April 15, 2008

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

Dear Ms. Callan:

RE: WCAT Decision # 2007-03809

On December 6, 2007, you issued a determination that Policy Item #40.00 ("Policy") of the *Rehabilitation Services & Claims Manual, Volume II* ("*RS&CM*") is so patently unreasonable that it is not capable of being supported by the *Workers Compensation Act* ("*Act*") and its regulations. This determination was made under section 251 of the *Act*, which gives the Workers' Compensation Appeal Tribunal ("WCAT") discretion to refuse to apply a policy of the Board of Directors ("BOD") "*only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations*."

Your determination was formally received by the BOD on January 28, 2008, and all appeal proceedings pending before WCAT that were considered to be affected by the Policy were suspended. Under section 251(6) of the *Act*, the BOD is given 90 days to review the Policy and determine whether the WCAT may refuse to apply it under section 251(1).

The BOD provided parties whose proceedings had been suspended pending the BOD's determination with notice of their entitlement to make written submissions with respect to your determination. The BOD received 41 submissions from or on behalf of individual parties or representative groups, all of which were taken into consideration in making this determination.

The Policy pertains to section 23(3.1) of the *Act* and provides guidance to decision-makers as to whether 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 section 23(1) of the *Act* does not appropriately compensate the worker for the injury.

This letter is to advise you that on March 19, 2008, the BOD met to finalize their determinations under section 251(6) of the *Act*. After careful deliberations and consideration of all of the submissions made, along with advice from its General Counsel, the Policy and Research Division and from an independent and external legal counsel, the BOD determined that Policy is supported by the *Act* and is therefore not patently unreasonable.

According to your written determination, you have concluded that the Policy cannot be rationally supported by the *Act*. The reasons underlying your decision are essentially the following:

- The definition of "occupation" in the Policy groups jobs together with similar skills and does not require consideration of physical requirements.

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- The definition of "skills" in the context of the three "so exceptional" criteria in the Policy does not include the ability to perform the physical requirements of an occupation.
- The combined effect of the definitions of "occupation" and "skills" and the three "so exceptional" criteria is to limit the Board's consideration under section 23(3.1) of the *Act* to whether the worker is able to perform the essential skills of the occupation, and exclude from its consideration the worker's ability to perform the physical requirements of the occupation.
- Given that the *Act* is premised on compensation to workers on the basis of physical (or psychological) disability, it is patently unreasonable for the governing body to have created a policy that does not consider the physical requirements of an occupation when considering the combined effect of a worker's occupation and his or her disability.
- The legislature did not intend that workers who could continue to perform the skills of an occupation but could no longer perform the physical requirements of the occupation would not be eligible for a loss of earnings award.
- The Policy effectively excludes unskilled labourers from consideration for loss of earnings awards.

Section 23(3.1) of the *Act* creates a discretion to award compensation based on a loss of earnings when compensation based on loss of function will not appropriately compensate the worker for injury, not when the latter method will not adequately compensate the worker. This distinction authorizes the Board to use its judgment as to when compensation based on the workers individual circumstances rather than the nature and degree of the injury is appropriate within the overall policy objectives of the workers' compensation system.

The Policy takes into account a worker's transferable skills and a worker's post-injury ability to perform those skills. Exceptional cases are those in which the injury makes it impossible for the worker to continue in the occupation at the time of injury or transfer his or her skills to another suitable occupation. The Policy does not ensure that the loss of earnings method is available in every case in which the loss of function method may not provide adequate compensation. A shortfall in compensation under the loss of function method, even an "exceptional" shortfall – on its own – will not necessarily ensure that the loss of earning method will be applied.

It is the BOD's opinion that Policy is within the range of rational policy options under the *Act* and therefore not patently unreasonable as:

- The focus on the ability to perform the "essential skills" of an occupation is a rational way of defining exceptionality, as a worker who has lost essential skills has lost the benefit of his or her education, training and experience.
- The focus on essential skills is consistent with the Legislature's objective in section 23(3.2) which requires the Board to consider the ability of a worker to continue in the worker's occupation or adapt to another suitable occupation. The Policy encourages workers to reapply their skills within their physical abilities.

The Board is also of the view that the Policy captures the physical requirements of an occupation in two ways:

- Some physical requirements are within the definition of skills which is "the learned application of knowledge and abilities". For example, a labourer's "learned abilities" may be the ability to swing a hammer efficiently, operate a jackhammer, or climb a ladder.
- Physical requirements are captured by the assessment as to whether the worker is "no longer able to perform the essential skills needed to continue in the occupation." For example, a worker is no longer able to raise his hand above his head is no longer able to perform certain kinds of skilled repairs, even if he or she retains the necessary fine motor skills.

The BOD noted that your decision relied upon the Best Practices Information Sheet (BPIS #17) and a July 2007 discussion paper to support your definition of skills in the Policy. The BOD agrees that BPIS #17 needs revision. As a result, the BOD has directed the administration to amend the practice to improve the quality and consistency in decision-making and to ensure the intent of the Policy is properly applied.

Given the BOD's determination that Policy Item #40.00 is rationally supported by the legislation, it is the BOD's decision that the WCAT cannot refuse to apply the policy on the basis that it is patently unreasonable. As required under section 251(8), this matter is referred back to the WCAT pursuant to section 251(8) of the *Act* to apply the policy.

Yours truly,

Douglas J. Enns, FCA, C. Dir.
Chair, Board of Directors

Copies to: Paul Straszak, Associate Deputy Minister, Labour
David Anderson, President and CEO
Ed Bates, General Counsel and Secretary to the Board
Roberta Ellis, Vice President, Policy and Research Division
Parties to Suspended Appeals