

### Noteworthy Decision Summary

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**Decision:** WCAT-2005-05621-AD **Panel:** Herb Morton **Decision Date:** October 24, 2005

***Interest for relief of costs historical project cases – Effect of blatant Workers’ Compensation Board error – Assessment Policy Manual No. 40:70:40 – Sections 39(1)(e), 82, 96(2) of the Workers Compensation Act***

In cases coming within the terms of the historical project, policy in the *Assessment Policy Manual* (APM) at No. 40:70:40 does not provide for the payment of interest prior to the date of the employer’s application for relief of costs on the basis of blatant Workers’ Compensation Board (Board) error. The 1998 resolution on section 39(1)(e) which formed the basis of this policy is not patently unreasonable in stipulating a single criterion (the date of the employer’s application) to govern the payment of interest in those cases.

The employer requested interest back to 1992 on the basis of blatant Board error. The Board denied the employer’s request on the basis of policy in the APM at No. 40:70:40, which provides that in cases coming within the terms of the historical project, interest was payable on any refund from the date of the employer’s request for relief. The employer appealed, arguing that it was entitled to interest on the basis of APM No. 40:70:40 concerning blatant Board error.

The relevant portion of APM No. 40:70:40 finds its basis in an April 23, 1998 policy resolution of the panel of administrators on section 39(1)(e) of the *Workers Compensation Act* (Act). However, APM No. 40:70:40 was actually amended by a separate resolution of the panel of administrators dated October 15, 2001. The panel read the 1998 resolution as meaning that it was the intent of the policy-makers to establish a single approach to the payment of interest on cases covered by that resolution, which was specific to such cases. The panel interpreted that resolution as providing direction that the policy regarding blatant Board error contained at APM No. 40:70:40 was not to be applied to the awarding of interest in cases coming within the terms of the relief of costs historical project (as either a prerequisite to the awarding of interest, or as a basis on which to grant interest behind the date of the employer’s application for relief of costs).

This interpretation of the 1998 resolution is consistent with the revised wording of APM No. 40:70:40 contained in the 2001 policy resolution. No attempt was made in the amended policy to mesh the blatant Board error test with the policy concerning interest on cases covered by the historical project. Furthermore, the terms specified in the 1998 resolution may be viewed as involving an exercise of discretion by the policy-makers under section 82 of the Act as to the terms on which these historical cases would be reviewed.

The policy-makers have a broad discretion under sections 39(1)(e), 82 and former section 96(2) of the Act to fashion policies governing the granting of relief of costs, and whether interest should be paid, in relation to the relief of costs historical project. The Board’s decision to award interest from the date of the employer’s application for relief of costs did not involve an error of law or contravention of published policy. In cases coming within the terms of the historical project, policy does not provide for the payment of interest prior to the date of the employer’s application for relief of costs on the basis of blatant Board error. The 1998 resolution is not patently unreasonable in stipulating a single criterion (the date of the employer’s application) to govern the payment of interest on cases coming within the terms of the historical project.

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## Introduction

The employer has appealed a decision dated July 29, 2002 by a claims analyst, to deny interest retroactive to 1992.

A prior decision letter dated March 27, 2001 granted relief of claim costs effective November 16, 1992. That decision noted that a determination to this same effect had previously been made on the claim file, but was never implemented. Although not stated in the March 27, 2001 decision, interest was granted commencing September 1, 1998, based on the date of the employer's August 17, 1998 letter requesting relief of claim costs.

By letter dated April 27, 2001, the employer requested interest back to November 16, 1992 on the basis of blatant Board error. The July 29, 2002 decision explained that interest was granted from the date of the employer's application for relief of claim costs. The decision to deny further interest retroactive to 1992 cited the policy in the *Assessment Policy Manual (APM)* at No. 40:70:40, which provided that in cases coming within the terms of the "historical project", interest was payable on any refund from the date of the employer's request for relief. The employer submits that they are entitled to interest on the basis of APM No. 40:70:40 concerning blatant Board error, and this policy does not conflict with the policy of the governors concerning the payment of interest on historical claims.

The employer's appeal is brought on the grounds that the July 29, 2002 decision "violates law and policy." The employer's appeal was initiated to the former Appeal Division by letter dated August 15, 2002 (together with letters dated August 9 and 12, 2002 raising similar issues). The employer is represented by a consultant, who has provided written submissions. I agree that the issue of law and policy raised in this appeal can be properly considered on the basis of written submissions.

## Issue(s)

Did the Board's decision to award interest from the date of the employer's application for relief of costs involve an error of law or contravention of published policy? On a case coming within the terms of the historical project, does policy support the payment of interest prior to the date of the employer's application for relief of costs on the basis of blatant Board error? If not, is the policy patently unreasonable?

## Jurisdiction

This appeal was filed with the former Appeal Division. On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). Subsections 39(1)(a) and (2) of the transitional provisions contained in Part 2 of Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, provide that all appeal proceedings pending before the Appeal Division on March 3, 2003, are continued and must be completed as proceedings pending before WCAT (except that no time frame applies to the making of the WCAT decision). This means that WCAT will consider this application under the former section 96(6), including application of the grounds of error of law or fact or contravention of a published policy of the governors, but the new WCAT provisions also apply (policy of the governors/panel of administrators must be applied pursuant to sections 250(2) and 251 of the *Workers Compensation Act (Act)*, and section 42 of the transitional provisions).

## Policy

The June 1993 version of APM No. 40:70:40 stated:

Where an overpayment of assessment has resulted from a blatant Board error, the firm may be entitled to accrued interest on the amount overpaid. This adjustment would also apply to penalty assessments and accrued interest on outstanding assessments that were paid during the period in question.

By policy resolution dated April 23, 1998, *Decision of the Panel of Administrators #98/04/23-03*, "Section 39(1)(e)", 14 W.C.R. 107, the panel of administrators approved a policy directed to bring closure to the application of section 39(1)(e) relief to "historical" claims. That process was aimed at remedying the Board's earlier failure to notify employers of decisions under section 39(1)(e) of the Act. The policy stated in paragraphs 4 and 5:

4. With respect to all claims where wage loss payments concluded, or a pension was awarded, after March 15, 1978 and on or before December 31, 1993, and on which an employer makes a request in writing for the Board to consider the application of Section 39(1)(e);
  - (a) the Board will pay interest on any resulting refund effective from the date of the employer's request;
  - (b) interest on all such refunds will be paid at the same interest rate as interest paid on retroactive payments of compensation under #50.00 of the *Rehabilitation Services and Claims Manual*.

5. In the event of a conflict between this resolution and other published policy of the Governors, this resolution shall prevail.

That policy was clarified by *Decision of the Panel of Administrators #2001/04/17-03*, "Section 39(1)(e)", May 17, 2001, 17 W.C.R. 183, which provided:

The intent of paragraph 4 of Resolution 98/04/23-03, "Re: Section 39(1)(e)", is that on historical relief of cost claims, interest on all refunds is payable from the date of the request for relief, whether the request predates the April 23, 1998 resolution or was made thereafter.

An October 15, 2001 policy resolution of the panel of administrators (*Number 2001/10/15-03*, "Calculation of Interest") is published at 17 W.C.R. 465. This resolution included amendments to the *Rehabilitation Services and Claims Manual* and APM concerning interest. Amendments to APM No. 40:70:40 were contained in Appendix 4 to the panel of administrators' resolution (at pages 473-474). Appendix 4 provided (with the deletion of the "struck-through" wording which was being removed from the former policy):

Where an overpayment of assessment has resulted from a blatant Board error, the firm may be entitled to accrued interest on the amount overpaid. This adjustment would also apply to penalty assessments and accrued interest on outstanding assessments that were paid during the period in question.

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.

An example of a blatant Board error that would entitle an employer to an interest rebate is where the employer is registered in an obviously incorrect classification; for example, a retail operation registered in the logging classification of industry when the employer correctly identified the industry at the outset.

Interest is also payable in cases where an employer prepays a penalty assessment (including an experience rating DEMERIT) pending an appeal to the Appeal Division and is then successful in the appeal.

If the recommendation to pay interest is approved, the employer will receive an interest rebate calculated on the adjusted assessment. The

rate of interest will be the same as that used for claims overpayments or retroactive payments.

The interest applicable will be calculated by the Actuarial and Research Department. A memo will be sent to the Actuarial and Research Department setting out the amount of overpayment on each payment date. Actuarial will provide the total interest amount applicable from the various payment dates to the current month.

**Where an employer is granted relief under Section 39(1)(e) with respect to a claim where wage loss payments concluded, or a pension was awarded, after March 15, 1978 and on or before December 31, 1993 and on which the employer made a request in writing for the Board to consider the application of Section 39(1)(e), interest is payable on any refund from the date of the employer's request for relief.**

Subject to the above provisions, where an amount is returned to an employer as a result of a successful appeal to the Appeal Division under Section 96(6) or (6.1) of the Act, interest is payable from the date the employer files the notice of appeal with the Appeal Division.

Notes:

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). 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.

Where an overpayment of assessment has resulted from a blatant Board error, interest will not accrue for a period greater than twenty years.

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

[emphasis added, original bolding removed]

The October 15, 2001 policy resolution further specified in point #6:

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.

### **Background and submissions**

The worker slipped and twisted her left knee at work on January 29, 1992. She had previously had arthroscopic surgery on both knees in 1990. Under her 1992 claim, she received wage loss benefits from March 30, 1992 to July 26, 1993, and from August 29, 1993 until September 13, 1993. By memo (#5) dated November 4, 1992, the Board medical advisor expressed the opinion:

Had the claimant simply had a minor meniscal tear, without any pre-existing pathology, I think the likelihood is she would recover from the arthroscopy within six or eight weeks. I think any delay in recovery past that point is likely related to the pre-existing degeneration.

A handwritten notation below this opinion, stamped November 9, 1992, stated:

Noted & agree.  
39(1)(e) applicable effective Nov 16/92.

However, this determination was not implemented. The panel of administrators issued the policy resolution dated April 23, 1998 concerning the historical relief of claims cost project, establishing a process under which employers had a period of time to request relief of costs on historical claims. In this case, wage loss benefits concluded effective September 13, 1993, prior to the December 31, 1993 date set in the April 23, 1998 resolution.

Following the April 23, 1998 resolution, by letter dated August 17, 1998 the consultant representing the employer requested relief of claim costs. By decision dated March 20, 2000, the employer cost relief officer granted relief of costs effective July 27, 1993. The employer appealed this decision to the Appeal Division, but withdrew the appeal pending the outcome of a January 29, 2001 application for reconsideration. By decision dated March 27, 2001, an employer cost relief officer granted relief of costs effective November 16, 1992. She reasoned:

Following a review of the [*sic*] all the information on file it is my decision that the worker's pre-existing left knee condition did enhance her disability and that relief should have been applied effective November 16, 1992. This is based on the Medical Advisors opinion in memo #5 that "Had the claimant simply had a minor meniscal tear, without any pre-existing pathology, I think the likelihood is she would recover from the arthroscopy within six or eight weeks. I think any delay in recovery past that point is likely related to the pre-existing degeneration." The Claims Adjudicator noted this opinion and made a notation on file that 39(1)(e) would be

applicable effective November 16, 1992. This decision was never implemented.

By letter dated April 27, 2001, the employer's representative requested interest back to November 16, 1992, on the basis of blatant Board error. This request was denied in the July 29, 2002 decision giving rise to this appeal.

An Appeal Division appeal officer referred the August 9 and 15, 2002 letters of appeal from the employer's representative to the director, Assessment Department, for comment. By memo dated October 21, 2002, the director commented:

I refer to your Memorandum dated October 8, 2002 and attach for your reference the Assessment Department's May 30, 2000 directive entitled *Responsibilities and Methods re: Payment of Interest*. I direct your attention to 3(a) of the directive and note that the Assessment Department should not have responded to the employer's representative but should have instead forwarded the employer's request to the Compensation Services Division.

I have now discussed this matter with Compensation Services, and it is agreed that as Compensation Services is responsible for all matters relating to Section 39(1)(e) relief, your query should properly be before Compensation Services.

The May 30, 2000 practice directive concerning payment of interest dealt with three different situations. The second situation involved cases coming within the terms of the historical project. The practice directive stated:

- (2) Cases of relief of costs under section 39(1)(e) on claims where wage loss payments concluded or a pension was awarded after March 15, 1978 and before December 31, 1993.

In these cases, the method of interest payment is strictly governed by a Panel of Administrators' resolution (dated April 23, 1998).

**The Panel resolution directs that interest is paid from the date the employer requested in writing relief of costs under section 39(1)(e). The Panel resolution also states that in the event of a conflict between this direction and other Board policy, the direction provided in the resolution shall prevail. In other words, the Panel is very specific that interest will not be paid from any other date in these cases. Therefore, allegations of blatant Board error *should not* be considered in these cases because the Panel resolution outlining the date from which**

**interest is paid over-rides any other Board policy on interest payment dates.**

The rate of interest and the total amount of interest to be paid are determined by the Actuarial and Research Department.

As outlined above, interest will be paid from the date of the employer's application.

[emphasis added]

A further memo dated October 30, 2002 was provided by the senior manager, Central Services, Compensation Services and Rehabilitation Division. She advised:

If the claims are "historical", interest is paid under the Panel Resolution. This is whether or not costs relief is allowed following an Appeal Division decision, or there was a blatant board error on the file.

...

In this instance, the decision on whether to award interest should be guided by the Board's policy regarding payment of interest on requests for relief of costs under Section 39(1)(e). This policy is outlined in the resolution of the Board's Panel of Administrators, dated April 23, 1998, as outlined above and applies if there is a conflict between the resolution and other policies. The resolution applies on all claims where wage loss payments concluded, or a pension was awarded, after March 15, 1978 and on or before December 31, 1993, and provides "the Board will pay interest on any resulting refund effective from the date of the employer's request."

As the wage loss benefits ended during the time period covered by this resolution, Board policy is that interest should be paid from September 1, 1998, the date of the employer's request for relief of costs.

These memos were disclosed to the employer for comment. By submission dated September 2, 2005, the employer's representative argued that the policy at APM No. 40:70:40 is not in conflict with the policy on historical claims. He submits that the general policy would allow for payment of interest from when the employer applied for cost relief, but in the circumstances outlined in APM No. 40:70:40, the Board could allow interest from the time that a blatant Board error existed. He submits that the policy regarding the payment of interest on the basis of blatant Board error may be read as supplementing, rather than being in conflict with, the April 23, 1998 policy concerning the payment of interest from the date of the employer's application for cases coming within the terms of the historical project. He argues:



We view the Governor's resolution as establishing the base line for interest payments. Where special circumstances exist the existing policy is supplemental to the Governor's resolution. While the Governors were trying to bring some finality to the process of cost review and attempted to provide direction, they could not envision all circumstances nor would they have attempted to apply inequitable outcomes where established policies for very unique circumstances already applied.

...

... we can not imagine the Board attempting to avoid its responsibilities when they had committed an error and had financially harmed the employers who provide the assessments to fund the system. The direction of interest under the Resolution was a guideline for the payment of interest that would generally meet all circumstances. The Governors certainly could not entertain introducing a policy that would be both unjust and unfair to an employer who but for the date of the claim would be eligible for such interest. It would be patently unreasonable and a denial of natural justice to refuse an employer entitlement to an established policy that remains in force today only to satisfy an issue of expediency in the handling of a claim.

[reproduced as written]

## **Reasons and findings**

The April 23, 1998 resolution directed the Board's administration to provide notice to employers within three months of the date of the resolution, by regular mail. The employer would then have not less than 90 days, and not more than 180 days, to make a request for relief. As the employer's request for relief was made on August 17, 1998, it was made within 180 days of the April 23, 1998 resolution. As well, wage loss benefits concluded effective September 13, 1993, prior to the December 31, 1993 date set in the April 23, 1998 resolution. For both reasons, this was a case coming within the terms of the April 23, 1998 policy concerning the relief of costs historical project.

The wording of the April 23, 1998 resolution specified, with respect to "all" claims where wage loss payments concluded, or a pension was awarded, after March 15, 1978 and on or before December 31, 1993, and on which an employer made a request in writing for the Board to consider the application of section 39(1)(e), that the Board would pay interest on any resulting refund effective from the date of the employer's request.

Had they so wished, the panel of administrators could have used different language to provide for a different policy concerning the awarding of interest. For example, they could have specified that interest would be payable on all claims covered by the April 23, 1998 resolution from the date of the employer's request, unless blatant Board

error were established in which case interest would be payable from the date of the error. The panel of administrators did not use such wording.

The panel of administrators further specified that in the event of a conflict between the April 23, 1998 resolution and other published policy of the Governors, the April 23, 1998 resolution "shall prevail". I read this as meaning that it was the intent of the policy-makers to establish a single approach to the payment of interest on cases covered by the April 23, 1998 resolution, which was specific to such cases. I read this as providing direction that the policy regarding blatant Board error contained at APM No. 40:70:40 was not to be applied to the awarding of interest on cases coming within the terms of the relief of costs historical project (as either a prerequisite to the awarding of interest, or as a basis on which to grant interest behind the date of the employer's application for relief of costs).

I find this interpretation of the April 23, 1998 resolution consistent with the revised wording of APM No. 40:70:40, contained in Appendix 4 of the October 15, 2001 policy resolution concerning payment of interest. No attempt was made in the amended APM No. 40:70:40 to mesh the "blatant board error" test with the policy concerning interest on cases covered by the historical project. In my view, the separate treatment of these two situations in APM No. 40:70:40 must have been intended by the policy-makers (rather than involving some oversight), consistent with the approach set out in the April 23, 1998 resolution.

The employer argues that such a policy would be patently unreasonable. Were I to be persuaded that this was the case, I would be obliged to refer this issue to the WCAT chair under section 251 of the Act.

A published Appeal Division decision concerning the application of the patent unreasonableness test (prior to the March 3, 2003 amendments to the Act contained in the *Workers Compensation Amendment Act (No. 2), 2002*) was *Appeal Division Decision #2001-2111/2112*, "President's Referral – Whether Policy in Item #39.44 Contravenes Section 23(1) of the Act", 18 W.C.R. 33. At pages 55-57, that decision cited a number of points relevant to the application of the patent unreasonableness test to policy approved under section 82 of the Act. These included the following:

- 1) Under section 82, "the Governors must approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health. . . ."
- 2) Under section 83.1 of the *Act*, the powers, duties and functions of the Governors are currently exercised by a panel of administrators (I will refer to the Governors for simplicity).

3) The legislature has vested responsibility and authority for policy-making in the Governors. The authority of the Governors is paramount in the policy-making arena.

4) Many provisions in the *Act* are broad or ambiguous in their wording, or confer a broad measure of discretion on the board, thus leaving room for a broad range of options for consideration by the Governors in adopting a policy. Most, if not all, policies necessarily involve some issue or issues of statutory interpretation, as the policies are developed under the *Act* to further the consistent interpretation and application of the *Act* to individual cases. Policy-making involves consideration of a broad range of factors, of which legal interpretation of the *Act* is only one.

**5) Policy-making will generally involve making choices among various permissible options. It requires an evaluation of the significance and effect of the choice for the workers' compensation system. It involves an application of values by the policy-makers in selecting the preferred policy. Policy-making requires consideration of numerous interests simultaneously, and the promulgation of solutions which balance benefits and costs for many different parties.**

6) **The Governors may properly adopt a policy which, as a matter of bare legal interpretation alone, would not appear to most closely match the terms of the *Act*.**

7) **The background considerations and material addressed by the Governors in making policy may not be before the Appeal Division at the time the lawfulness of a policy is being impugned. The actual reasons of the Governors for their ultimate choice will often not be in evidence before the Appeal Division.**

8) **To the extent the Governors are making choices guided by values, and economic and systemic considerations, which involve a balancing of competing interests, a second-guessing of their choices by the Appeal Division would involve an improper encroachment on the Governors' policy-making authority under section 82.**

9) The role of the Appeal Division is to make decisions in individual cases, and in so doing to provide interpretive guidance to the workers' compensation system.

10) The Appeal Division must apply and interpret the *Act*, Regulations, and existing published policy of the Governors. The Appeal Division has no authority to make policy.

11) The Appeal Division is required by section 99 of the *Act* to give its decision according to the merits and justice of the case. The Appeal Division is also subject to the requirements of natural justice, and cannot fetter its exercise of discretion or apply policy blindly.

12) The circumstances of an individual case may warrant a reasoned departure from a policy, without offending the policy.

13) Where the issue arises in a matter properly before the Appeal Division, the Appeal Division has authority to declare a policy unlawful. The Appeal Division has an obligation to declare policy unlawful where the policy is contrary to the *Act*.

**14) To the extent a policy decision of the Governors involves a selection from a range of viable policy options, the authority of the Governors to make that policy choice resides with them alone under section 82 of the *Act*. It is not for the Appeal Division to call a policy unlawful on the basis that some other interpretation might "better" fulfill the objectives of the *Act*. The Appeal Division has no authority to apply a "best-fit" approach (i.e. to require the policy-makers to select the policy which the Appeal Division considers most closely fits the terms of the *Act*).**

**15) A policy which appears to involve a strained interpretation of the *Act* may nevertheless be lawful.**

16) Where a policy involves an interpretation of the *Act* which is so patently unreasonable that its construction could not be rationally supported by the *Act*, that policy must be found unlawful. Such concerns should be addressed within

the workers' compensation system, to avoid the necessity for intervention by the courts.

17) The Appeal Division should apply the same standard of review, in determining the lawfulness of policy, whether the matter comes before it on appeal or on a referral by the President under section 96(4) of the *Act*.

18) The Appeal Division's consideration as to the lawfulness of policy must reflect the panel's conviction that the reasons for finding the policy contrary to the *Act* are so compelling under the *Act* they must override any systemic justifications for the policy choice of the Governors. The evaluation of competing systemic considerations is a function best performed by the Governors.

19) If the policy is based on a viable interpretation of the *Act*, that is, one that is supportable according to accepted principles of statutory interpretation, then the policy would not be based on an error of law.

[emphasis added]

I consider that these points remain largely valid under the current statutory framework under which the board of directors has authority for policy-making under section 82 of the *Act*, and the Board and WCAT are required to make their decisions based on the merits and justice of the case, but in so doing must apply a policy of the board of directors that is applicable in the case under sections 99(2) and 250(2). Where policy is stated as a rigid rule, however, rather than a guideline, the statutory requirement that policy be applied would seem to override the common law prohibition against the fettering of discretion (see *WCAT Decisions #2004-06308* and *#2005-03078*). In *Yukon (WCAT) v. Yukon Workers' Compensation Health and Safety Board*, January 27, 2005, [2005] Y.J. No. 5, the Yukon Territory Supreme Court addressed the effect of statutory amendments to the workers' compensation legislation in that jurisdiction to make policy binding, as follows:

56 It is my view that the concept of fettering one's discretion is a common law principle that could apply to the board or an appeal committee. **Under this Act however, the concept of fettering has a much reduced scope or application. The board is empowered to make policy and the policy is binding upon the appeal committee. In circumstances where there was no statutory authority to make binding policy, it would be appropriate to argue that an administrative policy could result in fettering the discretion of a board or tribunal. The concept of fettering, in my view, cannot apply**

**to the policy itself which is mandated by legislation so long as it is within the objectives of the Act or “the margin of manoeuvre contemplated by the legislature”.** See *Re Lewis and Superintendent of Motor Vehicles for British Columbia*, [1980] B.C.J. No. 1433, at page 528.

57 I do not rule out the application of fettering to a board or appeal committee decision but simply state that the board policy itself cannot be a fetter by virtue of its statutory mandate.

[emphasis added]

Under the March 3, 2003 statutory amendments to the Act, as set out in sections 99(2) and 250(2), the Board and WCAT must apply a policy of the Board of directors that is applicable in a case. Alternatively, WCAT may utilize the process set out in section 251 of the Act, for addressing a question as to whether a policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

In authorizing the “historical project”, it is evident that the policy-makers would have had to balance competing concerns relating to a possible lack of fairness to employers in the past, with the possible unfairness to current employers in having to bear the cost of remedying such past inequity. They would also have had to consider the extent to which current decision-making resources should or could be applied to remedy past inequities. While the materials considered by the panel of administrators are not before me, it is readily apparent that in establishing the relief of costs historical project the policy-makers were undertaking a major allocation of resources in order to deal with concerns relating to the adjudication of relief of costs under section 39(1)(e) of the Act on historical claims. This involved both decision-making resources, as well as significant cost to the accident fund due to the granting of cost relief on historical claims. The adoption of a single approach to payment of interest for such cases, based on the date of the employer’s application, would have obvious benefits in lessening the demands on the Board’s resources (in avoiding the need to investigate the reasons for the failure to grant relief of costs and to adjudicate whether this amounted to a blatant Board error, and in lessening the impact on the accident fund by limiting interest to a shorter period based on the date of the employer’s application). Such an approach may well have been a middle ground between allowing interest from an earlier date based on the blatant Board error test, and stipulating that no interest would be paid in cases dealt with under the historical project.

I appreciate that there is an apparent unfairness, in the fact that cases coming within the terms of the historical project receive different treatment than cases which fall outside of it. This different treatment may appear arbitrary, being based on the date wage loss benefits were concluded. For example, another case involving a similar oversight in implementing a decision to grant relief of costs resulted in an awarding of retroactive interest, as that claim involved a subsequent reopening for further wage loss benefits which placed it outside the terms of the historical project (*WCAT Decision #2005-04695-AD* dated September 7, 2005).

However, this is not a situation involving a statutory entitlement to interest. Under the wording of section 96(2) of the Act as it existed at the time the historical project was authorized by the April 23, 1998 policy resolution, section 96(2) of the Act provided that “the board may at any time at its discretion reopen, rehear and redetermine any matter” which had been dealt with by it or by a Board officer. The terms specified in the April 23, 1998 policy resolution may be viewed as involving an exercise of discretion by the policy-makers under section 82 as to the terms on which these historical cases would be reviewed. I consider that the policy-makers had a broad discretion under section 39(1)(e), 82 and 96(2) of the Act to fashion policies governing the granting of relief of costs, and whether interest should be paid, in relation to the relief of costs historical project. I find that the April 23, 1998 resolution was not patently unreasonable in stipulating a single criterion (the date of the employer’s application) to govern the payment of interest on cases coming within the terms of the historical project. I am not persuaded that the policy, as interpreted above, is so patently unreasonable that it is not capable of being supported by the Act.

In view of my conclusion set out above, it is not necessary that I consider the application of the blatant Board error test to the facts of this case.

Accordingly, I agree with the July 29, 2002 decision by the claims analyst, and the October 30, 2002 comments provided by the senior manager, Central Services, Compensation Services and Rehabilitation Division. The employer’s appeal is denied. I find no error of law or contravention of published policy in the decision to award interest from the date of the employer’s application in this case.

**Conclusion**

The July 29, 2002 decision by a claims analyst, to limit the payment of interest so as to commence from the date of the employer's 1998 application for relief of costs, is confirmed.

The Board's decision to award interest from the date of the employer's application for relief of costs did not involve an error of law or contravention of published policy. In cases coming within the terms of the historical project, policy does not provide for the payment of interest prior to the date of the employer's application for relief of costs on the basis of blatant Board error. The policy of paying interest from the date of the employer's application for relief of costs, in cases coming within the terms of the relief of costs historical project, is not patently unreasonable under the Act.

Herb Morton  
Vice Chair

HM/pm