

Decision of the Review Division

Number: 9775 and 9777
Date: May 6, 2004
Review Officer: Susan Nickerson-Graham
Subject: Payment of Interest

The worker, through his representative, requests a review of the decisions of the Workers' Compensation Board (the "Board") dated July 31, 2003 and August 7, 2003. In support of these requests for review, the worker's representative has provided written submissions. The employer was given notice of the review and has chosen to participate. The employer has not filed any submissions with respect to this review.

Section 96(6) of the *Workers Compensation Act* ("Act") gives a review officer authority to conduct this review.

Issue

This is a review of the Board's decisions to deny the payment of interest on the worker's permanent partial disability award.

Background

The worker sustained compensable heart attacks in 1989 and in 1999. The Board declined to refer the worker for assessments of permanent partial disability. The worker appealed to the Review Board, which returned the worker's claim files to the Board for referrals to the Disability Awards Department for pension assessments.

By decisions dated July 31, 2003 and August 23, 2003, a Board officer granted the worker permanent functional awards under both the 1989 and 1999 claims but declined to award interest. The worker seeks a review of the decisions to decline to pay interest.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- The worker was a firefighter when he sustained a myocardial infarction in May 1989. The Board accepted the worker's claim under section 6(1) of the former Act and paid wage loss to August 1989 when the worker returned to his pre-injury employment. The worker sustained a second myocardial infarction on July 29, 1999. The Board accepted the worker's claim and paid wage loss to the end of September 1999 when the worker returned to his pre-injury employment.

- By decision dated November 1, 2000, the Board declined to consider the worker for a pension on the 1999 claim on grounds that the worker returned to the same job at the same rate of pay as before his heart attacks. A June 12, 2001 decision letter similarly denied a pension on the 1989 and the 1999 claims. A June 18, 2001 decision confirmed the November 1, 2000 decision. There are also decisions dated January 28, 2002 and March 19, 2002 confirming the June 12, 2001 decision in relation to the 1989 claim and the 1999 claim respectively and apparently creating new appeal rights.
- The worker appealed to the former Review Board.
- A Review Board finding dated February 25, 2003, as amended on May 29, 2003, allowed the worker's appeal and entitled the worker to be considered for permanent partial pensions under section 23(1) of the former Act.
- The Review Board was unable to find anything in law or policy that justified a refusal to consider the worker for a pension. The Review Board said that the worker was in receipt of temporary wage loss for temporary disability for periods after each of his myocardial infarctions. He was thus disabled from earning full wages and met the test in section 6(1) for the purpose of establishing his entitlement to compensation for occupational disease. The Review Board said that there is no requirement that the worker meet the economic test again as a prerequisite for a pension. The fact that the worker returned to his pre-injury employment at the same job and rate of pay is no obstacle to consideration for a permanent disability pension.
- By decision dated July 31, 2003, the worker was awarded a permanent disability award of 5% of total disability on his 1999 claim, on a loss of function basis, retroactive to September 29, 1999. By decision dated August 7, 2003, the worker was awarded a permanent disability award of 10% of total disability on his 1989 claim, on a loss of function basis, retroactive to August 20, 1989. Attached memoranda to each decision notes:

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

Submission

The worker's representative submits that the Review Board finding was in keeping with a series of previous decisions of the former Appeal Division. The representative argues that in all of these decisions, as a matter of law, the test of being "thereby disabled from earning full wages at the work at which the worker was employed" under section 6 is met if a worker sustained any loss of wages at any stage of the claim. This is commonly referred to as the "economic test" and the representative argues that appeal decisions continually found the requirement of a second economic test as a prerequisite to a pension to be illegal; however, the Board did nothing.

The representative submits that while Board practice changed in May of 2003, the change was too late to allow the worker to avoid the expenses of the appeal process. In eventually

implementing the awards, the Board denied the worker interest on grounds that the claims were handled according to practice and did not qualify as blatant Board error as per the interest policy.

The representative submits that the Review Board findings are binding, including the determination that the Board's practice was not consistent with either the Act or policy. Thus, the managerial decisions attempting to maintain such a discredited practice must constitute a blatant Board error. The representative maintains that the errors were obvious and overriding. They were not "understandable errors based on judgment" but clearly glaring errors that no reasonable person could make.

Law and Policy

Policy item #50.00 provides, 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 258. In these situations, the Board will pay interest as provided for in the *Act*.

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 permanent disability 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. . . .

Reasons and Decision

I deny the worker's requests for the following reasons:

- Policy item #50.00 refers to a "blatant" Board error. The *Concise Oxford Dictionary* (9th ed.), defines blatant as "flagrant, unashamed (blatant attempt to steal)" and flagrant as "glaring; notorious; scandalous." The current chair of the Workers' Compensation Appeal Tribunal in WCAT decision 2004-01290 said that, "for interest to be payable, the Board officer must have made an extraordinary error and disregarded appropriate adjudicative practices." I agree with her analysis.

- The policy on interest is discretionary but it must also be noted that it is intentionally restrictive. In October, 2001, the former Panel of Administrators announced the intent behind the October 15, 2001 amendments to policy item #50.00:

... With respect to compensation matters, more restrictive criteria for determining when it is appropriate to pay interest in situations other than those expressly provided for in the *Act* have been developed. Interest will be provided if a “blatant Board error” necessitates a retroactive wage-loss or pension lump-sum award. This test is presently used to determine when interest may be provided to employers due to an overpayment of assessment. For an error to be “blatant” it must be an obvious and overriding error. . . .

- In order to consider whether there was a blatant Board error in the circumstances of this case, it is necessary to consider the issue in context. In the case at hand, the Board officer declined to refer the worker for pension assessments on grounds that the worker returned to the same job at the same rate of pay as before his heart attacks. This was an established practice of the Board based arguably on one of two statutory interpretations set out as follows:

- Under section 6(1) of the Act, a worker who suffers from an occupational disease must be disabled from earning full wages in order to be entitled to compensation other than health care benefits. This is often referred to as the “economic test.”

- Historically, there have been two interpretations on the application of the “economic test” under section 6(1) and how it relates to the various forms of compensation under the Act.

- One interpretation is that the economic test applies separately in relation to the different types of compensation payable for occupational diseases. Under this interpretation, a period of temporary disability satisfies the “economic test” for initial wage loss entitlement; however, a worker must still satisfy the “economic test” a second time before a section 23(1) award may be granted.¹ This interpretation supports the Board practice between 1989 and the end of 2003 (with the exception of 1993 to 1996).

- In adopting this interpretation, reference has been made to policy item #26.30, “Disabled from Earning Full Wages at Work” in support. The policy provides that the phrase “disabled form earning full wages”:

... means that there must be some loss of earnings from such regular employment as a result of the disabling affects of the disease, and not just an impairment of function. . . .

- A second interpretation is that the “economic test” must only be met once in order for all compensation to be payable notwithstanding the benefit. Under this interpretation, a worker meets the “economic test” through any period of temporary disability and does

¹ With exceptions for claims for silicosis, asbestosis, pneumoconiosis, and noise-induced hearing loss.

not need to be disabled from earning full wages over the long term to be entitled to a section 23(1) award. This interpretation supports the Board practice from 1993 to 1996 and the current practice (since May 2003).

- Support for this interpretation is found in sections 6 and 23. Under section 6(1), in order to be entitled to compensation benefits, the worker must be disabled from earning full wages. However, an award under section 23(1) reflects the extent to which a particular injury is likely to impair a worker’s ability to earn wages over the long term. There is no express provision in section 23(1) that entitlement to an award is dependent on a worker suffering an actual loss of earnings.
- Reference has also been made to a number of decisions of the former Appeal Division which adopted the second interpretation of section 6(1) as more viable.
- Over the years, the Board has varied its practice on the issue and has now adopted a practice in keeping with the second interpretation. It is not clear what persuaded the Board to change its practice in May 2003; however, it should be noted that the Core Reviewer recommended that the Board revise its published policies to reflect the second interpretation.²
- I do not consider that where there is more than one interpretation of law and policy, the adoption of one option over another is a blatant Board error in the context policy of item #50.00. I do not consider that the Board officer, in following established practice, made an extraordinary error and disregarded appropriate adjudicative practices.
- Further, policy item #50.00 is a discretionary provision in relation to an award of interest with respect to specific decisions on compensation matters. In context, interest is payable in relation to a decision made by a Board officer and not in relation to an adjudicative practice adopted by the Board, adherence to which a Board officer would be obligated to follow.
- In the circumstances of this case, I believe that the Board officer reasonably relied on his understanding of Board practice under the Act. The WCAT in decision 2003-01087-RB had occasion to consider a request for interest in a similar situation. In that decision, the Board officer applied a policy in keeping with Board practice even though a previous Review Board panel had found the related policy unlawful. The WCAT said that the Board officer relied on her understanding of the intent of the policies in reaching her conclusion. The WCAT said that in view of the fact that there was a lack of clarity regarding the precise intent of the policies applicable to a loss of earnings award where the worker’s earnings are below the statutory minimum, a blatant Board error did not result.
- Finally, policy item #50.00 provides by example that a blatant Board error is 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. This does not apply in the circumstances of this case, as the Board officer knowingly denied the worker a pension, given the Board’s established practice at that time.

² Alan D. Winter, *Core Services Review of the Workers’ Compensation Board*, March 11, 2002, at page 165.

Bearing in mind all of the above, I find that the Board officer's refusal to award pensions in decisions between November 2000 and March 2002, in light of the adjudicative practice to not do so, as adopted by the Board, is not a blatant Board error.

As a result, I deny the worker's requests for review.

Conclusion

As a result of this review, I confirm the Board's decisions of July 31, 2003 and August 7, 2003.