

April 21, 2011

Jill Callan, Chair  
Workers' Compensation Appeal Tribunal  
150 – 4600 Jacombs Road  
Richmond BC V6V 3B1

Dear Ms Callan:

**Re: WCAT-2011-00833 - Section 251 Referral**

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The Board of Directors ("BOD") acknowledges receipt of your letter of April 4, 2011 (and enclosures) but has asked me to advise you that they cannot accept this referral as a valid section 251 referral pursuant to the applicable sections of the *Workers Compensation Act* ("Act").

It is the opinion of the BOD that the decision of March 30, 2011 (WCAT – 2011-00833) and the process it contemplates circumvents the plain and unambiguous language of the *Act* and is not in accordance with the judgment of Madam Justice Bruce. A proper and valid application of the section 251 process in regard to this matter would have been at the time the matter was first considered by the WCAT. However, by virtue of WCAT decisions 2006-02312 and 2009-02631 the decisions of WorkSafeBC, including the Review Division, were confirmed and by implication so was policy item #40.00 in regard to this specific appeal.

There was never a referral to the WCAT Chair as required by section 251(2). The BC Supreme Court judgment is not such a referral and no referral has been made or is necessary. The discussion contained in paragraphs 58 to 62 of the decision, even if correct, does not respond to the situation in this case which is simply that the time for a section 251 referral in this matter has past.

It is not open to WCAT to improperly invoke the section 251 process outlined in the *Act* by assuming jurisdiction on the coat tails of a Supreme Court judgment on Judicial Review as paragraph 51 of the Decision attempts to do.

In paragraph 6 the WCAT Chair assigns this decision to herself. The WCAT Chair in paragraph 7 then identifies as a preliminary issue whether portions of the policy are patently unreasonable. That is not a preliminary issue in this case. For purposes of this case, the WCAT has been instructed by the Court to ignore those portions of the policy so there is no preliminary issue to resolve.

The WCAT Chair is mistaken in paragraph 56 in concluding that she cannot simply read down policy item #40.00 in accordance with the judgment. To implement the judgment, that is all that was required. Failing to proceed with the decision and instead creating an intervening section 251 referral as a preliminary matter is a failure to implement the Court's judgment. That error is reiterated in the WCAT Chair's conclusion that policy still binds the WCAT in this case despite the Court's ruling.

There is a very important reason why a section 251 referral following a Supreme Court Judgment such as we have in this matter is not available under the *Act*. Such a referral does not allow the BOD to come to any conclusion but that directed by the Judgment. That is not the intention of section 251 and is an improper use of it.

Due to the time constraints of the section 251 process the BOD's ability to appeal the Supreme Court Judgment is taken away by the referral as the BOD has no alternative but to change the policy before its appeal can be heard thereby rendering the appeal process moot. That is not the intention of the legislation. It results in the WCAT and a Supreme Court Judge making workers' compensation policy without permitting WorkSafeBC any chance to appeal the matter and without the benefit of any consideration, explanation or correction available in the appeal process of the courts. Further, the full, unfettered ability of the BOD to consider the policy contemplated by the section 251 process is lost.

This referral also deprives the BC Court of Appeal and the judicial system generally of the ability to consider these legal issues on appeal. The BC Supreme Court is effectively elevated to a court of final jurisdiction and the judicial appeal process obviated.

A WCAT referral under the section 251 process is, at this stage, unnecessary. Regardless of whether or not the WCAT agrees with the Supreme Court Judgment, absent an Appeal, the Judgment must be implemented.

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WorkSafeBC has appealed the Supreme Court Judgment. In the interim the Supreme Court has directed the WCAT to reconsider the Petitioner's permanent disability award entitlement under section 23(3) of the *Act* having regard to the principles outlined in the reasons for judgment. Thus, the outcome of that reconsideration is directed by the Court. No referral pursuant to section 251 is necessary or contemplated by the legislation. In this regard it is noteworthy that at paragraph 142 of the Judgment, the Court contemplates the reconsideration and the Judgment being implemented at the WCAT by the original panel that did not, as indicated above, refer the matter at first instance.

The Court left the questions of a broader application of her Ladyship's reasons to the WCAT and the BOD (as discussed at paragraph 143). However, that result is neither required nor given by the Court in this case. Undoubtedly those reservations recognize that the results are subject to further deliberation and consideration including the

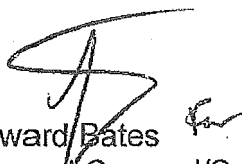
parties' rights of appeal. The section 251 referral process being implemented in this case derogates from that thoughtful conclusion. Where the Court has properly deferred to the administrative tribunal it would be improper for the tribunal to ignore the judicial process including appellate authority.

As this issue is presently before the Courts, a section 251 referral at this time is an abuse of process. The law seeks finality and for these reasons avoids duplication of proceedings, collateral attack and relitigation of issues already determined by a properly constituted judicial authority. Since the matter is before the Courts, it is improper for the WCAT and the BOD to proceed with this matter and create the risk of contradictory and contrary findings by different judicial bodies outside proper appellate proceedings.

In summary, the BOD are of the opinion that a section 251 referral on this matter at this time is neither contemplated by the *Act* nor by the Judgment of Madam Justice Bruce and is not proper procedure for the WCAT to follow. The BOD declines to accept the referral and will not be acting on it. Further, in consequence of the involvement of the Courts, a section 251 referral in regard to this issue is at the very least redundant. If the Supreme Court Judgment is confirmed the BOD will amend the policy accordingly and without further prompting from the WCAT.

If the Supreme Court Judgment is not confirmed, then the BOD will be governed by the Judgment of the Court of Appeal and, again, a section 251 referral would not be indicated.

Yours truly,

  
Edward Bates  
General Counsel/Secretary

/cb

Enclosure

April 29, 2011

**By email and mail**

George Morfitt, Chair  
Board of Directors  
WorkSafeBC  
6951 Westminster Hwy.  
Richmond, BC V7C 1C6

Dear Mr. Morfitt:

**Re: WCAT-2011-00833 – Section 251 Referral**

I acknowledge receipt of Mr. Bates' April 21, 2011 letter. He advised that the Board of Directors of the Workers' Compensation Board (Board) has determined that the referral under section 251 of the *Workers Compensation Act (Act)* set out in WCAT-2011-00833, dated March 30, 2011, is invalid and cannot be accepted.

It is my preliminary view that the Board of Directors has no legal authority to reject a referral as invalid and thereby decline its statutory duty under section 251(6) of the Act to review policy item #40.00 and determine whether WCAT may refuse to apply it.

In *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)* the Court clearly determined that the Workers' Compensation Appeal Tribunal (WCAT) was not to consider whether Mr. Jozipovic could perform the essential skills of "an occupation of a similar type or nature" as a precondition to eligibility for an award under section 23(3) in reconsidering his appeal. The basis of the Court's conclusion was a finding that aspects of policy item #40.00 were unreasonable as they are not rationally supported by the Act.

In paragraph 143 of the judgment, the Court stated:

Lastly, I am not satisfied that I should grant a declaration that Policy #40.00 is of no force and effect. It is apparent that, insofar as the offending portions of the policy have an impact on the WCAT's reconsideration of the petitioner's pension entitlement under s. 23(3) of the *Workers Compensation Act*, WCAT must have regard to the principles

outlined in these reasons for judgment. **However, whether my conclusions with respect to Policy #40.00 should have a more general application is an issue that should be left with WCAT and the board of directors pursuant to the s. 251 review process.**

[emphasis added]

This paragraph contemplates that, through the section 251 process, the WCAT chair and the Board of Directors could determine whether the Court's conclusions regarding the impugned portion of item #40.00 should have a general application in the workers' compensation system. In my March 30, 2011 decision, I have done so by initiating the section 251 process. In any event, the source of my authority to refer a policy to the Board of Directors is section 251 of the Act, not the Court's judgment.

Paragraph 56 of my decision states:

In considering the Court's decision and its application to the worker's appeal, I have considered whether it is appropriate to simply read down item #40.00 in accordance with the judgment and apply the policy to the worker's appeal. However, I find that it is absolutely necessary to suspend the worker's appeal under section 251(2) and refer this important matter to the board of directors under section 251(3). First, given the Court's finding that the policy is not rationally supported by the Act, the decision has wide implications and creates uncertainty throughout the workers' compensation system. **Second, the Court did not actually strike down the impugned portions of the policy and declare them of no force and effect and, for this reason, WCAT remains bound by the policy unless the board of directors of the Board determines otherwise pursuant to the section 251 process.**

[emphasis added]

Mr. Bates' comments at the top of page two of his letter suggest that the Board of Directors has interpreted the sentence in bold type reproduced above as a conclusion that the impugned portion of item #40.00 still binds WCAT in Mr. Jozipovic's case in spite of the Court's ruling. However, the sentence in bold type quoted above reflects the fact that section 250(2) of the Act requires WCAT to apply item #40.00 in its entirety in deciding appeals other than Mr. Jozipovic's where the impugned portion of the policy may be applicable.

This means that WCAT will be required to apply the impugned portion of the policy in deciding the 74 appeals that it has suspended under section 251(5)(b) of the Act, as well as the appeals that have been filed since April 4, 2011 and the appeals that will be

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filed up until the date when the Court of Appeal rules on the lawfulness of item #40.00 or any later date should the case be appealed further. Under section 253(4) of the Act, WCAT is generally required to make its final decision on an appeal within 180 days of disclosure of the Board's records. Timeliness of decision-making is an important value that was reflected in the 2003 amendments to the Act.

On page two of Mr. Bates' letter he states that, as a result of the section 251 referral, the Board of Directors has no alternative but to change the policy before its appeal to the Court of Appeal can be heard, thereby rendering the appeal process moot. I acknowledge that the Board of Directors does not wish to prejudice its right to appeal the Court's judgment and, presumably then, to argue that the B.C. Supreme Court was wrong to have concluded that the policy was not rationally supported by the Act. This concern appears to be the primary basis for the Board of Directors' refusal to engage in the section 251 process.

However, in my view, it is open to the Board of Directors, among other options, to amend item #40.00 to delete all references to "an occupation of a similar type or nature" in the policy. The amendment could be made on an interim basis pending the outcome of the Board's appeal to the Court of Appeal. In an analogous situation WCAT and the Review Division of the Board made interim amendments to their practice directives on extensions of time in order to comply with the B.C. Supreme Court decision in *Kerton v. Workers' Compensation Appeal Tribunal et al.* while we both pursued an appeal of that decision to the Court of Appeal. We succeeded at the Court of Appeal and subsequently retracted the interim amendments. Proceeding in this way permitted WCAT and the Review Division to continue to adjudicate extension of time applications without prejudicing our ability to fully present our respective positions in the appeal.

Such an interim amendment to policy item #40.00 would not prejudice the Board's position in its appeal and it would enable WCAT to proceed with decisions on the 74 suspended appeals as well as the appeals that have been filed since April 4, 2011. I view this as a very desirable outcome because it would facilitate decision-making under item #40.00 throughout the workers' compensation system while we await the judgment from the Court of Appeal, which is unlikely to be available until sometime in 2012. If the Board of Directors makes the interim policy amendment I have suggested, I would be able to withdraw my referral under section 251 of the Act.

I wanted to give the Board of Directors the opportunity to consider this suggestion while I consider WCAT's formal response to the position of the Board of Directors as set out in Mr. Bates' letter, including any legal options available to WCAT to require the Board of Directors to carry out its statutory duty under section 251(6) of the Act. When I have the Board of Directors' further response to this letter, I will take appropriate steps to communicate its decision to the affected parties to the 75 suspended appeals as well as appeals that have subsequently been filed with WCAT.

Date: April 29, 2011

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Given the 90 day time period imposed by section 251(6), I would appreciate the Board of Directors' response by the close of business on Monday, May 16, 2011. I look forward to receiving the Board of Directors' response.

Yours truly,



Jill Callan  
Chair

JC/gn

CC Edward Bates, General Counsel/Secretary, Legal Services Division, WorkSafeBC



WORKING TO MAKE A DIFFERENCE

May 12, 2011

Jill Callan, Chair  
Workers' Compensation Appeal Tribunal  
150 – 4600 Jacombs Road  
Richmond, BC V6V 3B1

Dear Ms. Callan:

**Re: WCAT - 2011 - 00833 - Section 251 Referral**

The Board of Directors has asked me to respond to your letter of April 29, 2011.

The Board wishes me to convey that they fully appreciate both the complexity and importance of these issues. The discussions we are having are welcome and have assisted greatly in mutually determining the best way to proceed.

The section 251 process outlined in the *Workers' Compensation Act* and your responsibilities in law are critically important to the overall health of our system.

However, the matters in question have been placed before the Court of Appeal and it is the Board's view that deference to the judicial system and the role of the courts in maintaining the integrity of the workers compensation system must govern the resolution of the issues. For these reasons and the reasons outlined in my letter of April 21, 2011 the Board remains of the view that a section 251 process cannot be conducted at this time.

It is not open to the Board of Directors to determine that WCAT can refuse to apply a decision of the British Columbia Supreme Court. That decision as it stands is that the Jozipovic WCAT appeal must be decided as if the policy did not include the impugned words. It is the Board's view that to instruct WCAT on policy in these circumstances would directly challenge a judgement of the Supreme Court and this would not afford the appropriate deference to the judicial system.

Further, inviting stakeholders to discuss whether or not an order of the Supreme Court should be implemented would be disrespectful to the court and is not a course of action contemplated in section 251. Within the context of the case there is not an issue on which stakeholders could properly make submissions.

The Board is appealing aspects of the Supreme Court decision and we respectfully maintain that is the correct approach.

W. C. A. T.

MAY 17 2011

Please send correspondence to "ATTENTION: Legal Services Department"  
and include claim or account number

Workers' Compensation Board of British Columbia

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W. C. A. T.

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MAY 16 2011

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It is hard to understand how the section 251 process can be maintained if, as seems to be contemplated by your letter, the only conclusion open to the Board is to agree with the Supreme Court Judgment. That again demonstrates that the section 251 referral is neither necessary nor contemplated by the *Act* in these circumstances. The WCAT is bound by the Judgment of the Supreme Court regardless of the outcome of a section 251 determination.

The Board is of the opinion that the dilemma both the Board and WCAT are faced with in this case is as a result of the Chambers Judge proceeding with a direct review of Board policy. The Board is challenging that aspect of the judgment in its appeal. The Board will be arguing that, contrary to the judge's finding at paragraph 109 of the judgment, the WCAT does have exclusive jurisdiction under s. 251(4) of the *Act* and where the WCAT's decision is the final decision in the s. 251 process, it is that decision which should be examined on judicial review. The Board will also be arguing that the Chambers Judge was incorrect in saying that WCAT cannot interpret Board policy. The Board will be submitting that WCAT has jurisdiction to interpret Board policy and must, where possible, give policy an interpretation that is consistent with the *Act*.

The Board is of the view that the discussion WCAT and the Board are having is an example of the problems created by the judgment which the legislature sought to avoid by enacting the s. 251 process and the privative clauses in s. 254 and 255.

The Board does not believe that the "interim" process suggested by your letter is a viable solution to this issue. In terms of legality and importance to the workers compensation system, there is a considerable difference between a WCAT/Review Division practice directive which is not legally binding and Board policy. The Board does not feel that it can appeal the Jozipovic Judgment and change the policy at the same time, even on an interim basis. Such a step would undermine the integrity of the *Act* and the Board. However, to give deference to the judicial system, and provide a means of moving forward, the Board will direct both the WES Division and the Review Division to issue a practice directive stating that pending the Court of Appeal Judgment in Jozipovic, the impugned portion of policy item #40.00 is not to be applied to the adjudication of section 23(3) entitlement decisions.

You reference paragraph 143 of the Judgment wherein the court states:

"It is apparent that, insofar as the offending portions of the policy have an impact on the WCAT's reconsideration of the petitioner's pension entitlement under s. 23(3) of the *Workers Compensation Act*, WCAT must have regard to the principles outlined in these reasons for judgment."

Your letter then refers to paragraph 56 of the referral decision which states in part:

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"Second, the Court did not actually strike down the impugned portions of the policy and declare them of no force and effect and, for this reason, WCAT remains bound by the policy unless the board of directors of the Board determines otherwise pursuant to the section 251 process."

With respect, the Board takes a different view. As a result of the judgment, the WCAT does not, in regard to the Jozipovic appeal, "remain bound by the policy unless the board of directors of the Board determines otherwise pursuant to the section 251 process". Rather, the WCAT's reconsideration of the petitioner's pension entitlement under s. 23(3) of the *Workers Compensation Act*, must have regard to the principles outlined in the reasons for judgment as stated in paragraph 143 of the Judgment.

It is not clear to the Board that the sentence from the judgment in bold type quoted at the top of page 2 of the April 29, 2011 letter pertains exclusively to the additional appeals referred to at the bottom of page 2 and top of page 3 ("additional appeals"). Paragraph 143 of the judgment quoted in the letter seems to refer to Policy #40.00 generally and not solely the impugned portion of it.

Either way, in regard to the additional appeals, it is the opinion of the Board that the impugned portion of the policy cannot be applied to them by reason of the judgment (pending appeal) and a section 251 referral is not necessary for the WCAT to decide those appeals. The Board does wish to point out, however, that section 253 of the *Act*, to which you refer, also contemplates the chair extending the applicable time period. It would seem to the Board that section 253(5)(a) would be applicable to the additional appeals and the most desirable and practical approach to follow pending the Court of Appeal decision. Certainly, section 253(5) would only need be applied to those additional appeals where the impugned words of the policy are relevant and determinative of the appeal.

It is possible that many of the additional appeals may be resolved without the impugned words being relevant or determinative. Where the impugned words are relevant or determinative, it is, of course, up to the WCAT to decide whether to apply section 253(5) of the *Act* or resolve the appeal in accordance with the Supreme Court Judgment demonstrating that the impugned words of the policy are not applicable to the appeal.

The WCAT may wish to consider issuing a practice directive similar to those contemplated by the Board. In our opinion, such a directive would be in keeping with the direction of the Supreme Court Judgment and would maintain the integrity of the workers compensation system.

In summary, the Board is of the opinion that the WCAT must, pursuant to the Supreme Court Judgment, proceed to reconsider the s. 23(3) pension entitlement of Mr. Jozipovic and that a section 251 referral is neither necessary nor appropriate. In regard to the additional appeals, the Board is of a view that section 253(5) of the *Act* should be applied but that is a decision for the Chair of WCAT to make. If it is the decision of the

WCAT to proceed with the additional appeals, the Jozipovic judgment applies equally to them and again a section 251 referral is not necessary or contemplated by the Act. The section 251 process contemplates the Board coming to a reasoned unfettered decision after the consultation contemplated by s. 251(7). That process is not possible at this time.

The Board believes that the approach it has discussed with you in this correspondence frees the WCAT to proceed to adjudicate the Jozipovic claim in a manner that respects the Workers Compensation Act, complies with the decision of the British Columbia Supreme Court, and affords due deference to the judicial system in guiding all of our eventual actions - those of the Board of Directors, from the perspective of making policy and of the WCAT in applying that policy.

Should this approach continue to be one with which you disagree, then we suggest that meeting to further discuss the issues would be appropriate.

Yours truly,



Edward Bates  
General Counsel/Secretary  
WorkSafeBC

Copies to:

George Morfitt, Chair, Board of Directors, WorkSafeBC  
David Anderson, President and CEO, WorkSafeBC  
Roberta Ellis, Sr. Vice President, Policy & Research Division, WorkSafeBC  
Joanne McConnachie, Executive Director, Executive Operations, WorkSafeBC  
John Panusa, Director Governance, WorkSafeBC  
Susan Hynes, Director Compensation & Assessment Policy, WorkSafeBC

W. C. A. T.

MAY 16 2011

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May 18, 2011

**By email and mail**

George Morfitt, Chair  
Board of Directors  
WorkSafeBC  
6951 Westminster Hwy.  
Richmond, BC V7C 1C6

Dear Mr. Morfitt:

**Re: WCAT-2011-00833 – Section 251 Referral**

Dear Mr. Morfitt,

We have received Mr. Bates' May 12, 2011 letter, conveying the Board of Directors' response to my April 29, 2011 letter. Mr. Bates has informed me that the board of directors will not be amending policy item #40.00 of the *Rehabilitation Services and Claims Manual*, Volume II on an interim basis pending the Court of Appeal's judgment in *Jozipovic v. Workers' Compensation Board and Workers' Compensation Appeal Tribunal*. However, he states:

... to give deference to the judicial system, and provide a means of moving forward, the [board of directors] will direct both the WES Division and the Review Division to issue a practice directive stating that pending the Court of Appeal Judgment in *Jozipovic*, the impugned portion of policy item #40.00 is not to be applied to the adjudication of section 23(3) entitlement decisions.

Mr. Bates also states that, as a result of the judgment of the B.C. Supreme Court in *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, the Workers' Compensation Appeal Tribunal (WCAT) may proceed to reconsider Mr. Jozipovic's appeal without applying those portions of policy item #40.00 that the B.C. Supreme Court decided were not rationally supported by the *Workers Compensation Act* (Act), which are those relating to the inclusion of the phrase "an occupation of a similar type or nature". I agree.

Mr. Bates also expresses the view that a referral under section 251 of the Act is unnecessary because the effect of the *Jozipovic* judgment is that the impugned portions of the policy must not be applied to the 74 appeals that WCAT has suspended under section 251(5) of the Act. In my view, since the B.C. Supreme Court did not make a general declaration that the impugned portions of the policy cannot be applied, section 250(2) of the Act continues to require WCAT to apply all portions of policy item #40.00 that are relevant to an appeal. WCAT cannot issue practice directives which purport to revise or limit the application of the policies of the board of directors set under section 82(1) of the Act.

At paragraph 56 of *WCAT-2011-00833*, I explained that my decision to refer the impugned portions of item #40.00 to the board of directors was, in part, driven by the uncertainty the *Jozipovic* judgment created throughout the workers' compensation system. The board of directors' direction to the WES Division and Review Division will address the uncertainty related to the application of the impugned portions of item #40.00 to the decisions of those bodies so that their decisions on entitlement to a loss of earnings award under section 23(3) of the Act do not apply the portions of policy item #40.00 that both the B.C. Supreme Court and I have found are not rationally supported by the Act. Therefore, upon receipt of a signed copy of the board of directors' direction, I will withdraw my referral under section 251 set out in *WCAT-2011-00833*. WCAT will then take the steps necessary to end the suspension of Mr. Jozipovic's appeal and the 74 appeals suspended under section 251(5) and proceed to decide those appeals.

I acknowledge that the impugned portions of item #40.00 will not be applicable to the adjudication of Mr. Jozipovic's appeal and that many of the 74 suspended appeals may be capable of being decided without the application of the impugned portions of item #40.00. However, the board of directors' direction to the WES Division and Review Division does not constitute published policy or an amendment to policy item #40.00, which WCAT must apply in accordance with section 250(2) of the Act. Therefore, it is possible that, in the course of adjudicating one of the appeals that was suspended under section 251(5) or an appeal that has been filed since April 4, 2011, a WCAT panel will find that the appeal turns on the application of the impugned portions of item #40.00. In that case, it will be open to the panel to make a referral of the impugned portions of the policy to the chair under section 251(2). I remain of the view that it is within my powers as WCAT chair to refer item #40.00 to the board of directors under section 251(5) in these circumstances.

I would appreciate receiving the signed copy of the board of directors' direction by Friday, May 27, 2011. WCAT will then inform the parties to each of the appeals suspended under section 251 that I have withdrawn the section 251 referral and WCAT

Re: WCAT-2011-00833 – Section 251 Referral

Date: May 18, 2011

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will proceed to process and decide the appeals. WCAT will also post Mr. Bates' April 21 and May 12, 2011 letters, my April 29, 2011 letter, and this letter to our website in order to make the history of this matter available to the parties to the suspended appeals and the workers' compensation community.

Yours truly,



Jill Callan  
Chair

JC/gn

CC Edward Bates, General Counsel/Secretary, Legal Services Division, WorkSafeBC



WORKING TO MAKE A DIFFERENCE

May 31, 2011

Ms. Jill Callan  
Chair  
Workers' Compensation Appeal Tribunal  
150-4800 Jacombs Road  
Richmond, BC V6V 3B1

BY EMAIL FAX AND MAIL

Dear Ms. Callan:

**Re: Jozipovic vs WCAT & WCB**

In the above noted matter, in Reasons for Judgment dated March 18, 2011, The Honourable Madam Justice Bruce found "that portion of Policy #40.00 which requires the WCB to consider whether the worker can perform the essential skills of 'an occupation of a similar type or nature' as a precondition to eligibility for an award under s. 23(3) is unreasonable because it is not rationally supported by the legislation."

The WCB has initiated an appeal of Madam Bruce's judgment to the B.C. Court of Appeal.

In the interim, pending a decision of the Court of Appeal, that portion of Policy #40.00 found by the Supreme Court Judgment not to be supported by the *Workers Compensation Act*, i.e. the words "an occupation of a similar type of nature", are suspended pursuant to a practice directive. The WCB, the Review Division of the WCB, and the WCAT should adjudicate claims, conduct reviews and decide appeals as if those words were not a part of Policy #40.00.

Yours truly,

George Morfitt  
Chair, Board of Directors

cc: David Anderson, President and CEO  
Roberta Ellis, Vice President, Policy and Research Division  
Joe Pinto, Chief Review Officer  
Susan Hynes, Director, Compensation and Assessment Policy

Mailing Address  
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6951 Westminster Highway  
Richmond BC V7C 1C6

worksafebc.com

June 1, 2011

**By email and mail**

George Morfitt, Chair  
Board of Directors  
WorkSafeBC  
6951 Westminster Hwy.  
Richmond, BC V7C 1C6

Dear Mr. Morfitt:

**Re: WCAT-2011-00833 – Section 251 Referral**

Dear Mr. Morfitt,

Thank you for your May 31, 2011 letter confirming the board of directors' direction to the Workers' Compensation Board's Worker and Employer Services Division and Review Division to not apply the impugned portions of item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). I hereby withdraw my referral under section 251 of the Workers Compensation Act in WCAT-2011-00833.

As you are aware, a "practice directive" or direction is not binding on the Workers' Compensation Appeal Tribunal. In your letter you indicate that WCAT should adjudicate appeals as if the impugned portions were not a part of item #40.00. As section 250(2) of the Act requires WCAT to apply a policy of the board of directors, and item #40.00 has not been amended, it is possible that the policy may be referred to me in another appeal under section 251 of the Act.

Yours truly,



Jill Callan  
Chair

JC/gn

CC Edward Bates, General Counsel/Secretary, Legal Services Division, WorkSafeBC