

As of May 12, 2015, this decision is no longer considered by WCAT to be noteworthy.

**WCAT Decision Number :** WCAT-2004-06403  
**WCAT Decision Date:** November 30, 2004  
**Panel:** Teresa White, Vice Chair

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## Introduction

The worker appeals a decision of the Review Division of the Workers' Compensation Board (Board) dated February 9, 2004. The appealed Review Division decision resulted from the Board's decision to grant the worker a permanent disability award based on functional impairment of his left upper extremity equivalent to 4.5% of a totally disabled person. This corresponded to 3.0% for functional impairment and 1.5% "enhancement" because the worker's condition is bilateral.

The worker's permanent impairment is the result of a compensable left axillary vein thrombosis. The worker had an accepted claim for the same condition in his right upper extremity, for which he is in receipt of a permanent disability award, also based on functional impairment, of 4.5%.

It should be noted that the worker also appealed decisions of the Board relating to his wage rate. In a decision dated November 12, 2002, another WCAT vice chair confirmed the Board's conclusions respecting the worker's initial and long-term wage rates. There is no wage rate issue before WCAT in this appeal.

The worker is represented by legal counsel. An oral hearing was initially requested by counsel, and was scheduled. In a letter dated August 11, 2004, counsel indicated that the worker wished to proceed based on written submissions. I agree that the issues can be fully and properly considered and resolved based on the evidence and submissions on file.

## Issue(s)

The issue is whether the worker's permanent partial disability award of 4.5% was properly determined. This involves consideration of the permanent functional impairment aspect of the disability award, and whether the worker is entitled to an award based on the application of section 23(3) of the *Workers Compensation Act* (Act). As noted above, it does not include consideration of the wage rate used for long-term disability purposes, which the subject of a separate WCAT appeal.

## Jurisdiction

This appeal was filed under sections 239 and 242 of the Act, which govern appeals from decisions of review officers of the Board.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board of Directors of the Board which is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

This is an appeal by way of rehearing, rather than a hearing de novo or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

The date of injury is August 1, 2002. As such, the worker's entitlement to a permanent disability award is adjudicated based on the provisions of the Act after the amendments made by the *Workers Compensation Amendment Act, 2002* (Bill 49), which were effective June 30, 2002. Applicable published policy is found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

It should be noted that section 239(2)(c) of the Act limits WCAT's jurisdiction in cases where the decision of the review officer is in respect of the application under section 23(1) of rating schedules compiled under section 23(2) of the Act where the specified percentage of impairment has no range or has a range that does not exceed 5%. The disability award in this case is indicated to be "scheduled." However, after a careful review of the file I am unable to find any reference to the "Permanent Disability Evaluation Schedule" (PDES) (which is the applicable schedule compiled under section 23(2) of the Act), or, for that matter, specific range of motion values respecting the worker's left shoulder. As such, I do not consider this to be an award based on the application of such a rating schedule as such is contemplated by section 239(2)(c). In any event, the PDES provides a range from 0 to 35 for loss of range of motion of the shoulder, albeit broken down into various ranges based on the planes of movement.

In that respect, I have had reference to policy item #39.10 in the RSCM II. It states:

In cases where the specific impairment is not covered by the *Schedule*, but the part of the body in question is covered, the Board officer in Disability Awards must first determine the percentage loss of function in the damaged area. This determination is based on the findings of the section 23(1) evaluation and other medical and non-medical evidence available. The final award is arrived at by taking this percentage of the percentage allocated in the *Schedule* to the disabled part of the body. Because the *Schedule* is used in the calculation, this type of award is still

considered as a scheduled one. For example, the amputation of an arm down to the proximal third of the humerus or its disarticulation at the shoulder is scheduled at 70% of total disability. Suppose a worker suffers a severe crush injury to the arm which culminates in a permanent loss of half its function. The final assessment would be 50% of 70%, i.e. 35% of total disability

Thus, an award may be “scheduled” but not specifically based on the application of the PDES. This case involves such an award. Section 239(2)(c) does not limit WCAT’s jurisdiction.

### **Law, Policy and Practice Directives**

Section 23(3) of the Act provides:

Subject to sections 34 and 35, if

- (a) a permanent partial disability results from a worker’s injury; and
- (b) the Board makes a determination under subsection (3.1) with respect to the worker;

the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between

- (c) the average net earnings of the worker before the injury, and
- (d) whichever of the following amounts the Board considers better represents the worker’s loss of earnings:
  - (i) the average net earnings that the worker is earning after the injury;
  - (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

(3.1) A payment may be made under subsection (3) only if the Board determines that the combined effect of the worker’s occupation at the time of injury and the worker’s disability resulting from the injury is so exceptional that an amount determined under subsection (1) does not appropriately compensate the worker for the injury.

(3.2) In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of the injury or to adapt to another suitable occupation.

Policy item #40.00 provides, in part:

Section 23(3) is a discretionary provision that establishes rules for compensating a worker for a permanent partial disability in exceptional circumstances. Section 23(3) is only applied where the test set out under section 23(3) and (3.1) is met. This test requires that the Board determine whether the combined effect of a worker's occupation at the time of injury and a worker's disability resulting from the injury is so exceptional that an amount determined under section 23(1) does not appropriately compensate the worker for the injury. Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills.

For the purposes of determining whether the worker meets the test set out under section 23(3) and (3.1), the Board must consider the combined effect of a worker's occupation at the time of injury and the resulting disability. While a worker may experience a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under section 23(3) and (3.1). The following is a list of criteria that must be considered under section 23(3) and (3.1). Each of these criteria must be satisfied in order for a worker to be assessed under section 23(3).

- The occupation at the time of injury requires specific skills which are essential to that occupation or to an occupation of a similar type or nature;
- As a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury or in an occupation of a similar type or nature;
- The effect of the compensable disability is that the worker is unable to work in his or her occupation or in an occupation of a similar type or nature, or to adapt to another suitable occupation, without incurring a significant loss of earnings.

Skills are defined in this context as the learned application of knowledge and abilities.

In all cases, the Board must determine if, following recovery from a work injury, a worker is either able to return to the occupation at the time of injury or to adapt to another suitable occupation. This determination

includes consideration of both the worker's transferable skills and the worker's post-injury functional abilities. In the vast majority of cases a worker's entitlement to a permanent partial disability award is determined under the section 23(1) method and this estimate of impairment of earning capacity is considered to be appropriate compensation.

However, in exceptional cases, the amount determined under section 23(1) may not appropriately compensate a worker. In these cases, medical evidence confirms that the work injury makes it impossible for a worker to continue in the occupation at the time of injury or in an occupation of a similar type or nature. In addition, the worker is considered unable to adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.

For the purposes of this policy, a significant loss of earnings means the Board may conclude in these exceptional cases, that the loss of earnings a worker will experience as a result of the combined effect could not have been anticipated under the section 23(1) method of estimating a worker's long term loss of earning capacity.

An example of when the combined effect may be considered so exceptional is one where a work injury results in a significant disability of two digits on the dominant hand of a worker whose occupation requires fine motor skills. As a result of the disability, the worker is no longer able to perform fine motor skills, and consequently, is unable to continue in the pre-injury occupation, or another occupation of a similar type or nature. In addition, due to the disability, the worker is unable to adapt to another suitable occupation without incurring a significant loss of earnings.

As a result, the section 23(1) award may not be considered to appropriately compensate the worker for the impact of the combined effect, and may therefore result in a consideration under section 23(3).

There is, in addition, a "practice directive" respecting the application of section 23(3). It provides detailed instructions respecting the approach to a section 23(3) decision.

Practice directive #46 provides that if there are indications that the worker will have difficulty returning to his or her pre-injury employment for reasons related to permanent restrictions arising out of the injury, the team will also investigate whether the worker meets the "so exceptional" requirements of section 23(3) for assessment of permanent disability benefits. At a team meeting the Board's disability awards officer (DAO) will determine what additional relevant information may be needed to complete a permanent partial disability assessment. The case manager, in consultation with the officer DAO and the vocational rehabilitation consultant (VRC), will arrange for this information to be gathered at the appropriate time in the worker's recovery.

The practice directive further states that information required may include a description of the essential skills required for the worker's occupation. It states that occupation for this purpose is defined by the collection of job titles that fall within a four digit occupation code as categorized by the National Occupational Classification ("NOC"). In describing the essential skills of an occupation, information may be gathered from a variety of sources including, but not limited to, data collected from specific jobs and other occupational descriptions such as is found in the NOC publications. Consideration will also be given to a worker's transferable skills and residual functional abilities.

The practice directive goes on to state, in part:

The policy requires that three criteria must be satisfied in order for a worker to be assessed under section 23(3):

1. *The occupation at the time of injury requires specific skills which are essential to that occupation or to an occupation of a similar type or nature;*

Policy defines skills as the learned application of knowledge and abilities. Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills. The worker's occupation at the time of injury will be identified in terms of the NOC classification system, at the four-digit (unit group) code level.

2. *As a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury or in an occupation of a similar type or nature;*

A similar occupation is defined as an occupation where the first three digits of the NOC [National Occupational Classification] code (minor group) are the same as the worker's pre-injury occupational code. Where a worker is considered to be able to perform any one or more of the jobs listed in the preinjury four digit NOC occupation code, or any one or more of the jobs under a similar four digit occupation, the worker does not meet the "so exceptional" test. The medical evidence must confirm that the disability makes it impossible for the worker to perform the essential skills of the occupation. The duties for an occupation must be considered in terms of the essential skills necessary to perform those duties.

Skills are not to be confused with physical demands such as standing, sitting, etc. The impact of limitations on physical demands may be mitigated through workplace modifications and therefore, the worker would still be able to perform the essential skills of the occupation.

For example, an ironworker with a knee injury may not be able to return to his pre-injury job because it requires that he climb ladders several times a day, which he is no longer able to do. Climbing ladders would not necessarily be determined to be an essential skill for the occupation of ironworkers. The worker still has the skills to be an ironworker. The NOC four-digit code for ironworkers (7264) lists various jobs within that occupation, which a worker may still be able to perform, even with the knee injury.

For example, an electronics technician is required to have fine motor skills to perform the core duties of his occupation. If the technician sustains a back injury, he still retains the fine motor skills necessary to be an electronics technician. The worker may experience difficulty with physical activity of prolonged sitting or standing. However, these are physical demands, not skills of the occupation required to perform the duties of an electronics technician.

*3. The effect of the compensable disability is that the worker is unable to work in his or her occupation or in an occupation of a similar type or nature, or to adapt to another suitable occupation without incurring a significant loss of earnings.*

Where a worker is unable to return to the pre-injury occupation or a similar occupation, consideration will then be given to whether the worker can adapt to another suitable occupation. For this purpose a worker is considered to retain all the essential skills of the pre-injury occupation, with the exception of the limitations caused by the permanent disability. Pre-injury transferable skills (considering as well the possibility of enhancements or re-certifications, through vocational rehabilitation assistance) will also be included to determine the worker's residual (post-injury) skill set. Where the worker is considered able to return to a suitable occupation, it must further be determined whether the worker will incur a significant loss of earnings.

For the purposes of the policy, a significant loss of earnings means the Board may conclude in these so exceptional cases, that the loss of earnings a worker will experience as a result of the combined effect could not have been anticipated under the section 23(1) method of estimating a worker's long-term loss of earning capacity. A loss of earnings is not sufficient to meet the requirements of the "so exceptional" test. Consideration must also be given to the nature of the section 23(1) award in relation to the Permanent Disability Evaluation Schedule and/or other schedules, judgements and considerations used to determine the functional impairment and whether these could not have anticipated this

worker's disability and resulting loss of earnings capacity. In considering such loss, consideration may also be given to comparing the extent of loss through aggregate statistical references on average occupational earnings.

For example, a logging helicopter pilot suffers a moderate head injury and has residual audiovestibular disturbance assessed at 10% disability. The disability is such that it renders it impossible for him to meet the physical requirements for holding a helicopter pilot's license and he is also unable to return to a different job in the same occupation or a similar occupation. The 10% award may be appropriate compensation for the average worker. However, it may not represent appropriate compensation in the case of the helicopter pilot.

### **Background and Evidence**

The worker was born in 1961. At the date of injury on August 1, 2002 he was 40 years old. The worker has a condition known as Paget von Sjoders syndrome, which has resulted in deep vein thrombosis ("effort induced") in both his right and left axillary veins. The right upper extremity condition developed in 1994 and was accepted as compensable.

The worker is in receipt of a permanent disability award respecting his right upper extremity based on 4.5% functional impairment. He has not been found entitled to an award pursuant to section 23(3) in respect of his right upper extremity. That conclusion was confirmed on appeal to WCAT in a decision dated September 11, 2003.

In August of 2002 the worker experienced deep vein thrombosis of his left axillary vein. As was the worker's right axillary vein thrombosis, the left-side thrombosis was accepted as compensable.

According to the information on file, the worker first experienced symptoms in his left arm on August 1, 2002. He had been cutting steel for approximately two weeks before the onset of symptoms. The worker told a Board officer that it was a "heavy load." The symptoms resolved somewhat, but on August 15, 2002 he was again doing some heavy work cutting and fabricating steel, and the arm started "tightening up." During a telephone conversation with the Board officer on September 9, 2002, the worker said he had not missed any time from work.

The worker continued to work after the onset of symptoms in his left arm, and received benefits under section 30 of the Act. For example, on October 30, 2002 the worker wrote to the Board listing the hours he had worked from August 15 to October 26, 2002. He stated that these hours were an approximately 30% reduction from what he "should have worked," because of his injury and being on light duty.

The worker was examined by a disability awards medical advisor (DAMA) on May 16, 2003. That examination looked at both the left and right upper extremities. The right was examined to determine if there had been any change. It was found that there had been no change, and the 4.5% award continues. The disability award for the worker's right upper extremity is not before WCAT in this appeal.

With respect to the left side, the worker was noted to have symptoms that are "almost identical to those" on the right. The worker's arm swells with moderate activities. Within an hour of starting activities, the worker's arm becomes tight, and it swells and becomes painful if the worker persists with activities. Lifting, and in particular overhead motions, precipitate the symptoms, which occur much sooner. Repetitive motions aggravate the symptoms more quickly, as do weather changes. Cold and wet weather are "particularly bad when he has to do any outside work."

Overhead activities can only be done on a limited basis and the worker tries to avoid these.

The DAMA stated that, "As far as the left arm is concerned, the symptoms are almost identical to those which have been described above" (the right arm symptoms).

The grip strength in both hands was found to be "quite adequate" but subject to early and easy fatigue. The worker must take frequent breaks between activities to ensure he does not become completely incapacitated.

The worker has constant aching in both shoulders, the intensity of which varies from day to day. The worker takes aspirin and Advil. He sleeps poorly because of aching in his shoulders. He cannot sleep on either side.

On examination, the worker was noted to have developed collateral venous circulation, which was more pronounced on the right. Skin perfusion, sweat pattern, deep tendon reflexes and sensation were all within normal limits and equal on the left and right. The DAMA noted that the worker had callosities on both hands, which he interpreted to mean that the worker was still doing physically hard level work.

There was reduced range of motion of the left shoulder and some weakness of the abductors of the left rotator cuff. There was also reduced grip strength and reduced girth in the muscles groups of the left forearm, which the DAMA felt was compatible with a right hand dominant person.

The DAMA noted that the collateral venous circulation included "what appears to [be] almost varicose formation, especially over the lateral right pectoralis major, but also anteriorly as far as the midline and the left clavicle." There were similar venous dilations on the left but to a much lesser extent.

The DAMA reported that there was no evidence of significant swelling in the left arm as compared to the right. He stated that a functional evaluation study could determine whether swelling increased with activity, and opined that “this may have to be considered before a final decision on this claim is made.” The DAMA stated:

He [the worker] sums the condition up in a letter dated May 16, 2003 where he goes on to say “the left side is very similar and it looks like it will progress as the right side is.”

There is a tremendous collateral circulation which has developed around the axillary vein on the right upper extremity in the shoulder region and there are signs of a similar set of collateral venous dilatation [sic] but of a lesser nature on the left.

The peripheral pulses can be made to disappear quite easily when the Adson maneuver is performed, left a little less than on the right at this stage but nevertheless present bilaterally.

The disability awards officer (DAO) discussed the examination results with a different DAMA. The DAO recorded, in a file memo dated June 3, 2003, that this second DAMA had reviewed the findings. The memo states that, **“As indicated in the log entry dated June 2/03 from [the first DAMA], this worker’s left side is not as bad as the right side and [the second DAMA] has recommended 3% of total for the left side. Also there will be bilateral enhancement consideration.”** [Emphasis in original.]

The June 2, 2003 log entry in question notes that, “Although he has taken it upon himself to rate the disabilities according to his daily function. These are, nevertheless, consistent with the diagnosis of bilateral axillary vein thrombosis, more severe on the right but also affecting his left upper extremity now.” [Reproduced as written.]

The Board’s consideration of the worker’s entitlement to a section 23(3) award is documented in a file memo dated March 20, 2003 (before the permanent functional impairment evaluation). The DAO noted that the Act after the amendments by Bill 49 provided that the mandatory benefit for permanent disability is the loss of function benefit under s. 23(1). Eligibility for consideration under section 23(3) first requires a conclusion that the worker’s circumstances are “so exceptional” that a 23(1) award is not appropriate. The DAO states that policy under “#46 of the Policy Manual” outlines the tests which must be applied.

This is an incorrect statement. Policy respecting section 23(3) and the “so exceptional” determination is found in policy item #40.00 in the RSCM II. There is also the practice directive which, although not published policy, provides guidance to adjudicators. The practice directive is numbered 46. It seems likely that the DAO meant to refer to the practice directive rather than the published policy in the RSCM II.

The section 23(3) decision is partially explained in a file memo dated March 20, 2003. The memo states, in part:

I have considered whether the worker has eligibility for consideration under s. 23(3). Eligibility for any such consideration first requires a conclusion that the worker's circumstances are 'so exceptional' such that a s.23(1) award is not appropriate. Board Policy under #46.00 of the Policy Manual outlines the tests for this, each of which needs to be met.

I have considered the worker's pre-injury occupation and similar occupations, in light of Practice Directive #46, and using the National Occupation Classification system. The Vocational Rehabilitation Consultant reviewed in depth the worker's job, taking into consideration the description provided by the worker to the Board, his prior claim (in which the Vocational Rehabilitation department assisted the worker with employment), and conversations with the worker. Her final recommendation, which I accept, is that the worker's pre-injury employment is under NOC code 6421, Retail Salesperson and Sales Clerks.

It is understood that the worker has specific limitations which are outlined in the log entry of the Case Manager of today's date. However, even with these limitations the Medical Advisor has provided his opinion that the disability would not render the worker incapable (or impossible) of performing the essential skills of the same or similar occupation.

On this basis it is my conclusion that the worker would not be considered to meet the policy requirements to be 'so exceptional' and therefore is not eligible for assessment under s.23(3) of the Act.

I would note that due to the foregoing, I have not adjudicated the worker's ability to adapt to another suitable occupation, or whether, under the circumstance, s.23(1) would or would not provide appropriate compensation. On a preliminary basis it would seem to me however, that this 43 year old worker would be able to adapt to other suitable occupations and that with a wage rate of approximately \$212.78 (90% net) weekly, would not likely incur a significant loss of earnings or one that could not have been contemplated by the loss of function award.

[reproduced as written]

There is nothing on the file explaining the basis for the conclusion that the worker's pre-injury employment, which it was acknowledged the worker was unable to resume, fell within NOC code 6421, Retail Salesperson and Sales Clerks. There is also nothing

on the worker's 1994 claim file which explains this conclusion. I can only speculate that this conclusion was based on the fact that the worker had received a significant amount of vocational rehabilitation assistance on the 1994 claim which supported a "business start up" designed to allow him to operate a business supplying metal such as rebar to the construction industry. That type of work must have been considered similar to that of retail sales, although, as noted, this is not explained.

The statement in this memo respecting the Board medical advisor's opinion that the worker's disability would not render the worker incapable, "(or impossible)" of performing the essential skills of the same or similar occupation could be seen to conflict with the following, contained in a file memo dated March 20, 2003:

The history of the claim and the physical injuries accepted were briefly reviewed.

The Medical Advisor confirmed that the worker has been left with permanent loss of function due to his injury and I confirmed that I will refer the claim to Disability Awards for assessment.

As a result of this injury, [name], Medical Advisor confirmed that the worker would be restricted from:

- Moderate to heavy lifting
- Overhead work
- Moderate to heavy bending
- Moderate to heavy cutting
- Repetitive movements

I confirmed that it would be my decision that the worker, as a result of his injuries and restrictions, cannot resume pre-injury work as performed, and as described on his job duties outline of Feb 5, 2003. [Name], Medical Advisor confirmed that in his opinion, it would be impossible for the worker to resume pre-injury duties as performed.

[Name], Vocational Rehabilitation Consultant confirmed her discussions with [the worker] and outlined briefly the worker's business situation since the injury. She noted that there was a slowdown in the industry at the moment. In any case, a referral to vocational rehabilitation is appropriate and I will complete the referral form.

Despite the above memo, it should be noted that the worker continued in his pre-injury employment after the onset of the left upper extremity problems, although he apparently worked fewer hours per week.

The worker was apparently offered vocational rehabilitation assistance but did not participate. A memo dated January 12, 2004 from the VRC states:

At plateau this worker was offered Vocational Rehabilitation assistance in the form of job search assistance as this was all he qualified for under Section 23(1) referral. The worker declined this assistance and advised he was going to appeal the 23(1) decision. As such no Vocational Rehabilitation involvement was undertaken.

The functional pension has been implemented and there is no further Vocational Rehabilitation involvement. As such the file will be closed for Vocational Rehabilitation purposes.

## Findings and Reasons

### *Permanent Function Impairment Award*

The worker was awarded a permanent disability award based on functional impairment equivalent to 3.0% of a totally disabled person. The “enhancement factor” of 1.5% because of the worker’s bilateral problems is based on one-half of the lesser award, which is the 3.0% awarded by the Board for the left upper extremity.

The worker, through his counsel, has not made any submissions directly addressing the quantum of the functional impairment award. However, the functional impairment award was the subject of the Board’s decision letter underlying this appeal, and was addressed by the review officer. The issue is before me.

The Board’s reason for providing the worker with a 3.0% award for the left-sided problems instead of 4.5% which was granted for the right side was the comments by the DAMA respecting the worker’s condition being worse on the right. Those comments appear to have been based on differences in the degree of collateral circulation evident on the right side, and the fact that with Adson’s manoeuvre, the pulse disappeared, “a little less on the right at this stage but nevertheless present bilaterally.”

However, the DAMA’s description of the functional limitations resulting from the worker’s bilateral problems suggest that the left upper extremity has symptoms that are almost identical to those on the right.

Although the DAMA did comment that the right side had greater collateral circulation and that the result of Adson’s manoeuvre was “a little less on the right,” I do not consider that to support a conclusion that the worker is entitled to 1.5% less by way of the functional impairment method of determining the quantum of a permanent disability award. The worker has been awarded only two-thirds of the award previously determined for the right side.

The DAMA is an expert in disability evaluation. As such, I accept and have given considerable weight to the results of his examination. However, it is apparent that both of the worker's upper extremities contribute to his level of impairment relatively equally. The DAMA noted that the left arm symptoms were almost identical to those on the right.

I consider that the differential between the awards for the two upper extremities is too large. The evidence does not support a conclusion that the degree of impairment in the left is only two-thirds of that on the right. The differences noted by the DAMA were subtle, and are overshadowed by the evidence that the symptoms are "almost identical."

However, there are objective differences, and those differences should be taken into account in the degree of functional impairment.

Based on my review of the whole of the evidence, I have concluded that the worker is entitled to a permanent disability award for the left upper extremity based on functional impairment equivalent to 4.0% of a totally disabled person rather than 3.5%. To that must be added the age adaptability award.

#### *Section 23(3) Award*

Counsel for the worker submits that the worker's position was improperly classified under the NOC system. The worker's occupational field was not sales clerk/salesperson. Rather, it was closer to the NOC classification 7264, which is "ironworkers."

Counsel for the worker submitted that the worker's job duties immediately prior to the onset of left upper extremity symptoms involved 80% manual labour. While it is not possible to determine the exact percentage of time spent in manual labour from the information on file, I accept that there was a component of manual labour. The worker's activities at the time of symptom onset are compelling evidence of the manual nature of at least some of the work. However, it should be remembered that the worker's job at the time of the onset of the left-sided symptoms had already been the subject of vocational rehabilitation intervention, and the provision of financial assistance in a business start up designed to decrease the requirement that the worker use his upper extremities.

The worker was provided with vocational rehabilitation assistance in the form of business start up funds under his 1994 claim file. At the time, the long-term income potential of the business was projected to be \$26,000.00. Counsel submitted that at the time the left upper extremity problems began to manifest themselves, the worker had not realized that income potential. He submitted that, logically, the worker's "long-term earning capacity and average earnings ought to be set at \$26,000.00 under the 2002 claim."

As previously noted, presumably, the Board used the NOC classification of code 6421, “retail salesperson and sales clerks” based on consideration that the worker, as the owner of a business that supplied metal construction materials such as rebar, did not perform the manual labour component. Rather, he marketed his firm’s product. However, I can find no evidence in the file explaining the Board’s reliance on that classification. There is a distinct lack of documentation of the decision to use that code, despite the importance that the NOC code is given by the practice directive #46.

It is difficult to understand, given the description of duties the worker was performing at the time of symptom onset in the left upper extremity, how the NOC code for retail clerks and salespersons could apply. I agree with counsel for the worker that the Board has likely used the incorrect NOC code.

But, in order to be eligible for a section 23(3) disability award, the worker’s circumstances must satisfy the criteria in the Act and the published policy that assists in the interpretation and application of the Act.

Section 23(3.1) provides that the combined effect of the worker’s occupation at the time of the injury and the worker’s disability resulting from the injury must be “so exceptional” that a functional award does not appropriately compensate the worker. That provision makes it clear that the key consideration is whether the functional award appropriately compensates the worker.

Section 23(3.2) states that in making a determination under section 23(3.1) the Board must consider the ability of the worker to continue in the worker’s occupation at the time of the injury or to adapt to another suitable occupation.

Published policy clearly states that what is considered are the specific skills required by the occupation, and essential to the occupational or an occupation of similar nature. The compensable disability must result in the worker no longer being able to perform those essential skills. The effect must be that the worker is unable to work in his occupation or one of a similar nature, without incurring a significant loss of earnings. Skills are defined as “the learned application of knowledge and abilities.”

I accept that the worker now has some difficulty performing the manual labour components of his pre-injury work. In that respect, I accept that he may be less able to earn income as the principal of his company, because he is unable to do certain tasks himself and must hire someone else to help him. However, it is apparent from the evidence that the worker continues to have the specific skills that are essential to his occupation. The worker continued to work in his pre-injury occupation throughout the history of his claim, albeit for reduced hours.

Section 23(3) and (3.1), in conjunction with published policy, make it very clear that a worker is not entitled to a permanent disability award based on “loss of earnings” unless

that worker no longer has the ability to continue in his occupation at the time of the injury or adapt to another suitable occupation without a “significant loss of earnings.” In this case, the worker is able to continue in his pre-injury occupation. He has demonstrated his ability to do so by continuing to work in that capacity, although the worker asserts, and I accept, that his earning capacity is somewhat reduced. It should be remembered, however, that the functional award also provides compensation for reduced earning capacity.

The Act and published policy make it clear that a difference in earning capacity is not the primary consideration in deciding whether a section 23(3) award should be considered. Policy states that while a worker may experience a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under section 23(3) and (3.1). The circumstances must satisfy the three criteria set out in policy.

In this case, the worker continues to have the skills that are essential to his occupation, and he continues to be able to work in that occupation. Further, the evidence does not suggest that the worker would be unable to adapt to another suitable occupation, particularly given his background and skills in provision of metal products to the construction industry. The worker has a wide variety of skills specific to his work, and although his bilateral upper extremity condition may limit his tolerance for heavy work, he continues to have the ability to work in his occupation at the time of the injury.

I consider that the worker’s actual and/or potential loss of earnings by reason of his disability are contemplated by, and compensated for by his section 23(1) award. As such, he is not entitled to a section 23(3) award.

## **Conclusion**

The Review Division decision is varied, in part. The worker is entitled to a permanent disability award based on functional impairment of the left upper extremity equivalent to 4.0% of a totally disabled person. To that must be added the appropriate amount for bilateral enhancement.

The worker is not entitled to consideration for a permanent disability award pursuant to section 23(3) of the Act.

Teresa White  
Vice Chair

TW/gw