Noteworthy Decision Summary

Decision: WCAT-2005-06872 **Panel**: Herb Morton **Decision Date:** December 23, 2005

Blatant error[1] – Interest – Relief of costs – Section 42 of the Workers Compensation Act – Policy items #50.00 and #88.12 of the Rehabilitation Services and Claims Manual, Volume I – Item #AP1-39-2 of the Assessment Manual – Practice Directive 1-39-2 (A)

The Workers' Compensation Board (Board) initially denied the employer's request for relief of costs associated with a worker's injury. The Board then made a new decision to approve the relief of costs, but denied the employer's request for interest. The employer's appeal was allowed. The Board made a blatant error in failing to consider its own policy on costs arising during graduated return to work (GRTW) programs. The "blatant error" test is similar to the common law "patent unreasonableness" standard of review, but the tests are not interchangeable.

The worker sustained an injury during the course of her GRTW program, which caused her to be temporarily disabled. The Board initially denied the employer's request for relief of costs associated with this injury. The employer appealed this decision to the Workers' Compensation Appeal Tribunal (WCAT). In *WCAT Decision #2004-04013* the panel denied the employer's appeal on technical grounds but stated that the Board should address the employer's request for relief of costs under section 42 of the *Workers Compensation Act* (Act). The Board subsequently revisited the issue and approved the employer's request for relief of costs. However, the Board denied the employer's request for interest. The employer requested a review of this decision by the Review Division of the Board, which confirmed the decision. The employer appealed to WCAT.

The panel noted that policy item #88.12 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) was in effect at the time the initial decision was made to deny the employer relief of costs. Item #88.12 stated that costs arising from injuries or aggravations that occur during the course of Board-sponsored work assessments with an employer are not charged to the participating employer. There was no evidence the Board had considered the application of this item.

The panel considered whether the charging of costs to the employer in contravention of item #88.12 involved blatant Board error. The test of blatant Board error in relation to the granting of interest, as set out in item #50.00 RSCM I and item #AP1-39-2 of the *Assessment Manual*, requires that the error must be obvious and overriding. 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. The panel noted that this was not a case involving a misjudgement, but rather appeared to have involved a lack of awareness of a particular policy item.

The panel noted that *Practice Directive 1-39-2 (A)*, "Payment of Interest", May 1, 2003 requires that four criteria must be met in order to conclude a blatant Board error had occurred. The panel disagreed with the final criterion – that the error required the exercise of reason or a determination between competing considerations - as this criterion is not contained in policy.

[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.

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Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

The panel noted that the common law test of a "clearly irrational" or "patently unreasonable" decision may provide a useful analytical framework for determining whether a blatant error was made. The panel also noted the tests were developed for different purposes and thus may not be interchangeable.

The panel concluded that interpreting the policy concerning blatant Board error with reference to the common law tests of a patently unreasonable or clearly irrational decision may assist in addressing a range of situations which are not clearly covered by the example provided in the policy. Disagreement with the weighing of evidence does not suffice to make a decision patently unreasonable. A failure to consider a relevant policy or statutory requirement may, however, make a decision patently unreasonable. In this case, the failure to take into account item #88.12 was a blatant Board error and the employer was entitled to interest.

The employer's appeal was allowed.

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Panel: Herb Morton, Vice Chair

Introduction

The employer has appealed *Review Decision #24903* dated February 11, 2005. The review officer confirmed the November 30, 2004 decision by the claims analyst, which denied the employer's request for interest.

By decision dated September 7, 2004, the case manager had granted the employer relief of costs under section 42 for the period of March 22, 2000 to September 8, 2000, inclusive. She found that the worker had sustained an injury during the course of her graduated return to work (GRTW), which caused her to be disabled until September 9, 2000. This appeal concerns the denial of interest in connection with the relief of costs granted to the employer.

The employer is represented by a consultant. The consultant initiated this appeal by a written submission dated February 23, 2005. He subsequently advised that he did not require additional disclosure, and that no further submission would be provided. I find that the policy issue raised by this appeal can be properly considered on the basis of the written submission, without an oral hearing. As the employer's request for interest does not affect the worker, she was not notified of this appeal.

Issues(s)

Is the employer entitled to interest, in connection with the removal of costs associated with the worker's further injury while participating in a GRTW program?

Jurisdiction

The Review Division decision has been appealed to the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act). 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) and 251 of the Act).

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Background and Evidence

Background information concerning this claim is set out in *WCAT Decision #2004-04013* dated July 28, 2004.

The worker was injured in 1999. On November 26, 1999, the case manager denied relief of claim costs under section 39(1)(e) of the Act, and advised that she found no indication of any other circumstance that would cause an exclusion of claim costs.

By letter dated March 21, 2000, the case manager advised the worker:

> As of March 24, 2000, you will have completed the Pain Program and a graduated return to work. I am concluding your wage loss benefits, effective March 25, 2000.

In a subsequent letter dated April 19, 2000, the case manager advised the worker:

> . . . I have now accepted this claim for a low back strain that occurred on March 21, 2000 while you were on a supernumerary Graduated Return to Work (GRTW). The claim was originally accepted for a left shoulder strain, which is no longer disabling you from returning to work.

Wage loss benefits were continued until September 8, 2000. Policy in the former *Rehabilitation Services and Claims Manual* (RSCM) which was in effect at that time provided, in RSCM item #88.10 to #88.12:

> **#88.10 Work Assessments**
>
> A work assessment program is a method of determining or enhancing a worker's employment capabilities and potential in an actual work environment with an employer, or in the simulated setting of the Board's Functional Evaluation Unit.
>
> *#88.11 Guidelines*
>
> 1. Work assessments may be utilized at any phase of the rehabilitation process.
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> 2. While involved in a work assessment with an employer, the worker is not being paid wages. Therefore, participating employers are not required to make deductions for Income Tax, Employment Insurance benefits or Canada Pension Plan contributions.

3. When a work assessment with an employer takes place prior to full medical recovery and is intended primarily as a therapeutic measure to assist increasing levels of work activity, the program is normally referred to as a "Graduated Return to Work". This program is commonly a first step in a worker's successful reinstatement with the pre-injury employer.

4. Work assessments also allow employers and workers to assess the viability of employment in a particular job and are frequently used together with training-on-the-job programs.

#88.12 Expenditures

1. The Board provides financial assistance to workers who are participating in work assessment programs, either through a continuation of wage-loss benefits under Section 29 or 30 of the Act, or payment of rehabilitation allowances under Section 16 when wage-loss benefits are no longer payable.

2. **Costs arising from injuries or aggravations that occur during the course of Board-sponsored work assessments with an employer are not charged to the participating employer.**

[emphasis added]

Although these policies are contained in Chapter 11 of the RSCM dealing with vocational rehabilitation, the policy concerning expenditures is clear in stipulating that it applies whether the benefits being paid to the worker were being paid as wage loss benefits or as rehabilitation benefits. The same policies are contained in the current version of Volume 1 of the RSCM.

On February 26, 2003, the consultant wrote to inquire concerning relief of costs under section 39(1)(e) or section 42 for experience rating purposes. By decision dated October 16, 2003, a team assistant denied the request on the basis of the 75 day time limit on the Board's reconsideration authority. The employer's request for review was denied on the basis that the Board had only communicated information regarding the 75 day time limit, without making a decision. On appeal, *WCAT Decision #2004-04013* commented:

> Logically, the evidence concerning the events in March 2000 could not have been included in the November, 1999 review of the claim file. Accordingly, I would not read the November, 1999 decision as precluding consideration of the employer's request. Such consideration would not

> involve any questioning of the November 26, 1999 decision. Accordingly, I would not view the 75 day limit on the Board's reconsideration authority as constraining the Board's authority to adjudicate this new issue.
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> . . . the consultant's submission to WCAT was the first document which articulated a request for consideration on this basis. I consider, therefore, that the consultant could simply present the employer's request to the Board for consideration, as being outside the scope of the above-noted decisions.
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> . . . the case manager should now address the employer's enquiry concerning whether the employer is eligible for relief of costs for experience rating purposes under section 42, in relation to the worker's March 21, 2000 injury while participating in a graduated return-to-work program.

The case manager obtained a medical opinion, and by decision dated August 19, 2004 denied relief of claim costs on the basis that the worker's recovery had not been prolonged or enhanced by her pre-existing condition. By letter dated August 26, 2004, the consultant explained that its request for relief was under the policy at RSCM items #88.10 to #88.12. By decision dated September 7, 2004, the case manager applied relief of costs under section 42 for the period of March 22, 2000 to September 8, 2000.

By letter dated November 9, 2004, the consultant wrote to the Assessment Department to request payment of interest. He argued that the cost relief pertaining to this credit arose from a successful WCAT appeal. By decision dated November 30, 2004, a claims analyst, Assessment Department, rejected this request. She noted that *WCAT Decision #2004-04013* stated:

> It must be kept in mind, however, that this is not an appeal to WCAT concerning whether the employer is eligible for relief of costs. The issue is whether there was a reviewable decision before the Review Division.

The claims analyst advised that interest was only payable based on the policy contained at *Assessment Policy 1-39-2*. She found that as the WCAT decision did not require a refund to the employer, the condition precedent for paying interest under section 259(2) of the Act was not met. The employer requested a review of this decision.

The Review Division requested comments from the Assessment Department concerning the employer's request for interest. By memo dated January 23, 2005, the research and evaluation analyst, Assessment Policy, commented:

As the circumstance that triggered the adjustment is not enumerated in AP1-39-2, interest is not payable.

I also believe that interest is not payable because the assessment adjustment was done in error, based on an error in the application of policy. In a log entry dated September 7, 2004, the Case Manager found that the employer should be relieved of costs under policy item 88.12 of the Rehabilitation Services and Claims Manual ("RSCM"). In her decision letter of the same date, the Case Manager advised the employer that she had applied cost relief under Section 42.

RSCM Policy item #115.30 is the policy that describes the application of Section 42 by Board officers in the former Compensation Services Division. It lists the types of claims costs [that] are excluded from consideration for the purposes of experience rating. Policy item #88.12 is not referenced anywhere in policy item #115.30. The list at #115.30 has been determined by both Compensation Services and the Assessment Department to be an exhaustive list and only includes #88.43, *Injury in the Course of Training-on-the-Job* and #88.54, *Injury in the Course of Training*.

Since 115.30 should not have been applied in this case and assessments should not have been adjusted, it follows that interest is not now, nor has it ever been, payable.

By decision dated February 11, 2005, the review officer confirmed the denial of interest. The review officer reasoned:

The relevant part of Policy AP1-39-2 states

> An amount…returned to an employer as a result of a successful review under section 96.2 or a successful appeal under Part 4 respecting a matter described in section 96.2(1)(b) of the *Act*. In these cases, interest is payable from the date the employer requests the review or files the notice of appeal."

. . . The consultant's submission on this review has focused on the wording of Policy AP1-39-2 quoted above. However, this part of the policy is based on section 259 of the *Act*, which is set out in the "Background" to the policy. The policy must be interpreted consistently with section 259. Although the policy may be ambiguous in referring to payments returned to the employer "as a result of" a successful appeal, section 259(2) clarifies this by stating that interest is payable where appeal decision

> "requires" the refund. It is clear in this case that the WCAT decision did not "require" the refund. It only found that the Board was not precluded by the 1999 decision from adjudicating the employer's request for relief of costs for the consequences of the March 21, 2000, incident. It remained open to the Board to accept or deny this request as the merits required.
>
> [reproduced as written]

The review officer found it was not necessary to address the submission by the consultant on the related question as to whether relief of costs granted for the March 21, 2000 decision should have been reflected in the employer's experience rating, having regard to the wording of Policies #88.10 and #115.30 of the RSCM.

The consultant has provided a submission dated February 23, 2005, in support of its appeal to WCAT. He argues:

> Given that it had taken an appeal to WCAT to force the Board to make its decision, we assumed that interest would be provided per W.C.B. policy, but it was not. That denial was taken to the Review Division and the decision of February 11, 2005 now purports that interest is not payable unless a WCAT decision specifically requires the Board to pay a refund.
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> The effect of this position is that the Board will never pay interest following a successful appeal unless a WCAT decision states categorically that a refund is due. . . .
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> It is hard to believe that legislation and policy is being fairly determined in this case. The rationale behind the Board's interest policy appears to be mitigation for delayed justice and to prevent unfair W.C.B. enrichment. Employers are required to pay whatever amount the Board demands and then must go through lengthy, sometimes expensive, means of appeal to have the over-assessment adjusted. Such is the case here and yet, due to creative policy/legislation interpretation, the Board attempts to deny any mitigation. This appears to be the actions of a for-profit business rather than a neutral public administration.

The consultant further argues that the refusal to initially provide any section 42 decision amounts to a blatant Board error, for which interest is payable under Policy AP1-39-2.

Law and Policy

Section 259 of the Act provides:

(1) The commencement of a review under section 96.2 or of an appeal under this Part respecting a matter described in section 96.2 (1) (b) does not relieve an employer from paying an amount in respect of a matter that is the subject of the review or appeal.

(2) If the decision on a review or an appeal referred to in subsection (1) requires the refund of an amount to an employer, interest calculated in accordance with the policies of the board of directors must be paid to the employer on that refunded amount.

Policy at AP1-39-2 of the *Assessment Manual* provides:

> Interest may be paid on an overpaid assessment in the following situations:
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> - The overpayment resulted from a blatant Board error. For an error to be blatant, it must be an obvious and overriding error. This means 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. A blatant error would include where an employer is registered in an obviously incorrect classification when the employer identified the correct industry at the outset.
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> - An employer prepays an administrative penalty under Part 3 of the *Act* or a penalty assessment (including an experience rating demerit) pending a review under section 96.2 or an appeal under Part 4 and is then successful in the review or appeal.
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> - An amount other than a prepayment covered by paragraph 2 is returned to an employer as a result of a successful review under section 96.2 or a successful appeal under Part 4 respecting a matter described in section 96.2(1)(b) of the *Act*. In these cases, interest is payable from the date the employer requests the review or files the notice of appeal.

Reasons and Findings

(a) Cost Relief

The January 23, 2005 memo to the Review Division by the research and evaluation analyst, Assessment Policy, stated that as RSCM item #115.30 should not have been

applied in this case and assessments should not have been adjusted, it follows that interest would not be payable.

The question as to whether cost relief should have been granted to the employer is not before me in this appeal. No request for review was made in relation to that decision, and the 75 day time frame for reconsideration by the Board has elapsed. Nevertheless, I consider that the argument raised by the analyst raises a fundamental concern which should be addressed.

RSCM item #115.30 states:

> As a general rule, all acceptable claims coded to a particular employer are counted for experience rating purposes. It makes no difference whether the injury was or was not the employer's fault. There are, however, some types of claim costs which are excluded from consideration. These are: . .

Item #115.30 contains a list of nine situations in which relief of costs is granted for experience rating purposes under section 42 of the Act. I agree with the analyst regarding the effect of the wording in the paragraph quoted above from RSCM item #115.30. The policy does not use wording in the nature of "such as" or "including" before listing the types of claim costs which are excluded under section 42. The wording "these are" supports a conclusion that the list in #115.30 is intended to be exhaustive, and requires policy amendment in order to add further items to the list.

A similar conclusion concerning the wording of RSCM item #115.30 was reached in *Appeal Division Decision #2002-2296* dated September 4, 2002 (accessible at: http://www.worksafebc.com/claims/review_and_appeals/search_appeal_decisions/appealsearch/advancesearch.asp). That decision quoted from a prior Appeal Division decision *(#99-1030*) which reasoned:

> As we understand it, [section 42] allows the board to rely on a system of experience rating as an indication of how an industry or plant is circumstanced or conducted. In our opinion, the exercise of the discretion conferred by s. 42 resides in the adoption of an experience rating system. To the extent that s. 42 empowers the board to adopt an experience rating system, it empowers it to fashion the system as it deems fit. It empowers it to exclude certain types of claims costs from the experience rating system just as much as it empowers it, for instance, to specify the period of time over which claims costs are included. These matters are intrinsic to the system and may be distinguished from other matters concerning the application of the system such as, for example, whether an experience rating should be transferred when the ownership of a business changes. Hence, viewing policy item #115.30 as providing an exhaustive list of exclusions does not, in our view, offend s. 42 of the Act. Nor does it run

> afoul of the principle against the fettering of a statutory power of discretion.
>
> [reproduced as written]

Appeal Division Decision #2002-2296 concluded:

> I agree with the analysis provided by the majority in Decision No. 99-1030, and I therefore conclude that until such time as The Panel of Administrators determines that a disease should be added to the list in item #115.30 on the basis of evidence that becomes available, the list is exhaustive. I further conclude that viewing the list in item #115.30 as exhaustive does not constitute an error of law, nor can it be viewed as fettering of a decision-maker's discretion.
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> [reproduced as written]

However, it is also necessary to read the policies of the board of directors as a whole. The current *Assessment Manual* addresses "Experience Rating Cost Inclusions/Exclusions" at item AP1-42-2. This policy similarly states:

> Some types of claim costs are excluded from consideration. These are:

AP1-42-2 proceeds to list four items (which are 1, 3, 4, and 5 from the policy at RSCM item #115.30), and concludes:

> Several policies in the *Rehabilitation Services & Claims Manual* also provide for relief of costs. These costs are also excluded from consideration for experience rating purposes.

Policy at AP1-42-2 does not limit relief of costs to those items listed in RSCM item #115.30.

To conclude that relief of claim costs is not available in connection with the policy at RSCM item #88.12 would be to strip the policy at #88.12 of meaning. Item #88.12 expressly provides that costs arising from injuries or aggravations that occur during the course of Board-sponsored work assessments with an employer are not charged to the participating employer. I consider it appropriate to try to interpret and apply the policy in a fashion which gives effect to the plain intent of the policy.

I note, in this regard, that #115.30 does not state that relief of costs is available if costs have been incorrectly coded to the wrong employer. It is only logical that if the costs should not have been charged to a particular employer's account, such costs should be removed. This is simply a matter of correcting an error, and does not need a policy regarding relief of costs for experience rating purposes under section 42 of the Act. It

may be that #88.12 was drafted from a similar perspective, of providing prospective direction that such costs should not be charged to the employer in the first instance. Given that direction, it was not necessary to address the situation in terms of subsequently granting relief of costs for experience rating purposes. However, my reasoning in this regard is only tentative. I note that a different approach is followed in relation to claim costs relating to an injury sustained during a retraining program sponsored by the Vocational Rehabilitation Department (policy item #88.43 and #88.44), for which a specific listing is contained in #115.30. I am not able to explain this difference in treatment.

Given the express direction contained in #88.12 to not charge costs to the employer when the worker suffers a further injury during a GRTW, and the broad wording of the policy at AP1-42-2 which contemplates the granting of relief of costs where this is supported by policy in the RSCM, I consider that the policies support the removal of these costs from the employer's experience rating (i.e. whether this is characterized as relief of costs for experience rating purposes, or simply as the removal of costs which should not have been charged to the employer in the first instance). Accordingly, I do not consider that there are sound reasons for objecting to the removal of these costs from the employer's experience rating. It may be, however, that the wording of the policies at RSCM #88.12 and #115.30 and AP1-42-2 should be reviewed to ensure that a coherent and consistent approach is articulated. It may also be useful to provide a comprehensive listing of all of the grounds on which such costs may be excluded or removed, to assist decision-makers in adjudicating such matters.

(b) Section 259(2)

WCAT Decision #2004-04013 concluded as follows:

> In summary, I find that the employer's request for consideration of relief of costs under section 42, in connection with the worker's low back injury on March 21, 2000 while participating in a graduated return-to-work program, was not addressed by the decisions of November 26, 1999 and October 16, 2003, and the Review Division decision of December 1, 2003. As this request was not addressed in the November 26, 1999 decision, the denial of reconsideration of the November 26, 1999 decision does not apply to it. Accordingly, I confirm the December 1, 2003 Review Division decision, subject to the proviso that this does not limit the Board from now proceeding to address the employer's enquiry concerning whether the employer is eligible for relief of costs in relation to the worker's March 21, 2000 injury while participating in a graduated return-to-work program.
>
> The employer's appeal is denied on the basis set out above.

Conclusion

> The Review Division decision is confirmed. The October 16, 2003 letter to deny reconsideration of the November 26, 1999 decision, based on the 75 day limit to the Board's reconsideration authority, was not a reviewable decision. However, the case manager should now address the employer's enquiry concerning whether the employer is eligible for relief of costs for experience rating purposes under section 42, in relation to the worker's March 21, 2000 injury while participating in a graduated return-to-work program.

I agree with the review officer regarding the effect of this decision, in relation to section 259 of the Act. The employer's appeal was denied, and the Review Division decision was confirmed, albeit on a narrow basis. The matter on which the employer was seeking cost relief remained to be considered as a new matter for adjudication which had not been previously addressed. This was not a case where the employer's appeal was successful in overturning an earlier denial of relief of that basis. The WCAT decision did not require "the refund of an amount to an employer", to use the wording of section 259(2) of the Act. I agree with the review officer in interpreting the policy at AP1-39-2, which refers to money being "returned to an employer as a result of a successful review under section 96.2 or a successful appeal under Part 4", as meaning a "direct" result of the review or appeal (in accordance with the wording of section 259(2) of the Act).

(c) Blatant Board Error

The consultant further argues that the charging of costs to the employer in contravention of the policy at RSCM item #88.12 involved blatant Board error. While comments were provided to the Review Division by the Assessment Department concerning the employer's request for interest, it might have been useful to have received comments from the Compensation Services Division as to whether the case manager's handling of this matter involved blatant Board error. However, I do not consider it necessary to defer my decision for the purpose of obtaining such comments.

The test of blatant Board error, in relation to the granting of interest, is set out in RSCM item #50.00, and in *Assessment Policy 1-39-2* (quoted above). The wording of these policies is essentially the same. RSCM item #50.00 provides:

> 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.
>
> [emphasis added]

Upon reviewing the contents of the claim file, I can find no indication that the case manager turned her mind to not charging the costs to the employer, of the worker's injury while participating in the GRTW. The case manager may have been unaware of the policy at RSCM item *#88.12*, or may simply have overlooked considering the application of this policy at the time of adjudicating the worker's claim for further benefits based on a further injury while participating in a GRTW.

This was not a case involving a misjudgment. Rather, it appears to have simply involved a case of oversight, or lack of awareness of a particular policy item. A question arises as to whether a failure to address a matter which should have been addressed may be viewed as a blatant Board error.

The policy concerning the meaning of a blatant board error refers to this as involving "an obvious and overriding error." The policy then states:

> 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.

The test established in policy for "blatant" board error is that it be obvious and overriding. The following sentence, which makes reference to a "course of reasoning", is clearly identified as an "example". If a "course of reasoning" was an essential ingredient, it may be that the test of blatant Board error could not be met in a case of an oversight (i.e. involving a failure to even make a decision regarding the subject matter), no matter how obvious or overriding the nature of the error. However, I do not read the policy as requiring a "course of reasoning" in all cases, as this requirement is only stated in connection with an example provided in policy.

Practice Directive 1-39-2 (A), "Payment of Interest", May 1, 2003, is accessible on the Board's website at: http://www.worksafebc.com/regulation_and_policy/

practice_directives/assessment_and_revenue_services/default.asp. The practice directive begins by noting:

> The Assessment Department will only pay interest on an overpayment of assessments in one of the following three situations:
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> • blatant Board error,
> • successful employer review or appeal, or
> • under the Historical Relief of Costs project.

The practice directive defines the requirements for finding a blatant Board error as follows:

> A blatant Board error requires that each of the following must be established:
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> (a) There was an error,
>
> (b) The error was obvious, in that the error can be identified without undue investigation,
>
> (c) The error was overriding, in that it worked to the employer's actual disadvantage and a different result would have occurred but for the error,
>
> (d) The error required the exercise of reason or a determination between competing considerations and was palpably violative of fact, judgment, or both.

A footnote (12) to this last item notes:

> The extraordinary passage of time in implementing an application of process may obviate Part 4 of the test.

I find that (a), (b) and (c) are all met by the circumstances of this case, in which the case manager failed to address the clear guidance provided by policy at RSCM item #88.12. However, (d) would not appear to be met, as the failure to apply the policy appears to have been due to simple oversight or lack of awareness of the policy, rather than involving an exercise of judgment.

I am inclined to disagree with the interpretation provided in the practice directive that (d) is an essential ingredient in defining a blatant Board error. The listing of this factor as a fourth requirement appears to elevate an element which is only essential to the example provided in policy, to make it an essential element of the test itself. This appears to add another requirement, which is not contained in the policy.

The circumstances of this case may, in any event, come within the terms of the footnote provided to the fourth item in the practice directive, as involving an extraordinary passage of time in implementing an application of process (i.e. the passage of four years prior to considering the application of policy at RSCM item #88.12). If the fourth requirement is read together with its footnote, the practice directive may be read as incorporating the terms "generally" or "usually", thus allowing flexibility in applying this fourth factor as a requirement. However, as I have some doubt whether four years amounts to an "extraordinary passage of time", I have further considered this matter from another perspective.

A comparison may be drawn between the test set by policy for awarding interest, of an obvious and overriding error, or a glaring error that no reasonable person should make, and the common law test of a "clearly irrational" or "patently unreasonable" decision. Obviously, the test established for awarding interest, and the common law test for a court setting aside a decision of an administrative tribunal which is protected by a full privative clause, are tests developed for different purposes. The tests may not be interchangeable, particularly in relation to natural justice issues. Nevertheless, it seems to me that a decision which is "clearly irrational" or "patently unreasonable" at common law may also involve an obvious and overriding error. Both wordings refer to an error of a certain type or degree of magnitude. For the purposes of my decision in this case, I need not consider whether these wordings refer to an error of the same type or degree of magnitude.

While it is necessary to use caution in applying the common law grounds, it seems to me that in some circumstances the common law may provide a useful analytical framework for determining whether a decision involved an obvious or overriding error. In *Speckling v. British Columbia (Workers' Compensation Board),* (2005) BCCA 80, accessible at: http://www.courts.gov.bc.ca/jdb-txt/ca/05/00/2005bcca0080err1.htm, February 16, 2005, the British Columbia Court of Appeal explained the effect of the "patent unreasonableness" standard of review (at paragraph 37):

> . . .a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable.

In *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001), Sara Blake similarly states at page 191:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal to determine whether there was sufficient evidence to support a finding of primary fact. A court will go no further than to determine whether there was any evidence, and only essential findings of fact upon which the decision of the tribunal turns will be reviewed in this manner. Non-essential findings of fact are not reviewable.
>
> ...
>
> A patently unreasonable rejection of evidence or a refusal in bad faith to consider relevant evidence may be grounds for review. If a tribunal, without explanation, completely ignores important evidence, its decision may be set aside.

WCAT Decision #2003-01800-AD cited three decisions of the Supreme Court of Canada regarding the effect of the test of patent unreasonableness, as follows:

> The standard of patent unreasonableness is frequently used by the courts in considering applications for judicial review of decisions of administrative tribunals. Accordingly, the Legislature's choice of the patent unreasonableness standard means that the test in section 251(1) can be interpreted through reference to judgments that have considered that standard.
>
> In *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada noted that the three standards of review for judicial review of administrative decisions are patent unreasonableness, reasonableness *simpliciter*, and correctness. These standards have come to reflect the degree of deference that a court is granting to the administrative tribunal. The least degree of deference is granted where the correctness standard is applied. The standard of patent unreasonableness involves a significant degree of deference.
>
> For instance, in *Canada (A.G.)* v. *Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 964, the Court explained that under the patently unreasonable test a court should only interfere with the decisions of a tribunal if the decision is "clearly irrational". Cory J., writing for the majority, stated:
>
> > It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one

> judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational … . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.
>
> …
>
> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

In *Law Society of New Brunswick v. Ryan*, (2003), 223 D.L.R. (4th) 577 (S.C.C.) at 596, Iacobucci J. made the following comments concerning the standard of patent unreasonableness:

> … a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective… A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

It is noteworthy that the common law test for a clearly irrational or patently unreasonable decision similarly provides that disagreement with the weighing of the evidence is not sufficient. However, there are additional grounds on which a decision may be found to be clearly irrational, which do not concern the exercise of judgment or the weighing of evidence. A decision may be patently unreasonable due to a failure to take into account a relevant statutory requirement, or other jurisdictional error.

An application for reconsideration of a WCAT decision involved a situation in which a panel failed to take into account certain policies. *WCAT Decision #2005-01290* dated March 15, 2005 reasoned as follows:

> Those policies would appear material to the issue which was being addressed by the panel. The failure to give consideration to the policy would appear to be a breach of the panel's obligation under section 250(2) of the Act.
>
> Caution must be exercised in considering whether a decision should be set aside due to a panel's failure to apply policy. On issues concerning the scope of employment, there are a broad range of policies which may apply. Under section 250(2), a WCAT panel must apply a policy that is applicable in that case. In so doing, the panel may determine which policy or policies are applicable in that case. The panel need not cite every policy which might be relevant, no matter how tangential or peripheral it may be in terms of its relevance to the issue being determined by the panel. However, if the issue being addressed by the panel is one to which a policy has obvious application, or is central to the issue framed by the panel, the panel cannot ignore (or overlook) the policy, or fail to apply it without explanation.

In that case, the WCAT decision was set aside as void, based on its failure to consider or take into account a relevant policy of the board of directors.

The initial failure in 2000 to address the question of costs pursuant to policy at RSCM item #88.12 preceded the March 3, 2003 amendments (contained in sections 99(2) and 250(2) of the Act) which made it obligatory for decision-makers to apply a policy that is applicable in that case. Nevertheless, even under the former provisions of the Act, the board of governors / panel of administrators had authority to make policy under the Act. While policy at RSCM item #96.10 formerly provided (prior to the March 3, 2003 amendments) that the Board was not "bound" by internal policy directives, the Board's policies provided general indications of how it would act when certain circumstances came before it. Accordingly, when these circumstances arose, the applicable policy directive would normally be followed. Accordingly, while the case manager was not bound to apply the policy, she was obliged to consider its application to the circumstances of this case.

In summary, interpreting the policy concerning blatant Board error (defined as obvious and overriding error), with reference to the common law tests of a patently unreasonable or clearly irrational decision, may assist in addressing a range of situations which are not clearly covered by the example provided in the policy. Disagreement with the weighing of evidence does not suffice to make a decision patently unreasonable. However, a decision based on no evidence, or a failure to take into account an important piece of evidence which was before the decision-maker, may be patently unreasonable. A failure to consider a relevant policy or statutory requirement may also make a decision patently unreasonable. In stating the foregoing, I am not concluding that the test of patent unreasonableness may be substituted for the

test of an obvious and overriding error. However, it seems likely that if a decision meets the test of being patently unreasonable, it would also meet the test of involving an obvious and overriding error for the purpose of determining eligibility for interest.

In this case, the charging of costs to the employer was clearly an oversight. This involved a failure to consider the applicability of the policy at RSCM item #88.12, for approximately four years. The costs were charged to the employer in connection with the time period from March 22, 2000 to September 8, 2000, and were not removed until 2004. I find that this amounts to a blatant Board error, with reference to the guidance provided in *Practice Directive 1-39-2 (A)* regarding an extraordinary passage of time in implementing an application of process. I find that the "decision" (i.e. the charging of the costs to the employer, without consideration of the policy at RSCM item #88.12) would also meet the common law test for being clearly irrational or patently unreasonable, in respect of its failure to address or take into account a policy which would seem directly applicable. To the extent I have any doubt whether the passage of four years amounts to an "extraordinary passage of time", I rely upon this latter analysis as the basis for concluding that interest is payable on the basis of blatant Board error.

This conclusion is also consistent with the reasoning expressed in *WCAT Decisions #2004-00890* (flagged as noteworthy on WCAT's internet site), *#2004-02438* and *#2005-04695*.

The employer's appeal is therefore allowed. Interest is payable on the basis of blatant Board error.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I therefore make no order regarding expenses of this appeal.

Conclusion

The Review Division decision is varied. The employer is entitled to interest, on the basis of blatant Board error.

Herb Morton
Vice Chair

HM/mr