**WCAT Decision Number:** WCAT-2009-03307
**WCAT Decision Date:** December 23, 2009
**Panel:** Michael Redmond, Vice Chair

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## Introduction

[1] The worker, a pizza delivery driver, 57 years old at the time, suffered an injury to his right wrist while at work on December 20, 2006. His application for compensation was initially accepted by the Workers' Compensation Board, operating as WorkSafeBC (Board), as a right wrist sprain. He later developed complex regional pain syndrome, type 1 (CRPS), and chronic pain, both of which conditions were accepted by the Board as compensable consequences of his work injury.

[2] The worker was referred to the Board's Disability Awards Department for an assessment of his entitlement to a permanent partial disability (PPD) award.

[3] On June 25, 2008 the Board wrote to the worker, advising him he had been granted a PPD award of 12.39% of total disability on a functional impairment basis, pursuant to section 23(1) of the *Workers Compensation Act* (Act).

[4] On October 30, 2008 the Board wrote to the worker and advised him it had concluded he was not entitled to an assessment for a loss of earnings pension pursuant to section 23(3) of the Act. The Board said it had concluded the worker could adapt to another suitable occupation without incurring a significant loss of earnings.

[5] The worker requested a review of the Board's October 30, 2008 decision by the Review Division.

[6] On April 29, 2009 the Review Division issued a decision, confirming the Board's decision.

[7] The worker appealed that decision.

[8] The appeal was conducted by means of a review of the claim file and an oral hearing conducted on October 13, 2009. The employer did not participate in the appeal, although advised of its right to do so.

## Issue(s)

[9] The issue to be determined in this appeal is whether the worker is entitled to an assessment for a loss of earnings pension pursuant to section 23(3) of the Act.



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**Jurisdiction**

[10] This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the Act. The worker appeals an April 29, 2009 decision of the Review Division.

[11] The relevant policies of the Board are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

**Background and Evidence**

[12] The worker commenced a hand program in January 2007. At the time of discharge in February 2008, the treatment team noted that the overall functional use of the right hand remained profoundly limited. He was currently unable to use his right hand at work.

[13] The worker attended permanent functional impairment evaluations on November 20, 2007 and March 3, 2008.

[14] The Board subsequently granted him a loss of function award of 12.39% of total disability which recognized right wrist, forearm, and hand impairment, as well as chronic pain.

[15] A vocational rehabilitation consultant (VRC) completed an Ability to Adapt Recommendation (ATAR) on December 18, 2007.

[16] The VRC said the worker's pre-injury work activities were best captured by National Occupational Classification (NOC) system code 7414 - Delivery Driver and Courier Service Driver and NOC 6242 – Cooks. Taking into consideration the worker's residual (adjusted profile), the VRC concluded that his transferable skills directly adapted to other occupations such as NOC 1434 - Other Financial Clerks and NOC 0631 – Restaurant and Food Service Managers. With respect to NOC 1434, the VRC noted that the worker had demonstrated customer service, clerical accounting, management and organizational skills and experience through his prior positions in real estate and fast food restaurants.

[17] The VRC said the worker would not require any additional education or training to adapt to this occupation but would benefit from résumé and job search assistance and some brief on-the-job training and ergonomic aids (for the computer, a one-handed keyboard and a foot mouse, if needed). For NOC 0631, the worker would not require any additional education or training to adapt to this occupation but would benefit from résumé and job search assistance and brief on-the-job training specific to the restaurant and ergonomic aids. The VRC identified specific job titles within both

occupations such as Real Estate Clerk or Property Clerk and Assistant Restaurant Manager.

[18] The VRC documented the vocational rehabilitation (VR) plan in a Recommendation for Expenditure dated April 21, 2008. The VRC and the worker engaged in a period of VR planning and occupational exploration. This investigation targeted Real Estate Agent, Real Estate related positions, customs positions, accounting/bookkeeping jobs; reception and switchboard, customer service work or greeter work; and cashier and inventory clerk. The worker was not interested in renewing his real estate license and re-entering this occupational field. With respect to customs, the VRC noted it was likely the worker's experience in this area was fairly outdated and his compensable limits might preclude access to this position. In relation to switchboard, reception, customer service, greeter, cashier and inventory positions, these were all jobs that the worker suggested himself and are positions the worker acknowledges he can perform from a physical perspective.

[19] The worker told the VRC he wanted a job where he was not required to perform tasks under pressure and in tight time frames. As such, he was willing to seek employment in positions that pay $10.00 per hour, as long as he felt confident he was able to fulfill the critical demands of the job. Based on labour market review (as documented), the VRC concluded that these positions would provide the worker with earnings comparable to his established long-term wage rate. In order to increase his competitiveness, VR Services would augment the job search assistance with offers of training on the job and/or a work assessment. That decision was outlined to the worker in a letter dated April 23, 2008.

[20] In a claim log entry dated July 9, 2008, the VRC noted that the worker was provided with VR assistance, including a lengthy phase 3 investigation which resulted in an offer that the worker declined due to wages. The worker was then provided support to locate a new job with a new employer and a job placement provider was contracted. An offer of work assessment and a potential job was made by an employer; however, the VRC said the worker declined to attend the work assessment, as he did not want to jeopardize his benefits with the accident employer. The worker had been paid his full job search entitlement. He remained entitled to a work assessment or training on the job if a suitable opportunity presented.

[21] A claims adjudicator in Disability Awards (CADA) set out a section 23(3.1) determination in a form 21 dated October 30, 2008. The CADA said the worker's accepted limitations included the following: he would have difficulty with work activities above the light category strength level, with repetitive work, with work activities requiring dexterous tasks, and with work activities requiring driving beyond short periods without an opportunity to rest between. Essential skills of the injury occupations under NOC 7414 and NOC 6242 were outlined. The CADA accepted that the worker had lost the ability to apply those skills to activities that were essential to his pre-injury job.

[22] The CADA then considered whether the worker would be capable of returning to a job within the same or similar occupations. Given the accepted limitations, the CADA felt the worker would be unable to return to any jobs listed within the same or similar occupations. The information provided by the VRC in the memo of December 18, 2007 was reviewed. The CADA agreed that the worker had the transferable skills and abilities to return to the jobs identified by the VRC.

[23] The CADA compared the pre-injury occupational average earnings against the post-injury suitable occupational average earnings and the amount of the section 23(1) award to determine whether the worker would sustain a significant loss of earnings. Statistical Class average monthly wage rates for the 4th quarter of 2006 were obtained as follows: Delivery Driver - $2,860.00; Pizza Cook - $2,230.00; Other Financial Clerks - $3,310.00 and Restaurant and Food Service Managers - $3,020.00.

[24] The CADA concluded that the worker had the transferable skills and the ability to adapt to jobs within the suitable occupations that had been identified without substantive VR assistance and without incurring a significant loss of earnings. Therefore, the combined effect of the worker's occupations and the disability resulting from the injury were not so exceptional that the worker was entitled to a loss of earnings assessment. The CADA said the section 23(1) award was considered the appropriate compensation.

[25] The worker was advised of that decision in the October 30, 2008 letter under review. He requested a review of that decision by the Review Division.

[26] The worker also requested a review, under a separate request for review, of a Board decision of April 23, 2008, concerning the provision of vocational rehabilitation services to the worker.

[27] In support of that request for a review, the worker submitted a December 2008 functional capacity evaluation (FCE) and a January 15, 2009 medical-legal opinion from Dr. R. Welsh, the worker's family physician.

[28] Dr. Welsh reviewed the worker's then-current condition and said that, in his opinion, the worker was unable to perform any work that involved the use of the right hand, a high level of concentration, sustained focus attention, sustained physical activity or prolonged driving, due to a combination of his physical pain and his medications. Dr. Welsh said the worker's ability to participate in job searches and training had been impaired by his poor concentration and ability to focus, his low energy and his chronic pain. He said those conditions were likely permanent.

[29] The FCE was prepared by an occupational therapist and was dated December 24, 2008. The FCE described a comprehensive series of tests of the worker's abilities. The occupational therapist reviewed the results of those tests and concluded the worker did not demonstrate the ability to perform activity at even a sedentary level with

both hands due to his inability to grasp items and manoeuvre with his right hand. He consistently demonstrated restrictions in his capacity for activity requiring reaching with his right arm, as well as below-waist work requiring bending, stooping, crouching and kneeling. There were measured restrictions in upper and lower extremity strength, as well as two-handed lifting.

[30] The occupational therapist said the test results and clinical observations of the worker indicated he did not demonstrate the strength, manual dexterity or handling abilities with his right hand to manage his previous occupation. With respect to his overall employability, the worker was restricted to performing activities even at a sedentary level. The occupational therapist concluded the worker was not competitively employable on a part- or full-time basis at any occupation.

[31] The occupational therapist considered the occupations identified by the Board as suitable and concluded they were not. With respect to the position of real estate clerk, the occupational therapist concluded that while the worker demonstrated the physical capacity to manage a portion of the work of a real estate/property clerk, even with significant ergonomic modifications, it was not likely he would be competitive in an open job market.

[32] Similarly, with respect to the position of assistant restaurant manager, the occupational therapist said that while some of the physical demands of that job were within the worker's abilities, there were questions about his durability and competitiveness. As well, the occupational therapist said an assistant manager would be expected to occasionally take on duties of a server, which would exceed his physical abilities. Again, he would not be competitive in an open market on a full-time basis.

[33] The Review Division issued a decision under *Review Reference #R0094656* dated February 6, 2009, confirming the Board's decision of April 23, 2008.

[34] The Review Division said it considered it likely the worker could have obtained suitable employment as a greeter if he had attempted the work assessment that was arranged for him. There were also other opportunities available to him. Therefore, the review officer considered the Board's vocational rehabilitation plan had a reasonable probability of success, assuming that the worker was motivated to return to suitable employment.

[35] In submissions to the Review Division in regard to the request for review which is the subject of this appeal, the worker submitted that the medical evidence coupled with the FCE established that he was not capable of adapting to another occupation. The worker said it was difficult to see how he could carry out the majority of the duties of the suggested two occupations without using his injured hand. In the real world, such a limitation would not be tolerated by any employer.

[36] The worker concluded that he met all the criteria for an assessment for a loss of earnings pension.

[37] The worker also submitted the Board had erred in calculating his potential loss of earnings by comparing the occupational average earnings of his pre-injury occupation to the average earnings of the identified suitable occupations, rather than using his actual pre-injury earnings.

[38] In a decision dated April 29, 2009, the Review Division confirmed the Board's decision.

[39] The Review Division said the CADA had identified jobs within suitable occupations that were in keeping with the worker's accepted limitations and transferable skills. The Review Division said it was satisfied that with ergonomic modifications suggested by the VRC, the worker would be able to perform the essential skills of a real estate/property clerk.

[40] The Review Division also found that use of occupational average earnings to estimate the worker's potential wage loss was appropriate and in keeping with the legislation and policy.

[41] The worker appealed that decision.

[42] At the oral hearing of this matter, the worker described the impact of his injuries on his ability to work.

[43] The worker said his hand, which was swollen to several times normal size from the wrist onwards, was constantly in pain, with a burning effect. Medication only soothed the pain somewhat, he said. Medication made the pain bearable but he needed to take pain medication continually to deal with it.

[44] The worker said he could not do anything with his right hand. He described a life of limited activity, dominated by the pain in his hand. He stayed at home and did very little.

[45] The worker said he could write a little with his left hand, but not very well. He could still drive but believed he would lose his driver's licence because of his pain medication. He said his driving was restricted anyway because of the effects of medication and the pain in his hand. When the pain became too great, he would have to stop driving and wait for it to subside.

[46] The worker described attending the FCE. He said he had not been able to finish the exercises he had been asked to do because of low blood sugar levels. He said he had been diagnosed with diabetes 14 or 15 years previously and had been using insulin since then. He had three occasions in which he had been taken to hospital for treatment while at work.

[47] The worker described his work experience since 1988 with the accident employer. He said he had learned all the various duties of the business, but his major duties were cooking and driving.

[48] The worker said he had become a real estate agent to do something on the side of his regular business. He had bought and sold some houses for himself in the mid-90s. He also owned some houses, in conjunction with other family members and friends, which he managed. He had sold all but one of those since his injury.

[49] The worker said he had turned down one attempted job as a greeter in a chain store. He had been heavily medicated that day and did not want to drive. He denied ever having been told work was available if he wanted it.

[50] The worker said he did not understand the job duties required in customer service and sales, but noted he could only use his left hand. He said his standing tolerance was limited due to his diabetes, as his feet would swell. He said he did not believe he could work for a full day because of his medication and his need for rest. He said he generally slept for three hours every afternoon. He had never needed to do that before his injury.

[51] The worker described his job search activities. He said he had dropped off more than 100 résumés, but none had resulted in a job offer. The accident employer had not been able to offer him any employment. He said realtors had not required any assistance and he had not had a real estate license for between 12 and 13 years.

[52] The worker said he did not think he could complete any courses until his hand was dealt with. He said his doctor had now suggested it might need to be amputated and replaced with a prosthesis, but he was not sure that would solve his pain problem.

[53] The worker said his medications interfered with his concentration and he did not believe he could pass any written examination. If he did work he would need an assistant to write up offers for him and he would not, in any event, be able to drive.

[54] The worker denied turning down new work in order to keep benefits from the accident employer. He said he had asked if taking new work would affect those benefits. He said he had no computer skills and could not do any clerical work due to his limited ability with his left hand.

**Submissions**

[55] The worker referred to submissions made to the Review Division in *Review Reference #R0094656*, a February 6, 2009 decision regarding the worker's vocational rehabilitation benefits. The worker referred, as well, to Dr. Welsh's medical reports and the FCE.

[56] The worker said the Review Division, in both the February 6, 2009 decision and the decision under appeal here, had given little weight to the FCE. He said the FCE should be considered as expert evidence relating to his employability.

[57] The worker noted the Board had accepted his need for substantial pain medication, including narcotics. That was, he said, an indication of the severity of his condition. He said the pain was so bad it affected his ability to engage in any meaningful work.

[58] The worker said the assertions of the CADA and the VRC that he was capable of work were not supported by the expert evidence of the FCE. He said the only expert evidence that should guide their opinion was that of the FCE.

[59] The worker said the test of "impossible," as stated in policy item #40.00 of the RSCM II, should be interpreted as "practically impossible," as has been accepted by a number of WCAT panels.

[60] The worker said the provisions of policy item #40.00 of the RSCM II should be interpreted to incorporate the concept of "reasonably available," as it was contained in the previous policy volume. He said the penultimate paragraph of the first section of the new practice directive regarding assessments for loss of earnings pensions gives an example that requires the concept of reasonable availability to apply.

[61] The worker also noted language in policy item #40.12 of the RSCM II, which referred to a "suitable occupation" and work that was "reasonably available over the long run." He said that is an indication any work to which a worker can adapt must be reasonably available. He said the new volume of policy did not define that term, but it must have implicitly meant the same as *Volume I* of the RSCM, that is, there must be an indication an employer would hire the worker, despite his disability.

[62] In the present case, the worker said, there was no indication he was, in fact, employable. In practice, even if he had knowledge skills that would allow him to perform some jobs, those jobs would not be reasonably available to him, given his physical limitations and heavy reliance on medication.

[63] The worker referred to WCAT decision *WCAT-2009-00744*, which, he said, dealt with a similar issue of employability and had returned the matter to the Board for further investigation. In the present case, he said, there was sufficient evidence before this

panel to allow a conclusion the worker was not medically capable of adapting to another occupation that would be reasonably available.

[64] The worker said he was not just entitled to an assessment for a loss of earnings pension, but was entitled to a 100% loss of earnings pension.

**Law and Policy**

[65] Section 23(3.1) of the Act provides that loss of earnings entitlement may only be paid 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 the benefit determined under section 23(1) does not appropriately compensate the worker for the injury.

[66] Section 250(2) of the Act states the appeal tribunal must make its decision based on the merits and justice of the case, but in doing so the appeal tribunal must apply a policy of the board of directors of the Board that is applicable in that case.

[67] Section 250(4) of the Act states that if the appeal tribunal is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

[68] Policy item #40.00 of the RSCM II sets out the procedures for assessments pursuant to section 23(3) of the Act. Section 23(3) is only applied when the test set out under section 23(3) and (3.1) is met. The test requires that the Board determine whether the combined effect of a worker's occupation at the time of an injury and a worker's disability resulting from the injury is so exceptional that an amount determined under section 23(1) of the Act dos not appropriately compensate the worker for the injury. The policy goes on to set out a list of criteria that must be met before the worker can be assessed pursuant to section 23(3).

[69] 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.

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

[71] 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.

[72] Policy item #40.01 of the RSCM II states that section 23(3) assessments are undertaken if a permanent partial disability results from the worker's award and the Board makes a determination under subsection (3.1) with respect to the worker.

[73] Policy item #40.10 of the RSCM II sets out the assessment formula to be used when a worker is entitled to an assessment under section 23(3) of the Act. In estimating what a worker is capable of earning after the injury, the Board will give regard to evidence about the suitability of the worker for occupations that could reasonably become available. Following those considerations, the Board will arrive at a conclusion about suitable occupations that the worker could be expected to undertake over the long-term future.

[74] Policy item #40.12 of the RSCM II defines the term "suitable occupation." It states an occupation is different from a "job." In estimating what a worker is capable of earning in a suitable occupation, regard is given to the suitability of occupations that could reasonably become available over the long run. The work must, in practice, be reasonably available.

[75] Policy item # 97.00 of the RSCM II deals with the issue of the evidence and the burden of proof in Board claims. The correct approach is to examine the evidence to see if it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If, on weighing the evidence there is a preponderance in favour of one view over another, that is the conclusion that must be reached.

[76] Policy item #97.10 of the RSCM II deals with the weighing of evidence. If evidence is evenly weighted, a decision must be made in favour of the worker. This only applies, however, if there is evidence of roughly equal weight, and does not apply if the evidence indicates one possibility is more likely than the other.

[77] Policy item #97.32 of the RSCM II states that a statement of a claimant about his own condition is evidence insofar as it relates to matters that would be within the worker's

knowledge. There is no requirement that a statement of a worker about his condition must be corroborated. A conclusion against a statement by a worker may be reached if it is based on a substantial foundation, such as clinical findings or other medical or non-medical evidence.

**Findings and Reasons**

[78] The appeal is allowed and the decision of the Review Division is varied. I find the worker is entitled to an assessment for a loss of earnings pension pursuant to section 23(3) of the Act.

[79] I find the evidence, in particular the December 2008 FCE, which I accept as an accurate description of the worker's physical abilities and potential employability, demonstrates that he has met the criteria entitling him to an assessment for a loss of earnings pension.

[80] The Board concluded the worker's pre-injury occupation required specific skills that were essential to that occupation. I agree with that conclusion. That satisfies the first criterion of policy item #40.00 of the RSCM II.

[81] The Board also concluded the worker was no longer, as a result of his compensable disability, 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.

[82] Policy item #40.00 of the RSCM II states that an assessment for a loss of earnings pension may be made in exceptional cases, if 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 must be considered unable to adapt to another suitable occupation without incurring a significant loss of earnings due to his work injury.

[83] The term, "impossible," while used in policy item #40.00 of the RSCM II, is not a term that appears in section 23(3) of the Act, nor is it defined in the Act or policy. *The Concise Oxford Dictionary*, tenth edition, provides two definitions of the term:

> "not able to occur, exist, or be done";
>
> and
>
> "very difficult to deal with"

[84] *Webster's Seventh New Collegiate Dictionary* defines "impossible" as:

> 1. a: incapable of being or of occurring b. felt to be incapable of being done, attained or fulfilled: insuperably difficult; hopeless. 2. A: extremely undesirable: unacceptable b: markedly difficult to deal with.

[85] *Black's Law Dictionary*, sixth edition, discusses "impossibility" and, at page 755, states:

> An act is physically impossible when it is contrary to the course of nature. Such an impossibility may be either absolute, i.e. impossible in any case, (e.g. to stop earth rotation) or relative (sometimes called "impossibility in fact") i.e. arising from the circumstances of the case (e.g. for A to make a payment to B, he being a deceased person). To the latter case belongs what is sometimes called "practical impossibility", which exists when the Act can be done, but only at an excessive or unreasonable cost.

[86] There are, therefore, alternate definitions of the term "impossible," some of which accord with the notion of absolute impossibility, and some of which indicate a less restrictive, more practical definition of practical impossibility.

[87] Those alternatives were considered by a prior WCAT panel in WCAT decision *WCAT-2007-02765*. In that case, a CADA had concluded it was not medically impossible for a worker to return to her pre-injury occupation or a similar one. The WCAT panel found the CADA's interpretation of the term "impossible" was too restrictive. She preferred to rely on the definition set out in *Black's Law Dictionary*. She stated, at page 13 of her decision:

> In this regard, I note that I do not consider the term "impossible" in the Board's policy to require evidence of an absolute impossibility. Instead, I am satisfied that, in accordance with the usual use of that term in legal documents, "impossible" is intended to mean practically impossible, or not practicable. In other words, as set out in *Black's Law Dictionary* (5th Edition), it is now recognized that a thing is impossible in legal contemplation when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost.

[88] I note that section 99(3) of the Act states that if the Board is making a decision respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted, the Board must resolve the issue in a manner that favours the worker. While that section is generally applicable to findings of fact, it is, I find, equally applicable on its face to issues of interpretation of Board policy. In this case, there are alternate interpretations of the word "impossible" used in Board policy, some of which are clearly more restrictive than others. In the absence of any language in the statute itself, or in the Board policy that would assist in determining the meaning

of that term, I find the dispute over that interpretation should be resolved in a manner that favours the worker.

[89] I agree with the reasoning of the panel in *WCAT-2007-02765*. It is more in keeping with the general legal use of the term "impossible" for it to mean, in the context of policy item #40.00 of the RSCM II, "practically impossible" or impracticable.

[90] Given the physical skills required by the worker's occupation and the nature of his injuries, which have rendered his right arm virtually useless, I agree with the Board's conclusion, supported by the Review Division, that it was impossible for him to continue in the occupation he had at the time of injury or in an occupation of a similar type and nature. That conclusion is supported by the FCE and Dr. Welsh's opinion. That satisfies the second criterion of policy item #40.00 of the RSCM II.

[91] The final issue before me is whether the worker was able to adapt to another suitable occupation without incurring a significant loss of earnings. Relying on the VRC's conclusions, the Board and the Review Division found the worker would be able to adapt to other occupations, specifically, Other Financial Clerks and Food Service Managers. I do not agree with that conclusion.

[92] While the VRC and CADA believed the worker retained the essential skills that would allow him to adapt to those positions, I do not find they took sufficiently into account the current medication on which the worker depends to control his pain. I also find they overestimated the degree to which he could use his injured right hand as a "helper" hand. I find the preponderance of medical evidence, and the expert evidence of the FCE, supports a conclusion the worker would not be able to adapt to a new position. Where the FCE differs from the conclusions of the VRC, I prefer and adopt the opinion of the FCE as I find it is based on a more thorough and complete testing of the worker's abilities and takes more completely into account the effect on the worker of the pain medications on which he now relies.

[93] As well, I do not find the CADA's conclusion that the worker could adapt to a new position without substantive vocational assistance is supported by the evidence.

[94] I accept the conclusions of the FCE that the worker would not be able to successfully adapt to the occupations identified by the VRC and the CADA.

[95] I find the evidence does establish that the worker's injuries make it impossible for him to continue in the occupation he had at the time of injury or in an occupation of a similar type or nature, and he is not able to adapt to any of the suitable occupations identified by the CADA and no other suitable occupations have been identified. He, therefore, meets the third criterion of policy item#40.00 of the RSCM II.

[96] The worker submitted that this panel should proceed to award him a loss of earnings pension of 100%, submitting the evidence was sufficient to allow that conclusion. I do not agree that is an appropriate exercise of this panel's jurisdiction in this case.

[97] Board policy sets out the procedure for decision making under section 23(3) of the Act, once a decision is made that a worker has met the threshold standard of section 23(3)(3.1). The only issue before me on this appeal was the Board's decision that the worker had not met that threshold. I do not agree it would be appropriate to make an initial adjudication now of the matters that remain to be decided in determining the worker's entitlement to a loss of earnings pension.

**Conclusion**

[98] The appeal is allowed and the decision of the Review Division is varied. I find the worker is entitled to a loss of earnings assessment pursuant to section 23(3) of the Act.

[99] The worker is entitled to be reimbursed by the Board for the expenses of the December 2008 FCE in the amount requested and Dr. Welsh's January 15, 2009 medical-legal report, that report to be subject to the Board's schedule of fees.

Michael Redmond
Vice Chair

MR/gw/ec



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