Noteworthy Decision Summary

Decision: WCAT-2007-03809 **Panel**: Jill Callan **Decision Date:** December 6, 2007

Loss of Earnings Permanent Disability Award – Section 23(3) of the Workers Compensation Act (Act) – The So Exceptional Test – Item #40.00[1] of the Rehabilitation Services and Claims Manual, Volume II – The Three So Exceptional Criteria – Definition of Occupation – Definition of Skills – Two-Stage Process – Section 251 of the Act – Patently Unreasonable – Best Practices Information Sheet #17 – National Occupational Classification

Elements of item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II*)* are so patently unreasonable that the policy is not capable of being supported by the *Workers Compensation Act* (Act) and its regulations. Specifically, the definition of "occupation" and its use in the three so exceptional criteria in item #40.00 are patently unreasonable because those elements of the policy only consider the essential skills of the worker's occupation at the time of the injury and whether the worker is able to perform the essential skills of the occupation. They fail to take into account the physical requirements of the occupation and the worker's ability to perform the physical requirements of the occupation. Also, the element of item #40.00 that divides the process for adjudicating loss of earnings award entitlement into two stages is not patently unreasonable.

Where a permanent partial disability results from a compensable injury, the worker may be entitled to a permanent partial disability award under section 23 of the Act. The worker may be awarded either a permanent partial disability award under section 23(1) of the Act (a "loss of function" award) or under section 23(3) of the Act (a "loss of earnings" award). Section 23(3.1) provides that the Workers' Compensation Board, operating as WorkSafeBC (Board), may award a loss of earnings award to a worker only if the Board determines that the combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury is so exceptional that a loss of function award does not appropriately compensate the worker for the injury.

Item #40.00 of the RSCM II provides, in part, that in order for the Board to make a determination under section 23(3.1) of the Act, three criteria must be satisfied (the "three so exceptional criteria"): (1) the occupation at the time of injury (the time of injury occupation) requires specific skills which are essential to that occupation or to an occupation of a similar type or nature; (2) 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; and (3) 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. Item #40.00 defines "occupation" as a collection of jobs or employments that are characterized by a similarity of skills, and "skills" as the learned application of knowledge and abilities.

[1] This decision is noteworthy as a determination of the lawfulness of Board policy but should be viewed with some caution as policy item #40.00 was significantly amended on April 26, 2012. Click here for more information.

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In the appeal that was the subject of the referral to the chair under section 251 of the Act, the worker injured his back at work. He was a tireman/welder and worked on heavy equipment and trucks. The Board accepted the worker's claim for a disc herniation, the subsequent surgery, and chronic pain. The Board awarded him a loss of function award under section 23(1) for a resulting permanent partial disability. In the course of assessing the worker's entitlement, the Board also considered whether the worker was entitled, in the alternative, to a loss of earnings award under section 23(3) and found that he was not.

In considering the worker's possible entitlement to a loss of earnings award, the Board first determined that the worker's time of injury occupation was the general occupational group "Automotive Mechanical Installers and Services", as defined in the *National Occupational Classification System* (NOC). The Board then considered the first of the three so exceptional criteria and determined that the time of injury occupation required essential skills, such as the knowledge and ability to operate equipment. The physical requirements of the worker's time of injury job were not considered to be essential skills of his time of injury occupation.

The Board then considered the second of the three so exceptional criteria and determined that the worker remained able to perform the essential skills needed to continue in his time of injury occupation. The evidence before the Board was that, among other physical limitations resulting from the injury, the worker was no longer able to perform medium to heavy lifting, and further, that such lifting was a necessary physical ability of his time of injury job. The Board found that, while it may have been impossible for the worker to perform the essential skills of his time of injury job, the worker retained the ability to perform the essential skills of his time of injury occupation because the identified occupational group was broad enough to include both truck and car tire repair jobs. Car tire repair jobs remained within the worker's physical abilities. On that basis the Board denied the worker a loss of earnings award. The Board did not consider the third criterion as the second had not been met.

The Review Division of the Board confirmed the Board's decision. On appeal to WCAT, the vice chair considered elements of item #40.00 of the RSCM II so patently unreasonable that it was not capable of being supported by the Act and referred the policy to the chair for determination under section 251(2) of the Act. Pursuant to section 251(3) of the Act, the chair found that elements of item #40.00 are so patently unreasonable that item #40.00 is not capable of being supported by the Act and its regulations.

The chair determined that item #40.00 is patently unreasonable because it is founded upon a patently unreasonable definition of the term "occupation" in section 23(3.1). Item #40.00 defines "occupation" solely by reference to jobs with similar skills. The chair found that it also excludes consideration of the physical requirements of an occupation unless those requirements are directly related to an essential skill. The chair found that there is no rational basis for this characterization and provided the following reasons for that conclusion:

- In ordinary parlance an occupation is characterized both by skills and by physical requirements.

- Section 23(3.2) provides that, when making a section 23(3.1) determination, the Board must consider the ability of a worker to continue in his time of injury occupation or adapt to another suitable occupation. The chair determined that the

legislature could not have intended that a worker be considered to be able to continue in his time of injury occupation if the worker cannot meet the physical requirements of that occupation. Similarly, a "suitable occupation" must mean suitable in respect of required skills as well as physical requirements.

- One of the fundamental objects of the Act is to provide compensation by reference to a worker's physical abilities. It is therefore more consistent with the object of the Act to interpret the so exceptional test as requiring consideration of a worker's ability to perform the physical requirements of the time of injury occupation.

- While it is clear from the legislative history and evolution of section 23(3) that the legislature wished to enact a much higher threshold for obtaining a loss of earnings award, it is not clear that the legislature intended a dramatic shift in the meaning of occupation such that it would be defined to exclude consideration of physical requirements.

- Since section 23(3.1) requires the decision-maker to consider whether a worker is appropriately compensated for the injury under section 23(1), it is apparent that the economic impact of the combined effect of the occupation and the disability must be considered. While there will be a financial impact if the worker can no longer perform the essential skills of the occupation, there is also a financial impact if he or she can no longer perform the physical requirements of the occupation.

- While the NOC emphasizes skills and is relied on by Board administrative staff to identify occupations, as set out in Best Practices Information Sheet #17, it is not intended to be a tool for determining disability benefits or for identifying jobs that can be performed by people with disabilities.

In addition, and for similar reasons, the chair found the three so exceptional criteria in item #40.00 patently unreasonable because, in considering "the worker's occupation at the time of the injury", they focus on the occupation's specific and essential skills and do not consider the physical requirements of the occupation. The chair found that the logical consequence of the three so exceptional criteria is that an unskilled labourer could never be entitled to a loss of earnings award regardless of the severity of the worker's disability as the unskilled worker's occupation does not require essential skills. The chair found that there is no rational basis for excluding unskilled labourers from consideration for loss of earnings awards.

Pursuant to the vice chair's referral, the chair also considered whether item #40.00 of the RSCM II was patently unreasonable on the basis that it divided into two stages the process for adjudicating loss of earnings award entitlement: the first stage being a determination under section 23(3.1) of the Act, and the second stage being an assessment as to whether the worker is entitled to an award. The referring vice chair was of the view that a determination under section 23(3.1) was determinative of the question of entitlement and left the Board with no further discretion. The chair found that the two stage process created by the policy was not patently unreasonable as it was capable of being supported by the Act. Section 23(3) expressly provides to the Board a residual discretion to deny a worker an award even where the Board has made a determination under section 23(3.1) by providing that the Board "may" pay the worker on a loss of earnings basis if such a determination is made.

Also in relation to the two stage process created by item #40.00, the chair considered the vice chair's additional concern that the first stage of the process, which provides the criteria for making a determination under section 23(3.1), precludes consideration of the financial element found in section 23(3.1), namely whether an award under section 23(1) does not "appropriately compensate" the worker for the injury. The vice chair noted that it was only at the second stage of the process created by policy that the Board gathers detailed information regarding a worker's financial loss. The chair found that, while the two stage process is problematic in that it limits the information available to decision makers when making a section 23(3.1) determination, the first stage of the process created by item #40.00 does include a financial element as the third of the three so exceptional criteria considers whether the worker will incur a "significant loss of earnings".

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WCAT Decision Date: December 06, 2007
Panel: Jill Callan, Chair

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1. Introduction

A vice chair of the Workers' Compensation Appeal Tribunal (WCAT) is considering an appeal from a September 29, 2005 decision (*Review Decision #31250*) of the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). The issues before the Review Division related to the permanent partial disability award granted by the Board to the worker. The Review Division found that the award granted by the Board under the functional impairment method prescribed by section 23(1) of the *Workers Compensation Act* (Act) appropriately compensated the worker for his permanent partial disability and for that reason he was not eligible to be assessed for an award under section 23(3) of the Act.

In the course of considering the worker's appeal, the assigned WCAT vice chair concluded that item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) is so patently unreasonable that it is not capable of being supported by the Act. Accordingly, by memorandum dated July 10, 2006[2], the vice chair referred item #40.00 to me under section 251(2) of the Act. The vice chair contends that item #40.00 establishes a more onerous threshold for awards under section 23(3) of the Act than the threshold that is established under sections 23(3), (3.1), and (3.2). The vice chair identified the following elements of item #40.00 that, in his view, render the policy patently unreasonable:

1. The policy establishes a two-step procedure for considering section 23(3) payments which is not contemplated by sections 23(3), (3.1) and (3.2).

2. The policy adopts a definition of "occupation" which is inconsistent with the ordinary meaning of that term [and with] its use in the statutory context.

3. The policy introduces a category of "occupation" (an "occupation of similar type or nature") that is not contemplated by sections 23(3), (3.1) and (3.2).

4. In implementing the two-step process the policy prevents consideration of the worker's loss of earnings if it occurs within the same occupation as at the time of injury, or within an occupation of a similar type o[r] nature. As long as the worker is capable of performing the essentials skills of the original occupation, or an occupation of similar type or nature, the policy does not permit any consideration of a loss of earnings resulting from the injury, and

[2] The memorandum is available on the WCAT website at www.wcat.bc.ca .

presumes that the compensation under section 23(1) is appropriate. Sections 23(3), (3.1) and (3.2) do not create such a presumption.

5. Individually and cumulatively the aforementioned aspects of the policy establish a higher or more onerous threshold for section 23(3) payments than the threshold actually established by sections 23(3), (3.1) and (3.2). …

Under section 251(3) of the Act, I must decide whether the referred policy "should be applied" in adjudicating the worker's appeal. In accordance with section 251(1), this requires me to determine whether the referred policy is "so patently unreasonable that it is not capable of being supported by the Act and its regulations." In this case, there is no relevant regulation.

The scope of this determination is limited to the elements of item #40.00 that have been identified by the vice chair. Those elements mainly relate to the "so exceptional" test established by section 23(3.1) of the Act and are germane to the question of whether the worker is eligible for assessment for an award under section 23(3). They also relate to the two-step procedure for establishing a worker's entitlement to a loss of earnings award.

The worker and some of the participants in this determination challenge elements of item #40.00 which were not identified in the vice chair's referral, such as the requirement that in exceptional cases "medical evidence confirms that the work injury makes it **impossible** for a worker to continue in the occupation at the time of injury or an occupation of a similar type or nature" [emphasis added]. As this determination only relates to the elements of item #40.00 that have been identified by the vice chair and are germane to the worker's appeal, I will not be determining whether other elements of the policy are patently unreasonable.

The worker and some of the participants also object to the Board's practice of using the National Occupational Classification (NOC)[3] system to identify the worker's time of injury occupation. As the Board's practices are not policies of the board of directors, the question of whether the practices are patently unreasonable is beyond the scope of this determination.

Pursuant to the *Workers Compensation Amendment Act, 2002,* S.B.C. 2002, c. 56, (Amendment Act), several of the entitlement provisions of the Act, including section 23, were significantly amended, effective June 30, 2002. As a result of these amendments, the governing body of the Board created new policies related to the amended provisions. Unless otherwise stated, all references to the Act and policies in this determination should be read as references to the current Act and policies. I will refer

[3] The NOC website is available at http://www23.hrdc-drhc.gc.ca/2001/e/generic/welcome.shtml .

to provisions of the Act that existed prior to June 30, 2002 and the related policies as former provisions, sections, and policies.

2. Issue(s)

The issue in this determination is whether item #40.00 of RSCM II is so patently unreasonable that it is not capable of being supported by sections 23(3), (3.1), and (3.2) of the Act. The scope of this determination is limited to the elements of item #40.00 that have been identified by the vice chair. Those elements mainly relate to the question of whether a worker has met the "so exceptional" test in section 23(3.1) and is, therefore, eligible for assessment for an award under section 23(3) of the Act. In addition, they relate to the two-step procedure for establishing a worker's entitlement to a loss of earnings award.

3. Participants and distribution of this determination

The worker is represented by his trade union. Although invited to do so, the employer is not participating in the appeal.

Section 246(2)(i) enables WCAT to "request any person or representative group to participate in an appeal if the tribunal considers that this participation will assist the tribunal to fully consider the merits of the appeal". As the vice chair's referral, and this determination, arise out of an appeal to WCAT and raise matters of considerable importance to the workers' compensation system, I directed that the following representative groups be invited to participate in this determination:

- B.C. Federation of Labour
- Business Council of B.C.
- Coalition of B.C. Businesses
- Employers' Advisers Office
- Employers' Forum to the WCB
- Workers' Compensation Advocacy Group
- Workers' Advisers Office.

Submissions have been provided by all of the invited participants except the Business Council of B.C. and the Coalition of B.C. Businesses.

The worker, the B.C. Federation of Labour, the Workers' Compensation Advocacy Group, and the Workers' Advisers Office submit that item #40.00 is so patently unreasonable that it is not capable of being supported by the Act. The Employers' Forum to the WCB and the Employers' Advisers Office submit that the policy is not patently unreasonable.

WCAT will send copies of this determination to the parties, the chair of the board of directors of the Board, the president of the Board, and the Board's vice president, Policy and Research Division. In addition, WCAT will send copies of this determination to the participating groups, with the worker's and employer's identifying information deleted.

4. Delay in issuing this determination

The vice chair's memo that initiated this determination is dated July 10, 2006. There is no time frame specified for the WCAT chair to make a determination under section 251. However, section 251(3) provides that the chair will determine whether the policy should be applied "as soon as practicable" after the policy is referred by the vice chair. The *Concise Oxford English Dictionary, Eleventh Edition* (Oxford Dictionary) defines "practicable" as "**1**. able to be done or put into practice successfully. **2**. useful." Judicial guidance on the meaning of practicable can be found in the judgment of the Supreme Court of Alberta, Trial Division, in *R. v. Fitzpatrick* [1978] A.J. No. 722, in which the court held that the lower court had erred in finding that "as soon as practicable" means "as soon as possible". The Supreme Court held:

> I would think that if that were so Parliament would have said "as soon as possible". A synonym for "practicable" quoted in the dictionary is "feasible" which is "capable of being accomplished". In my view the phrase does not require that all else be dropped to accomplish the end. I would import some idea of reasonableness and practicality into the situation. In my view "as soon as practicable" means "as soon as possible having regard for the practical requirements of the situation". There was, then, an error in interpretation and that is an error in law.

Accordingly, in establishing the time frame for making a determination under section 251(3), the WCAT chair may take reasonableness and practicality into account.

Paragraph (d) of the practice directive in item #12.40 (Lawfulness of Policy) of WCAT's *Manual of Rules of Practice and Procedure* provides that, as a courtesy, a panel's memorandum regarding a referral to the chair under section 251 will be referred to the Policy and Research Division (PRD) of the Board when it is disclosed to the parties to the appeal. Accordingly, the vice chair's memorandum was disclosed to the PRD in the summer of 2006.

The worker and the various participants provided their submissions regarding this matter to WCAT in the early fall of 2006. Subsequently, by letter dated October 13, 2006, the vice president, PRD, informed me that the board of directors had instructed the PRD to proceed with an immediate review of item #40.00. At that time, the Board's intention was to conduct a formal consultation with the community on proposed policy changes to item #40.00 in early 2007. I concluded that it would be reasonable,

practical, and beneficial to delay this determination until the board of directors reached a decision on the proposed changes. I sought the worker's consent to the delay, which he provided.

On several occasions, the board of directors has amended policies that were the subject of referrals to the chair under section 251 but in relation to which the chair had not yet made a determination. By declaring that the amended policies were applicable to all decisions, including appellate decisions, the board of directors eliminated the need for a determination under section 251(3). Those policies have included:

- Item #50.00 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) (interest for widows and dependants);
- Item #31.40 of RSCM II (hearing loss);
- Item #13.30 of RSCM II (recurrence of mental stress); and
- AP 1-37-3 and AP 1-96-1 of the *Assessment Manual* (changes in an employer's classification due to Board error).

In this case, the Board's consultation process on item #40.00 has taken longer than was initially anticipated. On July 24, 2007, the PRD publicly issued a discussion paper entitled "Loss of Earnings ("LOE") Assessments", which I will call the July 2007 LOE discussion paper. It sets out eight questions for comment by stakeholders. The Board accepted comments until October 31, 2007. When the discussion paper was issued, the Board's website stated:

> … Once this input has been received and reviewed, a discussion paper with options and draft policy will be prepared for a second round of stakeholder consultation.

In August 2007 I wrote to the Board's vice president, PRD, to find out when any revisions to item #40.00 would be presented to the board of directors for approval. The vice president advised me that she anticipated the issue would be presented to the board of directors in the late spring of 2008.

As the vice chair's referral potentially affects many appeals, I became concerned about the delay. I asked the WCAT tribunal counsel to inform the worker of my concern and determine whether he would object if I proceeded with the determination. He agreed that, in light of the delay, I should proceed.

5. Section 23 and the "so exceptional" test

If a permanent partial disability results from a worker's injury, the Board must assess the worker under section 23(1) of the Act, which provides:

> (1) Subject to subsections (3) to (3.2) and sections 34 and 35, if a permanent partial disability results from a worker's injury, the Board must
>
> (a) estimate the impairment of earning capacity from the nature and degree of the injury, and
>
> (b) pay the worker compensation that is a periodic payment that equals 90% of the Board's estimate of the loss of average net earnings resulting from the impairment.

The method for assessing the permanent partial disability under section 23(1) is called the loss of function or functional impairment method. In establishing an award using this method, the Board is required to "estimate the impairment of earning capacity from the nature and degree of the injury".

Section 23(2) permits the Board to compile a rating schedule.

The provisions of the Act that are germane to the vice chair's referral are sections 23(3), (3.1), and (3.2), which provide:

> (3) Subject to sections 34 and 35, if
>
> (a) a permanent partial disability results from a worker's injury, and
>
> (b) the Board makes a determination under subsection (3.1) with respect to the worker,
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> the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between
>
> (c) the average net earnings of the worker before the injury, and
>
> (d) whichever of the following amounts the Board considers better represents the worker's loss of earnings:
>
> (i) the average net earnings that the worker is earning after the injury;

> (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.
>
> (3.1) A payment may be made under subsection (3) only if the Board determines that **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 subsection (1) does not appropriately compensate the worker for the injury.**
>
> (3.2) In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of the injury or to adapt to another suitable occupation.
>
> [emphasis added]

Section 23(3.1) establishes a test that must be met in order for a worker to be eligible for an award under section 23(3). The statutory test, which I will call the "so exceptional test", requires a determination by the Board that "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 award under section 23(1) "does not appropriately compensate the worker for the injury".

I interpret section 23(3.1) as establishing the following three factors for consideration in the application of the so exceptional test:

- the worker's occupation at the time of the injury;
- the worker's disability resulting from the injury; and
- the financial impact of the combined effect of the worker's occupation at the time of the injury and the resulting disability.

Section 23(3.2) requires the Board, in making a determination under the so exceptional test, to also consider the ability of the worker to:

- continue in his or her time of injury occupation; or
- adapt to another suitable occupation.

The vice chair contends that item #40.00 is patently unreasonable because, among other things, the policy establishes a threshold for a loss of earnings assessment that is more onerous than that established under the so exceptional test in section 23(3.1).

6. Item #40.00 (Section 23(3) Assessment)

Item #40.00 came into effect on July 16, 2002 (see *Resolution 2002/08/27-01*) in response to the amendments to section 23 of the Act. At that time, the governing body of the Board was the panel of administrators, who had been charged with the statutory responsibilities of the board of governors of the Board since 1995.

The Act was subsequently amended effective January 2, 2003 to establish the board of directors as the governing body under section 81 of the Act. Under section 82(1)(a) of the Act, the board of directors has the authority to "set and revise as necessary the policies of the board of directors, including policies respecting compensation".

Pursuant to the board of directors' *Decision No. 2003/02/11-04*, "Policies of the Board of Directors", item #40.00 of RSCM II became a policy of the board of directors as of February 11, 2003. There have been no amendments to item #40.00 since that date. There is no analogous policy in RSCM I because most policies in that volume deal with the former provisions of the Act, which did not include the "so exceptional" test.

Item #40.00 sets out the criteria that must be met in order to satisfy the so exceptional test established by section 23(3.1). After reproducing sections 23(3), (3.1), and (3.2) of the Act, item #40.00 provides:

> Section 23(3) is a discretionary provision that establishes rules for compensating a worker for a permanent partial disability in exceptional circumstances. Section 23(3) is only applied where the test set out under section 23(3) and (3.1) is met.
>
> This test requires that the Board determine whether the combined effect of a worker's occupation at the time of injury and a worker's disability resulting from the injury is so exceptional that an amount determined under section 23(1) does not appropriately compensate the worker for the injury. **Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills.**
>
> For the purposes of determining whether the worker meets the test set out under section 23(3) and (3.1), the Board must consider the combined effect of a worker's occupation at the time of injury and the resulting disability. While a worker may experience a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under section 23(3) and (3.1).
>
> **The following is a list of criteria that must be considered under section 23(3) and (3.1). 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.**

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

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.

However, in exceptional cases, the amount determined under section 23(1) may not appropriately compensate a worker. In these cases, 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 is considered unable to adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.

For the purposes of this policy, a significant loss of earnings means the Board may conclude in these exceptional cases, that the loss of earnings a worker will experience as a result of the combined effect could not have been anticipated under the section 23(1) method of estimating a worker's long term loss of earning capacity.

An example of when the combined effect may be considered so exceptional is one where a work injury results in a significant disability of two digits on the dominant hand of a worker whose occupation requires fine motor skills. As a result of the disability, the worker is no longer able

> to perform fine motor skills, and consequently, is unable to continue in the pre-injury occupation, or another occupation of a similar type or nature. In addition, due to the disability, the worker is unable to adapt to another suitable occupation without incurring a significant loss of earnings.
>
> As a result, the section 23(1) award may not be considered to appropriately compensate the worker for the impact of the combined effect, and may therefore result in a consideration under section 23(3).
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> [emphasis added]

Item #40.00 establishes the manner in which the three factors in the so exceptional test established by section 23(3.1) are to be applied. The Act does not define "occupation". Item #40.00 provides that "[o]ccupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills." It also provides that "[s]kills are defined in this context as the learned application of knowledge and abilities". The meanings of "occupation" and "skills" are critical to the question of whether a worker meets the so exceptional test because of the three bulleted criteria that item #40.00 has established under the so exceptional test. The policy provides that each of the three criteria must be satisfied in order for a worker to be assessed for a loss of earnings award under section 23(3). I will refer to the three bulleted criteria in item #40.00 as the "three so exceptional criteria".

7. BPIS #17 and the meanings of "occupation" and "essential skills"

In order to promote the consistent application of the Act and policies, the Board's Regulatory Practices Department has developed practice directives and Best Practices Information Sheets (BPISs) regarding various adjudicative issues. Although the Act requires adjudicators throughout the system, including WCAT vice chairs, to apply the policies of the board of directors, there is no statutory requirement to apply the guidelines set out in the practice directives and the BPISs.

On March 3, 2003, the Board issued Practice Directive #46 entitled "Permanent Disability Benefits – Section 23(3)". On August 25, 2006, the practice directive was replaced with BPIS #17, which is called "Permanent Disability Benefits – Section 23(3) ("So Exceptional" Test)". Under the heading "*(A) Occupation and Similar Occupation*" BPIS #17 provides:

> The primary tool for categorizing the worker's time of injury job or employment into an occupational grouping is the *National Occupational Classification System* ("NOC"). The worker's occupation is generally identified by choosing the 'Unit Group' or four-digit occupation code that best encompasses the characteristics of the worker's pre-injury job.

The following sources of information may assist in this process:

- a description of the worker's pre-injury duties;
- a NOC recommendation form; and,
- a comparison of the main duties from the identified NOC occupation to the worker's pre-injury job duties.

Under the heading "*(B) Identifying Essential Skills*", BPIS #17 states that some occupations may not require essential skills, such as those "where the requirements are primarily physical in nature". It goes on to state that where there are no required essential skills, the functional impairment award granted under section 23(1) will be considered appropriate compensation for the injury. In this way, the Board's administration has interpreted the use of the term "skills" in item #40.00 to mean that physical requirements do not constitute skills for the purposes of applying the so exceptional test.

8. The worker's claim

The circumstances of a claim and appeal that have led to a referral under section 251(2) may be relevant to the issue of whether the impugned policy is applicable to the appeal. However, they are generally of limited relevance to a determination under section 251(3) because the merits of the appeal are not before the chair. The chair is required to determine the legal question of whether the impugned elements of the policy in question are patently unreasonable.

In this case, I will provide a summary of the background of the worker's claim because it is illustrative of the operation of item #40.00 and how it is applied by the Board. Therefore, it provides some relevant context for consideration of the policy.

The worker was employed as a tireman/welder when he sustained a significant back injury in September 2002. According to his application for compensation, the injury occurred when he was lifting a tire and wheel, with a combined weight of 198 pounds, off the floor. The Board accepted his claim for a disc herniation at the L5-S1 vertebral level, a discectomy at that level, and chronic pain.

A document entitled "Medical Restrictions and Physical Limitations", which was scanned to the Board's electronic claim file for the worker on June 22, 2004, sets out the following list of "limitations" noted during the course of the worker's rehabilitation and the following comments regarding the demands of the worker's job at the time of the injury:

- Waist to crown lift-28 lbs. Requires medium to heavy for work.

- Floor to waist lift -35 lbs. Requires heavy for work.
- Front carry – 35 lbs. Requires heavy for work.
- Stooping – 27/60 seconds. Requires frequently for work.
- Ladder climbing.
- Job demand is medium to heavy for tireman/welder.
- Worker does not meet medium to heavy job demands but can do light to medium tasks.

In assessing the worker's medical restrictions and physical limitations in the context of the requirements of his job at the time of injury, the document states:

> **The position of welder/tireman is considered medium to heavy work with this accident employer.** His job includes welding tractor trailers to keep Super B units functioning. The tire work includes changing and repairing tractor trailer tires weighing about 198 pounds. He would build about 20 tires a day and do change outs (replacing old tire with new one). The employer has provided the information that the job involves bending, lifting, overhead work, varied body positions, lying under equipment while holding grinder above head and weight of up to 100 pounds. Frequent standing and kneeling/lifting/bending/reaching is indicated.
>
> **Based on the above restrictions and physical limitations, the worker's remaining abilities are less than the critical job demands.**
>
> [emphasis added]

In a July 26, 2004 document entitled "Form 21 – Section 23(3.1) Determination" a Board claims adjudicator, Disability Awards (CADA) considered whether the worker was eligible for an assessment under section 23(3) of the Act and, in so doing, considered the application of item #40.00 to the worker's circumstances.

The CADA first considered whether the worker's occupation at the time of injury required specific skills essential to that occupation (essential skills) and if so, what those essential skills were. He noted that the NOC was generally used by the Board to determine the occupation at the time of injury. He determined that the NOC code that applied to the worker was #7443 – Automotive Mechanical Installers and Services, which included "Tireman" and "Tire Repairer" as job titles within the occupational group. He concluded that the occupation required essential skills and determined that the essential skills required for the occupation included:

- the knowledge of and ability to operate both tire-mounting and tire-balancing equipment for motor vehicles, trucks, and heavy equipment,

- the knowledge of and ability to operate pneumatic equipment such as a lug nut gun, as well as manual tools,
- the knowledge of and ability to perform tire repairs such as sealing punctures, and install or replace tire valves,
- the knowledge and ability to assess the need as to when a tire requires replacement to ensure continued safe vehicle operation.

The CADA then considered whether the compensable disability prevented the worker from performing the essential skills of his occupation and decided:

> In considering the accepted limitations in relation to the worker's pre-injury occupation, it is my conclusion that while the medical evidence allows the conclusion that it is 'impossible' for him to continue to apply his essential skills in relation to *heavy equipment and/or truck tire repair* (the 'job') – the worker retains the ability to perform the specific and essential skills of the pre-injury occupation. He is able to apply the essential skills on *motor vehicles/cars*, where tire/rim weights are in keeping with his accepted limitations.
>
> Therefore the second criteria [*sic*] has not been met, as the worker is considered able to perform the essential skills needed to continue in the occupation at the time of injury.
>
> [italics in the original]

By letter dated February 17, 2005, a disability awards officer informed the worker that he would receive a permanent partial disability award under section 23(1) of the Act of $215.44 per month, effective July 12, 2004. It also informed him that he was not eligible for an assessment under section 23(3) of the Act because he did not meet the criteria set out in item #40.00. A pension calculation sheet enclosed with the letter noted that the worker's actual monthly wage rate was $3,928.27 and his compensation wage was $2,628.26.

The worker sought a review of the February 17, 2005 decision by the Review Division of the Board. In the September 29, 2005 Review Division decision, the review officer confirmed that the worker did not meet the requirements of section 23(3.1) and was not eligible for an assessment under section 23(3) of the Act.

It is in the context of the worker's appeal of the Review Division decision to WCAT that his representative has argued that item #40.00 is patently unreasonable.

In his referral memorandum, the vice chair noted that the worker's gross earnings as a tireman/welder in the one-year period prior to his September 2002 injury were $47,139.28. The worker is currently earning $10.00 per hour as a computer service technician and sales person in a computer store. The evidence before the vice chair is

that, if the worker was applying the essential skills of his occupation at the time of injury (as defined in item #40.00) and working as an automotive mechanical installer, he would be in an occupation that had average earnings of $31,500.00 in 2000. On this basis, the vice chair concluded that the worker would be experiencing a loss of earnings if he were working in that job.

The following aspects of the worker's claim are germane to the vice chair's referral:

- When the Board applied item #40.00, the worker's pre-injury ability to perform medium to heavy lifting was not considered to be a skill and, since "occupation" is defined as a collection of jobs with similar skills, this ability was not considered to be a relevant element of his occupation for the purposes of the so exceptional test. This conclusion is consistent with the statements in BPIS #17 that occupational requirements that are physical in nature do not constitute essential skills for the purposes of the so exceptional test.

- As a result of the definition of occupation in item #40.00, the Board did not take into account either the fact that the NOC code #7443 contains jobs with a range of salaries or the fact that the worker was working in a high-paying job relative to other jobs in that category. Item #40.00 does not consider the extent of a worker's earnings in his or her job to be a defining characteristic of his or her occupation.

- In terms of the three so exceptional criteria in item #40.00, the Board determined that the worker's case met the first criterion because his occupation at the time of injury required specific skills that were essential to that occupation. However, since he continued to be able to perform the essential skills of his occupation, his case did not meet the second criterion. The third criterion, which requires that the worker incur a significant loss of earnings, was not considered because the second criterion was not met. It is apparent from the vice chair's referral memorandum that he has concluded that the worker would incur a significant loss of earnings if he were to work in a job within the NOC code #7443 that has lighter physical requirements than his pre-injury job as a tireman/welder.

9. Standard of patent unreasonableness

Section 250(2) of the Act provides:

> The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

Section 251(1) provides:

> 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.

Pursuant to section 251(2), if, in the course of deciding an appeal, a vice chair considers that a policy should not be applied, the issue must be referred to me, in my capacity as chair of WCAT, for a determination as to whether the policy must be applied.

The vice chair's referral memorandum contends that certain elements of item #40.00 are so patently unreasonable that they are not capable of being supported by the Act. In *WCAT Decision #2005-01710*, dated April 7, 2005, I discussed the standard of patent unreasonableness at pages 12 to 17. I adopt that analysis in this decision. In addition to the judgments cited in that decision, I have also found the judgments referred to below to be helpful in characterizing the standard of patent unreasonableness.

In *Speckling v. British Columbia (Workers' Compensation Board),* 2005 BCCA 80, the court defined patently unreasonable as "openly, clearly, evidently unreasonable". In *Davidson v. British Columbia (Workers' Compensation Board) et al.,* 2003 BCSC 1147, the court cited the following series of authorities regarding the meaning and application of the standard of patent unreasonableness:

> [47] The patently unreasonable test requires that a decision under review to [*sic*] be "openly, evidently, clearly" unreasonable. In the *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748, Iacobucci J. stated at ¶57:
>
> > The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.
>
> [48] In *Canada Safeway Ltd.* v. *British Columbia (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 at ¶23, application for leave to appeal dismissed, [1999] S.C.C.A. No. 20:
>
> > The Appeal Division may have arrived at its decision by questionable reasoning but it is the result which must be tested for patent unreasonableness.

> [49] If a rational basis can be found for the decision, then it should not be disturbed simply because of defects in the tribunal's reasoning: *Kovach v. British Columbia (Workers' Compensation Board)* (1998), 52 B.C.L.R. (3d) 98 (C.A.) per Donald J.A., aff'd [2000] 1 S.C.R. 55, 2000 SCC 3.
>
> [50] Another description of this standard is that enunciated by Beetz J. in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412:
>
> > A mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it. As Dickson J. (as he then was) described it, speaking for the whole Court in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at p. 237, it is
> >
> > > …so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review...

The *Core Services Review of the Workers' Compensation Board* (March 2002), which I will call the Core Review, was conducted by Mr. Alan Winter and commissioned by the provincial government. The Amendment Act was enacted following the release of the report for the Core Review. In the Core Review, Mr. Winter provided the following explanation of the standard of patent unreasonableness (at page 94), which I adopt in this determination:

> The "patently unreasonable" standard – The focus under this approach is whether the applicable policy involves an interpretation of the ***Act*** which could not be rationally supported. This standard would tolerate a possible interpretation of the ***Act***, no matter how strained that interpretation might be, if otherwise lawful under the ***Act***.

Under section 82 of the Act, the board of directors has broad discretion to set and revise policies. The board of directors is not required to apply the correct interpretation of the Act in establishing policies. A policy is not patently unreasonable under the Act if it applies a rational interpretation of the Act. Therefore, in considering whether policies of the board of directors are patently unreasonable under the Act, I must accept that statutory provisions are often capable of more than one interpretation and that there may be a variety of rational policy options through which a statutory provision may be

implemented. In this case, I interpret section 23(3.1) as potentially supporting a wide variety of policy options for implementing the so exceptional test.

10. Principles of statutory interpretation

At the heart of the matter before me is the question of whether the elements of item #40.00 that are the subject of the vice chair's referral are rationally supported by sections 23(3), 23(3.1), and 23(3.2) of the Act. Accordingly, it is necessary to consider and apply the principles of statutory interpretation. Statutory interpretation in Canada is governed by the "modern principle". This principle was formulated in 1974 by Professor Elmer Driedger in the first edition of the *Construction of Statutes*[4] as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In 1998, the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd*.[5], declared the modern principle as the preferred approach to statutory interpretation. In 2002, in *R. v. Jarvis,*[6] the court restated the modern principle in this way (at paragraph 77):

> The approach to statutory interpretation can be easily stated: one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.

The types of external contextual factors to consider vary from case to case, but often include information about the legislative evolution and history of the statute and provision in question, such as previous versions of the provision in question, legislative debates about its enactment, and government commissioned reports related to the proposed amendments.

In British Columbia, the modern principle is buttressed by section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 which provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

In my view, the issues raised by the vice chair's referral largely turn on the question of whether item #40.00 is supported by a rational interpretation of the so exceptional test

[4] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at p. 67.
[5] [1998] 1 S.C.R. 27, at 41, per Iacobucci J.
[6] [2002] 3 S.C.R. 757, 2002 SCC 73, per Iacobucci J. and Major J.

in section 23(3.1) of the Act. In applying the modern principle for the purposes of interpreting section 23(3.1), I will consider the objects of the Act, its legislative history, the Core Review, and the debates in the legislature. I will also consider the ordinary meaning of the words in section 23(3.1) and consider them in the context of section 23 and the Act as a whole.

11. Context for interpreting section 23(3.1)

a) The objects of the Act

In *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at para. 27, 149 D.L.R. (4th) 577, the Supreme Court of Canada cited with approval the following four fundamental principles of workers' compensation legislation:

> (a) compensation [is] paid to injured workers without regard to fault;
> (b) injured workers should enjoy security of payment;
> (c) administration of the compensation schemes and adjudication of claims [are] handled by an independent commission, and
> (d) compensation to injured workers [is] provided quickly without court proceedings.

b) The former section 23(3) and related policies

Prior to the 2002 amendments, the former section 23(1) of the Act established permanent partial disability awards for permanent functional impairment. Under the former section 23(3), the Board had the discretion to grant an alternative award on a projected loss of earnings basis. The former section 23(3) provided:

> (3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury, and the compensation must be a periodic payment of 75% of the difference, and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business.

Prior to 1991, Board policy was set by the commissioners of the Board. Even though section 23(3) was enacted in 1954 (then section 22), it was not until October 2, 1973, the date of the commissioners' *Decision No. 8* (Re The Measurement of Partial Disability) (1 WCR 27), that the commissioners introduced into policy the concept of granting permanent partial disability awards on a projected loss of earnings basis. In that decision, they established the "dual system" for assessing permanent disability pensions involving the spinal column. In 1977, the dual system was extended to

non-spinal injuries and it continues to apply to pensions assessed under the former section 23.

The dual system is described in item #38.00 (Permanent Partial Disability) of RSCM I, which still applies to workers whose permanent disabilities first occurred prior to June 30, 2002 (see section 35.1(4) of the Act). It provides:

> The Board has two basic methods of assessing permanent partial disabilities. These are:
>
> 1. Loss of function/physical impairment method.
> 2. The projected loss of earnings method.
>
> The use of these two methods is termed the "Dual System". **These two methods are considered in every case where applicable, the amount of the pension being the higher of the two figures produced by the two methods.**
>
> [emphasis added]

Under the applicable policies in RSCM I, if the calculation of the award under the projected loss of earnings method results in a greater award than that estimated under the functional impairment method, the Board will generally award the pension using the projected loss of earnings method.

c) The Core Review and the amendments to section 23(3)

In chapter 10 of the Core Review, Alan Winter reviewed the pension system and provided recommendations to the provincial government. He noted that a briefing paper provided by the Board had stated that the long-term viability of the workers' compensation system could be adversely affected by the growth in the number of pension awards and pension reserves for both loss of earnings and functional awards. Mr. Winter commented on a variety of options. He also expressed concerns about the application of the dual system for assessing pensions.

Mr. Winter concluded that it was unnecessary to amend section 23(3) of the Act. However, he recommended that the board of directors revisit the intent and application of section 23(3) of the Act. He stated (at page 205):

> … **In my opinion, the current provision in the *Act* adequately captures the initial intent to permit the WCB to apply the loss of earnings method in those "special instances" where the WCB considers it is equitable to do so.** To revise the legislation to narrow the focus of Section 23(3) (for example, by replacing the words "where the board considers it more equitable" with "in those exceptional

> circumstances as determined by the board") would unnecessarily restrict the broad discretion currently provided to the governing body of the WCB to respond to emerging circumstances.
>
> The concerns associated with the mandatory application of the Dual System (such as the concern expressed in the WCB Briefing Paper, referred to previously, with respect to the long-term viability of the workers' compensation system as a result of the growth of the pension reserve) have arisen as a result of the previous policy choices made by the applicable governing bodies of the WCB. In my opinion, these existing concerns can be, and must be, similarly addressed and rectified through policy.
>
> [emphasis added]

Despite Mr. Winter's recommendation not to amend the Act but to instead amend policy, the legislature amended the former section 23(3) and replaced it with sections 23(3), (3.1), and (3.2). However, the "so exceptional" test in section 23(3.1) implements Mr. Winter's recommendation that loss of earnings pensions be limited to the special instances or exceptional circumstances determined by the Board.

d) The debates in the legislature

I have reviewed the debates of the legislature regarding the Amendment Act (Bill 49) and have not found any references to sections 23(3), (3.1), and (3.2). However, it is useful to consider some of the general comments of the Minister of Skills Development and Labour, who introduced the bill to the legislature. During the May 16, 2002 second reading of Bill 49 (*Hansard*, Volume 8, No. 3), the Minister raised concerns about the financial impact on the Board of the continuation of the benefit scheme then in place and outlined the following goals of Bill 49 (at page 3547):

> The goals of this bill are to restore the system to financial sustainability by bringing costs under control, to make the system more responsive and to maintain benefits for injured workers, which are among the highest and best in Canada, while ensuring fairness for workers and employers.

Clearly, a key purpose of the amendments was to reduce the costs of workers' compensation benefits in order to support the ongoing sustainability of the Board's accident fund, which is maintained under section 36 of the Act to fund the workers' compensation system and is paid for through assessments on employers' payrolls under section 39.

e) The purpose of section 23

The purpose of section 23 is to provide awards to those workers who are left with a permanent partial disability as a result of one or more compensable injuries. It is clear that an award will usually be granted on a functional impairment basis under section 23(1). It is also clear that, in enacting sections 23(3), (3.1), and (3.2), the legislature intended to narrow the circumstances in which a loss of earnings award would be granted.

12. The interpretation of "the worker's occupation at the time of the injury" in item #40.00

a) The vice chair's referral memorandum

The vice chair's comments on the definition and use of "occupation" in item #40.00 may be summarized as follows:

- Item #40.00 provides that "[o]ccupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills".

- This definition is "more expansive than the ordinary meaning of [occupation]".

- Although item #40.00 does not refer to the NOC, the definition of occupation in the policy appears to be derived from the NOC.

- The *Career Handbook* for the NOC[7] provides that "[a]n 'occupation' is a theoretical concept which includes specific types of skills and responsibilities held in common by those who work in an occupation". Therefore, the definition of occupation in item #40.00 and its use in the three so exceptional criteria "reflect the NOC terminology and structure, and as such involve a technical use of the word from the context of vocational counselling".

- The starting point for interpreting the phrase "the worker's occupation at the time of injury" in the so exceptional test in section 23(3.1) is to apply the ordinary meaning rule of statutory interpretation, which provides that words should be interpreted in their grammatical and ordinary sense. Dictionaries define occupation narrowly or broadly, depending on the context. It can refer to an individual's actual job or his or her career or profession.

[7] Publicly available on the Internet at http://www23.hrdc-drhc.gc.ca/ch/e/docs/ch_welcome.asp .

The vice chair concludes by stating:

> Even if the ordinary meaning of [occupation] is not determinative, … the word must also be considered in the entire context of the Act, the references to "occupation" in sections 23(3), (3.1) and (3.2) are linked to the worker's earnings at the time of his injury and his earnings after the injury in the same or a different occupation. The focus in those sections on what the worker earned and can earn is consistent with actual jobs or employments, rather than the broad conceptual or theoretical categories that are used in the NOC to create an analytical framework for overall trends in the labour market. In the following passage of its introductory section, the authors of the NOC *Career Handbook* specifically warn readers against utilizing it for insurance benefits purposes:
>
> > The Career Handbook is intended for career counselling, development and exploration purposes. [Human Resources and Skills Development Canada] neither condones nor recommends the use of this information for other purposes. **The profiles presented here are not appropriate for other uses such as screening applicants for particular positions or determining insurance benefits.** The data do not replace the use of criterion-referenced testing to establish performance requirements for work as it occurs in the labour market.…
>
> The foregoing indicates that the concept of "occupation" used in the NOC and the *Career Handbook* is not suitable for assessment of disability entitlement. The NOC concept of "occupation" is theoretical and does not include information based on the actual working conditions or demands of jobs within the occupational groups. **The adoption of the NOC concept of an "occupation" in policy item #40.00 involves a use of the word that is inconsistent with its ordinary meaning and with the meaning that is supported by the statutory context, which is concerned with the impact of disability on earning ability.**
>
> [emphasis added]

Therefore, among other things, the vice chair contends that item #40.00 is patently unreasonable because, in considering the combined effect of the worker's occupation and disability, the policy employs a technical definition of occupation, which focuses on skills. Through the practices established by the administration of the Board, the skills that are considered are derived from the NOC rather than the worker's actual time of injury job or occupation. In addition, the three so exceptional criteria only consider the impact of the disability on a worker's ability to perform the essential skills of the

occupation. The policy fails to consider the impact of the disability on the physical requirements of the occupation.

In my view, the vice chair's concerns about the definition of occupation in item #40.00 raise the following questions:

- Is the definition of occupation in item #40.00 patently unreasonable?

- Are the three so exceptional criteria patently unreasonable because, in considering "the worker's occupation at the time of the injury", they focus on the occupation's specific and essential skills and do not consider the physical requirements of the occupation?

b) Submissions of the worker and the participants

The worker's representative refers to the ordinary meaning of occupation and contends "it is not sufficient for the Board to simply review generalized occupational codes and associated skills to satisfy the statutory requirements of Section 23(3), (3.1) and (3.2) of the *Act*". She notes that section 23(3.2) requires the Board to "consider the ability of the worker to continue in the worker's occupation at the time of the injury" and submits that "this requires that the Board first determine the nature of the worker's occupation and then consider the extent and degree to which the worker can resume or maintain that occupation". She contends that the three so exceptional criteria impose a precondition to a loss of earnings award that is patently unreasonable under the Act. She states:

> The [Act] requires that the Board consider the worker's ability to continue [in his or her] occupation rather than whether the occupation is associated with essential skills and whether those essential skills are retained. By setting out the pre-condition of essential skills and the loss of those skills [in the three so exceptional criteria], the Board has incorporated requirements not contained within the statute.

The submissions provided by the other participants regarding the definition of occupation, the use of the NOC, and the three so exceptional criteria include the following:

- The B.C. Federation of Labour submits that, in establishing the first two of the three so exceptional criteria, item #40.00 "creates artificial barriers" to compensating a worker for his or her actual loss of earnings in accordance with section 23(3).

- The Workers' Advisers Office submits that "the overall effect of [item #40.00] is to create a threshold for access to [loss of earnings awards] which defeats the spirit and intent of section 23(3) and (3.1) … and [the Act] as a whole; namely, to provide

access to fair and equitable compensation for permanently disabled workers". They contend that the definition of occupation in item #40.00 is inconsistent with its ordinary meaning and its meaning in the context of the Act and that the use of the NOC codes can lead to "absurd results".

- The Workers' Compensation Advocacy Group contends that the three so exceptional criteria are arbitrary and patently unreasonable under the Act because large losses of earnings are irrelevant if a worker is capable of performing the essential skills of his or her pre-injury occupation. They also submit that the NOC is not designed to measure losses of earnings for workers' compensation purposes.

- The Employers' Advisers Office contends that the "2002 amendment to section 23(3) and the addition of sections 23(3.1) and (3.2) were intended to dramatically reduce the number of loss of earnings awards". They submit that those provisions confer a broad discretion on the Board to determine whether the so exceptional test has been met and the worker is eligible for a loss of earnings assessment. They submit that it is within the jurisdiction of the board of directors "to adopt a broad definition of [occupation] or a technical use of the term, rather than rely on the dictionary or ordinary definition of the term". They also point out that the standard of patent unreasonableness requires that the definition of occupation in item #40.00 be clearly irrational or so flawed that no amount of deference can justify the policy.

- The Employers' Forum to the WCB submits that, even if the use of occupation in item #40.00 is inconsistent with its ordinary meaning and its meaning in other sections of the Act, item #40.00 may not be patently unreasonable.

In order to consider the vice chair's memorandum and the submissions that have been provided, I will start by interpreting item #40.00 and then turn to the meaning of occupation in section 23(3.1).

c) The interpretation of "the worker's occupation at the time of the injury" in item #40.00

In order to determine whether item #40.00 is patently unreasonable in its interpretation of the phrase, "the worker's occupation at the time of the injury", which appears in the so exceptional test in section 23(3.1), it is necessary to first establish the manner in which item #40.00 takes the worker's time of injury occupation into account in the three so exceptional criteria.

As noted earlier, item #40.00 provides that "[o]ccupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills". It is clear from this definition of occupation that item #40.00 interprets "the worker's

occupation at the time of the injury" as a category of jobs with similar skills rather than the worker's specific job.

As the term "occupation" is defined, in part, by the use of the term "skills", and as criterion one of the three so exceptional criteria provides that a worker's occupation must require essential skills, the specific question that arises is whether the term "skills" in item #40.00 generally takes physical requirements of the time of injury occupation into account, where those physical requirements are not directly related to a specific skill. In the worker's appeal that is the source of the referral, such a physical requirement would include the requirement to lift or move the tires which need to be changed or repaired. If such physical requirements are not taken into account, then only those physical requirements needed to perform the essential skills of the time of injury occupation are considered under item #40.00 in applying the so exceptional test.

In relation to the policy's three so exceptional criteria, item #40.00 provides that "[s]kills are defined in this context as the learned application of knowledge and abilities". The three so exceptional criteria require the decision-maker to identify "the specific skills which are essential to that occupation" and consider whether "the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury". Accordingly, it is clear that the three so exceptional criteria consider whether the worker is disabled from performing the essential skills of the occupation. However, the question that is fundamental to this determination is the extent to which the three so exceptional criteria consider whether the worker is able to perform the physical requirements of the time of injury occupation that are not directly related to a specific skill. Is the ability to perform a physical requirement that is not directly related to a specific skill an essential skill for the purposes of the three so exceptional criteria?

I must therefore consider the extent to which item #40.00 takes into account the physical requirements of a job in identifying a worker's occupation and the essential skills of that occupation. There is no positive statement in the policy that skills or essential skills include the ability to perform physical requirements of a job or occupation. Accordingly, the question of whether physical requirements are to be considered in the so exceptional test turns on the meaning of "skills" in the policy. In determining the meaning of skills, I will rely largely on the ordinary meaning of skills and the words used in item #40.00 to define skills. I will also be guided by the Board practices contained in BPIS #17 and the July 2007 LOE discussion paper.

The term "skills" does not appear in the Act or the regulations. The Oxford Dictionary defines "skill" as "the ability to do something well; expertise or dexterity". It defines "dexterity" as "skill in performing tasks, especially with the hands". It defines "skilling" as "train (a worker) to do a particular task".

The definition of skills in item #40.00 as the "learned application of knowledge and abilities" appears to exclude a worker's ability to perform physical requirements if the

definition is read to be the learned application of knowledge and the learned application of abilities. However, it is also possible that the definition is intended to be read without "abilities" being modified by "the learned application of the". If the term "abilities" is intended to stand alone, it is useful to consider its definition.

The Oxford Dictionary defines "ability" as "**1** possession of the means or skill to do something. **2** skill or talent". The Oxford Dictionary defines "means" as "an action or system by which a result is achieved". These dictionary definitions certainly indicate that an ability can include a physical ability. In fact, in common parlance and in the workers' compensation system, ability usually refers to physical ability.

The following guidelines in BPIS #17, which are not policies of the board of directors and are not binding on WCAT, indicate that skills, as defined in item #40.00 do not include physical abilities:

> ***(B) Identifying Essential Skills***
>
> The first criterion outlined in Policy item #40.00 provides that the pre-injury occupation requires "specific skills" which are essential to the occupation. Policy item #40.00 states that "skills" are defined in this context as the **learned application of knowledge and abilities** [emphasis in original]. Those skills that are an absolutely necessary element or quality for a specific occupation may be characterized as "essential skills" for that occupation. …
>
> **Given the definition of skills and the first criterion outlined in policy, it is possible that a specific occupation may not require essential skills. This would typically be the case where the requirements are primarily physical in nature** [emphasis added]. As such, there is no specific feature of the occupation that could combine with the worker's disability to produce a result that would not be adequately reflected in the amount determined under the functional impairment method of assessment (section 23(1)). For example, a requirement to manually lift heavy objects is a purely physical requirement and would not generally be characterized as a "learned application of knowledge and abilities." The following example illustrates the distinction:
>
> - An electronics technician needs fine motor skills to perform the occupation's core duties. If a technician sustains a back injury, he or she still retains the fine motor skills necessary to be an electronics technician. The worker may experience difficulty with sitting, standing, lifting or carrying items or objects for prolonged periods. However, these are physical demands and, unlike the

> requirement for fine motor skills, are not essential skills of the occupation.
>
> Therefore, where it is determined that the worker's occupation at the time of injury does not require essential skills, the amount determined under section 23(1) of the *Act* for a permanent partial disability will be considered appropriate compensation for the injury. …

The July 2007 LOE discussion paper, which was approved by the board of directors, also indicates that skills, as defined in item #40.00, do not include physical abilities. It states:

> ***(a) Combined effect of pre-injury occupation and disability resulting from injury***
>
> … [Item #40.00] broadly defines occupation as a collection of jobs or employments that are characterized by a similarity of skills. This approach has been criticized by stakeholders and in appeals as being inconsistent with the ordinary meaning of that term. It has been put forward that the definition should reflect common definitions found in, for example, the *Gage Canadian Dictionary* which defines occupation as one's employment or trade.
>
> On appeal the issue has been raised that the skills identified for an occupation need to be related to the worker's actual pre-injury job.
>
> The following additional issues have also been raised on essential skills:
>
> - Practice currently provides that manual occupations do not have essential skills. In [*WCAT Decision #2004*-06402] the panel concluded that although in most cases heavy physical labour is not a skill in the sense that it is a learned application of knowledge and abilities, it is a necessary skill for a trades helper or labourer.
> - Questions have been raised regarding whether physical demands such as standing, sitting, lifting or carrying for prolonged periods, should be considered essential skills of an occupation.
> - Another question raised is whether policy should provide that the WCB must also consider whether the worker has the physical ability to apply the essential skills. For example, a roofer may be able to apply shingles to a roof after his or her back injury. However, if the back injury prevents the worker from being able to climb the ladder to get to the roof, should the WCB determine that the worker can no longer perform the essential skills of the occupation.

It is apparent from reading item #40.00 as a whole and from Board practice and the 2007 LOE discussion paper, that the definition of skills in the policy does not include physical abilities. The significance of this interpretation of skills in BPIS #17 is apparent from the following information regarding Best Practice Information Sheets, which is posted on the Board's website:

> The development of "Best Practices Information Sheets" represents a new approach to communicating corporate practice. These documents are being developed to address specific compensation matters. **They are intended to support quality decision making by highlighting key adjudicative considerations consistent with the objective/principle of a particular legislative or policy requirement, and, where appropriate, providing examples to demonstrate appropriate application. …**
>
> **The expectation is that Board officers will consider and apply the information provided in the Best Practices Information Sheets. …**
>
> [emphasis added]

Therefore, I find that the definition of skills in item #40.00, properly interpreted, excludes consideration of the ability of a worker to perform the physical requirements of the occupation from the definition of skills. If I am wrong in this regard, it is open to the board of directors to provide appropriate guidance to all decision-makers in the workers' compensation system.

As a result, the issue that arises is whether the exclusion of consideration of the worker's ability to meet the physical requirements of his or her time of injury occupation involves a patently unreasonable interpretation of "occupation" in section 23(3.1). In order to answer this question, I must first determine the meaning of "occupation" in the so exceptional test in section 23(3.1).

d) Process for determining the meaning of occupation in the so exceptional test in section 23(3.1)

There is no definition of "occupation" in the Act or in the *Interpretation Act*. While there is a definition of "occupational disease" in section 1 of the Act, it does not shed any particular light on how "occupation" should be interpreted.

In the absence of a statutory definition, and in order to interpret "occupation" in the so exceptional test in section 23(3.1), I will consider:

- its ordinary meaning through references to dictionary definitions;
- its use and meaning in other sections of the Act;

- the objects of the Act;
- its use and meaning in the former section 23(3); and
- the purpose of the 2002 amendments to section 23.

e) Ordinary meaning of occupation

The definitions of "occupation" in the Oxford Dictionary include "a job or profession" and those in *Webster's New Twentieth Century Dictionary Unabridged, Second Edition* (Webster's) include "the principal business of one's life; vocation; calling; trade; the business which one follows to procure a living or obtain wealth; as, he is a merchant by occupation". "Occupational" is defined in Webster's as "of occupation or an occupation".

These definitions indicate that a reference to a worker's occupation may be a reference to his or her specific job but may also be much broader. The required skills of an occupation would clearly be considered to be one of its key characteristics. However, in ordinary parlance, an occupation would have characteristics other than skills, such as physical requirements.

f) Meaning of occupation in other sections of the Act

Having considered the meaning of occupation in ordinary parlance, I will now consider its use in other sections of the Act. The references to "occupation" and "occupational" in the Act include the following provisions:

- Section 4(3) concerning the death of a commercial fisher in the course of his or her "occupation".
- Section 6(1) regarding a worker suffering from an "occupational disease".
- Section 6(4.2) regarding designating or recognizing a disease as being peculiar to "a particular process, trade or occupation".
- Section 24(9) which deals with the reconsideration of benefits in certain circumstances and refers to "the maximum the Board would award to a worker in an occupational category similar to the occupation of the applicant worker before the injury".
- Section 30(1)(b)(ii) which refers to "the average net earnings that the Board estimates the worker is capable of earning in any suitable occupation after the injury".

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- Section 33(3.2) which refers to situations in which a worker is in an "occupation or industry that results in recurring seasonal or recurring temporary interruptions of employment".

- Section 33.2 which refers to "an apprentice in a trade, an occupation or a profession".

In general, the references to occupation in each of these sections are consistent with its broad ordinary definition. In most cases, occupation does not appear to refer to a worker's specific job with his or her employer at the time of injury. In contrast, sections 5(2) and 6(1) refer to a worker's specific job as "the work at which the worker was employed", in providing that compensation is payable if an injury or occupational disease disables the worker from earning full wages at his or her employment.

In *Sullivan and Driedger on the Construction of Statutes*[8] (Sullivan and Driedger), the authors provide the following explanation of the presumption of consistent expression (at pages 162 to 163):

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.

Accordingly, it is presumed that the legislature intended "occupation" in section 23(3.1) to have the same meaning as it has in other sections of the Act. Therefore, it is presumed that it refers to the worker's principal business, profession, vocation, trade, or calling.

g) Meaning of occupation in other subsections of section 23 of the Act

In addition to appearing in section 23(3.1), "occupation" also appears in sections 23(3) and 23(3.2). In section 23(3), the formula for calculating a loss of earnings award requires consideration of "the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury". Section 23(3.2) requires the Board to consider the worker's ability "to continue in the worker's occupation at the time of the injury" or "adapt to another suitable occupation". I interpret each of these

[8] Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: The Butterworth Group of Companies, 2002).

subsections as referring to an occupation in the general sense rather than a specific job.

Section 23(3.2) incorporates a mandatory requirement that, in applying the so exceptional test, the Board consider the ability of the worker to continue in his or her time of injury occupation. While "ability" can be interpreted to mean skills, in the context of a worker with a permanent disability, I find it also refers to the ability to meet physical requirements as well as the ability to execute skills. In my view, subject to available modifications and accommodations, the legislature could not have intended that a worker, who could not meet the physical requirements of the occupation, would be able to continue in that occupation.

The obvious interpretation of "suitable occupation" is that it refers to an occupation that is suitable in respect of the required skills as well as the physical requirements. The need to consider physical requirements is recognized in item #40.12 (Suitable Occupation) of RSCM II, which provides:

> In estimating what a worker is capable of earning in a suitable occupation after the injury, the Board officer gives regard to the evidence, including the medical evidence of the limitations imposed by the compensable disability, and the ability of the worker to perform different occupations.

h) Meaning of occupation that gives effect to the objects of the Act

The next matter is to consider the meaning of "occupation" in section 23(3.1) in the context of the objects of the Act. One of the fundamental objects of the Act is to provide compensation to workers with compensable disabilities. Entitlement and eligibility for short-term and long-term disability benefits is usually determined by reference to the worker's physical abilities. In considering the effect of a worker's disability on his or her occupation, one would normally consider the worker's ability to perform the physical requirements of the occupation as well as his or her ability to perform the skills of the occupation. Accordingly, it is more consistent with the objects of the Act to interpret the so exceptional test as requiring consideration of the effect of the disability on a worker's ability to perform the physical requirements of the time of injury occupation, as well as the skills, than it is to interpret the so exceptional test as only requiring consideration of the worker's ability to perform the skills.

i) Meaning of occupation in the former section 23(3)

In terms of the legislative history, it is important to consider the meaning of occupation as it was used in the former section 23(3), which provided:

> (3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference

> between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable **occupation** after the injury, and the compensation must be a periodic payment of 75% of the difference, and regard must be had to the worker's fitness to continue in the **occupation** in which the worker was injured or to adapt to some other suitable employment or business.
>
> [emphasis added]

It is clear that the legislature intended that in considering "some suitable occupation" and in considering "the worker's fitness to continue in the occupation in which the worker was injured", decision-makers would consider the physical requirements of the relevant occupations as well as the skills. The applicable former policies reflected that intention.

j) Meaning of occupation in light of the objects of the amendments to section 23(3) and the introduction of the so exceptional test in section 23(3.1)

It is absolutely clear from the Core Review and the legislative debates that the amendments to section 23(3) and the addition of sections 23(3.1) and 23(3.2) resulted from concerns that the financial viability of the British Columbia workers' compensation system was at stake.

In the Core Review, Mr. Winter recommended a return to a framework in which loss of earnings awards would be granted in "special instances". Although he concluded that the granting of loss of earnings awards must be restricted, he did not specifically recommend a policy framework that restricted consideration of a worker's disability to its effect on his or her ability to perform skills as opposed to physical requirements.

Notwithstanding Mr. Winter's view that there was no need to amend section 23(3), the legislature enacted sections 23(3), (3.1), and (3.2). It is apparent that the legislature enacted the so exceptional test in response to Mr. Winter's recommendations.

In my view, in enacting the "so exceptional" test, the legislature intended that the Board's governing body would establish policies that would restrict loss of earnings awards to exceptional or unusual circumstances. The legislature intended that there would be circumstances in which a worker, who was experiencing a loss of earnings and who would have been entitled to a loss of earnings award under the dual system established under the former provisions, would not be eligible to receive an award under the new legislation.

Section 23(3.1) established that the Board would have the discretion to determine the circumstances that would meet the so exceptional test. The task for the panel of administrators and the board of directors was to establish a policy that would in effect

draw the line between those workers who would be granted a loss of earnings award and those who would not.

There is no doubt that item #40.00 achieved the legislature's intention of raising the threshold for awarding loss of earnings pensions in order to protect the long-term financial sustainability of the workers' compensation system. In part, the policy has achieved those goals by establishing a framework in which a worker who continues to be able to perform the essential skills of his or her occupation is not eligible for an assessment for a loss of earnings award. The fact that a worker is experiencing a loss of earnings because the permanent disability prevents him or her from performing the physical requirements of the occupation is not relevant under the policy.

While it is clear that the legislature intended to enact a much higher threshold for obtaining a loss of earnings award, it is not clear that the legislature intended a dramatic shift in the meaning of occupation such that a worker's occupation would be defined on the basis of its skills rather than on the basis of its skills and its physical requirements. There was no signal from the legislature that a worker's inability to perform the physical requirements of his or her occupation would only result in an assessment for a loss of earnings award if the worker was rendered unable to perform the essential skills of the job. In fact, in requiring consideration of whether the functional award under section 23(1) appropriately compensates a worker for a permanent partial disability, the legislature included a financial element in the so exceptional test.

Since section 23(3.1) requires the decision-maker to consider whether a worker is appropriately compensated for the injury under section 23(1), it is apparent that the economic impact of the combined effect of the occupation and the disability must be considered, as it is in the third of the three so exceptional criteria set out in item #40.00. While there will be a financial impact if the worker can no longer perform the essential skills of the occupation, there is also a financial impact if he or she can no longer perform the physical requirements of the occupation.

k) The definition of occupation in item #40.00 by reference to the NOC framework

It is apparent that the definition of occupation in item #40.00 as "a collection of jobs or employments that are characterized by a similarity of skills" was not derived from the ordinary meaning of occupation, its use in other sections of the Act, or its use in the former section 23. The ordinary meaning of occupation and its use in the other provisions of the Act do not support a definition that limits the characteristics of an occupation to the required skills. I agree with the vice chair's contention that the definition of and the skills-based framework for the three so exceptional criteria have been developed by reference to the NOC. BPIS #17 provides that the NOC is the primary tool for identifying the occupational grouping for the time of injury job.

In 1993, the NOC replaced the *Canadian Classification and Dictionary of Occupations* (CCDO). In a page called "Transition from the CCDO to the NOC"[9] the NOC Career Handbook notes that there has been a "shift from tasks to skills in the current labour market" and, accordingly, for counseling purposes it is necessary to focus on skills. Among other things, the NOC is used for labour market research and career counseling. Its website provides:

> **About the NOC:**
>
> The NOC is the authoritative resource on occupational information in Canada. It is used daily by thousands of people to understand the jobs found throughout Canada's labour market. The NOC provides a standardized framework for organizing the world of work in a coherent system and is implemented in a number of major services and products throughout the private and public sectors.
>
> The NOC is updated in partnership with Statistics Canada according to 5 year Census cycles. It is based on extensive occupational research and consultation conducted across the country, reflecting the evolution of the Canadian labour market.

The *Career Handbook*, *Second Edition* (cited earlier) is available on the NOC website. It provides information on the NOC classifications. For each classification, including the NOC code #7443 (the code that was applied to the worker's occupation), the Career Handbook sets out information, including the required skills and some limited information regarding the physical requirements of the occupation. The introduction section includes a page entitled "*Physical Activities and Environmental Conditions*", which states:

> **The ratings for Physical Activities factors in an occupational profile do not indicate that persons with disabilities can or cannot perform the duties of that occupation.** However, counsellors of clients with disabilities may find the information useful in terms of considering workplace accommodations that would enhance their client's employability.
>
> [emphasis added]

I acknowledge that the NOC provides useful information about jobs and that, for workers' compensation purposes, it is a helpful tool for identifying other similar jobs and transferable skills. However, it is clear that the NOC is not intended to be a tool for determining disability benefits (see quote from the Career Handbook identified by the vice chair and reproduced earlier) or for identifying jobs that can be performed by people with disabilities.

[9] Available online at http://www23.hrdc-drhc.gc.ca/ch/e/docs/intro_page15.asp .

The guidelines in BPIS #17 provide that the NOC is the primary tool for identifying a worker's time of injury occupation and the essential skills of that occupation. However, I note that there is no requirement in item #40.00 that a worker's occupation and essential skills be defined by reference to the NOC. While the consistent application of guidelines supports consistency of decision-making, it is open to WCAT to depart from the guidelines in BPIS #17.

l) Appropriate compensation under section 23(1)

Section 23(3.1) sets out that loss of earnings awards may only be granted when "the amount determined under subsection (1) does not appropriately compensate the worker for the injury". Accordingly, I have considered whether the rationale for the restrictive definition of occupation in item #40.00 is that section 23(1) of the Act compensates a worker for his or her inability to perform physical requirements of his or her job (as opposed to skills) where that inability results from the worker's permanent disability.

Section 23(1) of the Act requires the Board to pay compensation to workers with permanent partial disabilities and to "estimate the impairment of earning capacity from the nature and degree of the injury". The July 2007 LOE discussion paper refers to the method under section 23(1) as the "loss of function method" and states (at page 2):

> An award based upon the loss of function method reflects the average impact of a permanent physical impairment upon earning capacity. The intent is that the same percentage rate of disability is to be applied to all workers who suffer a similar work-related disability. The percentage of disability is then applied to the worker's long-term average net earnings and the permanent disability award is 90 percent of this amount.

In contrast, the discussion paper states that "[t]he projected LOE method is designed to more closely approximate a worker's loss of earnings that results from the impairment".

Item #39.00 (Section 23(1) Assessment) of RSCM II explains the purpose of functional awards under section 23(1) as follows:

> The percentage of disability determined for the worker's condition under section 23(1)(a), reflects the extent to which a particular injury is likely to impair a worker's ability to earn in the future.
>
> A permanent partial disability award calculated under section 23(1) also reflects such factors as:
>
> - short term fluctuations in the compensable condition;
> - reduced prospects of promotion;

- restrictions in future employment;
- reduced capacity to compete in the labour market; and
- variations in the labour market.

It is apparent that loss of function awards granted under section 23(1) are intended to cover a variety of factors. In some cases, a worker's inability to perform the physical requirements of his or her time of injury occupation may lead to "restrictions in future employment" and "reduced capacity to compete in the labour market" for which compensation will be granted under section 23(1).

The underlying assumption in item #40.00 is that in all cases in which the worker remains able to perform the essential skills of his or her occupation, the worker will be appropriately compensated under section 23(1). While consideration of the appropriateness of the award under section 23(1) is clearly an element of the so exceptional test, I find that section 23 cannot be rationally interpreted as establishing that an award under section 23(1) is, in all cases, intended to compensate for a projected loss of earnings that results from the worker's disability rendering him or her unable to perform the physical requirements of his or her time of injury occupation.

m) Is the interpretation in item #40.00 of the "the worker's occupation at the time of the injury" in section 23(3.1) patently unreasonable?

Having completed the process for considering the meaning of "the worker's occupation at the time of the injury" in section 23(3.1), I now turn to the questions regarding the policy's interpretation of that phrase which are:

- Is the definition of occupation in item #40.00 patently unreasonable?

- Are the three so exceptional criteria in item #40.00 patently unreasonable because, in considering "the worker's occupation at the time of the injury", they focus on the occupation's specific and essential skills and do not consider the physical requirements of the occupation?

I find that it is rational to interpret occupation in section 23(3.1) as the worker's principal business, profession, vocation, trade, or calling. Accordingly, I am not persuaded by the submissions that the term occupation in that section refers to the worker's own job at the time of injury.

While BPIS #17 requires that a worker's time of injury occupation be established on the basis of the NOC codes, practice directives are not policy of the board of directors and therefore are not binding on WCAT.

The question is whether, in defining occupation as "a collection of jobs or employments that are characterized by a similarity of skills", item #40.00 is founded on a patently

unreasonable definition of the term occupation in section 23(3.1). This question turns on whether there is a rational basis for characterizing a worker's time of injury occupation solely on the basis of its skills. I find that the definition of occupation in item #40.00 excludes consideration of the physical requirements of the occupation. Given the objects of the Act, the purpose of section 23, the ordinary meaning of occupation and its use in other sections of the Act, and the requirements of section 23(3.2), I find no support for defining occupation in section 23(3.1) in this manner. In my view, item #40.00 is patently unreasonable because it establishes a worker's time of injury occupation by grouping jobs with similar skills without also considering the physical requirements of a worker's time of injury job and the jobs that are grouped with it to define the occupation.

In addition, I find item #40.00 is patently unreasonable because the operation of the definitions of occupation and skills in the policy, coupled with the three so exceptional criteria, limit consideration of the effect of the disability on a worker's time of injury occupation to the effect of the disability on the worker's ability to perform the essential skills. Given that the Act is premised on the payment of compensation to workers on the basis of physical (or psychological) disability, I find that it is patently unreasonable for the governing body to have created a policy pursuant to section 23(3.1) that does not consider the physical requirements of a worker's occupation when considering the "combined effect" of a worker's time of injury occupation and his or her compensable disability. It could not have been the legislature's intention to limit section 23(3.1) in this way.

The case of the worker whose appeal is the subject of the referral illustrates the effect of the second of the three so exceptional criteria in item #40.00. That criterion requires consideration of whether the disability renders a worker unable to perform the essential skills of the time of injury occupation. The worker continued to be able to perform the essential skills of his occupation of Automotive Mechanical Installers and Services, which included "Tireman" and "Tire Repairer" as job titles (as the occupation is defined by the Board through the application of the NOC code). However, he was unable to perform the physical requirements of his specific occupation of repairing heavy equipment and trucks, which was at the higher end of the range of salaries for the occupation of tire repairer. His back injury prevented him from performing the heavy physical requirements of his work. If the worker had injured his hands instead of his back, it seems his disability may have rendered him unable to perform the essential skills of his occupation, which included operating pneumatic equipment, such as a lug nut gun and manual tools, and operating tire-mounting and tire-balancing equipment.

The logical extension of my analysis of the three so exceptional criteria is that an unskilled labourer could never meet those criteria because, no matter how severe the disability, the unskilled labourer's occupation does not require specific skills that are essential to the occupation. Therefore, the compensable disability could not render him or her unable to perform the essential skills of the occupation. In fact, given that

occupation is defined as characterized by "a similarity of skills" it seems that what is commonly viewed as the occupation of an unskilled labourer would not be considered an occupation at all under item #40.00. There is no rational basis in the Act for excluding unskilled labourers from consideration for loss of earnings awards.

I acknowledge that there may be circumstances and purposes for which the definition of occupation in item #40.00 (which focuses on skills) would be suitable. The obvious example is that such a definition is suitable for the purposes of establishing a labour market framework, such as the NOC. I also acknowledge that a classification system, such as the NOC, may assist in determining the skills required to perform an occupation. The effect of the disability on the worker's ability to perform the skills of the occupation is clearly relevant to the question of whether there is a loss of earnings. However, I share the vice chair's concern that, in the context of the Act, its objects, and sections 23(3), (3.1), and (3.2), the impact of the disability on the ability of the worker to perform the physical requirements of the occupation, and the effect of the disability on the worker's earning capacity in the occupation are relevant considerations. I find there is no rational basis for excluding these considerations in item #40.00.

In concluding that the failure to consider a worker's ability to perform the physical requirements of his or her occupation renders item #40.00 patently unreasonable, I have been mindful of the clear intention of the legislature that the threshold for loss of earnings awards be significantly raised. If section 23(3.1) limited the determination of the Board to the question of whether the combined effect of the worker's occupation and the disability is exceptional (without the inclusion of the requirement that the appropriateness of the compensation under section 23(1) be considered), it might be open to the board of directors to establish a policy where the combined effect is only considered to be exceptional if the worker can no longer perform the essential skills of his or her occupation. However, in establishing the policy related to the so exceptional test, the board of directors is required to take into account the fact that section 23(3.1) refers to the combined effect of the occupation and the disability being "so exceptional that an amount determined under subsection (1) does not appropriately compensate the worker for the injury". Since the worker's ability to perform the physical requirements of his or her time of injury occupation can have a financial impact, the physical requirements must be taken into account in determining whether the award under section 23(1) is appropriate. I am not persuaded that the legislature intended that workers who could continue to perform the skills of the occupation but could no longer perform the physical requirements of the occupation would not be eligible for loss of earnings awards. I find that this element of the policy is so patently unreasonable that it cannot be supported by the Act.

While section 23(3.1) establishes that the board of directors can determine the circumstances in which the combined effect of the occupation and the disability meets the so exceptional test, I find it is patently unreasonable to do so by establishing a policy that fails to consider the effect of the disability on the worker's ability to perform

the physical aspects of the occupation. While the intention of the legislature was clearly to establish a threshold for the granting of loss of earnings awards, the board of directors cannot apply a patently unreasonable interpretation of the Act. There are many rational options available to the board of directors in implementing the so exceptional test in a manner that is consistent with the legislative intention.

13. The two-step procedure for section 23(3) awards

The policy framework for loss of earnings awards establishes a two-step procedure. The first step is the determination under item #40.00 of whether the so exceptional test has been met. The second step is the assessment of the entitlement to a loss of earnings award under items #40.01 to #40.14.

In the referral memorandum, the vice chair objects to the two-stage procedure. I understand his position to be as follows:

- Under sections 23(3), (3.1), and (3.2), if the requirements of the so exceptional test in section 23(3.1) have been met, a worker is entitled to a loss of earnings award.

- Item #40.00 is patently unreasonable because it provides that, if the three so exceptional criteria are met, "the section 23(1) award may not be considered to appropriately compensate the worker for the impact of the combined effect, and may therefore result in a consideration under section 23(3)". Entitlement to the loss of earnings award has been established if the so exceptional test has been met and therefore, at that point, the loss of earnings award should be granted and not merely considered.

- The two-stage process precludes adequate consideration of the financial element of the so exceptional test because item #40.00 does not include "the mechanism for gathering and assessing earnings information".

The Workers' Advisers Office submits that the two-step process is patently unreasonable and the Employers' Advisers Office and Employers' Forum contend that the two-step process is supported by sections 23(3), (3.1), and (3.2) of the Act.

Section 23(3.1) requires consideration of whether "an amount determined under subsection (1) does not appropriately compensate the worker for the injury". Accordingly, I agree that there is a financial element to the so exceptional test and, if item #40.00 did not take the financial element into account, there might be a good argument that the failure to do so renders the policy patently unreasonable. However, the financial element in the so exceptional test is taken into account in the third of the three so exceptional criteria in item #40.00, which requires consideration of whether the worker will incur "a significant loss of earnings".

Section 23(3) provides that if a permanent partial disability has resulted from the worker's injury and the requirements of section 23(3.1) have been met, "the Board **may** pay the worker compensation" [emphasis added] on a loss of earnings basis. Accordingly, the Board's authority to grant a loss of earnings award is subject to the condition that the so exceptional test has been met. Once that condition has been satisfied, the Board "may" grant a loss of earnings award. If the Board has a residual discretion under section 23(3) to determine whether a loss of earnings award will be granted to those workers whose situations meet the so exceptional test, the two-step process is supported by the Act.

In my view, the question of whether section 23(3) grants the Board discretion over the decision to grant a loss of earnings award even if the so exceptional test has been met turns on the meaning of "may" in section 23(3). Section 29 of the *Interpretation Act* provides that in interpreting a British Columbia enactment, the word "may" "is to be construed as permissive and empowering". In contrast, it provides "must" "is to be construed as imperative". Section 23(3) can be contrasted with section 23(1), which provides that if a permanent partial disability results from a worker's injury, the Board "must" provide a permanent partial disability award on a functional basis. It is imperative that the Board do so. Section 23(3) permits and empowers the Board to grant a loss of earnings pension if there is a permanent partial disability and the requirements of section 23(3.1) have been met.

In Sullivan and Driedger, Professor Sullivan discusses the meanings of "may", "shall", and "must" at pages 56 to 65. She notes that "may" is used in legislation to confer an authority or power. She states (at page 57):

> When a statutory power is conferred using the word "may", the implication is that the power is discretionary and that its recipient can lawfully decide whether or not to exercise it. After all, if the legislature wished to impose an obligation, it could easily have used "shall" instead of "may"….

Given the meaning of "may" in section 23(3), I find that section establishes that the Board has the residual discretion to determine whether a loss of earnings award will be granted even if the so exceptional test in section 23(3.1) has been met.

In light of the residual discretion granted to the Board in section 23(3) and the fact that the three so exceptional criteria in item #40.00 include consideration of whether the worker will incur a significant loss of earnings, I am not persuaded that the two-step procedure is patently unreasonable. However, I note that item #40.00 does not specify the information that will be taken into account and the criteria that will be applied in determining whether there is a significant loss of earnings. Since fairness requires that like cases be treated alike, the lack of guidance in item #40.00 is problematic.

BPIS #17 provides little further guidance as to the meaning of significant loss of earnings. It provides:

> Policy item #40.00 does not define a "significant loss of earnings" in terms of a benchmark dollar value or percentage differential. As a result, a definitive figure cannot be presented in practice.
>
> In an effort to assist decision makers with this criterion, it is worth noting that a number of Workers' Compensation Appeal Tribunal ("WCAT") panels have concluded that a "significant loss of earnings" is a financial test that requires a comparison of the difference in values of a worker's net income before and after the injury, with the ultimate consideration being whether the section 23(1) award appropriately compensates the worker for the impairment of earning capacity resulting from the compensable disability. As well, a number of panels have concluded that a difference between the worker's pre- and post-injury average net earnings of 25 percent is a "significant loss of earnings," subject to an examination of the amount of the permanent functional impairment award.
>
> Although in some cases a differential of 25 percent, as described above, has been considered significant, the individual circumstances of each case must be considered in order to determine whether a significant loss of earnings exists. **In other words, it must be determined whether the difference in pre- and post-injury occupational average earnings is significant to the point that the amount of compensation provided under section 23(1) does not provide appropriate compensation.**
>
> [emphasis in original]

I acknowledge that there may be circumstances in which it is difficult to determine whether there is a significant loss of earnings because the detailed financial information that would assist a decision-maker in determining whether an award under section 23(1) is appropriate is not available on a worker's claim file. This is a concern that the board of directors may wish to address through policy amendments. While I agree that the two-step procedure is problematic because it limits the information available to decision-makers who are applying the so exceptional test, I find the two-step procedure is supported by sections 23(3) and (3.1).

14. An occupation of similar type or nature

In addition to referring to the worker's "occupation at the time of the injury", the three so exceptional criteria also refer to "an occupation of a similar type or nature".

In the referral memorandum, the vice chair stated:

> In determining whether the worker meets the criteria for a loss of earnings assessment, RSCM II item #40.00 requires consideration of three "occupations": the worker's own "occupation at the time of injury," an "occupation of similar type or nature," and "another suitable occupation." The first and third of these occupations reflect the language of section 23(3.2), which requires the decision-maker, in making a determination under subsection (3.1)" to "consider the ability of the worker to continue in the worker's occupation at the time of injury or to adapt to another suitable occupation." The second "occupation" referred to [in] policy item #40.00 is not expressly mentioned in sections 23(3), (3.1) or (3.2).
>
> The addition of a category of "occupation" in item #40.00 ("of similar type or nature") not mentioned in the relevant sections of the Act is one of the elements of the policy which contribute to a threshold in the policy for a loss of earnings award that is higher or more onerous than the one found in Act.

The vice chair contends that it is patently unreasonable to include references to an occupation of a similar type or nature. The vice chair's concerns are shared by the worker's representative and the Workers' Advisers Office. The Employers' Advisers Office notes that section 23(3.2) provides that, in applying the so exceptional test, the Board must consider the ability of the worker "to adapt to another suitable occupation". They point out that "an occupation of a similar type or nature" fits within the meaning of "another suitable occupation".

In the circumstances of the appeal before the vice chair, the concept of "an occupation of a similar type or nature" was not considered in determining whether the worker's circumstances met the so exceptional test because the worker was found to be able to perform the essential skills of his own occupation. Section 251(2) of the Act requires a vice chair to refer a policy to me for a determination under section 251(3) if the vice chair considers that the policy should not be applied in the adjudication of an appeal. As the appeal before the vice chair does not require consideration of "an occupation of a similar type or nature", and therefore does not require the application of that portion of the policy, I decline to determine whether the inclusion of this concept in item #40.00 is patently unreasonable.

If this question somehow becomes relevant in the adjudication of the worker's appeal, the vice chair may again refer it to me under section 251(2) and I will endeavour to render a determination under section 251(3) on an expedited basis.

15. The remaining issues raised in the vice chair's referral

I have concluded that item #40.00 is patently unreasonable because, in considering the combined effect of the worker's occupation and disability, the policy only considers whether the worker is able to perform the essential skills of the occupation and does not take the physical requirements of the worker's occupation into account. This conclusion addresses the vice chair's concern that:

> As long as the worker is capable of performing the essentials skills of the original occupation, or an occupation of similar type or nature, the policy does not permit any consideration of a loss of earnings resulting from the injury, and presumes that the compensation under section 23(1) is appropriate.

My conclusion also addresses the vice chair's concern that the threshold established by item #40.00 in order to implement the so exceptional test is more onerous than the test established by section 23(3.1).

Accordingly, I believe I have addressed all of the elements of the vice chair's referral that are germane to the appeal before him. If there are determinative matters that I have not addressed, the vice chair may refer them to me for an expedited determination after the board of directors provide their determination under section 251(6).

16. Conclusion

I find:

- The term "occupation" in section 23(3.1) refers to the worker's time of injury occupation in the general sense rather than the worker's specific job at the time of the injury.

- The definition of "occupation" in item #40.00 pertains to jobs characterized by similar skills. Item #40.00 does not require consideration of the physical requirements of jobs in identifying the applicable occupation.

- The definition of "skills" in the context of the three so exceptional criteria in item #40.00 does not include the ability to perform physical requirements of the job or occupation. The three so exceptional criteria only consider the effect of the disability to the extent that it disables a worker from performing the essential skills of his or her time of injury occupation.

- The definition of "occupation" and its use in the three so exceptional criteria in item #40.00 of RSCM II are so patently unreasonable that they are not capable of being supported by the Act. In considering the combined effect of a worker's

occupation and disability under section 23(3.1) of the Act, those elements of the policy consider whether the worker is able to perform the essential skills of the occupation but fail to take into account the worker's ability to perform the physical requirements of the occupation.

- The two-stage procedure in the board of directors' policies for awards under section 23(3) is supported by section 23.

- As the question of whether it is patently unreasonable to include the references to "an occupation of similar type or nature" in item #40.00 does not arise out of the worker's appeal, I decline to determine whether that element of the policy is rationally supported by the Act.

17. The operation of section 251

Section 251 prescribes a series of steps that must be taken as a result of my determination that the impugned policy should not be applied. Those steps include the following:

- In accordance with section 251(5), WCAT will suspend any other appeal proceedings that can be affected by the impugned policy.

- In accordance with section 251(5), I will send notice of this determination and my reasons to the board of directors in care of the chair of the board of directors. I will enclose with the notice a list of the parties to the appeal that has led to this referral and the parties to the appeals that WCAT has suspended under section 251(5).

- In accordance with section 251(6), within 90 days of receipt of notice of this determination, the board of directors must review item #40.00 and determine whether WCAT may refuse to apply the elements I have found to be patently unreasonable. If I am wrong in interpreting the policy to mean that the physical requirements of the worker's job are not to be taken into account in applying the so exceptional test, the board of directors can provide guidance to the workers' compensation system by clarifying the manner in which the three so exceptional criteria are to be applied.

- The date for receipt of the notice under section 251(5) is a matter to be determined by the board of directors. However, I note that WCAT's task of identifying the appeals that are to be suspended under section 251(5) will be logistically demanding. Accordingly, there will be a delay between the date of this determination and the date I give formal notice of this determination to the board of directors.

- In accordance with section 251(7), the board of directors must allow the parties to this appeal and the parties to all appeals suspended by WCAT to make written submissions.

- In accordance with section 251(8), WCAT will be bound by the board of directors' determination.

Jill Callan
Chair

JC/hb