Date: October 12, 2004

Memo to: Jill Callan, Chair

Memo from: Anthony Stevens, Vice Chair

RE: Section 251 Referral
Date of Decision Appealed: March 9, 2004

This is a referral to the chair under section 251 of the *Workers Compensation Act* (Act). Pursuant to section 251(1) of the Act. I consider policy item #31.40 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), as at May 15, 2003, to be so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Background

The worker appealed the March 9, 2004 decision (*Review Reference #7002*) of the Review Division of the Workers' Compensation Board (Board). The review officer confirmed the May 15, 2003 decision of a hearing claims officer. The hearing claims officer concluded that the worker had asymmetrical hearing loss, such that the lower level of hearing loss in his left ear was considered to be representative of his occupational noise-induced hearing loss. The hearing claims officer also concluded that the 26.6 decibel hearing loss that the worker had was below the statutory threshold for pension entitlement, with that threshold being 28 decibels measured at 500, 1000 and 2000 Hertzian waves. The review officer confirmed that decision, and also undertook a further decision that the deterioration in the worker's hearing observed in an audiogram undertaken on June 3, 2003 was not due to occupational noise exposure.

As such, the issues before me include whether the review officer exceeded her jurisdiction by undertaking the further decision respecting the deterioration in the worker's hearing that was established subsequent to the hearing claims officer's May 15, 2003 decision. Other issues are whether the worker's occupational noise-induced hearing loss is best represented by the hearing loss in his left ear, and whether there is entitlement to a pension under Schedule D of the Act.

It is the issue involving potential entitlement under Schedule D of the Act on which I am undertaking this referral.

Act and Policy

The relevant legislation at the time of the May 15, 2003 decision includes Schedule D, which provides for a sliding scale of pension entitlement for increasing ranges of hearing loss commencing at 28 decibels. Moreover, Schedule D includes the following requirements:

> The loss of hearing in decibels in the first column is the arithmetic average of thresholds of hearing measured in each ear in turn by pure tone, air conduction audiometry at frequencies of 500, 1000 and 2000 Hertzian waves, the measurements being made with an audiometer calibrated according to standards prescribed by the Board.

The requirement that the average be from measurements at 500, 1000 and 2000 Hz was reflected in prior versions of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), up to and including the April 27, 1999 version. Specifically, item #31.20 of the RSCM I to that time provided:

> …Therefore, since the disability assessment under Schedule D relies on frequencies of 500, 1,000 and 2,000 hz., no adjustments for duration of exposure are made.

Moreover, item #31.40 incorporated Schedule D of the Act, including the requirements quoted above.

A change to the Board's RSCM I first became evident in the September 5, 2000 version. That version continued to use the item #31.20 language noted above, and in item #31.40 also continued to incorporate Schedule D from the Act. However, the requirements from Schedule D that were outlined in item #31.40 of the RSCM I differed from the requirements outlined in Schedule D in the Act. In particular, that portion of item #31.40 of that version of the RSCM I outlined:

> The loss of hearing in decibels in the first column is the arithmetic average of thresholds of hearing measured in each ear in turn by pure tone, air conduction audiometry at frequencies of 1000, 2000 and 3000 Hertzian waves, the measurements being made with an audiometer calibrated according to standards prescribed by the Board.

That change (from 500, 1000 and 2000 Hz to 1000, 2000 and 3000 Hz) occurred in the absence of a policy resolution at the Board level, and without any change to the Act.

That language continued in subsequent versions of the Board's policy manual, including in the construction of the RSCM II. That language was in place when the hearing claims officer issued the May 15, 2003 decision on the worker's claim, and it is that language that the worker's representative relies on to argue that the worker's potential pension entitlement must be considered with regard to the pure tone average figure arrived at from measurements at 1000, 2000 and 3000 Hz.

The RSCM II changed, effective August 1, 2003. The June 17, 2003 resolution of the board of directors which effected that change included the following resolution specific to item #31.40 of the RSCM II:

> Miscellaneous changes to policy item #31.40 of the *Rehabilitation Services & Claims Manual*, Volume I and II, to correct an error in the percentage of permanent partial disability for hearing loss in one ear are approved as set out in Appendix D.

That appendix included not only the correction on the percentage of permanent partial disability for hearing loss in one ear, it also changed the reference to pure tone average figures to indicate that the measurements are to be taken at 500, 1000 and 2000 Hertzian waves.

Analysis

Insofar as the appeal before me, the initial decision of the Board that was rendered on May 15, 2003 indicated that the legislative requirement was that there must be an average loss of 28 decibels measured at 500, 1000 and 2000 Hz, and that the Board is not given flexibility to grant a pension if the loss of hearing is below that level. The hearing claims officer did not refer to item #31.40 of the RSCM II. The review officer did refer to item #31.40 of the RSCM II, but did not apply the criteria in that policy that the loss be measured at 1000, 2000 and 3000 Hz, and instead used the frequencies referred to in Schedule D of the Act.

However, pursuant to section 250(2) of the Act, WCAT must apply a policy of the board of directors that is applicable to a case. That, in essence, is the argument put forth by the worker's representative. I consider policy item #31.40 of the RSCM II, in the relevant timeframe, is not capable of being supported by the Act.

It is for that reason that I am undertaking this referral pursuant to sections 250(1) and (2) of the Act, which provides:

> (1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.
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> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.

The standard of patent unreasonableness has been defined by the Supreme Court of Canada, as follows:

> "Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?" (*CUPE Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.)

Following my review of the relevant policy and legislation it is apparent that there is internal inconsistency with the RSCM II, insofar as the fact that item #31.20 and item #31.40 refer to differing criteria regarding the frequencies that pure tone averages must be measured at. From that, and the fact that Schedule D of the Act uses the standard of 500, 1000 and 2000 Hz, it could be argued that the item #31.40 requirement to use 1000, 2000 and 3000 Hz was a simple error. That form of analysis is really unnecessary, as at the end of the day the frequencies that were outlined in item #31.40 in the version of the RSCM II that existed on May 15, 2003 were directly at odds with the frequencies that were listed in Schedule D of the Act. Whether this is viewed as a matter of interpretation, or as inclusion of language that differs from that within the Act itself, I conclude that the requirement to use 1000, 2000, 3000 Hz in item #31.40 is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Conclusion

I consider that policy item #31.40 of the RSCM II, in effect on May 15, 2003, to be so patently unreasonable that it is not capable of being supported by the Act and its regulations pursuant to section 251(1).

Anthony F. Stevens
Vice Chair

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