WCAT Decision Number: WCAT-2015-02729
WCAT Decision Date: August 31, 2015
Panel: James Sheppard, Vice Chair

Introduction

[1] In February 1996 the worker sustained a right shoulder injury. The February 1996 claim included chronic tendonitis of the right shoulder, a lateral clavicular resection of the right shoulder, post-surgical right axillary nerve entrapment injury, rotator cuff tendinopathy and synovitis of the right shoulder, thoracic outlet syndrome, chronic pain, and a Major Depressive Disorder.

[2] *WCAT-2004-03848* dated June 21, 2004 in addressing the original permanent partial disability award (effective February 28, 2000) referred the matter of a loss of earnings back to the Workers Compensation Board, operating as WorkSafeBC (Board). The WCAT panel stated:

> However, the additional conditions accepted (traumatic injury to the axillary nerve, thoracic outlet syndrome and chronic pain/chronic pain syndrome) merit further assessment of their contribution to the worker's permanent partial disability. I therefore direct the Board to re-assess the worker's permanent partial disability to determine the total functional disability. **A loss of earnings assessment should also be undertaken, including the completion of an employability assessment.**
>
> [emphasis added]

[3] *WCAT-2007-03544* dated November 14, 2007 addressed the worker's appeal of a May 23, 2006 Review Division decision. The Review Division confirmed a December 15, 2005 Board decision. This decision, from the Disability Awards Department, followed a reassessment of the worker's permanent disability award. The award was reduced to 2.49% of total disability, effective March 31, 2005 (the permanent partial disability award had been 11.32% of total disability for the right arm, effective February 28, 2000). The Board found the worker was capable of returning to her pre-injury employment.

[4] The Workers' Compensation Appeal Tribunal (WCAT) Vice Chair in *WCAT-2007-03544* varied the Review Division decision by finding that the worker was entitled to an award for chronic pain (effective February 28, 2000). The other aspects of the December 15, 2005 Board decision were confirmed. The WCAT Vice Chair also found:

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> …I order a further assessment of the worker's loss-of-earnings entitlement predicated on the finding that she is not able to return to her pre-injury employment as a flight dispatcher as a result of the medication she takes. This would also rule out air traffic controller or modified versions of these two jobs which require acuity of mental function. I order a further investigation in the form of a psychological assessment of the worker to determine if there are psychological impairments which have not been formally identified and which go beyond chronic pain.

[5] In June 2008 the Board accepted the worker had a compensable Major Depressive Disorder which was permanent.

[6] A March 3, 2009 Board decision letter provided the worker with a permanent partial disability award of 10% of total disability for the worker's permanent Major Depressive Disorder, effective February 5, 2008. The Board denied the worker a projected loss of earnings award.

[7] The worker requested a review of the March 3, 2009 Board decision.

[8] An August 19, 2009 Review Division decision (*Review Reference #R0106062*) referred the issue of entitlement to a projected loss of earnings award back to the Board for further investigation and a new decision. The review officer also directed the Board to determine when the worker's depression stabilized and became permanent and provide the worker with a new decision on the effective date of her pension award for it. The Board was also asked to clarify what limitations were associated with the worker's chronic pain and use of pain medication.

[9] A March 16, 2010 Board decision found the worker's permanent Major Depressive Disorder had become permanent as of June 1, 2003. The worker was found, based upon video surveillance and a medical opinion by a Board medical advisor, not to have additional limitations associated with her permanent chronic right shoulder pain or from the pain medication she took to control her pain.

[10] An April 30, 2010 Board decision found the worker was not entitled to a projected loss of earnings award. The Board found that post-injury employment as a bookkeeper was suitable and reasonably available to the worker in the long run. Employment in that occupation would not result in the worker sustaining a loss of earnings.

[11] The worker requested a review of both the March 16 and April 30, 2010 Board decisions. A December 10, 2010 Review Division decision (*Review Reference #R0117526*) confirmed both of these Board decisions. The worker appealed the December 10, 2010 Review Division decision to WCAT.

[12] *WCAT-2011-01600* dated June 28, 2011 confirmed the decision that the compensable Major Depressive Disorder had become permanent as of June 1, 2003. However, the WCAT panel also found that the worker was entitled to a projected loss of earnings award. She left it up to the Board on the implementation of this decision to determine if there are, in fact, any suitable and reasonably available part-time concrete simple jobs that can accommodate the worker's limitations both in relation to her right upper extremity physical limitations and the significant limitations arising from her pain condition and medication intake.

[13] The April 17, 2012 Board decision, relying on a December 2011 employability assessment, granted the worker a partial loss of earnings award, based upon the suitable occupation of telemarketer, effective February 28, 2000. A November 2, 2012 Review Division decision (*Review Reference #0144677*) confirmed the April 17, 2012 Board decision.

[14] *WCAT-2013-01992* dated July 12, 2013 allowed the worker's appeal of the Review Division decision. The WCAT panel granted the worker a 100% loss of earnings award. The Board implemented this WCAT decision in July 2013.

[15] The worker's legal counsel asked the WCAT panel to address the issue of interest. In an addendum dated September 5, 2013 the WCAT panel advised that because the issue of interest had not been addressed in the April 17, 2012 Board decision he would not exercise his discretion to address the issue.

[16] On September 19, 2013, the worker wrote to the Board asking for interest on her retroactive lump sum payments.

[17] A November 20, 2013 Board decision denied interest on the retroactive payments.

[18] A June 11, 2014 Review Division decision (*Review Reference #R0171059*) confirmed the November 20, 2013 Board decision.

[19] The worker appealed the June 11, 2014 Review Division decision to WCAT.

[20] The worker is represented by legal counsel. The employer is not participating in the appeal.

Issue(s)

Whether the worker is entitled to interest on retroactive payments for his projected loss of earnings award. If so, the date from which interest should be paid.

[21] The review officer made the preliminary determination that the Review Division did not have jurisdiction to find that policy item #50.00 *Rehabilitation Services and Claims Manual Volume I and II* was patently unreasonable.

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[22] The worker's legal counsel, on the notice of appeal, states that the Review Division wrongly rejected jurisdiction over this matter. In his September 19, 2014 written submission he requests a copy of a Review Division decision (*Review Reference #R007070)* which is not available on the Board's external website, but was quoted by the review officer in the June 11, 2014 Review Division decision concerning this preliminary determination. This decision along with *Review Reference #R0064456* are cited by the review officer as having decided that the Review Division does not have jurisdiction to find a Board policy patently unreasonable (this Review Division decision is posted on the external WorkSafeBC website at www.worksafebc.com).

[23] The worker's legal counsel submits that the Review Division misunderstood the submissions being made to it. I have reviewed and considered his submissions to the Review Division. He submits that the Review Division has authority at common law to determine whether the Board's interest policy is "unreasonable" because it requires a blatant Board error for interest to be payable.

[24] However, section 99 of the Act provides that the Board "must" apply a policy of the board of directors. The Review Division is part of the Board, and therefore it is required to apply section 99, and therefore applicable policy. There is no suggestion in the language of section 99 of the Act that the Review Division has at common law the authority to declare the Board's interest policy to be "unreasonable" because it requires a blatant Board error for interest to be paid. In fact, such language would displace any suggested common law authority.

[25] If the legislature had intended the Review Division to have the authority to declare a Board policy to be void it could not have been on the basis of "reasonableness" as expressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9 as the legislation creating the Review Division was enacted in 2002.

[26] Further, I note the statement in *Western Stevedoring Co. v. British Columbia (Worker's Compensation Board)* 2005 BCSC 1650 wherein Mr. Justice Groberman states: "The reviewing officers have no jurisdiction to even inquire into the validity of policy. It is clear that the statute does not intend that decisions as to the jurisdiction of the board of directors to implement a particular policy be made at their level."

[27] I acknowledge that item #A4.2.1 of the *Review Division Practices and Procedures Manual* provides that the Review Division will consider issues raised by parties under the *Human Rights Code of BC* and the Canadian Constitution, including the *Canadian Charter of Rights and Freedoms*. If it is determined that the challenge has merit, the board of directors has directed the review officer not to apply the policy affected to the particular case under consideration. The issue related to the policy will be referred to the Board to consider whether changes should be made. However, the challenge to the Board's interest policy in this case is premised on the common law authority to declare a policy "unreasonable" because the policy requires a blatant Board error before interest

can be paid, not on the basis of a violation of the *Human Rights Code of BC* or the Canadian Constitution.

[28] The worker's legal counsel has asked that I obtain and provide him with a copy of *Review Reference #R007070* and a further opportunity to provide a written submission on this matter. I find that this step is unnecessary. Although I acknowledge the unfairness in the review officer relying upon an unpublished Review Division decision (as well as undisclosed) it would not be binding on me. I owe no deference to this Review Division decision, nor the one before me. After considering all of the arguments made by counsel I have found that the Review Division does not have the common law authority to determine whether or not the Board's interest policy is "unreasonable" because it requires a blatant Board error before interest can be paid.

[29] The board of directors of the Board issued a determination in July 2012 in response to the former chair's 2012 WCAT decision which requires WCAT to apply policy item #50.00 to the matter of interest.

[30] On April 18, 2012 the former WCAT chair determined under section 251 of the *Workers Compensation Act* (Act) in *WCAT-2012-01017* that the requirement in policy item #50.00 for a "blatant Board error" to qualify for the payment of interest on retroactive compensation was so patently unreasonable that it was not capable of being supported by the Act.

[31] On July 17, 2012, the board of directors of the Board issued a determination under section 251(6) of the Act. The board of directors determined that policy item #50.00 regarding the payment of interest was not patently unreasonable and that WCAT must apply it. They found that the blatant Board error test was rational when considered in light of the objectives and purposes of the Act, and was therefore neither arbitrary nor discriminatory. That determination has not been set aside by a court and remains valid. WCAT is bound by that determination as a result of section 251(8) of the Act.

[32] In passing, I note that *WCAT-2005-03622- RB* was overturned on judicial review (*Johnson v. WCB*, 2007 BCSC 1410). That judicial review decision was set aside by the British Columbia Court of Appeal (*Johnson v. BC (WCAT)*, 2008 BCCA 232). The Court of Appeal did not consider the substantive question of whether the Supreme Court erred in determining that item #50.00 was unreasonable.

Jurisdiction and Procedure

[33] The appeal was filed with WCAT under section 239(1) of the Act, which provides for appeals of final decisions by review officers regarding compensation matters.

[34] Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

[35] This is a rehearing by WCAT. WCAT reviews the record from previous proceedings and can hear new evidence. WCAT has inquiry power and the discretion to seek further evidence, although it is not obliged to do so. WCAT exercises an independent adjudicative function and has full substitutional authority. WCAT may confirm, vary, or cancel the appealed decision or order.

[36] The standard of proof is the balance of probabilities, subject to section 250(4) of the Act. Section 250(4) provides that if WCAT is hearing an appeal regarding the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

[37] I am bound to apply the published policies of the board of directors of the Board, subject to the provisions of section 251 of the Act. As previously mentioned given the determination made by the board of directors of the Board WCAT cannot refuse to apply policy item #50.00 of the RSCM Volume I and II as it read before the amendments to this policy effective January 1, 2014.

[38] The worker requested that the appeal be heard in writing, through written submissions. I am able to consider the appeal through a different procedure, including an oral hearing, if I consider it necessary. I have reviewed the issues, evidence, and submissions on the worker's file and presented to WCAT and considered the rule and the other criteria set out in the WCAT *Manual of Rules of Practice and Procedure* at item #7.5. There is no significant credibility issue. Any disputed factual issues concerning this appeal can be determined through a review of the file material and the evidence and/or submission provided. Because the appeal issue rests primarily on questions of mixed fact, law, and policy, I find that I can decide this appeal without an oral hearing.

Reasons and Findings

Law, Policy, and Practice

[39] By resolution dated October 15, 2001 ("Calculation of Interest," 2001/10/15-03), the former panel of administrators resolved as follows (quoted, in part):

> 2. Policy item #50.00 is also amended to provide new criteria for determining when it is appropriate for the Board to pay interest in situations other than those expressly provided for in the Act. The amended policy will provide for interest on retroactive wage-loss and pension lump- sum payments where it is determined that a blatant Board error necessitated the payment. For an error to be "blatant" it must be an obvious and overriding error.
> …

> 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.**

[40] The amended policy at item #50.00 provided, in part:

> With respect to compensation matters, the Act provides express entitlement to interest only in the situations covered by sections 19(2)(c) and 92(3). In these situations, the Board will pay interest as provided for in the Act (see policy items #55.62 and #105.30).
>
> The Board has discretion to pay interest in situations other than those expressly provided for in the Act. In these situations, interest may be paid subject to the following conditions:
>
> > The retroactive payment is to a worker or employer in respect of a wage-loss payment (provided under sections 29 and 30 of the Act) or a pension lump-sum payment (provided under sections 22 and 23 of the Act).
> >
> > It has been determined that there was a blatant Board error that necessitated the retroactive payment. For an error to be "blatant" it must be an obvious and overriding error. For example, the error must be one that had the Board officer known that he or she was making the error at the time, it would have caused the officer to change the course of reasoning and the outcome. A "blatant" error cannot be characterized as an understandable error based on misjudgment. Rather, it describes a glaring error that no reasonable person should make.

[41] The first bulleted point in the amended policy was subsequently further amended on 2006 to provide:

> 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 dependant of a deceased worker in respect of a payment provided under section 17 of the Act.

[42] The February 21, 2006 policy resolution (2006/02/21-04, "Interest on Survivor Benefits"), approved amendments to item #50.00 of Volumes I and II of the RSCM, effective March 1, 2006. The policy resolution provided that the amendments "are approved and apply to all decisions, including appellate decisions, made on or after March 1, 2006." Accordingly, the March 1, 2006 policy amendments are applicable in this appeal (see *WCAT-2005-03622-RB* dated July 8, 2005, "Precedent Panel - Payment of Interest on Retroactive Benefits," 21 WCR 205, regarding the interpretation of the language in the application statement). These amendments did not affect the requirement that there have been a blatant Board error that necessitated the retroactive payment.

[43] Practice Directive #28, "Interest on Retroactive Wage Loss and Permanent Disability Lump-Sum Benefits," was effective March 3, 2003. (Practice directives are not policy, and are not binding.) This included examples of situations which would, and would not, constitute a blatant Board error, in Appendix A:

> Blatant Board Errors
>
> 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.
>
> The wrong body part was adjudicated. For example, a decision was made to disallow a claim for a left knee injury. It was evident that the worker's claim was for a right knee injury. Had the Board officer adjudicated entitlement for an injury to the correct knee, it would have caused the Board officer to change the course of reasoning and the outcome.
>
> 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.
>
> No Blatant Board Error
>
> 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.

> 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.

[44] Practice Directive #C7-2, "Interest," dated March 1, 2006, replaced Practice Directive #28. This provided the same list of examples, in Appendix A, of situations which would, and would not, constitute a blatant Board error.

[45] On November 20, 2013, the board of directors of the Board amended policy item #50.00. The new interest policy applies to Board decision issued on or after January 1, 2014, not appellate decisions. The blatant Board error test continues to be applied to appeals arising from Board decisions made before January 1, 2014, as is the case in this appeal.

Preliminary Matter

[46] In his September 19, 2014 written submission the worker's legal counsel requests that I suspend or put on hold this appeal until the courts have completed their deliberations in the second *Lockyer-Kash* proceeding. The court proceeding was certified a class proceeding in 2014. The worker's legal counsel submits that the worker's claim for interest falls squarely within the class membership and common issues established by the Supreme Court of British Columbia (*Lockyer-Kash v. WCB*, 2014 BCSC 1443). I note that the decision to certify this a class action proceeding was overturned by the British Columbia Court of Appeal (*Lockyer-Kash v. WCB*, 2015 BCCA 70). That decision is subject to a leave to appeal application to the Supreme Court of Canada. In the meantime, the Supreme Court of British Columbia had decided to wait until that leave application is decided before proceeding with a judicial review application examining the lawfulness of policy item #50.00.

[47] The worker's legal counsel states that the legal issue in this appeal is "*sub judice*"[1], and WCAT should not proceed until the court proceedings conclude. He submits that the second *Lockyer-Kash* proceeding may (will) find the policy is still patently unreasonable.

[48] I find that it is appropriate to proceed to address the merits of the appeal even in light of these further court developments. As previously stated on July 17, 2012, the board of directors of the Board issued a determination under section 251(6) of the Act. The board of directors determined that policy item #50.00 regarding the payment of interest was not patently unreasonable and that WCAT must apply it. They found that the

[1] Latin for "under judgment", means a particular matter is being considered by the court

blatant Board error test was rational when considered in light of the objectives and purposes of the Act, and was therefore neither arbitrary nor discriminatory. That determination has not been set aside by a court and remains valid. WCAT is bound by that determination as a result of section 251(8) of the Act.

[49] Further, I have considered the delay these court proceedings may cause in addressing the merits of the worker's appeal; the legislative requirements of section 245 and 250(2) of the Act that WCAT apply the policy of the board of directors, and that WCAT issue its decisions within certain specified time frames; and that this is not a situation for which a suspension of the appeal is authorized under sections 246(3), 249, 251, or 252 of the Act.

Reasons and Decision

[50] I have read the disclosed worker's electronic claim file as it relates to the payment of interest on the retroactive permanent disability benefits payments. I do not find it necessary to restate all of this information and the submissions made, but will refer to them to the extent necessary to explain my decision. Prior appellate decisions, including *WCAT-2013-01992* have outlined the background of the worker's claim.

[51] The worker's legal counsel submitted to the Review Division that interest should be paid on the retroactive payments because:

- The Board had a duty to decide the issue of interest when it provided the retroactive lump sum payments. By failing to apply policy, the Board officer fell into overriding error by neglecting the duty to decide. This along is sufficient to entitle the worker to interest. A delay of nearly 2 years is also an independent Blatant error.

- WCAT did not "re-weigh" the evidence. WCAT rejected the employability assessment and applied current law and policy that the Board failed to apply. Failing to apply relevant law and policy is not a re-weighing, but rather a blatant error that no reasonable person would make in any circumstances. The Board misread the instructions that were given by the WCAT panel in *WCAT-2011-01600* dated June 28, 2011. The Board failed to comply with this WCAT decision. The WCAT panel that issued the July 12, 2013 recognized this error and found the Board had failed to apply law and policy. He did not re-weigh the evidence. He rejected the flawed employability assessment on the grounds that it did not address binding policy. It was on this basis the panel concluded that the worker was entitled to a 100% loss of earnings pension.

- The worker relies upon *WCAT-2013-00544* dated February 27, 2013 and Noteworthy *WCAT-2013-01282* dated May 10, 2013.

[52] The worker continues to rely upon these submissions. On the notice of appeal her legal counsel submits that interest should be granted on all retroactive benefits.

[53] In his September 19, 2014 written submissions he states that the Board's failure to adequately investigate and to apply policy, and its excessive delays in the adjudication of the claim, accumulate into the realm of "blatant" errors. The reason that appellate decisions vary initial Board decisions include inadequate adjudication, inadequate investigations in gathering evidence and medical opinions and conducting assessments, and mistakes in interpreting law and policy and the medical opinions, such as demonstrated by the series of proceedings that eventually led to the granting of a 100% loss of earnings pension to this worker. The appeals were undertaken precisely in order to correct Board errors of various kinds. It is incongruous to decline to pay interest on the ground that the WCAT decision(s) were based on a reweighing of the available evidence, which is not a blatant error. At least when taken as a whole, these errors amount to "blatant" errors when viewed in the context of an expert tribunal that enjoys a statutory exclusive jurisdiction.

[54] *WCAT-2011-01600* confirmed the decision that the compensable Major Depressive Disorder had stabilized and become permanent as of June 1, 2003. The worker was entitled to a permanent partial disability award for her psychological condition as of June 1, 2003. The WCAT panel also found that the worker was entitled to a projected loss of earnings award. She considered both the worker's evidence and the video surveillance evidence in determining whether or not the jobs identified by the Board were suitable. She did express concerns over how the Board had used the video surveillance evidence, to the exclusion of all other evidence and without first disclosing the video surveillance evidence to the worker for comment which was their practice. She placed less weight on a Board medical advisor's clinical opinion regarding the extent of the worker's compensable limitations based on video surveillance footage. The panel acknowledged, as did the subsequent panel that issued *WCAT-2013-01992,* that there was "conflicting medical evidence and opinion regarding the worker's employability." The panel considered the evidence provided by Drs. Armstrong and Davidson, and the medical opinion provided by the worker from Dr. Clemans-Gibbon, an attending physician. She placed weight on the expert evidence/opinion of the external vocational rehabilitation consultant (the same opinion considered by the WCAT panel in the appeal heard in 2007; the consultant also testified at the oral hearing in 2007). The panel found that the jobs identified by the Board were not suitable given her limitations. The WCAT panel found the worker was entitled to a projected loss of earnings award because her compensable conditions would limit her to employment at "concrete simple jobs" on a very part-time basis. The WCAT vice chair stated:

> **There is some evidence that suggests the worker may be able to perform simple work tasks on a very part-time basis**, as suggested by both Drs. Armstrong and Davidson. The external vocational rehabilitation consultant also suggested this may be a possibility, but he was not able to envision an actual job that would accommodate the worker's cluster of

> limitations and restrictions. I leave it to the Board on the implementation of this decision to determine if there are, in fact, any suitable and reasonably available part-time simple work jobs that can accommodate the worker's limitations both in relation to her right upper extremity physical limitations and the significant limitations arising from her pain condition and medication intake. **It is apparent; however, given my finding the worker is limited to only part-time employment at concrete simple jobs, she will be entitled to a loss of earnings award.**
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> [emphasis added]

[55] In *WCAT-2013-01992* the panel found that the case manager and the review officer had both unreasonably misinterpreted the instructions of the WCAT vice chair who issued the June 28, 2011 WCAT decision. They misinterpreted her decision to mean the worker was capable of regularly scheduled work as a telemarketer. They concluded that the worker was capable of working a 20 hour week making $12 per hour. The WCAT panel stated:

> **With respect to this decision it is necessary to point out that the previous vice chair found the worker may be able to perform simple work tasks on a very part-time basis. This decision was very cautiously worded as the vice chair was aware that the medical evidence from Drs. Armstrong and Davidson and the assessment by the external vocational rehabilitation consultant was that they were not able to envision an actual job that would accommodate the worker's cluster of limitations and restrictions. The previous vice chair actually stated that she left it up to the Board to determine if there were in fact <u>any</u> suitable and reasonably available part-time simple work jobs that could accommodate the worker's limitations both in relation to her right upper extremity physical limitations and the significant limitations arising from her pain condition and medication intake. The findings by the vice chair did not in any way bind the Board to find the worker was able to perform part-time employment.**
>
> The issue of available jobs was addressed in *Young v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011, BCSC 1209. In this decision the court considered policy item #40.12. It quoted the portion of the policy that provided:
>
> > … the phrase "available jobs" does not mean any job position in which there are vacancies. An available job means one reasonably available to the claimant in the long run. For example, a city may have several theatres, and

> there may be occasional job vacancies for the position of theatre usher; but if there are always numerous better qualified applicants and the realities are that a worker with the particular disability is not likely to obtain such a job, that is not a reasonably available job.
>
> The Court found that by relying on a Vocational Rehabilitation Consultant's report **based only on statistics obtained from various government databases,** the Board failed to analyze the words of the policy and therefore the question of whether the Petitioner was competitively employable. The Court stated that the very purpose of the words is to prevent a decision being made only on statistics. The Court said that neither the Board decision nor the Vocational Rehabilitation Consultant's report referenced the likelihood of the worker, with her particular disability, obtaining such a job if there are always better qualified applicants.
>
> **Given the overwhelming weight of medical opinion evidence on the claim file, I find employment as a telemarketer is beyond the worker's physical capability and is not suitable. I further find that employment as a telemarketer is not reasonably available as the worker would not be competitive given the limitations resulting from her reliance on pain medication. Accordingly I allow the worker's appeal. I find the worker is competitively unemployable. I find she is entitled to a total loss of earning award.**
>
> [emphasis added]

[56] With respect to the review officer (June 11, 2014 Review Division decision) I disagree with his characterization of the Board error that misinterpreted the June 28, 2011 WCAT decision with respect to her decision about the worker's ability to work. The subsequent WCAT panel (quoted above) found this misinterpretation "unreasonable". The WCAT panel in the June 28, 2011 decision made a clear finding that the worker was **limited to concrete simple jobs on a very part time basis.** She found the worker was entitled to a loss of earnings award. She instructed the Board to conduct further investigation and adjudication into whether there were **any** suitable and reasonably available concrete simple jobs on a very part time basis. The blatant Board error was committed when the Vocational Rehabilitation Consultant misinterpreted the June 28, 2011 WCAT decision instructions when completing the December 2011 employability assessment.

[57] The December 2011 employability assessment was then relied upon by the case manager, long term disability and occupational disease services, in rendering the April 17, 2012 Board decision. In turn the November 2, 2012 Review Division decision confirmed this blatant Board error. The blatant Board error was an obvious and overriding error. This blatant Board error was one that had the Board officer (Vocational

Rehabilitation Consultant) known that they were making the error at the time would have caused the officer to change the course of the Board's reasoning and the outcome with respect to the worker's entitlement to a projected loss of earnings award. 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.

[58] Because I have found a blatant Board error the issue arises as to when interest should be calculated from based upon the provisions of policy item #50.00.

[59] Although it is debatable as to whether I should determine this matter or leave it up to the Board to determine, the worker's legal counsel has argued it to me and for purposes of finality I find it appropriate to make this determination.

[60] The worker's legal counsel submits that interest should be calculated from the date of plateau – which I take to mean from the effective date of the projected loss of earnings award (February 28, 2000). He cites *WCAT-2008-02861* dated September 26, 2008 in support of the argument that if interest is payable it should be paid from the first day of the month following the effective date of the worker's projected loss of earnings pension award (February 28, 2000), as that is the commencement date of the retroactive benefit, and not from the date of the blatant Board error.

[61] Policy item #50.00 states, in part:

> 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.

[62] I agree with the analysis in *WCAT-2008-02861* that the plain meaning of policy item #50.00 (quoted above) requires that interest will be calculated from the first day of the month following the effective date (February 28, 2000) of the worker's projected loss of earnings award, as that is the commencement date of the retroactive benefit. I adopt this analysis as my own.

[63] Because I have found that interest is to be calculated as outlined above there is no need to explore whether there are other blatant Board errors prior to the one committed in December 2011, as the remedy would be the same.

Conclusion

[64] The worker's appeal is allowed. I vary the June 11, 2014 Review Division decision (*Review Reference #R0171059*). The worker is entitled to interest on the retroactive payments. Interest will be calculated from the first day of the month following the effective date (February 28, 2000) of the worker's projected loss of earnings award, as that is the commencement date of the retroactive benefit.

[65] No appeal expenses were requested and none are ordered.

James Sheppard
Vice Chair

JS/ec