speaks to the lack of harmony or

cohesiveness within the workers' compensation system as it existed at that time. Rather than obtaining policy clarification from the new panel of administrators, the administration appears to have simply reverted to its former interpretation of section 6(1) of the Act, with no public statement or explanation for this change.

Section 99(2) provides

The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case.

Section 250(2) of the Act similarly provides:

The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

While the merits and justice of this case support the worker's request for interest, I must apply a policy of the board of directors that is applicable. To the extent the Disability Awards Department's decision in this case simply mirrored the position taken by the president in undertaking the second section 96(4) referral regarding the interpretation of section 6(1) of the Act, I have difficulty characterizing the position as involving a glaring error that no reasonable person should make. While the Board's actions appear, from the materials before me in this appeal, to have been disrespectful to the Board of Governors' policy-making authority as well as the Appeal Division's interpretive authority, I cannot find that its practice was illegal under the Act. The wording of the January 1, 1995 policy concerning section 6(1) of the Act was not so clear and unambiguous to preclude the Board's change of practice (although it would have been preferable for the administration to have obtained policy clarification before embarking on its change in practice in contradiction to the published Appeal Division decision). Accordingly, on the spectrum between an understandable error based on misjudgment, and a glaring error that no reasonable person should make, I find that the Board's decision was closer to the former than the latter.

Accordingly, I find that the worker's appeal must be denied.

Conclusion

I confirm the Review Division decision. The policy requirements for awarding interest on the worker's permanent partial disability awards, under his 1989 and 1999 claims, are not met.

Herb Morton
Vice Chair

HM/pm/cd