

As of May 19, 2015, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number : WCAT-2009-00744
WCAT Decision Date: March 12, 2009
Panel: Deirdre Rice, Vice Chair

Introduction

- [1] On August 30, 2004, the worker sustained a crushing and burning injury to his right forearm in the course of his duties as a crematorium operator. The Workers' Compensation Board (Board)¹ has granted him a permanent partial disability (PPD) award equal to 56.05% of total disability, plus an age adaptability factor of 4.48%, for the permanent functional impairment (PFI) resulting from the injury. In a November 23, 2007 decision, a claims adjudicator in Disability Awards (CADA) advised the worker that he is not entitled to be assessed for a loss of earnings award. Although the worker was unable to return to his pre-injury job, the CADA was satisfied that he could obtain other employment without incurring a significant loss of earnings.
- [2] The CADA's decision was upheld in a June 11, 2008 decision by a review officer with the Board's Review Division (*Review Decision #R0089005*).
- [3] The worker has appealed the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). He participated in the oral hearing of his appeal with the assistance of his representative. The employer is not participating in the appeal, although provided with the opportunity to do so.

Issue(s)

- [4] The issue is whether the worker is entitled to an assessment for a loss of earnings pension award.

Jurisdiction

- [5] This appeal was filed with WCAT under section 239(1) of the *Workers Compensation Act* (Act). WCAT must make its decision on the merits and justice of the case but, in so doing, it must apply a policy of the board of directors of the Board that is applicable in the case. Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

¹ Now operating as WorkSafeBC.

Background and Evidence

- [6] The worker is currently 55 years old and began working for the employer in November 2002. The employer is located in a major metropolitan centre.
- [7] The August 30, 2004 incident occurred when a crematorium door fell on the worker's right forearm. The specific injuries the Board has accepted under the claim are a right forearm crush injury with burn devascularization, an open comminuted fracture of the right radius and ulna with subsequent surgery, multiple soft tissue injuries to muscle and extensor tendons of the right upper extremity, and a revision amputation of the right thumb and right index finger.
- [8] Shortly after the injury, the worker moved back to the economically depressed community where he has lived for most of his life.
- [9] At the hearing, the testified that he has been living with his partner and her two teenage children in this smaller community for almost 5 years. Off and on, he and his partner have had a relationship for 25 years. He spent 2 years in the major metropolitan centre and, while there, stayed at his brother's house. He went back to his home town on weekends. For most of that time, he stayed at his mother's house but, about a month before his injury, he moved into his partner's apartment and spent the weekends there. He belonged to a band, and supplemented his income by playing with the band on weekends. The worker no longer has a place to stay in the metropolitan community because his brother does not live there anymore.
- [10] The worker underwent operative treatment on August 31, 2004 and subsequently underwent a number of further surgeries, the last of which was undertaken on June 21, 2006 by an orthopaedic surgeon, Dr. McAllister.
- [11] The worker received physiotherapy over much of this period and was discharged from the clinic he had been attending on November 2, 2006. In the discharge report, the registered physiotherapist noted that the worker had loss of forearm rotation and could not touch his right shoulder with his right hand. He was unable to pronate his right hand to reach for objects. His ability to grip with his right hand was limited by severe right forearm pain and the amputation of his thumb and index finger. The worker also had very limited dexterity for writing with his dominant right hand and could not steer a car with his right arm. The physiotherapist advised that the worker could not return to his pre-injury job as a crematorium operator and thought that the worker should seek employment that does not require bilateral fine motor skills or use of the right hand for holding, lifting, carrying, reaching or handling objects.

[12] In a December 12, 2006 decision, a Board case manager advised the worker that his condition was now considered to be permanent and his wage loss benefits had been concluded as of August 31, 2006. The case manager noted that the file had been reviewed by a Board medical advisor and accepted that the worker had been left with both permanent medical restrictions and permanent limitations as a result of his injury. The permanent physical limitations which the medical advisor had indicated were reasonable and biologically plausible were as follows:

- Decreased right arm tolerance to cold weather or to being touched by cold objects
- significantly decreased right forearm rotation
- right wrist limited to 30° extension and 35° flexion
- right thumb movements limited to 20° extension, 55° abduction and decreased opposition
- decreased ability to grasp objects with right hand
- decreased right hand strength – pinch up to 6lbs. and grip up to 40 lbs.
- loss of light touch sensation of right dorsal index digit and dorsal and volar aspects of right thumb
- limited dexterity for writing

[all quotations typed as written unless otherwise indicated]

[13] With regard to medical restrictions, the medical advisor had said that the worker was left with the following:

- avoid vibrations to the right arm/hand
- avoid lifting more than 10 lbs. with the right arm/hand
- avoid extremes of range of motion with the right hand/arm
- avoid frequent repetitive gripping activity with the right hand

[14] In addition, the case manager accepted a permanent chronic pain condition as a consequence of the compensable injuries and referred the file to the Board's Disability Awards Department for assessment of the worker's entitlement to a pension for this condition as well as for his physical injuries. Finally, in view of the worker's physical limitations and medical restrictions and the nature of the job demands of the worker's pre-injury employment, the case manager referred the claim to the Board's Vocational Rehabilitation Department.

[15] On March 14, 2007, a Board disability awards medical advisor (DAMA) examined the worker for the purpose of determining the extent of his PFI. The DAMA concluded that the worker's handgrip strength could not be adequately tested. Dynamometer testing was omitted from the evaluation as the worker only appeared to have pinching grip strength between his partial right thumb and forefinger and such evaluation

would likely have been of limited usefulness. In addition, the DAMA did not wish to cause the worker unnecessary pain. Among the concerns the worker expressed during the evaluation were that he had a continuous burning sensation like scalding water over the dorsum of his proximal index finger and the dorsum of his proximal thumb. He also got pain in the mid-forearm dorsally, and severe pain if he bumped the arm. Additionally, he had occasional sharp pain on the radial aspect of his amputated thumb, and got “shocks” over his forearm and hand at times. Any attempt to use the right hand for gripping or lifting resulted in often severe pains over the right forearm and into the hand.

- [16] The worker’s PPD award, which was effective January 1, 2007, was granted in a May 25, 2007 decision and was based on his earnings of \$30,615.00 in the one year prior to his injury. No decision was made at this time regarding the worker’s eligibility to a loss of earnings assessment because investigation was still ongoing.
- [17] In a June 20, 2007 decision, a Board vocational rehabilitation consultant (VRC) advised the worker that he had been found entitled to vocational rehabilitation benefits in the form of 12 weeks of job search benefits and the assistance of a job placement provider to support his job search.
- [18] In July 2007, with assistance of the job placement provider, the worker began a 4-week work assessment as a gas station attendant. The worker worked one 4-hour shift, but found that he could not continue as handling cash and stocking items was too difficult. He went to see his family physician, Dr. Steyn, on July 30, 2007. Dr. Steyn noted that the worker had experienced significant swelling in his hand and advised the Board that the worker was unable to do this work.
- [19] The worker continued his job search, with the assistance of the job placement provider. In a final report dated August 13, 2007, the job placement provider advised that there were not many employment opportunities in the community where the worker lives where the worker could meet the physical demands of the job. He considered that the worker had significant barriers to employment and suggested that the Board consider providing the worker training so that he could build on his current skill set. The worker was an accomplished musician prior to the accident and made money playing in a band. A musical career as a broadcaster or audio recording technician therefore made sense. In addition, the worker had built hundreds of homes while working in construction and the job placement provider thought that he would benefit from further training in the areas of construction inspection, cleaning and restoration. The provider also noted that the worker had lost his driver’s licence as a result of an impaired driving charge. This eliminated driving a taxi cab, and also restricted his ability to search for employment in other communities in the area.

- [20] As noted above, in the November 23, 2007 decision, the CADA concluded that the worker could perform alternate employment. The basis for this decision is explained in a form 21 memorandum which the CADA completed on November 2, 2007. The CADA determined that the worker's pre-injury job fell within the National Occupational Classification (NOC) code 6683, "other elemental service occupations," and found that the worker could perform other jobs within that occupational code, such as ticket takers, gas station attendants, greeters and door attendants, and retail cashiers. As a result, the CADA concluded that the worker was not eligible for a loss of earnings assessment.
- [21] In the meantime, the worker had filed a request for review of the VRC's June 20, 2007 decision. That decision was varied by a review officer on February 13, 2008 (*Review Decision #R0083588*). The review officer noted that the VRC had determined that the worker should be able to access customer service entry-level jobs such as a gas station attendant, but the worker had been unable to do this job. The review officer concluded that the worker's geographical location and lack of a valid driver's licence reduced his ability to find employment and, therefore, that non-compensable factors were impacting the worker's prospects of employment. However, the review officer also concluded that the worker's significant disability was the major limiting factor to his re-employment and was not satisfied that a 12-week period of job search with placement assistance was sufficient to meet the significant vocational challenge his circumstances presented. Accordingly, the review officer determined that the worker was entitled to additional vocational rehabilitation assistance and a new vocational rehabilitation plan.
- [22] Based on guidelines set out in policy item #C11-88.30 of the RSCM II, the review officer concluded that, at minimum, he was entitled to an additional 9 weeks of job search assistance. The review officer also said that additional assistance should be determined based on the worker having a reasonable probability of successfully achieving the vocational goal. In other words, the plan should clearly document how the worker's vocational profile matched the targeted suitable occupation. Based on the medical evidence on the worker's file, the review officer was not satisfied that the worker had the physical capability to succeed in a repetitive "hands-on" occupation. She suggested that the Board might wish to refer the worker for a functional capacity evaluation (FCE) to determine what specific work activities he was capable of pursuing.
- [23] The Board arranged for an external service provider to undertake an FCE and this was conducted on April 3, 2008. The evaluator found that the worker was unable to lift, carry, push or pull any significant weight or force with his right arm. However, using his left arm alone, he could lift and carry up to the heavy strength level and push and pull up to the light strength level. In addition, while the worker had no limitations with respect to reaching, handling and fingering with his left upper extremity, he demonstrated very limited handling and fingering abilities with his right hand and could not make a fist with his right hand. The evaluator concluded that the worker was capable of full-time work that did not exceed his material handling abilities, with the

following limitations: that he only able to use his right hand as an assist to his left hand for handling and fingering activities (that is, to hold and steady objects); and, that he engage in no more than occasional very light gripping or pinching with the right hand. While the evaluator acknowledged that the worker would be slow, it was concluded that he was physically capable of work in the following occupations: cashier (NOC code 6611), ticket and cargo agent (NOC code 6434), retail sales persons, except car rental agent (NOC code 6421), and hotel front desk clerk (NOC code 6435). He was also considered able to work as a collections agent (NOC code 1435) if no significant writing or keyboarding was required.

- [24] In support of the worker's request for review of the November 23, 2007 decision, the worker's representative submitted that the worker should be granted a loss of earnings award as he is essentially unemployable. The representative argued that the Board has not referenced "a single real job the worker can do," and the jobs noted by the Board all require lifting and repetitive use of his hand. The representative also stated that the worker was incapable of working either full or part time, and noted that the worker had been granted no training or assistance to access suitable jobs. In addition, the representative submitted that the occupations noted in the FCE are neither suitable nor reasonably available and, since the worker's work would be slower, more awkward and less precise due to his right hand and arm injury, he would not be competitive in pursuing those jobs. The representative relied on the July 30, 2007 progress report from Dr. Steyn. The worker also provided a statement in which he said that he was unable to work as a gas station attendant and he did not wish to leave the small community where he relocated.
- [25] With respect to the FCE report, the worker's representative submitted that the submitted that the occupations identified by the evaluator are neither suitable nor reasonably available. Specifically, the representative argued that the worker's work would be slower, more awkward and less precise due to his right hand and arm injury, and he would therefore not be competitive in pursuing those jobs.
- [26] Further vocational rehabilitation planning was undertaken and the VRC developed a return-to-work plan with targets of front desk clerk (NOC code 6435), cashier (NOC code 6611) and retail sales (NOC code 6421). This plan included Board-sponsorship of courses and the worker went on to complete training in how to use a computerized cash system (Squirrel), his level 1 first aid and two hospitality industry courses (Superhost and Foodsafe). The worker was also provided with an additional 9 weeks of job search assistance and further one-to-one assistance with the job search. In the May 30, 2008 decision advising the worker of his further entitlement, the VRC also advised the worker that it her expectation that it, after 2 weeks of looking for work, he was unable to identify any job opportunities, he should expand his search to include other communities that are near the one where he lives. She confirmed that relocation assistance would be available to him if he were unable to fine employment in the area where he lives.

- [27] The law and policy relevant in this appeal has been set out in both the CADA's form 21 memorandum and *Review Decision #R0089005*. In brief, section 23(3.1) of the Act provides that a loss of earnings award is made 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 section 23(1) does not appropriately compensate the worker.
- [28] Policy item #40.00 of the RSCM II provides that, while a worker may have a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under sections 23(3) and 23(3.1) of the Act.
- [29] Policy item #40.00 is the initial step of a two-step process. First, a worker must satisfy three threshold criteria outlined below before a worker can be assessed under section 23(3) of the Act:
- 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.
- [30] Where the worker satisfies all three criteria, the worker moves on to the second step in the process, an assessment under section 23(3). It is at this second stage that the worker is considered for a loss of earnings award. It should be noted that, even if the criteria are satisfied, a loss of earnings award is not automatic but dependent on the findings of the section 23(3) assessment.
- [31] In *Review Decision #R0089005*, the review officer noted that, in the form 21 memorandum, the CADA had described the essential skills of the worker's job as a crematorium operator (NOC code 6683.3) and those for other elemental service occupations (NOC code 6683) as "oral communication" and "problem solving." The review officer noted that NOC code 6683 includes a wide variety of jobs (such as beauty salon attendants, door attendants, funeral home attendants, laundromat attendants, parking lot attendants and ticket takers) which provide services specific to the establishments in which those jobs are found. The review officer therefore found it difficult to identify skills which were essential to all jobs within this occupational code. However, the review officer accepted that each job within NOC code 6683 does require

specific skills essential to the job and the occupation. As a result, as the CADA had done, she found that the first criterion under policy item #40.00 of the RSCM II had been met.

- [32] With regard to the second criterion in policy item #40.00 of the RSCM II, the CADA had concluded that the worker could perform the skills of ticket takers, gas station attendants, greeters and door attendants, and retail cashiers. All of these jobs fell within the pre-injury occupational code, NOC code 6683 and, consequently, the CADA concluded that the worker could continue in a similar occupation. In reaching this conclusion, the CADA had relied on the 2006 physiotherapy discharge report and the Board medical advisor's opinion. However, the FCE had since been conducted and the review officer preferred the evidence in the FCE evaluation report. It contained detailed and up-to-date information on the worker's post-injury abilities and his ability to perform specific occupations. The review officer found the FCE to be persuasive evidence and, since the testing undertaken by the FCE evaluator demonstrated that the worker was capable of full-time work within his limitations, rejected the argument that the worker is unemployable. The review officer also rejected the argument that the occupations identified in the FCE report were not suitable or available to the worker. Rather, since the worker was now participating in a vocational rehabilitation process which included training in those occupations, as well as further job search assistance, the review officer concluded that the worker had, or could easily attain, the transferable skills and post-injury functional abilities that these occupations require. The review officer considered that the occupations of cashier (NOC code 6611), ticket and cargo agent (NOC code 6434), retail sales persons, except car rental agent (NOC code 6421), and hotel front desk clerk (NOC code 6435) were suitable and, moreover, that the worker could adapt to them.
- [33] For the purposes of the analysis under policy item #40.00 of the RSCM II, it is the Board's general practice to characterize a worker's occupation by the four or five digit NOC code for the unit group which best encompasses the characteristics of the worker's pre-injury.² Further, in general, the Board's practice is to identify occupations of a "similar type or nature" as those occupations with NOC codes that begin with same three digits as the selected unit group. Since the occupations identified by the review officer as suitable for the worker did not share the same initial four digits of NOC code for crematorium operators (NOC code 6683), the review officer went on to consider the third criterion in policy item #40.00 of the RSCM II.
- [34] The review officer obtained relevant occupational average earnings from the Board's Statistical Service Department for the occupations of collections agent, retail salesperson and ticket and cargo agent. Each of these exceeded the worker's pre-injury average earnings and, consequently, the worker would not incur a significant

² See "Practice Directive #C6-2: Permanent Disability Benefits – Section 23(3)."

loss of earnings with employment in these occupations. The review officer also reviewed the average occupational earnings for cashiers and hotel front desk clerks, and noted that these were less than the worker's pre-injury average earnings of \$2,160 per month. However, once the worker's functional award of \$1,111 per month was added, there would also be no significant loss with employment in either of these occupations. The review officer concluded that, since the worker was able to adapt to several suitable occupations without incurring a significant loss of earnings, the eligibility test under policy item #40.00 of the RSCM II for a loss of earnings assessment had not been met.

- [35] Subsequent to the date of *Review Decision #R0089005*, the worker has received further vocational rehabilitation assistance, including a period of job search allowance which began on July 7, 2008. The VRC set out the extent of the worker's further entitlement in this regard in a June 13, 2008 decision. His request for review of this decision resulted in a review officer concluding that the worker was entitled to a further vocational rehabilitation plan (*Review Decision #R0096474*). The review officer stated that the worker's cooperation in the vocational rehabilitation process would be of paramount importance to the outcome of that process. However, she was satisfied that, in order to assist in lessening the handicap the worker had due to his significant level of physical impairment, further assistance such as additional individualized job placement assistance to assist the worker to locate a work assessment or a training-on--the-job placement was required.
- [36] Vocational rehabilitation activities are ongoing.

Oral Hearing

- [37] At the hearing, the worker reviewed the current state of his right arm and hand impairment. His injuries have left him with extremely limited use of his right hand and arm. He cannot undertake repetitive activities with it, has no pinch strength, and his fingers do not pinch properly. He also has limited lifting ability, and cannot lift a jug of milk. There is limited feeling in the arm below the elbow and, because he is right-hand dominant, he has difficulty writing. He cannot pick up a standard size pen, and uses oversized utensils and implements when eating and writing. Because of his injuries, he is no longer able to play a guitar, which means that he can no longer make income as a travelling musician, as he did before the injury. He has also given up his pre-injury recreational activities of riding a motor bicycle, camping, fishing and hunting. Also, he stays away from crowded places because of the severe pain caused by his right forearm being hit or banged.
- [38] The worker also reviewed the difficulties he encountered during the four-hour shift at the gas station and the content of the Board-sponsored courses he took. He does not believe these courses have given him the skills necessary to make him employable

because his right arm disability prevents him from doing the duties that are expected by employers who hire workers in the related occupations. For example, he said that he thought he could apply the fundamentals of the Squirrel program, which is now obsolete, to more current cash register technology and that he could use this technology with just his left hand. However, he could not obtain a job as a cashier or theatre ticket agent because of the physical duties that go along with these entry-level positions. He cannot stock shelves, mop floors, or do anything that requires him to lift with his right arm. To date, he had not been able to find a job that would allow him to use only his left hand, and even a good friend who was looking for a front desk clerk for the hotel he owns would not hire him because he could not do the physical part of the job.

- [39] Just prior to the hearing, the worker had completed a career management course which provided him with new job search techniques. However, the program did not have experience in dealing with people with physical disabilities. The worker had since identified a new program that does have experience in assisting physically disabled people to find work and, as of the hearing date, was planning on starting that program once his doctor cleared him to do so.
- [40] The worker noted that the community where he currently lives has been his home for 32 years. His girlfriend's family is there and she is working. He does not consider it reasonable for him to have to give up his personal life in order to find a job. He intends to keep looking for work in the community but, if nothing turns up, he feels that that is all he can do. He will not be eligible to begin driving again until 2011 but, at the time he lost his licence, had already been tested and was qualified to drive with his left hand.
- [41] I accepted two documents at the hearing. Exhibit #1 is a list of jobs the worker applied for between October 15 and November 11, 2008. Exhibit #2 is an informational sheet about the career management course the worker had just completed, together with the certificate he obtained from the program. In addition, prior to the hearing, the worker's representative forwarded a submission the worker had prepared in support of the appeal.
- [42] The worker's representative submitted that the worker is entitled to consideration for a loss of earnings award. In summary, he submitted that none of the occupations that have been identified by the Board to date are suitable or reasonable in the context of policy item #40.12 of the RSCM II and, therefore, cannot be relied on as a basis for determining that the worker will suffer no loss of earnings. All of these occupations require adequately fast-paced and precise work and, the worker, with an almost unusable dominant right arm, would be greatly challenged or unable to perform these jobs in the long term. The representative said that the worker is at great competitive disadvantage in obtaining these jobs because of his inability to use his right hand to do the work, and the jobs not reasonably available to him. He submitted that the findings

of the FCE evaluator confirmed that the availability of “real jobs” for the worker was far from likely. Further, the training the worker had received to date was not efficient and was also somewhat inappropriate and poorly considered; that training did not lead to the skill acquisition that will allow employment and probably will not do so. The representative also took issue with the finding of the FCE evaluator that the worker could work full-time.

Reasons and Findings

- [43] In the November 23, 2007 decision, the CADA was satisfied that the worker met the first criterion in policy item #40.00 of the RSCM II, but found that he did not meet the second criterion. Therefore, it was not necessary to undertake a consideration of the third criterion established by that policy.
- [44] In *Review Decision #R0089005*, the review officer also found that the worker met the first criterion in policy item #40.00 of the RSCM II. Further, although not explicitly stated, it is apparent from the fact that the review officer undertook a consideration of the considerations relevant to the third criterion in that policy that she also accepted that the worker met the second criterion. It is important to note that, by the time of the review officer’s decision, there had been substantial further vocational rehabilitation activity on the worker’s file and, as a result of that activity, a greater understanding of the nature of the worker’s disability and the likelihood of him finding suitable and available employment in the community where he currently lives. The review officer consequently had the benefit of additional information that was not available to the case manager when she made her June 11, 2008 decision.
- [45] Subsequent to *Review Decision #R0089005*, the vocational rehabilitation process has continued and I have the benefit of the further information obtained through that process. With that benefit, I have concluded that the worker’s circumstances meet the first and second criteria in policy item #40.00 of the RSCM II.
- [46] With regard to the first criterion, I note that the CADA identified only two essential skills for the position of crematorium operator and the other occupations in NOC code 6683 as oral communication and problem solving. However, I am satisfied that there are additional essential skills for these positions. As set out in the form 21 memorandum, the main duties for the jobs in this occupational classification are as follows
- For door attendants require the knowledge and ability to assist persons entering or leaving residential buildings, theatres and similar establishments and may hail taxis and assist with parcels.
 - Funeral home attendants require the knowledge and ability to drive hearses, arrange lights and floral displays, escort mourners, act as pallbearers, and clean funeral parlours and chapels.

- Laundromat attendants require the knowledge and ability to replenish vending machines, provide change, explain operation of machines to customers, clean the laundromat and arrange for the repair of broken machines and may wash, dry and fold laundry for customers; may operate dry cleaning machines for customers.
- Parking lot attendants and car jockeys require the knowledge and ability to collect parking fees, issue ticket stubs, direct customers to parking spaces and park cars.
- Ticket takers and ushers require the knowledge and ability to collect admission tickets or passes from patrons at entertainment events and direct patrons to their seats.
- Other related elemental workers in this group the knowledge and ability to perform services specific to the establishments in which their occupations are found.

[47] Although not binding, I consider the clarification set out in the current version of Practice Directive #C6-2 helpful in defining the essential skills of these positions. Under the heading “Identifying Essential Skills,” the practice directive notes the following:

In practice, every occupation should be viewed as requiring skills that are a necessary element or quality for the specific occupation. It is recognized that physical requirements may be captured by the definition of skills where they are appropriately characterized as “learned abilities”. This is generally true where a physical requirement represents a necessary element for the majority of jobs in the occupational grouping. For example, a labourer’s “learned abilities” may be the ability to swing a hammer efficiently, operate a jackhammer, or climb a ladder.

[48] Later, under the heading “Ability to Continue in the Pre-injury Occupation/Similar Occupation,” the practice directive notes as follows:

The following types of evidence may assist in considering the effects of the disability and in determining whether a worker has the ability to perform the essential skills needed in the pre-injury or similar occupation:

- medical evidence on the claim related to the severity of the injury and the resulting disability such as x-rays, operative reports, specialist consultation reports, clinical examinations, and WorkSafeBC Medical Advisor opinions;

- the medical restrictions and physical limitations⁸ of the worker's impairment; and
- results from a functional capacity evaluation or an occupational rehabilitation program regarding the worker's post-injury functional abilities.

As part of the consideration for a section 23(3) award, the medical evidence must confirm that the work injury makes it impossible for the worker to continue in the pre-injury occupation or in a similar occupation. In practice, this means that there are no jobs in the pre-injury or similar occupation grouping where it would be medically possible for the worker to perform the essential skills. In other words, the worker's disability may directly prevent the worker from exercising an essential skill or may do so indirectly, for example, by preventing the worker from lifting the object on which or with which the worker applies an essential skill. For example, a worker who is no longer able to raise his hand over his head is no longer able to perform certain kinds of skilled repairs, even if he or she retains the necessary fine motor skills.

[emphasis added]

- [49] I am satisfied that, in view of the description of the main duties involved in the various occupations within NOC code 6683, each occupation includes use of the dominant arm that can appropriately be characterized as a "learned ability" as this term is explained in the practice directive. I am also satisfied that the medical evidence confirms that, by reason of his significant compensable right arm disability, the worker is no longer able to perform the essential skills that require use of the dominant arm; it is medically impossible for him to apply the learned knowledge and ability to arrange lights and floral displays, operate dry cleaning machines, or complete a variety of the learned skills that are required in these positions. Therefore, I am satisfied that the worker meets the second criterion in policy item #40.00 of the RSCM II.
- [50] As set out above, in circumstances where the worker can continue in neither the occupation at the time of injury nor in an occupation of a similar type or nature, the third criterion in policy item #40.00 of the RSCM II requires consideration of whether the worker can adapt to another suitable occupation without incurring a significant loss of earnings. The review officer concluded that the worker could adapt to the various occupations identified in the FCE evaluation. However, subsequent to the date of that decision, it has been determined through the vocational rehabilitation process that the worker does not currently have the skills and ability to access jobs in those alternate

occupations. I have again found the non-binding practice directive helpful in addressing the question of whether the third criterion in policy item #40.00 of the RSCM II is met. Under the heading "Another Suitable Occupation," the practice directive states, in part:

Generally, an occupation will be considered suitable where the worker has, or can reasonably easily attain and perform, the necessary skills (i.e., duties, responsibilities, physical requirements, training and/or education) that the occupation requires.

When identifying possible suitable occupations for a worker, the DA [disability awards] officer considers the following:

- the worker's transferable skills,
- the worker's formal and informal education, and previous work experience; and
- the worker's post-injury functional abilities, including physical abilities.

[51] The assessment of whether a worker is able to adapt to another suitable occupation is, in general, to be made on the basis of an "Ability To Adapt To Another Suitable Occupation Recommendation" (ATAR), which is to be prepared by the VRC. The ATAR will provide information about the worker's post-injury vocational capabilities and earnings potential, and will identify occupations that the worker could perform without substantive vocational rehabilitation assistance. It is designed specifically to address whether the worker retains the ability to adapt to another suitable occupation.

[52] In this case, the VRC had not undertaken any analysis of the occupations identified by the FCE evaluator at the time that the review officer made the determination that the worker could adapt to those occupations. I have concluded that, in light of the significant level of physical impairment that has resulted from the worker's compensable injuries, the other factors that pose barriers to the worker adapting to a new occupation, and the additional information that has become available subsequent to the November 23, 2007 decision, there is insufficient evidence upon which to base a determination regarding whether the third criterion in policy item #40.00 of the RSCM II has been met. I find that the review officer's determination that this criterion was met was premature.

[53] I therefore conclude that the worker's claim should be returned to the Board's Disability Awards Department so that a CADA can complete the process established by policy item #40.00 of the RSCM II and undertake the analysis and investigation that is contemplated by Practice Directive #C6-2 with regard to the third criterion in policy item #40.00 of the RSCM II.

Conclusion

- [54] The worker's appeal is allowed in part. I conclude that the worker's circumstances meet the first and second criteria in policy item #40.00 of the RSCM II. I also conclude that there is insufficient evidence upon which to base a determination regarding whether the third criterion in policy item #40.00 of the RSCM II has been met. The worker's file is returned to the Board's Disability Awards Department so that a CADA can complete the process established by that policy and undertake the further analysis and investigation that is contemplated by Practice Directive #C6-2 with regard to policy item #40.00 of the RSCM II. The Review Division's June 11, 2008 decision is varied accordingly.
- [55] The worker is entitled to reimbursement for the expense associated with return travel to the hearing from his home, in accordance with the Board's usual practice. There were no other reimbursable expenses associated with the appeal and I therefore make no further order in that regard.

Deirdre Rice
Vice Chair

DR/ml