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

**WCAT Decision Number:** WCAT-2005-05557
**WCAT Decision Date:** October 19, 2005
**Panel:** Anthony F. Stevens, Vice Chair

---

## Introduction

The worker appeals three decisions of the Review Division of the Workers' Compensation Board (Board), which were issued in relation to his November 14, 2003 compensable back injury. Those decisions were undertaken on February 14, 2005, February 16, 2005, and April 26, 2005.

The review officer who issued the February 14, 2005 decision (*Review Decision #21842*) confirmed the Board's previous August 25, 2004 decision, in which a case manager concluded as follows: the worker's wage loss benefits would terminate effective August 22, 2004 on the basis that his condition had stabilized, the worker's health care benefits including those associated with physiotherapy would also terminate that date, the worker's compensable low back strain had resolved, the worker had pre-existing mild spondylolisthesis that was not a direct result of his injury, and the worker had chronic pain for which a referral to the Board's Disability Awards Department had been made. The review officer declined to consider whether the worker's diagnosed L4-5 disc protrusion ought to be accepted under the claim; she concluded that the Board had not adjudicated that issue, and noted that the worker could request a decision in that regard.

Another review officer issued the February 16, 2005 decision (*Review Decision #22375*) to confirm the Board's September 13, 2004 decision that the worker was entitled to a 2.5% functional pension for his accepted chronic pain. The review officer concluded that award was consistent with Board policy as outlined in item #39.02 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). The review officer further concluded that it had been appropriate for the Board not to undertake a disability assessment examination of the worker's back, as the Board had not accepted that the worker sustained permanent disability under the claim apart from that associated with his chronic pain.

Another review officer issued the April 26, 2005 decision (*Review Decision #24809*) to confirm the Board's November 24, 2004 decision that the worker was not entitled to a loss of earnings assessment under section 23(3) of the *Workers Compensation Act* (Act). The review officer accepted that the worker was precluded from returning to his pre-injury employment as a truck driver. She also noted that even though the worker disputed the Board's conclusion that he could work as a crane operator, he agreed that


Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

he could work as a shipper/receiver. Although the worker would sustain a loss of earnings in the long term through such employment, the review officer referred to item #40.00 of the RSCM II and noted that it provided that the fact a worker may experience a loss of earnings as a result of a work injury was not sufficient to meet the criteria necessary for an assessment under the loss of earnings method for determining pension entitlement. The review officer concluded that the worker's injury did not make it impossible for him to return to his pre-injury occupation, or to an occupation of a similar type or nature.

These appeals were considered by way of an oral hearing that was convened on September 8, 2005. The worker was represented by a workers' adviser. The worker's employer did not participate in his appeals, although it had been invited to do so.

**Issue(s)**

The issues raised by the worker in his appeals, which are available in the decisions under appeal, are as follows:

1. Whether the worker's back strain had recovered by August 22, 2004.

2. Whether the worker was entitled to general health care benefits beyond August 22, 2004 that were associated with the treatment of his accepted permanent chronic pain.

3. Whether the worker was entitled to additional physiotherapy benefits beyond August 22, 2004.

4. Whether the worker's section 23(1) of the Act permanent partial disability award was appropriately determined by the Board.

5. Whether the worker is entitled to an assessment for a loss of earnings pension under section 23(3) of the Act.

**Jurisdiction**

These appeals were filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the Act.

Under section 250 of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. It must make its decision based on the merits and justice of the case, but in so doing it must apply policies of the board of directors of the Board that apply to the case, except in circumstances as outlined in section 251 of the Act. Section 254 of the Act provides that WCAT has exclusive

jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal.

**Background and Evidence**

According to the information on file the worker sustained a low back injury on November 14, 2003 when he slipped on a piece of ice while stacking tires in his employment as a truck driver. He advised the Board that he had been holding a tire that weighed approximately one hundred pounds, and that the slip caused him to hyperextend his back. The employer indicated that it had employed the worker since June 1994. The worker was 45 years of age when his injury occurred.

The Board accepted the worker's claim for a back strain, and extended wage loss benefits to him from January 6, 2004 to February 16, 2004. The worker unfortunately experienced further back complaints with his resumption of work, such that the Board extended additional wage loss benefits to him from March 22 to 29, 2004. The worker subsequently again sustained time loss from work, and the Board reinstated wage loss benefits commencing April 24, 2004.

By decision dated May 18, 2004 the Board advised the worker that his long-term rate of compensation effective May 15, 2004 would be 90% of his $667.47 net weekly average earnings.

The worker's injury had been diagnosed by his attending physician, Dr. Sigalet, as being a lumbosacral strain. Dr. Sigalet also noted that the worker had been his patient for more than one year and there were no known prior complaints of relevance.

The worker commenced physiotherapy treatment on November 25, 2003. The physiotherapist later requested an extension of that treatment, which the Board approved.

On March 22, 2004 Dr. Sigalet reported that the worker was to recommence physiotherapy.

The Board ultimately arranged for the worker to be treated at an occupational rehabilitation program due to his ongoing complaints and resulting employment limitations. That treatment commenced on May 5, 2004. The worker reported constant low back pain that was aggravated by lifting. On examination the worker had a reduced range of low back movement, and his functional abilities were below those required in his pre-injury employment. The examiner also concluded that the worker's condition was consistent with a lumbar strain that was resulting in significant instability of his L5 segment.

A specialist, Dr. Faridi, completed a consultation report on June 8, 2004 to note that x-rays that had been taken in November 2003 had revealed about a 1-millimetre subluxation at L4-5. Dr. Faridi also indicated that a CT scan was to be arranged.

The June 11, 2004 CT scan revealed no abnormality at L3-4. However, at L4-5 a small central disc protrusion was observed, and it was noted to be in contact with the L5 nerve roots as they exited the dural sac.

The worker was discharged from the occupational rehabilitation program on June 16, 2004. Although the discharge report noted that he had a functional range of motion of his lumbar spine, it also noted that his back and hip motion was limited and weak. The worker also complained of constant low back pain that was aggravated by activity. The worker was discharged as not being fit to resume his employment.

In a June 22, 2004 consultation report Dr. Faridi indicated that lumbosacral x-rays had revealed slight instability at L4-5. Dr. Faridi also noted that on examination the worker was found to have full back flexion and extension, no limitation in straight leg raising, and no focal tenderness. He concluded that the worker had attained maximal recovery, and that he would not be able to return to work that involved quite a bit of lifting. Dr. Faridi also indicated that with further injury the worker's instability at L4-5 could worsen and require surgical fusion.

A Board medical advisor reviewed the worker's claim on August 17, 2004 and noted that he had L4-5 grade 1 spondylolisthesis, which he said was presumed to be due either to degenerative disc disease or spondylosis.

On August 18, 2004 the Board medical advisor noted that the worker had attained maximal medical recovery, permanent functional impairment was not expected, and the worker's chronic pain had been accepted by the case manager dealing with his claim.

On August 19, 2004 a locum for Dr. Sigalet reported that the worker had employment restrictions that included no heavy lifting, no repetitive lifting, and no prolonged sitting (which was defined in that report as being in excess of two hours). The worker's physical examination at that time revealed normal lumbar lordosis, normal sensation and power, and tenderness of the left paraspinal musculature with some spasm. Range of back motion was found to be normal, although the worker experienced back pain on extension.

A Board medical advisor provided the opinion on August 19, 2004 that the worker's restrictions included prolonged sitting over two hours, and medium-level lifting over shoulder height.

Dr. Sigalet sent an August 20, 2004 report to the Board to indicate that the worker was not able to sit for longer than two hours, but he could lift up to ninety pounds if he was

careful. However, Dr. Sigalet also suggested that the worker's lifting be restricted due to the risk of exacerbating his pain, and due to the risk of exacerbating his disc herniation.

The case manager issued the August 25, 2004 decision, which was the subject of the February 14, 2005 review officer's decision that is before me.

The Board next issued the September 13, 2004 decision, which was the subject of the February 16, 2005 review officer's decision that is also before me.

On September 23, 2004 the Board medical advisor concluded that there was no good indication that physiotherapy was reasonably necessary to treat the worker. He indicated that physiotherapy had only been shown to be effective in the first few weeks following an injury, following which the worker would be aware of exercises he could do.

The Board also issued a September 24, 2004 decision to decline to reopen the worker's claim for further physiotherapy treatment that he indicated was necessary to address increased complaints following a work trip to Edmonton in early August 2004. The worker did not appeal this particular decision of the Board.

On October 5, 2004 a case manager concluded that the essential skills of truck driving included prolonged sitting, and heavy lifting. After considering the medical restrictions imposed on the worker by his residual disability the case manager concluded that the worker was not able to return to his pre-injury employment.

On October 20, 2004 a claims adjudicator in the Board's Disability Awards Department completed a claim log entry to acknowledge that the worker had employment limitations related to the chronic pain accepted under the claim. However, she concluded that the worker's injury "does not make it impossible" for the worker to continue in his occupation, such that the test set out in the RSCM II for consideration under section 23(3) of the Act had not been met. The claims adjudicator did not attempt to reconcile that conclusion with the previous decision of the case manager that the worker was no longer able to return to his pre-injury employment.

According to a November 5, 2004 document generated on file by a vocational rehabilitation consultant, the worker's employment history has been primarily in truck driving and equipment operation. The vocational rehabilitation consultant discussed two future employment options with the worker, being that of a crane operator or that of a shipper/receiver. The worker was not inclined to pursue crane operator work, as it involved relocation or periods away from home. The vocational rehabilitation consultant noted that the worker had instead been focusing his job search efforts towards potential employment in shipping and receiving. The vocational rehabilitation consultant noted that the worker's experience in crane operating was dated, and outlined that additional vocational rehabilitation assistance would be offered. The vocational rehabilitation

consultant concluded that there were positions available in crane operator work that paid $1,120 per week, such that the worker could earn in excess of his rate of compensation. In terms of shipper/receiver work, the vocational rehabilitation consultant concluded that vocational rehabilitation assistance would be required. The vocational rehabilitation consultant also concluded that there were a large number of openings for such employment in that occupational group, and that according to BC Work Futures average earnings for shipper/receivers were $29,100 per annum.

Thereafter, the claims adjudicator in the Board's Disability Awards Department issued the November 24, 2004 decision to advise the worker that although his chronic pain made it difficult for him to perform all aspects of his previous employment, it nevertheless was not impossible for him to continue in that occupation. The claims adjudicator concluded that the worker's circumstances were not considered to be "so exceptional" as to warrant consideration of potential loss of earnings entitlement.

In a January 24, 2005 consultation report Dr. Faridi noted that the worker continued to have back pain. However, he noted that in addition to that complaint the worker was also experiencing radicular pain along the L5 nerve root on the right side. On examination there was no motor or sensory deficit, and straight leg raising was normal.

Dr. Faridi reported on March 22, 2005 that the worker had a good result from a facet block on the right at L4-5 and L5-S1.

At his oral appeal hearing the worker noted that he was active and healthy prior to his work injury, and was able to perform his work duties of driving and delivering tires for the employer. He indicated that he is no longer able to perform his pre-injury employment; he also noted that during the times that he attempted to resume that work the lifting and sitting that were involved significantly increased his complaints.

In terms of physiotherapy treatment, the worker indicated that such treatment was beneficial for him, and enabled him to gain strength in his back and improve his life overall. The worker contrasted such treatment to that which he performed at the occupational rehabilitation program, which he said involved pushing him to the limits of his ability. The worker said that the treatment at the occupational rehabilitation program increased his back complaints. He also noted that he subsequently saw Dr. Faridi, and was advised that there was nothing further that could be done. The worker indicated that Dr. Faridi suggested that he change occupations.

The worker noted that it was after yet another failed attempt at truck driving that he was referred by the Board for vocational rehabilitation services. He said that the vocational rehabilitation consultant was focused on a return to work in crane operation, the suitability of which he questioned given his difficulties with prolonged sitting. The worker said that he next took computer courses at his own expense, and that in addition he continued with physiotherapy treatment for so long as he could afford it. He noted

that he had also been given exercises to perform, which he uses in an attempt to remain off painkillers.

The worker indicated that the March 2005 facet block performed by Dr. Faridi provided some relief for his ongoing back complaints, and thereafter he applied for and was successful in obtaining work for an electrical contractor. According to the worker, that employment is seasonal in nature, running mainly from March to October. He also indicated that his employment duties involved running the crane truck, driving a service truck, and loading. The worker noted that he makes between $20.00 and $22.50 per hour. However, he also indicated that he only took that work due to financial need, and he doubts he will be able to perform it over the longer term given the back complaints he experiences as a result of that employment.

The worker also questioned the Board's decision that he could work as a shipper/receiver. He said that he put a number of applications out for such work, but found that he did not have the necessary employment background. He also suggested that most positions as shipper/receiver would require him to lift.

The worker's representative relied on his earlier submissions to the Review Division, with the exception of his earlier argument that future work as a shipper/receiver would be viable. The worker's representative now submits that employment as a shipper/receiver would involve heavy lifting, such that it is not a viable employment option for loss of earnings consideration. He argued that although the worker is currently employed, that work is not suitable and the worker will sustain a significant loss of earnings in the long term. The worker's representative also previously argued that the worker ought to be examined to determine what objective residual impairment may exist in the form of range of back motion deficits and the like; he suggested that the worker had impairment in excess of that represented by the 2.5% award for chronic pain.

**Findings and Reasons**

I will deal with the issues in the order that they were raised, as denoted in the outline of the issues that I completed above.

There were no particular submissions made on the Board's decision that the worker's back strain had recovered by August 22, 2004. In considering that particular issue, it is important to bear in mind that the Board has at all times only accepted that the worker sustained a back strain, and that is the limit of what has been accepted apart from the chronic pain that the Board also accepted as a compensable consequence. The medical evidence in my view supports the Board's decision that the worker's back strain had resolved, and that he was left with permanent chronic pain as a residual disability for which permanent disability assessment was indicated. As such, I confirm that aspect of the February 14, 2005 decision of the Board's Review Division that the

worker's low back strain had resolved, and that permanent chronic pain remained. It follows, therefore, that I endorse the Board's decision to terminate the worker's entitlement to temporary wage loss benefits, which according to both sections 29 and 30 of the Act are only payable for temporary disability.

I nevertheless vary the February 14, 2005 decision as it relates to the termination of general health care benefits. Section 21(6) of the Act provides that health care benefits must at all times be subject to the direction, supervision and control of the Board. In terms of the Board's exercise of that control, item #78.10 of the RSCM II provides that the main purpose of the control of treatment by the Board is to ensure that treatment is not overlooked, and that treatment choices are not overlooked. The RSCM II also discusses what options are available to the Board should a worker engage in insanitary or injurious practices, what types of treatment are generally accepted, and what limits may exist with certain forms of treatment such as physiotherapy. The effect of the February 14, 2005 decision of the Review Division was to terminate all forms of medical treatment effective August 22, 2004, being the date the worker's condition was considered to have stabilized and become permanent in nature. I conclude that decision was in error, and that the worker is entitled to a reasonable level of ongoing medical care that is necessary to treat his permanent chronic pain condition that has been accepted under his claim. In short, I conclude that the mere fact a condition has become permanent does not negate the fact that medical care and treatment may still be required. That is also reflected in item #73.20 of the RSCM II, which provides:

> Coverage for necessary health care continues for as long as the worker continues to experience the effects of a compensable injury or occupational disease, notwithstanding that he or she may not be disabled from working or may be retired from the workforce.

However, I confirm the Board's decision that further physiotherapy treatment would not be acceptable beyond August 22, 2004. A separate consideration is necessary in order for physiotherapy to be accepted beyond the initial eight weeks of such treatment. In particular, item #75.12 of the RSCM II provides that physiotherapy may be continued to a maximum of eight weeks, although extensions may be granted where prior approval is authorized by a Board medical advisor. In the worker's case, there is no specific request from his attending physician or the treating physiotherapist for a further extension of such treatment beyond August 22, 2004. Moreover, following a file review a Board medical advisor declined to authorize further physiotherapy treatment, and instead noted that physiotherapy would not likely be effective at that point in the worker's recovery, and that he could perform exercises instead. I accept that medical opinion, and conclude that the worker is not entitled to the further extension of physiotherapy treatment that he seeks.

Turning next to the February 16, 2005 decision of the Board's Review Division, the argument provided by the worker's representative is that a permanent disability

examination is necessary. I have difficulty agreeing with that particular argument, given that my review of the medical reports subsequent to the August 22, 2004 plateau date does not reveal information to suggest that there are any particular objective deficits of note on examination. Instead, the ongoing medical reports serve to confirm that the worker had ongoing chronic pain, being the medical condition that was referred to the Board's Disability Awards Department for assessment. It is also relevant to note that item #96.20 of the RSCM II, which according to a June 22, 2004 resolution from the Board's board of directors applies to all decisions including appellate decisions on or after July 2, 2004, provides:

> If an actual or potential permanent disability is accepted on the claim, the Board officer will refer the file to the Disability Awards Department for assessment. As part of the referral, the Board officer will prepare a memo, clearly setting out the status of the claim and confirmation of what permanent conditions have been accepted.

Also, as noted in item #96.30 of the RSCM II, "Board Officers in Disability Awards must accept the final decision of the Board officer as to what conditions are accepted under the claim."

In the worker's case, the Board officer's August 27, 2004 memorandum outlined that the permanent condition accepted under the claim was chronic pain. In noting that memorandum, and my earlier finding that the worker's back strain had likely resolved by August 22, 2004, I conclude that the only residual impairment that required permanent disability assessment was in relation to the worker's accepted chronic pain. The Board has specific policy, as outlined in item #39.02 of the RSCM II, which is to be used as a guideline in the assessment of section 23(1) of the Act functional pension awards for chronic pain. During such an assessment a referral may be made for a multidisciplinary assessment, at which time consideration is given to the worker's medical history, health status, physical limitations, psychological state, behaviour, and workplace issues. According to the Board's policy, the multidisciplinary assessment is intended to provide the Board officer in Disability Awards with information about the worker's experience of chronic pain, and assist in determining whether the worker is consistent in his or her presentation. Board policy also provides that once a Board officer determines that a worker is entitled to a section 23(1) of the Act award for chronic pain, an award equal to 2.5% of total disability is granted to the worker.

The performance of a multidisciplinary assessment is not, according to Board policy, mandatory. Moreover, in the worker's case specifically it is apparent that the Board accepted that the worker had entitlement to a section 23(1) of the Act award for his chronic pain, and that he was provided with a 2.5% functional pension award in that regard. I conclude that award is congruent with Board policy. I also conclude that a physical examination was not necessary to evaluate the worker's pension entitlement in relation to his accepted permanent chronic pain. I confirm the Review Division's

February 16, 2005 decision that the worker is entitled to a 2.5% functional pension award under section 23(1) of the Act.

In considering the argument that the worker is entitled to a loss of earnings award under section 23(3) of the Act, I accept that although the worker is currently employed such employment is seasonal in nature, and would not likely provide earnings comparable to the net earnings rate established on his claim. However, of more significance, I accept the worker's statement that he is only performing such work due to financial need, and that due to the increased complaints he experiences it is unlikely he will be able to maintain such employment in the long term. I also observe that such employment involves both prolonged sitting as well as lifting, or physical aspects that are contraindicated according to the medical evidence on file, and the restrictions that the Board accepted under the claim. In short, I conclude that the worker's current employment setting is most likely not suitable, and that it should not be used as an indicator of his likely long-term employability.

In further considering the issue of whether the worker is entitled to an assessment for a loss of earnings pension under section 23(3) of the Act, both the Board officer in Disability Awards, and the review officer subsequently, concluded that it was not impossible for the worker to return to his pre-injury employment, or to an occupation of similar type or nature.

Section 23(3) of the Act provides that the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between the average net earnings before the injury, and either the average net earnings following the injury or the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

However, as noted in section 23(3.1) of the Act:

> 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 the 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.

Moreover, section 23(3.2) provides:

> 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.

Thus, the Act does not use terminology to suggest that the test is whether it is impossible for the worker to continue in the pre-injury occupation or a suitable

occupation. It instead directs that the consideration is whether the combined effect of the worker's injury occupation and the compensable disability is so exceptional that the functional award under section 23(1) of the Act does not compensate for the injury. Clearly such a combined effect may exist, yet not be considered to be sufficiently exceptional as to warrant consideration of loss of earnings entitlement under section 23(3) of the Act. That is also reflected in item #40.00 of the RSCM II, which provides:

> 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 word "impossible" is contained in Board policy, but its use is in the context of defining a worker's ability to resume the pre-injury employment, or an occupation of a similar type or nature. However, the relevant policy does not define what a significant loss of earnings actually represents. The use of the word "impossible" is contained in item #40.00 of the RCSM II, which provides:

> 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.

In order to place that statement into context, it is appropriate to include it within the broader policy statements in item #40.00 of the RSCM II, as follows:

> 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).

In considering the worker's future employability the Board accepted that his residual impairment precluded a resumption of his pre-injury employment. Moreover, the review officer endorsed the Board's conclusion that the essential skills in the worker's pre-injury employment of truck driving include prolonged sitting, as well as heavy lifting. I agree with that approach in evaluating existing skill sets, and note that it is consistent with the conclusion contained in *WCAT Decision #2004-06402* (which is available at www.wcat.bc.ca/research/appeal-search.htm). The vice chair in that particular case accepted that in most cases heavy physical labour is not a "skill," in the sense that it is a learned application of knowledge and abilities. However, she nevertheless accepted that in the circumstance where the vast majority of jobs in the National Occupational Classification (NOC) required heavy physical labour then it must be considered to be a skill. In that particular case the panel concluded that although the worker retained the ability to follow directions and identify his tools, he was in the end limited in his ability to use his tools due to his compensability disability, which included in that case chronic pain and the inability to do heavy lifting, sustained standing or bending.

I endorse that analysis and conclude in the case before me that the worker is no longer able to perform the essential skills of his pre-injury employment due to his inability to sit for any length of time, or to lift heavy objects or perform repetitive lifting. Skills, according to Board policy in item #40.00 of the RSCM II, are defined as the learned application of knowledge and abilities. While the worker undoubtedly retains the knowledge of how to drive truck and complete the ancillary duties of that employment, it is well established from the medical evidence that his residual disability precludes him from applying those skills. In that sense, I accept that it is impossible for the worker to resume his pre-injury employment, with that inability being driven by the impact that his residual impairment has on his ability to apply his previous knowledge and abilities of his pre-injury employment.

I note that my conclusion in that regard is not in conflict with the discussion contained in the Board's Practice Directive #46, which is not Board policy and is not binding on WCAT. That directive nevertheless does provide instruction to Board officers in relation to the adjudication of like matters, and as such warrants some discussion. Practice Directive #46 (which is available through the Board's website at http://www.worksafebc.com/) assists in determining when a case is so exceptional as to warrant section 23(3) of the Act consideration. It provides, 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 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 pre-injury 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.

**Section 23(3) Assessment**

> Where a worker is considered to meet the "so exceptional" test, the worker will be entitled to a section 23(3) assessment, which includes an employability assessment. This will identify the suitable occupations that will maximize the worker's long-term earnings. This may include additional occupations in light of all reasonable vocational rehabilitation assistance that may be offered to the worker

The above may appear at first to establish that skills are not to be confused with physical demands such as sitting or standing. However, that discussion is quite clearly limited to the circumstance where 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. In the worker's case before me, I accept, as did the Board, that his inability to sit for any length of time would preclude him from resuming his pre-injury employment; that physical limitation obviously precluded him from performing the essential skills of that occupation. Moreover, and with regard to Practice Directive #46, the four-digit code that describes the worker's occupational code is 7411. In noting that all of the jobs listed under that code involve driving, I accept that it is impossible for the worker to continue in such work, given the limitations imposed by his residual disability.

As such, for the purposes of the policy discussion in item #40.00 of the RSCM II, the medical evidence confirms that it is impossible for the worker to continue in the occupation in which he was employed at the time of his injury. Insofar as whether he was also precluded from performing a job of similar type and nature, the associated jobs with the same first three digits in the NOC are: bus drivers and subway and other transit operators, taxi and limousine drivers and chauffeurs, and delivery and courier service drivers. Considering that those associated jobs would also involve sitting for extended periods, I have no difficulty in accepting that the worker would also be medically precluded from performing jobs of a similar type and nature to his injury employment.

Turning to whether the worker is able to adapt to another suitable job without incurring a significant loss of earnings, I am unsure on what basis the Board concluded that future employment as a crane operator was viable. Although such employment would offset any potential loss of earnings, the fact remains that it would require the worker to remain seated for prolonged periods, something that he is medically precluded from doing. Considering that this form of alternate employment would require that the worker remain seated, and that it is established that he is unable to do so for sufficient periods of time, it is axiomatic that the worker is not physically suited to perform such alternate employment.

I am unable to agree with the argument that the worker is not physically suited to perform shipper/receiver work. While the worker does not currently have the skills to perform such work, according to the information on file, the Board was willing to provide additional vocational rehabilitation assistance to ensure that access to such employment could take place. The worker initially held the view that he was physically suited to such work, as did his representative. Although their views have changed, I conclude that such employment does not necessarily involve the heavy lifting that is now suggested. The NOC defines the role of the shipper/receiver, and job duties may include some packing and unpacking. However, the other duties involved include invoicing, record keeping, coding and the like. The medical evidence before me is that the worker is unable to perform heavy lifts, or continuous lifting. As such, I accept that the worker is able to perform some lifting. Moreover, I also accept that there would be a variety of shipper/receiver employments available where the products involved would be well within the worker's physical ability to handle, particularly considering that such duties would be interspersed with the administrative aspects of the job.

According to the Board there are a large number of openings for such employment. As such, I accept that with appropriate vocational rehabilitation assistance the worker could access such a position. However, the Board also acknowledged that such employment had average earnings of $29,100 per annum, being the gross earnings figure. The Board did not calculate what that would translate to as expected net annual income, with consideration of the expected deductions and tax credits; however, for the purposes of this particular appeal it is sufficient to apply a notional 20% reduction in those gross projected earnings, as I do not have access to the Board's electronic net earnings calculator. The worker's net rate of compensation has been established to be $2,610.27. Taking the $29,100 gross average earnings figure, the gross monthly earnings would be $2,425, which is a figure that itself is below the net rate of compensation established for this claim. Using the notional reduction of 20% (which would be a figure that is likely below the actual reduction through net earnings calculation) the worker could be expected to have notional net earnings of $1,940 in his employment as a shipper/receiver.

The Act and Board policy clearly contemplate that a loss of earnings award can be granted. However, in order for such consideration to take place the worker must meet the threshold criteria outlined in item #40.00 of the RSCM II that: 1) the occupation at the time of injury required specific skills which are essential to that occupation or an occupation of similar type of nature; 2) as a result of the compensable disability the worker must no longer be able to perform the essential skills needed to continue in his injury occupation or in an occupation of a similar type or nature; 3) the effect of the compensable disability is that the worker is unable to work in his 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.

As noted above, I have concluded that the worker's occupation required specific skills that were essential to its performance, and that due to his compensable disability he is no longer able to perform the essential skills needed to continue in that occupation, or in an occupation of a similar type or nature. Moreover, although I have also concluded that the worker is physically able to perform alternate employment as a shipper/receiver, and that such employment would be available to him with appropriate vocational rehabilitation assistance, it is readily apparent that he will sustain a loss of earnings through such employment. Thus, the remaining question is whether the worker will incur "a significant loss of earnings."

According to section 23(3.1) of the Act a loss of earnings pension may be paid in the circumstance where the combined effect of the worker's pre-injury occupation and compensable disability is so exceptional that the section 23(1) of the Act functional pension award does not appropriately compensate the worker. Board policy does not define what considerations are necessary in order to assist with the evaluation of whether a "significant" loss of earnings exists, being one of the threshold criteria discussed in item #40.00 of the RSCM II. However, Practice Directive #46 indicates that a significant loss of earnings exists when the loss of earnings a worker will experience could not have been anticipated under the section 23(1) of the Act method of estimating a worker's long-term loss of earning capacity. That directive also indicates that consideration must be given to the nature of the section 23(1) of the Act award, 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 the worker's disability and resulting loss of earning capacity. Finally, that directive notes that to consider such loss, consideration is given to comparing statistical references on average occupational earnings. Thus, for the purposes of considering whether a significant loss of earnings exists I accept that it is a financial test, with the ultimate consideration being whether the section 23(1) of the Act award appropriately compensates the worker for the impairment of earning capacity resulting from the compensable disability.

As noted in *Carling O'Keefe Breweries of Canada Ltd. v. Brewery, Winery & Distillery Workers, Local 300* (1986), 87 C.L.L.C. 16,005 at 14,026, 14,027 (B.C.L.R.B.):

> Significant may mean significant in terms of sheer numbers. It may also refer to significance in terms of impact to the unit as a whole. Finally, although in this case the emphasis is on those employees who have been laid off, it may also be appropriate to assess the impact of the change on those employees who continue to work.

I conclude that in the context of compensation under the Act, regard ought to be had to income loss, in terms of the difference in values of net income figures before and after the injury. I accept that is likely the most appropriate viewpoint to take, noting that the comparables for compensation purposes are the compensation for impairment of

earning capacity resulting from the residual functional impairment, and the pre- versus post-injury net earnings figures. While there may be an impact on the worker personally, I accept that in determining whether there has been a significant loss of earnings resulting from the injury the evaluation is in relation to the resulting financial impact.

The facts of the case before me suggest, using the figures I have outlined above, that the worker has sustained an approximate 25% reduction in employment income when net pre- and post-earnings figures are compared. The Board should quite obviously calculate the actual net earnings figure from the $29,100 annual earnings figure for shipper/receivers; however, for the purposes of this particular appeal I have little difficulty concluding that the worker's disability resulting from his injury is so exceptional that the 2.5% amount determined under section 23(1) of the Act does not appropriately compensate him. I further conclude that the worker has likely sustained a significant loss of earnings, such that a loss of earnings assessment is indicated. I return his file to the Board to complete that particular assessment.

In summary, I conclude:

1. The worker recovered from his back strain by August 22, 2004.

2. The worker is entitled to additional general health care expenses beyond August 22, 2004 that can be reasonably associated with the treatment of his accepted permanent chronic pain.

3. The worker is not entitled to health care expenses specific to an extension of physiotherapy treatment beyond August 22, 2004.

4. The worker's 2.5% functional pension award for his accepted permanent chronic pain was appropriately determined.

5. The worker cannot continue in his pre-injury employment, or work in an occupation of a similar type or nature. While he can return to suitable alternate employment as a shipper/receiver with appropriate rehabilitation assistance, he will incur a significant loss of earnings as a result such that a loss of earnings assessment is indicated.

Pursuant to section 7 of the *Workers Compensation Act Appeal Regulation* I allow appeal expenses associated with the worker's time loss to attend his oral hearing.

**Conclusion**

I vary the February 14, 2005 decision, confirm the February 16, 2005 decision, and vary the April 26, 2005 decision, as described in the above findings and reasons.

Anthony F. Stevens
Vice Chair

AFS/gl