

SUBMISSION TO THE WORKERS' COMPENSATION BOARD

Interest Policy
for
Compensation Benefits
BC BUILDING TRADES' POSITION

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A good decision is based on knowledge and not on numbers.

Plato (424-347 B.C.)

Values and their changes are related to the increase in power of that which posits them.

Nietzsche (1844-1900 C.E.)

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INTRODUCTION

The current formulation of Board policy respecting the payment of interest on compensation benefits pursuant to the *Rehabilitation Services and Claims Manual (RSCM)* Volume II, Policy Item #50.00 fails the test of reason and equity. As a result, and as argued by the chair of the Workers' Compensation Appeal Tribunal (WCAT) and many advocacy organizations, the current policy cannot stand. In its place the policy should be redrafted to ensure workers, who have been injured or killed at work, are not further penalized by the Board's failure to pay compensation in an expeditious manner.

The BC Building Trades Council represents building and construction trades workers in myriad contexts throughout British Columbia and the Yukon. Our hard working members include construction labourers, ironworkers, electricians, roofers, plasterers, cement masons, sheet metal fabricators, bricklayers, heat and frost insulators, and many others. High underemployment in the industry coupled with the sporadic nature of building and construction projects makes the timely payment of compensation benefits, whether in the form of wage loss or pensions, of particular importance to our members. When the Board fails to provide our members with their compensation within a reasonable time period, the Board must compensate for that failure.

In WCB matters, the BC Building Trades Council works in cooperation with the wider labour community, especially the British Columbia Federation of Labour and the Workers' Compensation Advocacy Group. Both of these organizations as well as the Ethos Law Group, Workers' Advisors Office, and other unions have made comprehensive submissions to the Board respecting the payment of interest. In developing this document, we have drawn heavily upon their primary and secondary research, and concur with their findings. We trust that the Board will consider our submission within this larger context.

BACKGROUND

Under the *Workers' Compensation Act* interest payments must be paid by the Board in only two situations: one, if a survivor's benefits are incorrectly terminated after remarriage; and two, when payments resulting from a Review Division decision are deferred pending an appeal to the WCAT.

Under the RSCM Volume II Policy Item #50.00, the Board has the discretion to pay interest in situations other than those expressly provided in the Act where, among other things, "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". An example of such an error is provided in the policy:

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 misjudgment. Rather, it describes a glaring error that no reasonable person should make.

This interest policy in general and its "blatant error" test in particular fails the test of reason and equity. It is for this reason, of course, that the Board of Directors - following a section 251 proceeding initiated by the chair of the WCAT who found the blatant error test patently unreasonable – has instructed the Policy and Regulation Division to undertake a stakeholder consultation respecting entitlement for interest on compensation benefits.

DISCUSSION

From the standpoint of reason and equity, it is untenable to argue, as the Board has in its "fulsome analysis" in the discussion paper, that the policy is consistent with the purpose and objectives of the Act. Nor is this specious position altered by the fact that the Board considered whether the interest policy is consistent with the *purpose and objectives of the Act*, as opposed to the WCAT Chair Jill Callan who framed her question as whether the interest policy is consistent with the *purpose of interest*. The BC Building Trades Council concurs with its labour colleagues and the WCAT chair who find the Board's "blatant error" test patently unreasonable because, among other things, it arbitrarily distinguishes between those who are victims of a blatant error and those who are not. The untenable nature of this position was underlined by Justice Gray in *Johnson*:

[The RSCM Volume II, Policy Item #50.00] determines entitlement to interest on the basis of the type of error made by WCB. There is nothing in the WCA [Workers Compensation Act] which suggests that it is appropriate to take into account the WCB's conduct determining what compensation is payable. The WCB's conduct is simply irrelevant to determination of what compensation a worker will receive.

Undeterred, the Board persists in contending that while "the purpose of interest" may be a relevant fact in testing the rationality of the interest policy against the purposes of the Act, it is not the sole factor. According to the Board the other factors worthy of consideration are manifold, most importantly, the blatant error test already addresses the payment of interest when the delay falls "markedly outside the parameters of the expected delay inherent in the worker's compensation system"; the financial integrity of the workers' compensation system must be borne in mind, and as opined by BC Supreme Court in 2007, could justify "an interest policy that provides less than full compensation to workers for delayed payment; and the fact that a policy shift would require changes to the Claims Management Solutions system to calculate interest for retroactive benefit payments.

The BC Building Trades Council vehemently opposes the suggestion that workers, due to no fault of their own, should be penalized by not receiving their compensation payments in a timely manner because the Board has resolved to weigh the payment of interest to workers against the aforementioned extraneous factors. Reason and equity must form the foundation of the rationale regarding the payment of interest, not issues extraneous to the matter at issue. Precisely, the fundamental principles that should instruct the Board's position on this matter are: (1) the "historic compromise" of 1917 established a no-fault insurance system for payment of compensation in a timely fashion to workers injured on the job; (2) interest must be applied to a compensation benefit when there is a delay beyond a reasonable period in keeping with standard business practices; and finally, (3) the purpose of interest, as is commonly understood, is to compensate for the loss of the opportunity to use the money at the time it was due as well as to remedy the expenses associated with borrowing money or expending personal resources – financial, physical, and mental - as a result of not receiving the monetary benefit.

With these principles in mind, it is evident that the five policy options set out by the Board do not fully resolve the detriment currently imposed on workers with respect to the payment of interest. Therefore, instead of choosing from this narrow list, the BC Building Trades recommends that interest be paid when wage loss or pension benefits are delayed beyond sixty (60) days for any

reason, that is to say, interest should be paid on benefits irrespective of whether there is new evidence, a misinterpretation of the previously submitted evidence, or a misapplication of policy.

While the Board, like any governmental body, must turn its mind to the issue of cost when contemplating its policy options, the administration of our provincial workers' compensation system in general, and the historical foundation and principles of that inform the 1917 "historic compromise" in particular, should give the Board pause when considering the most "cost effective" policy options. The intention of the Act is that workers are to be compensated fairly when injured at work; that payments are made to workers in a timely manner; and that compensation will be subject to the payment of interest if and when the Board is unable, for whatever reason, to make the requisite payments in a timely fashion. Again, the reasons for the Board's delay are irrelevant to the payment of interest. No where does the *Workers Compensation Act* empower the Board to withhold, expand, or modify the compensation owing, including interest, in relation to the maintenance of the accident fund.

CONCLUSION

In keeping with Nietzsche's aphorism about the positing of values, heretofore the BC Liberals have used their power to shape a regulatory, policy, and cultural framework that serves the insatiable monetary values of the business community. These values are reflected in the Board's existing interest policy which does a serious disservice to workers. If the Board fails to use this opportunity to significantly change this policy, if the Board makes its policy decision based on numbers instead of knowledge, reason, and equity, our provincial workers' compensation system and those it is supposed to serve will continue to suffer.

In summary, then, the BC Building Trades Council recommends that none of the Board's policy options be implemented, and further, that interest be paid whenever wage loss or pension benefits owing to a worker are delayed beyond sixty (60) days for any reason.

We appreciate the Board's decision to undertake a stakeholder consultation on this important matter and thank you for the opportunity to share the viewpoints of the building and construction trades.