October 10, 2006

Memo to: Jill Callan, Chair

Memo from: Sherryl Yeager, Vice-Chair

RE: Policy item RSCM II #13.30; section 251 Referral

This is a referral to the chair under section 251 of the *Workers Compensation Act* (Act). I consider the portion of policy #13.30 regarding recurrence of mental stress contained in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) to be so patently unreasonable that it is not capable of being supported by the Act and its regulations pursuant to section 251(1) of the Act.

1.0 Background

The worker was employed as a loader operator in 1995 when he accidentally struck a co-worker with the loader. The co-worker died as a result of the accident. The worker was subsequently diagnosed with post-traumatic stress disorder (PTSD). The Workers' Compensation Board (Board) accepted his claim for late onset PTSD in 1998 and provided wage loss, health care and vocational rehabilitation benefits. The Board closed the worker's claim in October 1999 and advised him there was no permanent functional impairment. The worker appealed this decision to the Review Board, which allowed his appeal and sent the claim back to the Board for further adjudication. The Board determined the worker could function in his pre-injury occupation if he was working in remote areas with no other workers in the area, and therefore did not require any further compensation. The worker's claim was not sent to the Disability Awards Department for consideration of a permanent functional impairment and vocational rehabilitation benefits were concluded in 2001.

In January 2003 the worker was admitted to hospital for treatment after a deterioration of his psychological status. A Board officer advised the worker on April 13, 2004 that his claim would not be reopened for wage loss or health care benefits in relation to this incident, as the cause of the deterioration was personal, not related to the compensable PTSD. The Board officer also would

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not reopen the worker's claim in April 2004 as he did not meet the diagnostic criteria for PTSD at that time.

The worker requested a review of this decision. In *Review Decision #17078* dated October 6, 2004, the review officer characterized the issue under appeal as whether the worker's claim should be reopened. The review officer found the file must be referred back to the Board for additional investigation and clarification.

A Board officer subsequently advised the worker in a decision dated March 3, 2005 that his claim was accepted for PTSD and depression. The Board officer accepted the opinion of the Board psychologist that the worker's condition in January 2003 was related to his compensable PTSD. The Board officer therefore reopened the worker's claim effective January 23, 2003 and paid benefits until February 27, 2003, when the officer determined the worker's condition had returned to its prior status. The 2004 reopening was not addressed.

The worker requested a review of the March 3, 2005 decision letter. He disputed the finding that his psychological disorder was not permanent and that he could return to his pre-accident employment on February 27, 2003. The worker requested an assessment for permanent functional impairment, a vocational assessment to determine employability and benefits to recognize flare-ups in his condition as they related to his employability from the date of the accident.

The review officer applied the current provisions of the Act and Board policy contained in the RSCM II regarding mental stress and determined the worker's claim did not meet the requirements of policy #13.30 of the RSCM II for acceptance of a mental stress claim. She also found there was no significant causal connection between the worker's symptoms in January 2003 and the work incident.

As the worker's hospitalization did not meet the tests required in policy #13.30 to reopen his claim, the review officer denied his request for any additional period of disability. As she found the claim should not have been reopened, all other issues she had identified as under review were no longer relevant. She therefore varied the Board's decision of March 3, 2005 in *Review Decision #28985* dated August 18, 2005.

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I have completed a preliminary decision regarding the issue of whether the worker had a permanent disability, as I concluded the evidence supported a conclusion that the worker has had a permanent condition since his claim was concluded in 2001 and he has been attempting to obtain a decision on this issue for a significant period of time. I have severed the remaining issues from that decision, as they hinge on the question of reopening the worker's claim for a recurrence of temporary disability in January 2003. The remainder of the WCAT decision will therefore be completed following your determination on the lawfulness of the impugned portion of policy #13.30.

2.0 Act and Policy

The Board accepted this worker's claim in September 1998 for a personal injury under section 5(1) of the Act and policy #13.20 of the *Rehabilitation Services and Claims Manual* (RSCM) as it read at that time.

This policy simply stated:

> **#13.20 Psychological Impairment**
>
> "Personal injury" includes psychological impairment as well as physical injury. A claim for traumatically induced psychological impairment could be accepted even if unaccompanied by any physical impairment. Psychological impairment has not been deemed to be an occupational disease. Conditions of this type however may be accepted if they are a sequela to an accepted personal injury or occupational disease.

The former appeal commissioners took a broad view of the phrase "traumatically induced" and interpreted this to include witnessing or experiencing traumatic events. A number of decisions were published and are available through the Board's website, including; *Appeal Division Decision #99-1254* [17 W.C.R. 117], *Appeal Division Decision #00-0073* [17 W.C.R. 129], *Appeal Division Decision #00-1682* [17 W.C.R. 147] and *Appeal Division Decision #2001-0574* [17 W.C.R. 347].)

In summary, the policies at that time established a psychological injury was compensable only if it was "traumatically induced." Although this could be understood to mean as the result of physical trauma, the appeal commissioners interpreted the term "traumatic" liberally, meaning to include observing or

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experiencing unusual events. The commissioners set out three criteria for determining if an event could be considered traumatic in a mental stress or psychological injury context.

- Did the workplace circumstances or events involve unusual stimuli?
- Were the workplace circumstances or events reasonably capable of causing psychological injury?
- If so, were the workplace circumstances or events of causative significance with respect to the worker's psychological condition for which compensation is sought?

The Workers Compensation Amendment Act, 2002 (Bill 49) introduced section 5.1 of the Act regarding mental stress claims, effective June 30, 2002 (the transition date). The new legislation set out these criteria in a more comprehensive way, with more stringent tests and exemptions for the circumstances under which a mental stress claim could be accepted for compensation.

Section 5.1 of the Act now provides:

> (1) Subject to subsection (2), a worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress
>
> (a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,
> (b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of diagnosis, and
> (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

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Policy #13.30 of the RSCM II provides lengthy direction regarding the criteria for accepting a mental stress claim. The portion of the policy relevant to this referral states:

> **If a worker's claim for mental stress was allowed prior to June 30, 2002, for a recurrence to be compensable, the claim must meet the requirements of section 5.1 of the *Act*.**
>
> [emphasis added]

The transition provisions of the amended Act contained at section 35.1(8) provide:

> If a worker has, on or after the transition date, a recurrence of a disability that results from an injury that occurred before the transition date, the Board must determine compensation for the recurrence based on this Act, as amended by the *Workers Compensation Amendment Act, 2002*.

Policy #1.03(4) of the RSCM I and II regarding the transition legislation provides in part:

> If an injury occurred before June 30, 2002, and the disability recurs on or after June 30, 2002, the current provisions apply to the recurrence.
>
> This transitional rule applies only to a recurrence of a disability on or after June 30, 2002. It does not apply to permanent changes in the nature and degree of a worker's permanent disability. Where a worker was entitled to a permanent disability award before June 30, 2002 in respect of a compensable injury or disease, the former provisions apply to any changes in the nature and degree of the worker's permanent disability after that date.
>
> For the purposes of this policy, a recurrence includes any claim that is re-opened for an additional period of temporary disability, regardless of whether the worker had been entitled to a permanent disability award before June 30, 2002. However, where the worker was entitled to a permanent disability award before June 30, 2002, the former provisions apply to any changes in the nature and

> degree of the worker's permanent disability following an additional period of temporary disability.
>
> The following are examples of a recurrence:
>
> - A worker totally recovers from a temporary disability resulting in the termination of wage-loss payments. Subsequently, there is a recurrence of the disability and the claim is re-opened for compensation.
>
> - A worker is in receipt of a permanent partial disability award and the disability subsequently worsens so that the worker is temporarily totally disabled. The claim is re-opened to provide compensation for a new period of temporary disability. The additional period of temporary disability is a recurrence to which the current provisions apply. However, a subsequent change in the nature and degree of the worker's permanent disability is adjudicated under the former provisions.

The Board issues practice directives which are non-binding on the Board and WCAT, but useful when interpreting policy. The practice directive for policy #13.30 of the RSCM II has seen several variations, which I believe are relevant to consider.

Practice Directive #39 was issued on June 30, 2002. This stated in part:

> **Recurrences:** Where, on or after June 30, 2002, there is a recurrence of a mental stress claim that was considered compensable prior to June 30, 2002, existing benefits are not impacted. However, the recurrence must meet the criteria outlined in the new section 5.1 of the *Act* in order to be compensable.
>
> For example, a worker may have been awarded a $200.00 pension for a mental stress claim that was considered compensable prior to June 30, 2002. If there is a recurrence on or after June 30, 2002, the first step would be to determine whether the recurrence meets the criteria outlined in the new section 5.1 of the *Act*. If the recurrence does not meet the criteria in the new section 5.1, existing benefits would not be affected. The worker would continue to receive a $200.00 pension and no additional compensation

> would be payable. However, if the recurrence does meet the criteria in section 5.1 and the workers' compensable condition has worsened, the worker may be eligible for additional benefits (to be calculated in accordance with the newly amended *Act* as outlined in Practice Directives #32, 33, 38 & 40).

Practice Directive #39 was amended on March 3, April 22, December 31, 2003, February 1 and February 27, 2004. The following portion of the directive was unchanged in all versions:

> Where a worker experienced an acute reaction to a sudden and unexpected traumatic event before June 30, 2002, any resulting claim is adjudicated under the legislation and polices that existed prior to June 30, 2002.
>
> …
>
> **Reopenings**
>
> Where, on or after June 30, 2002, there is a reopening of a **mental stress claim** that was considered compensable prior to June 30, 2002, existing benefits are not impacted. However, in order to be compensable, the reopening criteria under section 96 (2) & (3) of the *Act* must be met, as well as the criteria outlined in section 5.1 of the *Act*.
>
> The above reopening criteria should be distinguished from the following situation. Where, on or after June 30, 2002, there is a reopening of a worker's claim for a previously compensable psychological impairment which was a sequela to an accepted personal injury or occupational disease, the reopening of the claim is adjudicated under section 5(1) of the *Act*.
>
> For example, a worker may have been awarded a $200.00 permanent disability award many years ago for a mental stress claim (i.e., a claim that was considered compensable prior to June 30, 2002). If one of the reopening grounds has been met (e.g., there has been a significant change in the worker's compensable medical condition) on or after June 30, 2002, the next step would be to determine whether the criteria outlined in section 5.1 of the *Act* have been met. If the criteria in section 5.1

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> have not been met, existing benefits would not be affected. The worker would continue to receive a $200.00 permanent disability award and no additional compensation would be payable. However, if the criteria in section 5.1 have been met the worker may be eligible for additional benefits (to be calculated in accordance with the current *Act* as outlined in Practice Directives #32, 33, 38 & 40).

(Practice Directives #32, #33, #38 and #40 discuss wage rates and benefit payment calculations.)

Practice Directive #39 was replaced by the *Best Practices Information Sheet* (BPIS) #15, Mental Stress, on July 10, 2006. The BPIS provides guidance on conditions with a delayed onset and urges caution if the onset is more than four weeks after the acute incident. The BPIS is silent on the question of a recurrence of a mental stress condition.

Prior to and immediately following the amendments contained in Bill 49, the Board had authority under section 96 of the Act to reopen and reconsider its prior decisions.

Section 96(2) of the Act stated:

> (2) Notwithstanding subsection (1), the board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

Policy #106.10 of the both versions of the RSCM (Discretionary Nature of Power to Reopen and Reconsider) stated in part:

> Not only is the reopening of a matter discretionary, but the Legislature has used the emphatic phrase "full discretionary power". This authorizes the Board to determine when it will reopen previous decisions, and the criteria by which it will do so.
>
> …Section 96(2) authorizes the Board to consider its own judgment on what is fair in deciding whether that decision should be reopened or reversed. …

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The *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) altered the legislation regarding the Board's ability to alter prior decisions and reopen claims contained at section 96(2) of the Act, effective March 3, 2003.

Section 96(2) now provides:

> (2) Despite subsection (1), at any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,
>
> (a) there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or
>
> (b) there has been a recurrence of a worker's injury.
>
> (3) If the Board determines that the circumstances in subsection (2) justify a change in a previous decision respecting compensation or rehabilitation, the Board may make a new decision that varies the previous decision or order.
>
> (4) Despite subsection (1), the Board may, on its own initiative, reconsider a decision or order that the Board or an officer or employee of the Board has made under this Part.
>
> (5) Despite subsection (4), the Board may not reconsider a decision or order if
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> (a) more than 75 days have elapsed since that decision or order was made,
>
> (b) a review has been requested in respect of that decision or order under section 96.2, or
>
> (c) an appeal has been filed in respect of that decision or order under section 240.

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Current Board policy regarding reopening and reconsideration of claims is found in chapter 14 of the RSCM I and RSCM II, and is identical in both volumes.

Policy #C14-102.01 provides, in part:

> **(a) General**
>
> The reopening of a previous decision does not affect the application of the decision to the period prior to the significant change in the worker's medical condition or the recurrence of the worker's injury. Rather, it enables the Board to reopen matters previously decided and determine a worker's ongoing entitlement. A reopening involves the adjudication of new matters.
>
> **(b) A reopening is not a reconsideration**
>
> A reopening is to be distinguished from a reconsideration of a previous decision.
>
> A reconsideration occurs when the Board considers the matters addressed in a previous decision anew to determine whether the conclusions reached about these matters reached were valid. Where the reconsideration results in the previous decision being varied or cancelled, it constitutes a redetermination of those matters.
>
> **(c) Grounds for reopening**
>
> A decision may be reopened if, since it was made:
>
> - there has been a significant change in a worker's medical condition that the Board has previously decided was compensable; or
> - there has been a recurrence of a worker's injury.
>
> "A significant change in a worker's medical condition that the Board has previously decided was compensable" means a change in the worker's physical or psychological condition. It does not mean a

change in the Board's knowledge about the worker's medical condition.

A "significant change" would be a physical or psychological change that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits or services. In relation to permanent disability benefits, a "significant change" would be a permanent change outside the range of fluctuation in condition that would normally be associated with the nature and degree of the worker's permanent disability.

A claim may be reopened for repeats of temporary disability, irrespective of whether a permanent disability award has been provided in respect of the compensable injury or disease. A claim may also be reopened for any permanent changes in the nature or degree of a worker's permanent disability.

(d) Recurrence of injury

A recurrence of an injury may result where the original injury, which had either resolved or stabilized, occurs again without any intervening new injury. A recurrence of an injury may result in a claim being reopened for:

- an additional period of temporary disability benefits where no permanent disability award was previously provided in respect of the compensable injury;

- an additional period of temporary disability benefits where a permanent disability award was previously provided in respect of the compensable injury; and,

- an additional permanent disability award being provided due to a change in the nature and degree of the worker's permanent disability resulting from the original work injury.

An example of a recurrence of an injury is where a worker has a compensable injury for which temporary disability benefits are paid. The injury resolves and the claim is closed, but later becomes disabling again without any intervening new injury. In these

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> situations it is considered that the original injury has recurred. The result is that the worker may be entitled to an additional period of temporary and/or consideration for permanent disability compensation under the original claim.
>
> A recurrence of injury that entitles a worker to request a reopening of an existing claim is to be distinguished from a new injury that entitles the worker to make a new claim.

Finally, policy #34.12 (Claimant in Receipt of Permanent Disability Pension) of the RSCM I (the wording of this policy in the RSCM II is essentially the same) states:

> Wage-loss benefits are terminated when the claimant's condition becomes permanent and prior to the assessment of any pension. However, they may again become payable because a further work injury or a natural relapse in the condition for which the pension is being paid causes a further period of temporary disability.
>
> With regard to the latter situation, it is recognized that no condition is ever absolutely stable or permanent; there will commonly be some degree of fluctuation. Nevertheless, a pension will be awarded when, though there may be some changes, the condition will, in the reasonably foreseeable future, remain essentially the same. The fluctuations in the condition of a worker receiving a pension may be such as to require the worker to stay off work from time to time. The question then arises whether wage-loss benefits should be paid for these periods. If the fluctuations causing the disability are within the range normally to be expected from the condition for which the worker has been awarded a pension, no wage loss is payable. The pension is intended to cover such fluctuations. Wage loss is only payable in cases where there is medical evidence of a significant deterioration in the worker's condition which not only goes beyond what is normally to be expected, but is also a change of a temporary nature. If the change is a permanent one, the worker's pension will simply be reassessed.

3.0 Prior Consideration of Policy

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As is set out in more detail below, whether the impugned policy is considered patently unreasonable hinges on whether section 35.1(8) of the transition provisions is interpreted broadly, to include not only the quantum of benefits but entitlement to benefits, or in the narrow sense, in that it refers only to the manner in which benefits are to be calculated.

A number of WCAT vice chairs have considered reopening appeals of mental stress claims accepted under the former provisions since the transition date. (These Review Division and WCAT decisions are summarized in the attached appendix.)

The majority of WCAT panels have considered only whether the symptoms the worker experienced could reasonably be considered a significant change in or recurrence of the initially accepted condition under section 96(2) of the current provisions of the Act. As this test was not met, they did not turn their minds to whether the initial injury met the requirements of section 5.1, nor did they reference policy #13.30 of the RSCM II at all. In short, the appeals failed because they did not meet the section 96(2) requirements.

The Review Division decisions that gave rise to these appeals, in general, set out a two-part test. The review officers indicated it was first necessary to consider if the reopening request meet the criteria set out in section 96(2), and if so, then whether the original claim meet the criteria set out in section 5.1 of the Act as required by policy #13.30 was to be considered. Again, the majority found the first portion of the test was not met and did not proceed on to consider whether the claim would have met the section 5.1 criteria.

I would note as an aside that in the majority of the findings I reviewed, the initial injury as described would arguably have met the criteria of section 5.1 – the workers were the subject of assaults, bank robberies or involved in fatal accidents where the lives of others were taken and had been diagnosed with a Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) disorder for which they had received treatment.

I found only one example of a WCAT decision which considered policy #13.30 of the RSCM II at length, *WCAT Decision #2004-02810*. In this decision, the panel considered the issue of whether the broad or narrow interpretation of the word "compensation" in section 35.1(8) of the Act should be applied. In that case the worker's claim for psychological impairment was accepted by the Board in 1998. The worker eventually returned to work but a few months later, in October 2002, stopped working and applied for wage loss benefits. The Board found that she

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had successfully returned to work and that her most recent psychological difficulties were unrelated to her original claim.

The Review Division agreed with the Board's assessment that the worker had recovered from the original compensable injury. The Review Division noted that policy #13.30 of the RSCM II applied to the worker's claim for a recurrence. The Review Division found that the worker's original claim did not satisfy the criteria set out in section 5.1 of the Act and thus upheld the Board's decision not to reopen the worker's claim. The Review Division did not address the question of whether the worker had in fact suffered a recurrence. The worker appealed and, among other things, argued that policy #13.30 of the RSCM II was patently unreasonable on the basis that section 35.1(8) should be interpreted to refer to the amount of compensation and not to the right to compensation.

The WCAT vice chair determined that policy #13.30 of the RSCM II was not patently unreasonable. The panel provided the following reasons:

- section 35.1 of the Act specifies which provisions apply with respect to both entitlement and rate of compensation;

- it is reasonable to interpret the term "compensation" broadly as it is interpreted in other sections, such as section 99(3) of the Act, so as to include entitlement to compensation as well as rate of compensation; and,

- although there is no express provision in the Act that the current standard under section 5.1 of the Act should apply retrospectively, there is an adequate statutory basis for this approach when section 35.1(8) of the Act is viewed in the context of the Board's authority to change its own previous decisions. The Board has and has had the power to require a reassessment of the initial mechanism of injury and the injury when considering entitlement to compensation for a new period of disability. The Board has the accompanying power to change the original decision.

The panel recognized that the application of the policy results in differential treatment for workers with psychological conditions in that their entitlement to compensation subsequent to a recurrence depends on whether the condition previously accepted as compensable now satisfies a more stringent test than existed at the time that the condition was accepted. The panel also clearly found that interpreting section 35.1(8) so that a recurrence must satisfy section 5.1 criteria would be either a retroactive or retrospective application of the law but did not provide reasons for this conclusion.

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In any event, the panel found that the appeal turned on whether the worker's condition at the time of the application for a reopening was best characterized as a recurrence. The panel found that in order to be a "recurrence" a worker must have totally recovered. In the case before the panel, the worker had ongoing significant symptoms, remained under the care of a psychiatrist and was treated with medication and psychological counselling. Therefore the panel found that the worker had not experienced a recurrence. As the former reopening provisions were applicable to this appeal and permitted reopenings in cases other than those involving recurrences, the panel determined that the worker's claim should be reopened and allowed the appeal. The panel noted that if the new reopening provisions were applicable she would have found that the worker had suffered a significant change in her compensable condition and granted a reopening.

Although the panel did not expressly say so, it can be inferred from the reasoning that the panel considered that policy #13.30 of the RSCM II did not apply to the facts of the appeal (as there was no recurrence) and therefore was not applied. In that sense the panel's discussion of policy #13.30 of the RSCM II was obiter, that is not necessary to the disposition of the appeal.

For reasons set out below, I do not reach the same conclusion as the previous WCAT vice chair regarding policy #13.30 of the RSCM II.

4.0 Analysis

Prior to June 30, 2002 the Board accepted mental stress claims under section 5(1) of the Act as a personal injury. Mental stress was considered as separate and distinct from a claim for depression arising from a physical injury such as the loss of a limb. Those psychological injuries were accepted under policy #22.33 of the RSCM (prior to June 30, 2002 there was only one volume of the RSCM), while mental stress was accepted under policy #13.20 of the RSCM.

The legislature clearly intended to draw a further distinction between these two different types or groups of psychological disability with the introduction of section 5.1 to the Act.

However, section 5.1 does not provide any direction regarding recurrences of mental stress or reopening of mental stress claims, regardless of the date they were accepted. It is a provision of the Act which provides criteria for the initial acceptance of the claim, similar to sections 5 and 6 of the Act.

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Section 96(2) of the Act now requires only that for a reopening of a claim, there must be a significant change in the "worker's medical condition that the Board has previously decided was compensable" or "there has been a recurrence of a worker's injury." Section 96(2) does not exclude reopenings of claims for changes in or recurrences of injuries accepted under the former provisions of the Act, nor does it differentiate between previously compensable injuries and mental stress claims. This is therefore not consistent with the requirement in policy #13.30 of the RSCM II that formerly accepted claims meet the criteria set out in the current provisions at section 5.1 of the Act if there is a recurrence of the injury. Sections 96(2) and (3) of the Act do not specifically address transition issues and so they also fail to provide direct support for the Board policy.

Section 96(4) of the Act limits the Board's abilities to alter its prior decisions to a 75-day period.

For this reason, although sections 5.1, 96(2) and (3) must be considered when interpreting section 35.1(8), as the Act must be considered as a whole, I have considered the meaning of the transitional provision, section 35.1(8) of the Act.

This section stipulates that if there is a recurrence of disability resulting from an injury that occurred prior to the transition date "the Board must determine compensation for the recurrence" based on the current provisions of the Act.

This raises the question of the meaning of the words "determine compensation." In the broad sense, it would include not only the calculation or quantum of benefits, but entitlement to benefits. In the narrow sense, it would refer only to the calculation.

Using the ordinary meanings of these words, it could be assumed the provision refers to the calculation of benefits rather than entitlement. However, the words "determine" and "compensation" are not used consistently throughout the Act. The grouping of the transitional provisions under the part of the Act entitled "Scale of Compensation" is not of assistance as subsection 35.1(2) of the Act would reasonably include section 5.1, which deals with entitlement.

The language in subsections 35.1(4) and (5) states that those sections are to be applied in light of the provisions in the amended Act.

By contrast, section 35.1(8), rather than stating that the "Act as amended applies," states that "the Board must determine compensation for the recurrence

based on this Act, as amended." The inclusion of the word "compensation" in section 35.1(8) implies an interpretation that is narrower than that found in the other transitional provisions.

It could be argued that sections 35.1(3) and 35.1(8) are contradictory unless 35.1(8) is interpreted in the narrow sense. The first requires the former provisions of the Act to apply to historical claims, while the second states the current provisions will apply in the event of a recurrence. However, it is not logical to require a recurrence of mental stress to meet the section 5.1 test at the time of the reopening, as it will clearly fail. It is not possible after an extended period of time for the reaction to an historical stimulus to be "acute" or sudden. If the worker is experiencing an acute reaction to a current event, the claim would not be viewed from a recurrence perspective, but properly considered as a new claim.

However, this appears to have been the initial interpretation in the Board's first practice directive, which was later amended to indicate it was the initial event for which the claim was accepted that had to meet the section 5.1 criteria if there was a recurrence of the condition.

In relation to the general purpose of Bill 49 the minister made the following statement relating to mental stress when he called for second reading of the bill on May 16, 2002:

> This bill clarifies coverage for mental stress, explicitly stating that coverage will only be provided for mental stress when it is an acute reaction to a sudden and unexpected traumatic event or the result of an injury or disease for which the worker is entitled to compensation. …
>
> …
>
> This bill also addresses the difficult issue of mental stress claims. The bill clarifies WCB coverage for mental stress by clearly establishing that compensation will be provided in cases of mental stress due to a sudden and unexpected traumatic event such as the post-traumatic stress that a bank teller may experience after a bank robbery. Coverage will also be provided in cases of mental stress that result from a compensable injury such as the loss of a leg.

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> Coverage will not be provided in other situations such as chronic stress conditions resulting from the sort of ongoing stress that everyone experiences in their everyday personal and workday lives. This clarification provides greater certainty for workers and brings British Columbia's coverage into line with most other provinces.

In relation to transition issues, the minister also commented during second reading:

> A person receiving benefits today will not receive less when this is passed. Workers injured after this legislation has come into force will receive benefits at the rate of 90 percent of their net pay at work, instead of the previous system which paid them 75 percent of their gross pay. No other province calculates benefits using a rate higher than 90 percent of net pay.
>
> …
>
> Let me emphasize again that this bill does not reduce any benefits already awarded to injured workers. I just want to say that again for people to understand, because there could be people who are fearful that these changes relative to the benefit they're receiving today will be changed. That is not correct. I will say it again. This bill does not reduce any benefits already awarded to injured workers. The new method of calculating benefits applies only to those benefits awarded after this legislation comes into force.

The minister reiterated this comment on several occasions.

With the exception of the mental stress provision, all of the changes to the Act brought about by Bill 49 related to the rate or type of disability benefits a worker may be entitled to receive.

Given that the purpose of the amendments was to reduce costs in the worker's compensation system, it is not surprising that the legislature wished to also apply the new rules to workers whose disability had resolved but then occurred again (that is, recurred). In order to affect that wish, the legislature required clear language in the Act to ensure that the new provisions were not restricted to new claims. Section 35.1(8) of the Act supplies that clear language.

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The mental stress amendment, on the other hand, is not restricted to determining the worker's right to or rate of compensation for mental stress arising out of a disability. It determines a worker's right to compensation for mental stress, full stop. Section 5.1 of the Act states "a worker is entitled to compensation for mental stress…." It thus has a much broader application. It determines whether a worker is entitled to either something or nothing arising out of a mental stress claim. A worker who does not meet the section 5.1 criteria for mental stress cannot have their claim accepted for any purpose, not simply for the purposes of disability benefits.

Section 96(2) of the Act is limited to reopenings for recurrences of significant changes in a worker's compensable condition. A worker who requires further vocational rehabilitation to assist in recovery from a permanent injury would have entitlement adjudicated under section 16 of the Act. Similarly, a worker who requires only further health care benefits, such as counselling, would not be subjected to section 96(2), entitlement would be considered under section 21 of the Act. These are considered new matters for adjudication. This is set out in policy #C14-101.01 of the RSCM I and II. There is no mention in this policy that a worker whose mental stress claim was accepted under the former provisions must meet the criteria under section 5.1 in order for these new matters to be considered.

The result would be that a worker with a permanent condition who is faced with a short period of temporary disability, such as the case before me, would not be entitled to a reopening of a mental stress claim. However, if that same worker requested vocational rehabilitation assistance, which would potentially involve months of job search allowance, retraining and specialized equipment, the Board could provide these benefits, which can be significant. There would be a discrepancy between how different workers with the same condition are treated, and indeed even how the same worker could be potentially treated. This inconsistency also potentially defeats the stated purpose of Bill 49, to reduce costs.

For this reason, if one was to adopt the broad interpretation, it would be peculiar for the legislature to have intended that the new mental stress criteria apply to workers seeking a reopening of their claim for recurrences of disability (which is all that section 35.1(8) of the Act relates to) but not those seeking a reopening of their claim for recurrences more generally, such as health care or vocational rehabilitation benefits.

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The effect of such an interpretation would be that a worker who suffers a recurrence of injury not accompanied by disability would not have her claim re-examined to determine if it met the more stringent mental stress criteria, and thus may receive some benefits such as health care or vocational rehabilitation. However, a worker who suffers a recurrence of disability would require such a re-examination. More precisely, one would say that a worker who suffers a recurrence of injury, whether accompanied by disability or not, would be subject to different entitlement criteria depending on the type of benefits being considered.

While there is nothing at law prohibiting the legislature from adopting such a rule, it is difficult to conclude that this was their intent given that (a) section 5.1 does not similarly discriminate between types of benefits, and (b) nor does any other section of the Act that sets out basic entitlement criteria (for example, sections 5 and 6). The workers' compensation system does not generally require that workers satisfy different entitlement tests for different types of benefits; if a claim is accepted it is accepted for all applicable benefits.

I think that it is more consistent with the inferred purpose of section 31.5(8) of the Act to assume that it was merely directing that a recurrence of disability arising from any previously compensable condition (including mental stress) would be subject to the new cost-saving rules. In this way, adopting the narrow interpretation would arguably fully satisfy the primary purpose of section 35.1(8). Mental stress claimants would be as affected as any other worker who suffers a recurrence of disability, but not more so. If the legislature intended to have mental stress claims meet the new entitlement criteria for all purposes they could have used the term "recurrence of injury" (although that would not have been determinative, it would dispatch the current argument by providing a broader interpretation).

In relation to the minister's statement above starting with "Let me emphasize again that this bill does not reduce any benefits already awarded to injured workers," the British Columbia Supreme Court in *Cowburn v. Worker's Compensation Board of British Columbia*, 2006 BCSC 722 had occasion to consider this particular comment and the meaning of "benefits." At paragraph 35 of the decision, the court said:

> …Counsel for the WCB argued that the Minister used the phrase "the bill does not reduce any benefits already awarded to injured workers" and that meant there would be no reduction in the amount of money injured workers were already receiving. **I do not agree.**

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> **The Minister used the word "benefits". One of the benefits that the workers had already received was the right to an increased pension, if his condition got worse. To take this away is the taking away of a benefit already awarded**. **In my view, the legislation clearly intended that workers who had suffered injuries prior to the 2002 amendments should retain those rights.** Any workers who suffered an injury or a recurrence of an injury after the 2002 amendments would have their compensation calculated under the new system. The legislature could easily have included the word "deterioration" or some similar concept in s. 35 and it chose not to. The Minister made it clear that no retired pensioner would lose any benefits and **the section makes it clear that no retired worker would lose benefits unless an injury recurred.**
>
> [emphasis added]

Thus the court appears to have considered that workers had a vested right in certain future benefits even in cases where the future event (that is, the deterioration) had not yet occurred. The court considered that the minister's use of the word "benefit" was broad enough to include those arising out of future changes in a worker's condition, short of a recurrence.

Presumption Against Retroactivity/Retrospectively

Law

It is presumed that legislation is not meant to have a retroactive application. In most circumstances the presumption is strong, but it may be rebutted either expressly or by necessary implication. It is also presumed that legislation is not meant to have a retrospective application, although the presumption in this respect is not as strong as the presumption against retroactivity.

Sullivan, at page 546 of *Sullivan and Driedger on the Construction of Statutes, Fourth Edition,* suggests the following vocabulary to treat issues relating to the temporal application of legislation. She argues that legislation may be applied so as to:

1. change the past legal effect of a past situation (a "retroactive application)

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2. change the future legal effect of a past situation (a "retrospective" application)
3. change the future legal effect of an on-going situation (an "immediate" application).
4. change the future legal effect of future situations (a "future" application)
5. take away or diminish a protected expectation or interest (interference with "vested, accrued or accruing rights")

At page 550:

> …The categories set out above depend on three things: (1) what is identified as the "situation"; (2) whether it is past, ongoing, or future; and (3) whether the change introduced by the new legislation operates for the future only or changes the past as well. The "situation" consists of the facts (the acts, events, circumstances) that must exist or have occurred for specific legal consequences to arise. When a situation is complete, the legal consequences attaching to it are fixed as of that moment and it becomes a past situation. Until it is complete, a situation remains ongoing.

Application

Does the broad interpretation involve the retroactive or retrospective application of the amendments? If so, the presumptions apply and the legislature must state clearly its intent to have recurrences of disability arising out of mental stress claims satisfy new entitlement criteria.

In order for section 35.1(8) of the Act to apply retroactively to mental stress claims it would be necessary for it to require that all mental stress claims, not just recurrences of such claims, be re-adjudicated under the new section 5.1 criteria. Clearly it does not do so. No benefits already received by a worker with an accepted mental stress claim will be reduced or affected by the amendment. The "situation" or "event" in question is the recurrence of disability. That is a future event, not a past or ongoing event. It is neither a past nor ongoing event because a recurrence is now firmly understood to be something that "occurs again" (*Cowburn*). Thus, I believe that the broad interpretation involves a prospective or future application of law. It would involve a retrospective application of law only if the "situation" was deemed to be the acceptance of the claim or the occurrence of the event as the broad interpretation would then change the future effects of a past situation.

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The difficulty is that one intuitively feels that the broad interpretation nonetheless takes something away from a worker, namely the original acceptance of his claim. The worker must now again satisfy basic entitlement criteria. However, I think that this concern is best considered within the context of vested rights as opposed to considering the broad interpretation as retroactive or retrospective.

Presumption Against Interference with Vested Rights

Law

Sullivan, in *Sullivan and Driedger on the Construction of Statutes* at page 568, states:

> …It is presumed that the legislature does not intend legislation to be applied in circumstances where its application would interfere with vested rights. In the *Gustavson Drilling* case, Dickson J. wrote:
>
> > The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction…. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective…

At page 590:

> …It is presumed that legislation is not meant to interfere with vested rights. When the impact of applying legislation is an arbitrary or unfair diminishment of a protected interest, the legislation is presumed not to apply. The greater the unfairness, the stronger the presumption. By definition, provisions that are purely procedural or beneficial do not interfere with vested rights.

The Supreme Court of Canada in *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, recently considered the concept of vested rights and said (per Bastarche, J.):

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> ¶ 33 The leading case on this presumption is *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, at p. 638, where this Court stated the principle in the following terms:
>
> A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main v. Stark* [(1890), 15 App. Cas. 384, at 388]), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

In respect of the nature of vested right, the court said:

> 4.2.2.2 *Criteria for Recognizing Vested Rights*
>
> ¶ 37 Few authors have tried to define the concept of "vested rights". The appellant cites Professor Côté in support of his arguments. Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Côté, at pp. 160-61). This analytical approach was used by, *inter alia*, the Saskatchewan Court of Appeal in *Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 95 D.L.R. (4th) 706, at p. 727.

Sullivan in *Sullivan and Driedger on the Construction of Statutes* at page 571, summarizing the test set out in *Scott*, similarly states that the first criteria is that the right must be "particularized" and "personalized". The court in *Scott* determined that "The individual claiming the right must have placed himself in a distinctive legal position…in a position different from other members of society." The second criteria is that the right claimed must have been acted upon and effectively claimed as one's own.

On the weight of the presumption against interfering with vested rights, Sullivan writes at page 576 "Although the presumption against retroactivity is strong, the

presumption against interfering with vested rights is generally thought to carry only modest weight."

Sullivan writes at page 577:

> These comments point out a paradox in the law relating to vested rights. On the one hand, the legislature is presumed to respect them because this is the fair and reasonable thing to do. On the other hand, the usual purpose of legislation is to change the law, and change is often meant to interfere with ongoing arrangements or to disturb existing distributions of burdens and advantages. From this point of view, interference with vested rights looks like the norm and non-interference the exception.
> Arguably, the key to weighing the presumption against interference with vested rights is the degree of unfairness the interference would create in particular cases. When the curtailment or abolition of a right seems particularly arbitrary or unfair, the courts require cogent evidence that the legislature contemplated and desired this result. When the interference is less troubling, the presumption is more easily rebutted. …

But at page 581:

> When a primary purpose of legislation is to abolish a right of which the legislature disapproves, a court may readily conclude that the legislature intended to target existing as well as future examples of that right.

Distinction Between Vested Rights and Retroactivity

The Supreme Court of Canada in *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, recently discussed this distinction:

> 4.2.1 Distinctions Between Vested Rights and Retroactivity
>
> ¶ 30 Vested rights result from the crystallization of a party's rights and obligations and the possibility of enforcing them in the future. Professor Côté writes that, "[w]ithout being retroactive, a statute can affect vested rights; correspondingly, a statute can have a retroactive effect and yet not interfere with vested rights" (at p. 156). In general, it will be purely prospective statutes that will

> threaten the future exercise of rights that were vested before their commencement: Côté, at p. 137.
>
> ¶ 31 Although the courts have in the past analysed the same question from the perspective of either the presumption against interference with vested rights or the presumption against retroactive legislation, there remains, as the submissions of the parties in the instant case demonstrate, a clear distinction between these two rules of construction: *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880, at p. 906; *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732, at pp. 741 and 744; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at pp. 279 and 282.

Application

The situation with policy #13.30 of the RSCM II and the requirement for a worker's claim to meet new criteria is somewhat analogous to that set out in *WCAT-2004-01881-RB*, a noteworthy decision regarding the Board's decision that a worker with an occupational disease had to pass the economic test set out in section 6(1) of the Act in order to receive a permanent partial disability award. This amounted to the worker having to pass the economic test, or qualify twice, in order to receive benefits, which is not a requirement under section 5 of the Act. This decision, available at www.wcat.bc.ca, sets out the prior appellate findings of the Appeal Division that dealt with this issue. I quote the following section, setting out the commissioners reasoning:

> The worker's representative also pointed to *Appeal Division Decisions #00-1188* and *#00-1189* as being particularly applicable to the circumstances in the claim that is now appealed. In those decisions the panel reached the following conclusion concerning the threshold test for entitlement to compensation:
>
> > Section 6(1) can be seen as something of a "gateway" for entitlement to compensation because it provides a threshold test for entitlement to compensation. Put another way, compensation is not defined in section 6(1) and it is very broadly defined in section 1 of the [Act] to mean "includes health care". Where it

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> is defined is in sections such as section 23 or section 16 of the [Act], which deal with pensions and rehabilitation, respectively.
>
> Once a worker has demonstrated entitlement to compensation for an occupational disease under Section 6(1), there is no requirement in the [Act] or anywhere else for the worker to go back through section 6(1) in order to obtain a pension, for example. Once the basic entitlement has been established, a claim for compensation is adjudicated for wage loss, rehabilitation matters, pensions and other kinds of compensation under the [Act]. In this regard we do not see why an application for an occupational disease should be treated any differently than an application for a personal injury (which, incidentally, includes the language at issue in this case in section 5(2)). This analogy to entitlement to personal injury claims is expressly set in section 6(1) of the [Act]. The memo attached to the submission on behalf of the President accepts that the first two periods of temporary disability prior to the worker's retirement in this case satisfy the requirements of section 6(1). In our view there is no further application of section 6(1) once its requirements have been met. The next legal step is to consider what form of compensation is payable and there is no requirement or need to re-determine entitlement pursuant to section 6(1).

The difference between the section 6 of the Act pension entitlement question and this matter is there is a requirement in policy #13.30 of the RSCM II for a worker's claim to meet a new test in order for benefits to be paid. However, I believe there is no support for this policy in section 5.1, which speaks only to entitlement to a claim on or after June 30, 2002, nor is there support for a second test for recurrence of mental stress in section 96(2).

In my opinion, a worker's right to compensation arising out of mental stress vests when the original application for compensation is accepted by the Board. Such an event would appear to satisfy both criteria for a vested right, that is, (1) the worker's legal situation is tangible and concrete and (2) the worker's legal

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situation is sufficiently constituted. The acceptance of a worker's claim is based upon the application of specific criteria set out in the Act. The acceptance of the claim, or the continued acceptance of the claim, does not depend on the discretion of the Board or their continued good will. Normally, the courts do not recognize entitlement to a benefit where the benefit depends on the free exercise of policy-based discretion, unless the discretion was exercised in the claimant's favour: *Sullivan and Driedger on the Construction of Statutes*, p. 573, citing *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at 772 (F.C.A.).

In this case there is no policy-based discretion (as the criteria are set out in the Act and expressly create a right) and even if there were, in all cases relevant to the impugned policy the Board would have already accepted the worker's claim. Furthermore, the Act does not require the Board to challenge the worker's right to compensation each time a specific benefit is being considered (although there may be additional benefit-related criteria).

The right to compensation, once vested, normally survives for the life of the claim. There will naturally be issues arising as to whether a worker's condition has resolved or what type or rate of compensation the worker may be entitled to but there is never any question that the worker's claim originally satisfied the threshold test set out in the Act.

The broad interpretation of section 35.1(8) of the Act clearly interferes with this vested right as it challenges the basic right to compensation in the case of mental stress claims. It provides that even though a worker's claim previously met the criteria for acceptance, the worker must now satisfy new criteria. While a recurrence of disability is a new event, the fact remains that it is not a new injury and is therefore directly related to, and only to, an earlier accepted claim.

As quoted above, Sullivan states that:

> …the key to weighing the presumption against interference with vested rights is the degree of unfairness the interference would create in particular cases. When the curtailment or abolition of a right seems particularly arbitrary or unfair, the courts require cogent evidence that the legislature contemplated and desired this result. When the interference is less troubling, the presumption is more easily rebutted.

Changing the base criteria for acceptance of a worker's claim is highly irregular and reduces consistency and certainty in the workers' compensation system. I

consider the degree of unfairness involved in such a process to be high and particularly arbitrary. It is one thing to say to a worker that the rate of compensation that he or she has been receiving will be reduced upon the happening of some future event. It is quite another to say that the workers' compensation system is no longer responsible for the claim, in cases where the claim was previously accepted and the future event is directly related to the original injury.

The provisions of section 96 of the Act in place prior to Bill 63 provided the Board significant power to alter its prior decisions.

The wording in policy #13.30 regarding recurrences that requires a claim to meet a different standard was arguably within the Board's authority to implement. This is discussed in *WCAT Decision #2004-02810*, referenced earlier.

However, Bill 63 introduced significant limitations on the Board's ability to alter its prior decisions and sets out specific criteria for reopening claims. Prior decision, such as the acceptance of a mental stress claim is 1998, can no longer be altered after 75 days have passed.

Therefore, I consider the reasoning of the WCAT vice chair in *WCAT Decision #2004-02810* applies only to reopening applications of former provisions of mental stress claims between June 30, 2002 and March 3, 2003. After Bill 63 came into effect, the Board no longer has statutory authority to alter decisions more than 75 days after they are made. Requiring a former provisions claim to meet the criteria in section 5.1 of the Act is in effect a readjudication of the claim, which section 96(2) of the Act prohibits, and I believe interferes with the worker's vested rights.

In my opinion, the presumption against the interference of vested rights applies to section 35.1(8) of the Act and is not rebutted by Bill 49.

Arbitrariness

Bill 49 was to be effective for new injuries, permanent disability that occurred on and after June 30, 2002 and reopenings on and after that date. The minister repeatedly indicated that the new provisions for mental stress would bring clarity to the acceptance of these claims, but made no comment on the status of or reopening existing mental stress claims.

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It is perverse for a worker who has entitlement to a pension award for mental stress accepted under section 5(1) of the Act to also be subjected to section 5.1 of the Act when the claim is reopened for temporary disability. Some of these workers may not be entitled to temporary wage loss benefits for a flare-up in a permanent condition, which other workers are entitled to under policy #34.12 of the RSCM I and II.

There are other conditions which the Board has altered its acceptance criteria for, such as heart attacks in fire fighters. An exhaustive history of the legislative and policy changes is set out in *WCAT Decision #2006-02974*. In brief, Schedule B of the Act created a presumption that if a firefighter had a heart attack, the condition was considered to have arisen out of the employment. This was removed from the schedule in 2000 and replaced by RSCM II policy #15.15 (*Firefighters and Heart Injury*). The Board has not introduced a similar change in policy #15.15 of the RSCM II requiring that a former provisions claim meet the current provisions of the Act in order to be reopened.

I also note that there is no requirement in Board policies regarding permanent disability contained in chapter 6, or claims procedures in chapter 12, of the RSCM that a worker with a former provisions mental stress claim which becomes permanent after the transition date meet the test of 5.1 of the Act in order for a pension to be payable. In other words, a worker whose mental stress condition was accepted under the former provisions does not have to meet 5.1 of the Act before the condition can be considered permanent if the plateau date is after June 30, 2002. A worker in those circumstances could receive a pension for the mental stress, but not have the claim reopened for temporary disability if the criteria in section 5.1 of the Act are not met.

Finally, section 96(2) of the Act discusses both a significant change and a recurrence in a compensable condition as grounds to reopen a claim. The requirement in policy #13.30 of the RSCM II for a former provisions mental stress claim to meet the current test at section 5.1 of the Act for a recurrence could be defeated simply by determining that the symptoms a worker experienced amounted to a significant change. A condition that resolves and then becomes disabling has arguably undergone a significant change, in the same way a permanent condition that becomes temporarily disabling may be considered a recurrence of temporary disability, or a significant change in the worker's permanent condition. The interpretation of the current reopening provisions of the Act is continuing to evolve at the Board and appeal level. The net effect of requiring a worker to meet the section 5.1 criteria for some types of reopenings under section 96(2) of the Act but not others, is a more arbitrary and subjective

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interpretation of the law and policy. This is contrary to the other stated intents of the legislative amendments to the Act.

5.0 Conclusion

I consider the portion of policy #13.30 of the RSCM II regarding recurrence of a former provisions mental stress claim to be so patently unreasonable that it is not capable of being supported by the Act and its regulations pursuant to section 251(1) of the Act for the following reason(s):

- There is an obvious and significant difference between whether a claim is accepted and the rate at which the worker is compensated. By using the word "compensation" the legislature did not clearly set out that it meant right to as well as rate of compensation. The inclusion of the word "compensation" in section 35.1(8) of the Act implies an intention that is narrower than that found in the other transitional provisions. Furthermore, given the nature and number of the amendments contained in Bill 49 relating to rate of compensation issues it is reasonable to assume that the primary, if not sole, purpose of section 35.1(8) of the Act was to ensure that the new rates/rules of compensation applied to recurrences.

- The purpose of section 5.1 and section 35.1(8) of the Act is obviously not defeated by the failure to apply it to existing rights.

- The effect of policy #13.30 of the RSCM II and the broad interpretation of section 35.1(8) of the Act would be that a worker who suffers a recurrence of injury not accompanied by disability would not have his or her claim re-examined to determine if it met the more stringent mental stress criteria, and thus may receive some benefits such as health care or vocational rehabilitation. However, a worker who suffers a recurrence of disability would require such a re-examination. There is no evidence that this differential treatment of workers by benefit type was the legislature's intent.

- The broad interpretation is not consistent with the intent of the legislature to increase certainty to the worker in matters relating to mental stress. Workers with claims accepted under the former provisions would be left with a high degree of uncertainty as to whether their condition will continue to be compensated in the event of a recurrence.

- Policy #13.30 of the RSCM II interferes with a worker's vested rights and the provisions of the Act do not clearly evidence an intention do so.

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- The policy is arbitrary in that it only applies to recurrence, which is only one portion of the reopening criteria contained in 96(2) of the Act, does not apply to transitional pension claims, and similar requirements have not been established for other conditions which have been subject to legislative amendments.

Sherryl Yeager
Vice Chair

SY/lc

Appendix

In *Review Decision #13639*, a review officer considered a worker's reopening request for a 2001 mental stress claim under sections 96(2) of the Act for a significant change or recurrence, as well as a new claim under 5.1 of the Act. The review officer interpreted this to mean the worker must first past the requirements of section 96(2), and then those in section 5.1 of the Act. The review officer found the medical evidence did not support a conclusion there was a significant change in or recurrence of the worker's 2001 compensable injury. The review officer also went on to find the situation the worker was describing in 2004 did not meet the test set out in section 5.1 of the Act for mental stress and a new claim would not be accepted.

This decision was appealed to WCAT. In *WCAT decision #2005-04471*, the vice chair discussed only whether the worker met the test in 96(2) of the Act and did not reference policy #13.30 of the RSCM II as the circumstances did not meet the criteria for reopening, nor a new claim. The vice chair confirmed the Board's decision.

Review Decision #14616 denied a worker's application to reopen a 2000 claim for PTSD on the basis a series of events in 2003 which resulted in a new claim being accepted for a psychological injury did not meet the criteria in 5.1 of the Act. The review officer allowed the employer's appeal of the acceptance of the 2003 claim for mental stress (*Review Decision #14615*). The review officer did

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not summarize or consider the events leading to the initial compensable injury in 2000.

These decisions were appealed by the worker. In *WCAT Decision #2006-00945-RB* the vice chair confirmed the Board's decision not to reopen the worker's 2000 PTSD claim because the reported flare-ups in 2003 were related to a new incident. The vice chair therefore denied the worker's reopening request as it did not meet the criteria set out in 96(2) of the Act. No mention was made of the recurrence requirements in #13.30 of the RSCM II by the vice chair. The vice chair allowed the worker's appeal of the Review Decision that the 2003 claim ought not be accepted for mental stress, finding the incident did meet the criteria.

Similar application of section 96(2) is found in *Review Decision #22585* and the subsequent *WCAT Decision #2006-00107*. The WCAT decision did not discuss policy #13.30 in terms of recurrence.