

DISCUSSION PAPER

1. TITLE

Interest on Survivor Benefits

2. ISSUE

The *Workers Compensation Act* (“*Act*”) provides for certain types of mandatory benefits that must be paid when an injury or fatality arises out of and in the course of employment. This includes the payment of wage-loss and pension benefits to workers, and the payment of compensation to the surviving dependants of deceased workers.¹

While the current policy provides for interest payments on retroactive wage loss and pension benefits that are the result of a blatant Board error, interest payments are not provided for survivor benefits.²

At issue is whether the interest policy should be expanded in scope to provide for interest payments on retroactive section 17 survivor benefits that are the result of a blatant Board error.

3. BACKGROUND

3.1 Law and Policy

With respect to compensation matters, the *Act* currently provides express entitlement to interest in only the following two situations:

- Section 19(2) – Interest payments to surviving spouses of deceased workers whose benefits had been terminated on remarriage.
- Section 258(5) – Interest payments on any compensation benefits awarded by the Review Division but for which payment of the benefit was deferred pending a decision of the Workers’ Compensation Appeal Tribunal (“WCAT”).

Despite the limited situations in which WorkSafeBC – the Workers’ Compensation Board (“WCB”) is legislatively obliged to provide interest, the WCB has exercised its discretionary authority to provide interest in other circumstances.

¹ Wage-loss benefits are provided by sections 29 and 30, pension benefits by sections 22 and 23, and survivor benefits by section 17 of the *Act*.

² The term “blatant Board error” reflects the language contained in the interest policy, item #50.00 of Volumes I & II of the *Rehabilitation Services & Claims Manual*. In this context, the term “Board” is in reference to the WCB, otherwise known as WorkSafeBC.

The first instance of this was on January 24, 1979, when the prior Commissioners of the WCB instituted a policy that interest would be paid on retroactive lump sum payments where the pension was for a permanent disability that was previously overlooked or for which it was previously decided that no payment was due. Effective November 26, 1981, the WCB extended this policy to cover retroactive wage loss payments.³

In October 2001, the former Panel of Administrators (“POA”) approved significant changes to the *Rehabilitation Services & Claims Manual* (“RS&CM”) interest policy. The policy revisions included a change in the method of calculation for interest, and the limitation of interest to cases involving a blatant Board error. The resulting policy, item #50.00, *Interest*, of Volumes I and II of the *RS&CM*, provides that 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.

The appellate bodies have debated whether interest payments were appropriate on retroactive survivor benefits under the pre-2001 policy. In Appeal Division decision #2001-2137, the panel considered the wording of the policy in effect at that time, and concluded that the reference to the payment of interest to a “worker” included survivors. It is noteworthy that this interpretation was based on a version of the policy which did not reference specific sections of the *Act*. In contrast, the current policy expressly identifies sections 22, 23, 29 and 30 as the particular types of retroactive benefits to which interest payments may be applied.

The Policy and Research Division (“PRD”) is advised by the Worker and Employer Services Division that prior to 2001, the provision of interest payments on retroactive survivor benefits under section 17 of the *Act* was not common, but did occur in some instances. In most cases, the payment of interest on survivor benefits was the result of a direction from an appellate decision.

³ Decision No. 346 5 *WCR* 124. This policy was further revised to remove an application statement by Decision No 384, 5 *WCR* 207, effective May 7, 1984.

4. DISCUSSION

As noted, the *Act* requires the WCB to provide interest payments on compensation matters in only two circumstances, as set out in sections 19(2) and 258(5) of the *Act*. The WCB is not legislatively obliged to provide interest payments in any other circumstance.

While the WCB has exercised its discretionary policy-making authority to provide interest payments in other circumstances, namely on retroactive wage-loss and pension benefits that are the result of a blatant Board error, there is no policy in place to provide interest on survivor benefits.

Clearly the *Act* distinguishes between workers, employers and surviving dependants, particularly in the manner in which compensation is calculated. This implicitly authorizes the WCB to make distinctions between these groups when making policies.

However, despite the statute's differential treatment of the various groups who may receive benefits, it is noted that wage-loss, pensions and survivor benefits are similar in that they are all mandatory provisions under the *Act*, as payment must be made if eligibility criteria are met. Furthermore, workers and surviving dependants are in an analogous situation, as they are both in the same situation of being without the use of the award for some time and potentially facing financial hardship until the retroactive payment is made.

5. OTHER JURISDICTIONS

The majority of Canadian jurisdictions, namely Alberta, Manitoba, Nova Scotia, the Northwest Territories and Nunavut, Prince Edward Island and New Brunswick, do not provide interest to workers or survivors on retroactive benefits.⁴

In 2004, the Nova Scotia Workers Compensation Board was challenged in the court system for its practice of denying interest payments on retroactive survivor benefits. The Nova Scotia Court of Appeal found that because the Nova Scotia *Workers Compensation Act* did not provide for the payment of interest on survivor benefits, the WCB was under no obligation to pay interest.⁵

In addition to British Columbia, the Yukon and Newfoundland & Labrador have legislative provisions in place for the payment of interest to workers and survivors.

The Yukon's legislation provides that, "where compensation is payable, the adjudicator, hearing officer, or appeal tribunal shall order that interest be paid on

⁴ By regulation, Alberta may pay interest in special situations by Board order, however, the provision has rarely been applied, and interest on retroactive benefits is rarely paid.

⁵ *Boyle Estate v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (2004), 225 N.S.R. (2d) 69 (C.A.)

such compensation in accordance with board policy and the board shall pay such interest". The policy guidance sets out that interest shall be paid to workers and dependants on compensation benefits where the adjudication of a claim for a worker was delayed due to circumstances within the control of the board. Furthermore, when new evidence is received that changes the diagnosis of a condition and such evidence should have been known or investigated at the time of the initial adjudication, any resulting change to compensation benefits shall be subject to the payment of interest.⁶

Newfoundland's legislation provides for the payment of interest on wage replacement benefits to injured workers or their dependants where payment of compensation for loss of earning capacity has been unduly delayed because of circumstances that are in the control of the Commission. Policy has interpreted this to include cases where there is a reversal of the decision through internal, external or judicial review, except where the decision reversal is based upon new information not previously available to the Commission.⁷

While Ontario does not have a legislative mandate requiring the payment of interest, by policy, interest is provided on delayed benefit payments and also for adjudicative decisions that are overturned as a result of a policy being found contrary to the law of the Board of Directors and therefore revised.⁸ Similarly, Saskatchewan is not legislatively obliged to pay interest, but by policy provides interest for delays on appeals.⁹

6. OPTIONS AND IMPLICATIONS

Option 1: Status Quo

Under this option, no revisions would be made to policy item #50.00.

Implications:

- As noted, there is no express authority under the *Act* for the WCB to provide interest on survivor benefits. Therefore, the WCB is not legislatively obligated to provide interest on retroactive survivor benefits, or in any other circumstance other than what is contemplated under sections 19(2) and 258(5).
- The WCB's practice of not providing interest on survivor benefits, but providing interest payments on retroactive wage loss and pension benefits that are the result of a blatant Board error, would continue.

⁶ Section 19.4 of the Yukon's *Worker's Compensation Act*, and Policy CL-52.

⁷ Section 43(3) of Newfoundland and Labrador's *Workplace Health, Safety and Compensation Act*, and Policy item EN-10 of the Labrador's *Client Services Policy Manual*.

⁸ Policy 18-01-08 of the Ontario's *Operational Policy Manual*.

⁹ Policy Document #9.3 of Saskatchewan's *Policy Manual*.

- The current practice of not providing interest on retroactive survivor benefits is consistent with the approach taken in most other Canadian jurisdictions. It is noted that most Canadian jurisdictions also do not provide interest to workers.
- The interest policy would treat workers and surviving dependants, both of whom are entitled to mandatory benefits under the *Act*, in a different manner.

Option 2: Revise the interest policy so that interest payments are paid on retroactive section 17 survivor benefits that are the result of a blatant Board error

A draft copy of the proposed revision under this option is attached as Appendix A.

Implications:

- Interest payments would be provided to the dependants of deceased workers on retroactive section 17 benefits that are the result of a blatant Board error.
- The current practice of providing interest to workers on retroactive wage loss and pension benefits that are the result of a blatant Board error would continue.
- The interest policy would treat workers and the surviving dependants, both of whom are entitled to mandatory benefits under the *Act*, the same. In this regard, there would be no distinction between the two groups.
- Given the small number of claimants who receive fatal benefits each year, and furthermore that interest would only be applicable to retroactive benefits that result from a blatant Board error, it is anticipated that only a small number of surviving dependants may be eligible for interest payments.

7. CONSULTATION

Stakeholders are invited to provide feedback on the discussion paper, options, draft policy, and any additional comments that may be relevant to the issue.

Stakeholder comments will be accepted until **Friday January 20, 2006**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

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WorkSafeBC's governing body, the Board of Directors, will consider the options expressed by stakeholders before it adopts any amendments to the current policies.

Please note that all comments become part of the Policy and Research Division's database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.

APPENDIX A

#50.00 INTEREST

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* (see Item C8-61.10 and policy item #100.83).

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*).~~
- **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*.**
- 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.
- 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.

In all cases where a decision to award interest is made, the Board will pay simple interest at a rate equal to the prime lending rate of the banker to the government (i.e., the CIBC). During the first 6 months of a year interest must be calculated at the interest rate as at January 1. During the last 6 months of a year interest must be calculated at the interest rate as at July 1.

APPENDIX A

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

The rate of interest provided in this policy will also be used in the calculation of overpayments as outlined in policy item #48.42.

EFFECTIVE DATE: ~~March 3, 2003 (as to reference to section 258)~~
March 1, 2006

APPLICATION: ~~Not applicable.~~ **Applies to all decisions, including appellate decisions on or after March 1, 2006.**