

Noteworthy Decision Summary

Decision: WCAT-2013-01282 **Panel:** Debbie Sigurdson **Decision Date:** May 10, 2013

Blatant Board error – Obvious and overriding error that no reasonable person would make - Subsections 96.4(8) and (9) of the Workers Compensation Act – Policy item #50.00 of the Rehabilitation Services and Claims Manual, Volume II – Directions to the Board by Review Division decision – Board’s failure to comply with directions constituting blatant Board error

This decision is noteworthy for its analysis of what constitutes a blatant Board error entitling a worker to interest on the retroactive payment of temporary disability benefits, and for its review of other noteworthy decisions that deal with the issue of blatant Board error.

In this case a Review Division decision directed the Board to take four steps to complete medical investigations and to provide the worker with a new decision on his entitlement to temporary disability benefits. The Board failed to complete the investigations prior to determining his entitlement to temporary disability benefits. The WCAT panel found that this failure to complete the necessary investigations constituted a blatant Board error within the meaning of policy item #50.00 of the *Rehabilitation Services and Claims Manual, Volume II*. In this case, section 96.4(8) of the *Workers Compensation Act*, read in conjunction with section 96.4(9), created a positive obligation on the Board to conduct further investigations. The Board's failure to implement the directions for further investigation constituted a blatant Board error that necessitated the payment of retroactive disability benefits. The WCAT panel found that the Board's failure to gather medical evidence when it had been instructed to do so, was an overriding error that no reasonable person would make. The worker was therefore entitled to interest on the retroactive payment of his temporary disability benefits.

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Panel:

Debbie Sigurdson, Vice Chair

Introduction

- [1] The Workers' Compensation Board¹ (Board) accepted the worker's claim for a lumbar strain, an L3-L4 disc injury with post-injury degenerative changes, and low back chronic pain as arising out of and in the course of his employment in September 2006. In a decision dated July 21, 2010 a Board officer concluded the worker's compensable conditions had stabilized as permanent impairments as of June 9, 2007, such that he was not entitled to temporary disability benefits after that date. The decision was confirmed further to the worker's request for review².
- [2] The worker appealed the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). On August 17, 2011 a WCAT panel varied the Board's decision to find the worker remained temporarily disabled because of his compensable injuries after June 9, 2007 until the completion of a pain management program on December 8, 2010³.
- [3] The Board provided the worker with a retroactive payment of temporary disability benefits. The worker requested payment of interest on the retroactive payment. On September 2, 2011 a Board officer concluded that the decisions of the Board officer and review officer to conclude payment of temporary disability benefits in June 2007 were not based on blatant errors, but at most could be characterised as errors based on misjudgement, such that the worker was not entitled to interest on the retroactive payment. The worker requested a review of that decision.
- [4] On March 20, 2012 a review officer confirmed the Board decision to deny the worker interest on the retroactive payment of temporary disability benefits⁴. The worker has appealed this decision. He seeks interest on the retroactive payment of temporary disability benefits.

Issue(s)

- [5] The issue in this appeal is whether the worker is entitled to interest on the retroactive payment of temporary disability benefits.

¹ Operating as WorkSafeBC.

² See *Review Reference #R0121441*.

³ See *WCAT-2011-02080*.

⁴ See *Review Reference #R0136715*.

Jurisdiction

- [6] Section 239(1) of the *Workers Compensation Act* (Act) provides that a decision made by a review officer under section 96.2 may be appealed to WCAT. Section 250(1) and section 254 of the Act allow WCAT to consider all questions of law and fact arising in an appeal, subject to section 250(2), which requires that WCAT apply the relevant Board policy, and make its decision based on the merits and justice of the case.
- [7] The standard of proof in compensation matters is the balance of probabilities, subject to the provisions of section 250(4) of the Act. Section 250(4) provides that when the evidence on an issue respecting the compensation of a worker is evenly weighted, the matter is resolved in favour of the worker.
- [8] The worker did not request an oral hearing, and I agree that one is not necessary to decide the issue in this appeal. The matter requires consideration of the largely undisputed facts and the application of the relevant law and policy to those facts. The worker's credibility is not in dispute. I find I am able to decide this appeal from my review of the claim and consideration of written submissions.
- [9] The employer was provided with notice of the appeal but is not participating. The worker is represented by legal counsel, who has provided written submissions in support of the worker's appeal.

Background and Evidence

- [10] The worker sustained an injury to his back in September 2006; however, as he resides outside of the province, he did not commence his application for compensation until February 2007. In June 2007 the Board disallowed the worker's claim. The worker requested a review of that decision. In April 2008 the Review Division varied the Board's decision to find the worker's claim was compensable for a lumbar strain⁵.
- [11] The Board officer contacted the worker on May 22, 2008, at which time he reported that he had not sought medical treatment since consulting with Dr. Cho, orthopaedic surgeon and spine specialist, on June 8, 2007. The worker believed his attending physician, Dr. Emery, had referred him to a neurosurgeon. The worker reported his symptoms had not changed much; he continued to experience constant pain that was aggravated by prolonged sitting and forward bending. He experienced intermittent pain down his left leg.
- [12] On July 10, 2008 Dr. Byrne, Board medical advisor, reviewed the worker's claim including the medical investigations and treatment for the worker's low back to June 2007. He noted that the medical investigations revealed the worker had significant changes at the L3-L4 level, with activity in the L3-L4 disc that was symptomatic, but not

⁵ See *Review Reference #R0083369*.

present prior to the September 2006 workplace fall. Dr. Byrne indicated the aggravation of degenerative changes was likely temporary, but recommended further radiological investigations to determine whether there was active process ongoing. Dr. Byrne also recommended the worker be referred for further assessment by a rheumatologist. Dr. Byrne was not able to determine whether the worker had permanently aggravated his low back condition, as there was no recent medical information for review. If the worker had continued active degenerative process to his lumbar spine, medical limitations and restrictions would include prolonged sitting, forward bending, repetitive stooping and avoidance of heavy off-road vehicles.

- [13] On August 6, 2008 the Board implemented the April 2008 Review Division decision. The Board officer accepted the worker's claim for a temporary aggravation of pre-existing degenerative arthritis of his lumbar spine. The Board officer noted Dr. Byrne's recommendation for further assessment by a rheumatologist, and indicated the worker could follow up with his attending physician. The Board officer provided the worker with temporary disability benefits from October 16, 2006 to June 8, 2007. The Board officer concluded the worker's entitlement to benefits for his low back injury effective June 9, 2007. The worker requested a review of that decision.

- [14] On November 4, 2008 the Board officer denied the worker a referral to a rheumatologist and determined the worker had not developed permanent low back chronic pain as a consequence of his work injury. The worker requested a review of that decision.

- [15] On March 26, 2009 a review officer referred the issue of the worker's entitlement to temporary disability benefits after June 8, 2007 back to the Board with directions to complete further investigations and provide the worker with a new decision⁶ (the March 2009 Review Division decision). The review officer found that the overall weight of medical evidence was inconclusive as to the duration of the worker's entitlement to temporary disability benefits. He noted that Dr. Byrne had recommended further medical investigations; however, none had been undertaken. The review officer relied on Dr. Byrne's opinion to conclude there was insufficient medical evidence to be able to make any medical conclusions about the state of the worker's compensable injuries after June 8, 2007. The review officer provided specific directions to the Board in its referral back, as follows:

I refer issue #1 of the decision of August 6, 2008 back to the Board with the following instructions:

- 1. The Board should obtain any updated medical treatment and diagnostic investigation records regarding the worker's low back condition.
- 2. The Board should also conduct the further medical investigation contemplated by the MA [Dr. Byrne] in July 2008. If further, more

⁶ See *Review Reference #R0098052*.

- specific direction is required to establish the scope of that investigation, the Board should consult an MA [medical advisor].
3. The Board should consider contacting the worker for his update of the status of his condition.
 4. When it has completed the further investigation, the Board should render a new entitlement decision respecting the duration of the worker's entitlement to TWL [temporary wage loss] benefits.

[all quotations reproduced as written unless otherwise noted]

- [16] In April and May 2009 the Board officer attempted to contact the worker by telephone without success; the worker and the Board officer were exchanging telephone messages. In June 2009 the Board officer provided the worker with a form letter requesting that he make contact with the Board.
- [17] On July 2, 2009 a review officer allowed the worker's request for review of the Board's November 2008 decision⁷ (the July 2009 Review Division decision). The review officer determined the worker was entitled to a rheumatology referral for clarification of his medical condition, as recommended by Dr. Byrne. The review officer referred the issue of the compensability of low back chronic pain back to the Board with directions, noting that there was uncertainty surrounding the cause of the worker's low back symptoms. Specifically, the review officer directed the Board as follows:

Therefore, I am returning this decision back to the Board for further investigation with the following directions:

1. The Board should obtain updated medical information and/or diagnostic imaging for the worker concerning his low back condition.
 2. Obtain a MA [medical advisor] opinion concerning the nature of the worker's current low back complaints, specifically considering whether from a medical perspective, the worker has compensable chronic pain.
 3. Provide a new decision letter concerning this issue, identifying whether the worker is entitled to a referral to the DA [Disability Awards] department for consideration of a PFI [permanent functional impairment] award in relation to that condition.
- [18] On July 15, 2009 the Board officer provided the worker with a second letter requesting the worker make contact with the Board and included details of the type of information the Board was seeking from the worker⁸. The Board officer advised the worker his claim was suspended pending receipt of additional medical information.

⁷ See *Review Reference #R0101588*.

⁸ The Board officer requested the worker provide copies of updated medical reports and x-rays since August 22, 2008 or have his physician provide copies of those documents.

- [19] By letter dated January 10, 2010 Dr. Emery enquired with the Board as to the status of the need to seek further medical evidence and an assessment by a rheumatologist. Dr. Emery reported that the worker remained symptomatic and was looking for treatment alternatives for his low back pain. Dr. Emery had attempted to refer the worker to a physical medicine and rehabilitation specialist in the province the worker resided; however, the worker could not secure an appointment in the other province because his injury related to a workers' compensation matter.

- [20] The worker contacted the Board on January 27, 2010 to request the Board assist him in seeing a specialist regarding his ongoing low back symptoms. The worker acknowledged receiving the letters from the Board, but indicated he deferred responding because he had expected to see a specialist in the province he resides, after which he was planning to submit the new medical information.

- [21] In February 2010 the Board obtained copies of Dr. Emery's chart notes for treatment of the worker. Review of those records indicates that in February 2009 Dr. Emery had referred the worker for assessment and advice from a specialist physician regarding treatment of the worker's ongoing low back pain that radiated to his left leg.

- [22] In a letter dated February 15, 2010 Dr. Emery advised that his medical investigations had not revealed evidence the worker had inflammatory arthritis. Dr. Emery recommended the worker be assessed by a physical medicine and rehabilitation specialist, rather than a rheumatologist. The worker continued to experience low back pain with lifting restrictions and reduced flexion.

- [23] The Board referred the worker to Dr. Weiss, physical medicine and rehabilitation specialist, who examined the worker on March 24, 2010. In his report of that date, Dr. Weiss noted the worker continued to complain of back pain and soreness with a lack of hip mobility. He had stiffness across his lower back with pain to his left buttock. Over the previous six months the worker experienced numbness and tingling involving his hands and feet and a prickly sensation to the tips of his toes. The worker could not bend or lift due to acute discomfort. Dr. Weiss reported the worker's rheumatoid factor was normal. He diagnosed the worker with acute discogenic back pain involving the L3-L4 intervertebral disc without nerve root impingement. The worker experienced persistent low back pain that was now more diffuse. Dr. Weiss anticipated that if low back x-rays were taken, it would reveal advanced degenerative changes at the L3-L4 level. Dr. Weiss indicated the worker's clinical presentation was in keeping with chronic spinal discomfort without clear evidence of ongoing spondyloarthropathy. Dr. Weiss recommended the worker participate in a pain program and undergo repeat x-rays of his lumbar spine.

- [24] In June 2010 Dr. Byrne again reviewed the worker's claim and provided an opinion the worker had sustained a disc injury from the workplace fall, which subsequently resulted in degenerative changes to his low back. Dr. Byrne was not able to explain why the worker's symptoms had not settled. He provided an opinion the worker was at maximum

medical improvement and recommended the worker be referred to a pain program. Dr. Byrne indicated the worker had likely sustained a permanent functional impairment with loss of movement of his back.

- [25] In the July 21, 2010 decision, the Board officer identified the scope of the letter as confirming the “implementation of the Review Division decision dated July 9, 2009”. The Board officer concluded the worker had developed permanent low back chronic pain as a consequence of his work injury and that he had permanent restrictions and limitations arising from his accepted injuries. The Board officer stated as follows:

Based on the medical reports on file it is my decision that you reached medical plateau on June 9, 2007 (date following the last wage loss payment was made) as there is no indication that your condition significantly changed after that time.

- [26] The Board officer referred the worker to Disability Awards for consideration of a permanent partial disability award. As noted above, the Review Division confirmed the July 2010 Board decision, further to the worker’s request for review.
- [27] In *WCAT-2011-02080* (the 2011 WCAT decision) the panel noted the lack of medical evidence on the worker’s claim, which arose in large part because the worker resided in another province and was unable to obtain specialist care without the intervention of the Board. This did not occur until the Review Division accepted the worker’s claim in April 2008 and then later directed the Board to investigate further. The WCAT panel found that in such circumstances the Board could not reasonably use the lack of medical evidence as an excuse to deny the worker compensation benefits. She further noted that at the time of the July 2010 decision, the Board had not completed its investigation of the worker’s condition, completed the rehabilitation offered to the worker, or fully determined the extent of the worker’s injuries. The panel found that without that information, the Board was not in a position to determine whether or not the worker’s condition remained temporarily disabling or had stabilized either in July 2010 or in June 2007. The WCAT panel further noted that as a result of participation in a pain management program, the worker had experienced significant improvement in his condition. She concluded this provided evidence of potential for improvement.
- [28] The Board implemented the 2011 WCAT decision and provided the worker with a retroactive payment of temporary disability benefits.
- [29] In the September 2, 2011 decision the Board officer concluded that he could not clearly see that the decision of the Board to conclude temporary disability benefits effective June 2007 was wrong, without question, or that he would have come to the same conclusion as the WCAT panel did. The Board officer concluded the WCAT findings were not a “foregone conclusion”. The Board officer went as far as to state that it was reasonably asserted the WCAT findings were incorrect. This supported a determination

that the Board officer and review officer did not make blatant errors in concluding the worker's entitlement to temporary disability benefits earlier than the WCAT panel did.

- [30] In the March 20, 2012 decision the review officer concluded the circumstances did not amount to a blatant Board error, but rather the worker's entitlement to retroactive temporary disability benefits arose from the adjudicative weighing of evidence and opinion. While the WCAT panel had found the Board did not have sufficient information to decide whether the worker's condition had stabilized, the WCAT decision was silent as to whether the Board or the Review Division had made an error in their decisions. The review officer concluded the Board had not made a glaring error that no reasonable person should make. The situation in this case was analogous to a reweighing of the evidence to reach another conclusion.
- [31] At this juncture, it is important to note that the Board's policy on interest has been the subject of a number of court decisions. In *Johnson v. Workers' Compensation Board*, 2007 BCSC 1410, [2007] B.C.J. No. 2092 the British Columbia Supreme Court (BCSC) concluded that Board policy involving the application of the "blatant Board error" test was patently unreasonable under the Act. The Board appealed this decision.
- [32] On June 2, 2011 the British Columbia Court of Appeal (BCCA) in *Johnson v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 255 set aside the BCSC decision as the lawfulness of the interest policy was not properly before the BCSC on judicial review. As a result, policy item #50.00 is in force.
- [33] In April 2012 the former chair of WCAT issued two decisions, pursuant to section 251 of the Act, finding that the requirement in policy item #50.00 for a "blatant Board error" was so patently unreasonable it was not capable of being supported by the Act⁹. As a result, this appeal was suspended pending a determination from the board of directors of the Board. On July 17, 2012 the board of directors issued a determination under section 251(6) of the Act that policy item #50.00 was not patently unreasonable and that WCAT is required to apply it.
- [34] The board of directors' determination is now the subject of further court challenges to policy item #50.00. On September 21, 2012 WCAT informed the worker of this, and gave the worker the option to proceed with this appeal based on the application of the current policy item #50.00 or to wait pending the outcome of the matters presently before the court.
- [35] On October 12, 2012 the worker advised in writing that he wished to proceed with his appeal.

⁹ See *WCAT-2012-01017* and *WCAT-2012-01018*. These decisions provide a detailed discussion of the history of the Board's interest policy and the court challenges to the policy.

- [36] In submissions dated December 18, 2012 the worker argues that the Board made a blatant error when determining the duration of his entitlement to temporary disability benefits. He has argued the Board failed to fully consider and implement the directions provided by the Review Division in both the March 2009 and July 2009 Review Division decisions which referred matters back to the Board for new decisions. He noted that the Review Division had directed the Board to conduct further medical investigations before determining when his compensable conditions had plateaued. The worker submits it is reasonable to expect that the Board would inquire into and comply with the binding findings from the Review Division decisions. Specifically, the worker submits the Board failed to implement the direction to complete radiological investigations to determine whether there were ongoing active degenerative changes occurring at the L3-L4 level.
- [37] The worker notes that the panel in the 2011 WCAT decision found the Board had not completed its investigations of the worker's conditions, fully determined the extent of his injury, or completed rehabilitation of his injury at the time of the July 2010 decision terminating temporary disability benefits after June 8, 2007. The worker submits the Board overlooked and ignored the directions provided by the Review Division in the two referrals back for further investigation. Further, the worker argues the Board failed to provide any reasoned justification for choosing the date it did to terminate his temporary disability benefits.
- [38] The worker submits that the Board was ignorant of and/or wilfully blind to its obligations pursuant to section 99(2) of the Act and Board policy items #2.20, #34.00, #35.00 and #98.20 by not conducting further medical investigations and by failing to applying Board policy. The worker submits the Board did not exercise judgement in this case; rather, it was a failure to enquire, obtain and review further medical evidence and exercise any judgement that lead to a blatant error. The worker argues that delays in the implementation of the March 2009 and July 2009 Review Division decisions arose in large from delays by the Board and the specialist physician in another province, and not because of delays by the worker or his attending physician.

Reasons and Findings

- [39] The Act does not expressly provide for the payment of interest by the Board in the circumstances that arise in this appeal. Board policy item #50.00 provides direction on the payment of interest with respect to compensation matters, apart from specific entitlement set out in section 19(2)(c) and 258 of the Act¹⁰. Policy item #50.00 recognizes that the Board has discretion to pay interest in situations other than those

¹⁰ The express provisions in sections 19(2)(c) and 258 of the Act for payment of interest do not apply in this appeal.

expressly provided for in the Act. The policy goes on to set out specific conditions for the payment of interest, as follows:

- 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*.
 - To a worker or employer in respect of a permanent disability lump sum payment provided under sections 22 and 23 of the *Act*.
 - To a dependent of a deceased worker in respect of a payment provided under section 17 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 known that it was making the error at the time, it would have caused a change to the course of reasoning and the outcome. A “blatant” error cannot be characterized as an understandable error based on misjudgement. 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.

[emphasis added]

[40] The Board has developed Practice Directive #C7-2 to assist in determining when interest is payable¹¹. Appendix “A” of the practice directive sets out examples of blatant Board errors, as follows:

1. A document belonging to another worker’s claim file was used in the adjudication of the worker’s claim. Had the Board officer disregarded the erroneous information, it would have caused the Board officer to change the course of reasoning and the outcome.
2. The wrong body part was adjudicated. For example, a decision was made to disallow a claim for a left knee injury. It was evident the worker’s claim was for a right knee injury. Had the Board officer adjudicated entitlement for an injury to the

¹¹ While I am not bound to follow Board practice directives, I find the examples provided in Appendix A of Practice Directive #C7-2 provide useful guidance on what constitutes a blatant Board error.

correct knee, it would have caused the Board officer to change the course of reasoning and the outcome.

3. The worker submitted evidence that clearly substantiated further employment earnings. It was evident that the Board officer had missed or not seen the information when calculating the worker's wage rate. Had the Board officer reviewed the earnings information, it would have caused the Board officer to change the course of reasoning and the outcome.

[41] Appendix A also sets out examples of when there is not a blatant Board error, as follows:

1. A decision or finding of an appellate body, based on new evidence or a re-weighing of existing evidence, does not constitute blatant Board error.
2. Occasionally it is argued that, upon retrospective review of a decision, it might seem that a Board officer did not correctly weigh or consider a piece of information in reaching the decision. Simply re-weighing the evidence and reaching another conclusion does not constitute a blatant Board error. While a situation might occur where a Board officer did not formally document his or her consideration of a specific piece of information, this does not constitute blatant Board error.

[42] Previous WCAT decisions have considered what constitutes a blatant Board error.¹² In *WCAT-2004-00890-RB*, a WCAT noteworthy decision, the panel found that the Board's failure to refer the worker for consideration of a permanent partial disability award following receipt of medical reports in 1990 and 1992 constituted blatant Board errors within the meaning of policy item #50.00. In that case, the Board received a medical report in 1990 in which a specialist physician had provided an opinion the worker had a "definite residual impairment". The Board received a second medical report from the specialist in 1992, at which time the specialist reported the worker had not recovered from his asthma and recommended the worker be considered for a permanent partial disability award. The Board received a third report from the same specialist in 1996, and following review of that report, the Board referred the worker for consideration of a permanent partial disability award.

[43] The panel concluded that overlooking the evidence in the 1990 and 1992 medical reports could not be characterized as understandable errors based on misjudgement as there was no evidence the Board had exercised judgement over whether to refer the worker for a pension assessment. The panel determined the oversights were glaring errors that no reasonable person should make. The panel confirmed the worker was

¹² While I am not bound to follow previous WCAT decisions, I find guidance from previous appeals that have considered whether interest is payable because of a blatant Board error.

not entitled to interest on an increased portion of his award, further to a decision of the Workers' Compensation Review Board (Review Board), as that increase arose from the reweighing of evidence.

- [44] In *WCAT-2004-01152*, a WCAT noteworthy decision, the panel found that the reweighing of evidence by an appellate body to reach a different conclusion than the decision of the Board does not amount to a blatant Board error. In that case, the Board had concluded the worker was able to work 32 hours per week at minimum wage. That decision was varied by the Review Board, and the worker was provided with a 100% loss of earnings award. When considering whether interest was payable on the retroactive portion of the worker's loss of earnings award, the WCAT panel found that the Board error was characterized as misjudgement, and did not amount to a glaring error that no reasonable person should make. The panel noted that the weighing of evidence is common in the workers' compensation system where the exercise of judgement is required and decision makers must apply law and policy that is open to interpretation. She found that a difference of opinion does not amount to a blatant Board error.
- [45] The worker has requested I consider the reasoning of the panel in *WCAT-2004-00314*. In that decision, a Board officer had used an incorrect dollar value when calculating the amount of a worker's loss of earnings award. The WCAT panel noted the correct values were available to the Board officer and obvious on the claim file when the decision was made. The WCAT panel noted that a Board officer in the Disability Awards Department would have specific expertise in deciding a worker's pension entitlement. He went on to consider the meaning of "glaring" as contemplated in policy item #50.00 by referring to various dictionary definitions of the word. The panel found the meaning of glaring refers to a clear, conspicuous, and easily seen or detected error. In the facts of that case, the panel found the error was one that would have been easily seen and detected by a reasonable person fully informed of all the circumstances.
- [46] Turning to the facts in this appeal, the July 21, 2010 decision is defined at the outset as the implementation of the July 2009 Review Division decision, which directed the Board to complete further investigations and provide the worker with a new decision on the acceptance of permanent low back chronic pain. While the July 2009 Review Division decision did not address the worker's entitlement to temporary disability benefits, the Board officer in the July 2010 decision also determined the worker was not entitled to further temporary disability benefits after June 8, 2007.
- [47] It is not clear whether the July 2010 decision regarding the worker's entitlement to temporary disability benefits related to the now accepted low back chronic pain condition or generally to all conditions accepted on the worker's claim. Arguably, the singular use of the word "condition" in the phrase "no indication that your condition significantly changed after that time" could be interpreted as referring only to the worker's chronic pain, the matter addressed in the July 2009 Review Division decision. It is not readily apparent to me that the July 2010 decision implemented the March 2009

Review Division decision. Given that the appeal of the July 2010 decision determined the worker's entitlement to temporary disability benefits generally, I will proceed on the basis that the scope of the decision did include the Board's implementation of the March 2009 Review Division decision.

- [48] I agree with the worker that there is insufficient evidence the Board followed the directions of the Review Division as set out in the March 2009 decision. That decision set out four steps the Board was to take. From my review of the claim, it is apparent the Board completed the first of those four steps, as updated medical records were obtained from Dr. Emery.

- [49] The second step required the Board to conduct further medical investigations as set out in Dr. Byrne's June 2008 opinion. This included completing radiological investigations to determine whether the worker had ongoing active degenerative changes at the L3-L4 level. This did not occur. In June 2007 Dr. Cho had also recommended that repeat x-rays of the worker's low back be taken. Again, in March 2010 Dr. Weiss recommended the Board obtain x-rays of the worker's low back to determine the status of the L3-L4 degeneration. The Board did not take steps to obtain updated radiological evidence of the condition of the worker's low back.

- [50] The third step was to obtain an update from the worker as to the status of his condition. While the Board officer did communicate with the worker in late January 2010, he did not seek information from the worker as to the status of his low back condition between August 2008 and January 2010. The fourth step was to provide the worker with a new decision on his entitlement to temporary disability benefits, which, questionably, the July 2010 decision did. The worker has argued that the Board's failure to complete the investigations, as directed by the March 2009 Review Division decision, prior to determining his entitlement to temporary disability benefits constitutes a blatant Board error. I agree for the reasons that follow.

- [51] Section 96.4(8) of the Act provides that a review officer **may** make a decision to refer a Board decision or order under review back to the Board, with or without directions. Section 96.4(9) of the Act provides in part that the Board **must** comply with that decision.

- [52] I agree with the worker that the directions of the review officer in the March 2009 decision, when read together with section 96.4(9) of the Act, created a positive obligation on the Board to conduct further investigations. This included obtaining radiological evidence of the worker's low back and obtaining evidence from the worker as to the condition of his back. I find that the Board's failure to implement the directions of the review officer as set out in the March 2009 decision in the specific facts of this case constitutes a blatant Board error that necessitated the payment of retroactive temporary disability benefits.

- [53] The review officer set out specific instructions for the Board to take in order to determine whether the worker's injury remained temporarily disabling after June 8, 2007. The Board did not follow those instructions. In my view, when a review officer in a referral back to the Board pursuant to section 96.4(8) of the Act sets out specific instructions for the Board to follow, failure to do so may give rise to a blatant error. This situation can be distinguished from the Board's more general obligation to make inquiries pursuant to section 99(2) of the Act and policy item #98.00. The Act at section 96.4(9) mandates that the Board must comply with a Review Division decision, including the instructions provided in a referral back to the Board for a new decision.
- [54] When a review officer decides to refer a matter back to the Board pursuant to section 96.4(8) of the Act, the review officer has discretion as to whether to provide instructions or not. The review officer also has discretion in those instructions to use permissive or more restrictive language. In this case, the review officer set out four steps with specific and detailed instructions, with the use of the word "should". In my view, this afforded the Board little discretion to depart significantly from those specific instructions in the implementation of the March 2009 Review Division decision.
- [55] In the 2011 WCAT decision, the panel specifically found that the Board was not in a position in either June 2007 or July 2010 to be able to determine whether the worker's injuries had reached plateau. This was because the Board had not completed its medical investigations and rehabilitation of the worker's injury. This was the situation in June 2008 when Dr. Byrne recommended the Board undertake further medical investigations. This was also the situation in March 2009 when the review officer noted the Board had failed to undertake any of the medical investigations as recommended by Dr. Byrne. Further to that decision, the Board failed to complete those steps, resulting in the WCAT panel's findings described above.
- [56] This is not a case where the worker's entitlement to a retroactive payment of temporary disability benefits arose from a reweighing of evidence; rather, this is a case where the Board failed to gather medical evidence to be able to reach a decision on the issue, despite being specifically instructed to gather such evidence. I find that this amounts to a blatant error in the specific facts of this case. It is readily apparent from a plain reading of the March 2009 Review Division decision and Dr. Byrne's June 2008 opinion that the Board was required to obtain updated imaging of the worker's lumbar spine to be able to see if there was ongoing active degeneration at the L3-L4 level. The Board was also required to gather evidence from the worker as to his condition. The Board failed to gather this evidence before deciding the worker's entitlement to temporary disability benefits.
- [57] The Board officer in reaching his decision to deny the worker interest on the retroactive payment of his temporary disability benefits concluded the July 2010 decision was not "wrong without question". With respect, whether the decision was "wrong without question" is not the test of a blatant Board error as set out in policy item #50.00. A

blatant error is defined by policy item #50.00 as an obvious and overriding error, and as a glaring error that no reasonable person should make.

- [58] The review officer in part denied the worker interest on the retroactive payment of his temporary disability benefits because the panel in the 2011 WCAT decision did not explicitly state the Board had made an error. This is also not determinative of whether there was a blatant error. A decision of an appellate body that necessitates a retroactive payment need not explicitly state that the Board made an error in order for interest to be payable.
- [59] The review officer also denied the worker interest on the retroactive payment of his temporary disability benefits because his entitlement to the payment arose from the reweighing of evidence to reach a different conclusion. I agree with the worker that the July 21, 2010 Board decision provides little reasoning for terminating his temporary disability benefits effective June 8, 2007. In addition, the panel in the 2011 WCAT decision did not reweigh medical evidence to arrive at a different conclusion from the Board; rather, she found the Board did not have sufficient evidence before it to be able to make a decision on the issue. The Board had previously been instructed to gather medical evidence, but did not do so. I find this is a glaring error that no reasonable person would make when implementing the March 2009 Review Division decision. Two obvious steps in the implementation of the March 2009 Review Division decision were to obtain diagnostic imaging of the worker's lumbar spine and obtain evidence from the worker as to the status of his low back condition after August 2008. The Board's failure to take those steps was an overriding error.

Conclusion

- [60] I allow the worker's appeal and vary the Review Division decision. The Board made a blatant error in the determination of whether the worker was entitled to temporary disability benefits after June 8, 2007, such that he is entitled to interest on the retroactive payment of his temporary disability benefits.
- [61] No expenses were requested in relation to this appeal, and none are apparent from my review. I make no order for reimbursement of expenses.

Debbie Sigurdson
Vice Chair

DS/tv