August 11, 2005

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

Dear Ms. Callan:

RE: WCAT Decision #2005-01710

On April 7, 2005, you issued a determination that policy item #1.03(b)(4) ("Policy") of the *Rehabilitation Services & Claims Manual* ("*RS&CM*") is so patently unreasonable that it is not capable of being supported by the *Workers Compensation Act* ("*Act*") and its regulations. This determination was made under section 251(3) of the *Act*, which gives the workers' compensation appeal tribunal ("WCAT") discretion to refuse to apply a policy of the board of directors ("BOD") "*only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations*."

Your determination was formally received by the BOD on May 16, 2005, and all appeal proceedings pending before WCAT that were considered to be affected by the Policy were suspended. Under section 251(6) of the *Act*, the BOD was given 90 days to review the Policy and determine whether it should be applied.

The policy in question pertains to section 35.1 of the *Act* and states that a recurrence includes any claim reopened for any permanent changes in the nature and degree of a worker's permanent disability. The Policy directs that if an injury occurred before June 30, 2002, and the disability recurs on or after June 30, 2002, the current provisions of the *Act* apply to the recurrence. Under the former provisions, permanent disability awards were based on 75% of gross earnings and were payable for the life of the worker. Under the current provisions, awards are based on 90% of net earnings and are payable to age 65 or the worker's date of retirement, whichever is later. In addition, the worker receives a retirement benefit based on 5% of the permanent disability award.

This letter is to advise you that on August 8, 2005, the BOD met to finalize their determinations under section 251(6) of the *Act*. After careful deliberations and consideration of all of the submissions made, the BOD determined that policy item #1.03(b)(4) is supported by the *Act* and is therefore not patently unreasonable.

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Before setting out the process the BOD followed in reviewing this matter and the specific reasons for its decision, I would like to acknowledge that this is the first matter referred to the BOD since section 251 was enacted in 2002. The BOD recognizes that the issue is multifaceted and hinges on a complex legal assessment of what constitutes patently unreasonable as well as the intent of the *Act*. The specific issue for the BOD to determine was whether the Policy can be rationally supported by the *Act*. To assist in answering this question, the BOD sought advice from its General Counsel, the WCB's Policy and Research Division and from an independent and external Legal Counsel.

According to your written determination, you have concluded that the Policy cannot be rationally supported by the *Act* and that deteriorations of permanent disabilities should be compensated under the *Act* as it read prior to the Bill 49 amendments. Your decision is based largely on your analysis of the following:

- The principle of consistent expression: This principle states that 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.
- The ordinary dictionary meaning of recur: You found it compelling that the plain meaning of recur is "to occur again". In your view, this is a fundamentally different concept from a permanent change in a permanent condition.
- Your interpretation of the other sections of the *Act* where the word recurrence is used (sections 32 and 96(2)). You found that historically in the BC workers' compensation system, the term "recurrence" was not generally applied to a permanent deterioration of a permanent disability.

In early June, 2005, the BOD provided parties whose proceedings had been suspended pending the BOD's determination with notice of their entitlement to make written submissions with respect to your determination. The BOD received over 30 submissions from or on behalf of individual parties or representative groups, all of which were taken into consideration in making this determination. The BOD notes that the Workers' Compensation Advocacy Group, in its submissions, suggested that some form of oral hearing process before the BOD would have been appropriate. However, the tight timeline within which the BOD must make its determination is not conducive to holding an oral hearing, especially given the large number of participants. In any event, the BOD is satisfied that the issues are ones that can be fairly and fully dealt with through its written hearing process.

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Policy item #1.03(b)(4) was thoroughly reviewed by the BOD in light of the issues raised in your determination and the submissions from the parties. After careful consideration of the specific question before the BOD, it has determined that Policy #1.03(b)(4) accords with the context and purpose of the *Act* and therefore is not patently unreasonable.

The BOD is of the opinion that the most plausible interpretation of section 35.1(8) is that "recurrence" includes changes in the extent of permanent partial disabilities as well as repeats of temporary total or partial disabilities. This interpretation:

- is consonant with the interpretation of the word "recurrence" in compensation and insurance legislation and cases;
- eliminates inconsistent treatment of workers and differential calculations of benefits;
- is consonant with the balance of section 35.1; and
- is reflective of an apparent legislative intention to transfer new events on old claims into the amended *Act* as a transitional objective.

It is evident from the overall scheme of the *Act*, the Board's privative clause and the patent unreasonableness standard of review, that the BOD has been given a great deal of latitude in formulating policies that are best-suited to fulfilling the purposes and objectives of the *Act* so that the workers' compensation system operates in the manner in which the legislature intended.

The underlying objectives of the changes to the workers' compensation system under the *Amendment Act* were the subject of extensive comment by the Minister in his second reading speech on Bill 49 (Hansard, May 16, 2002, Volume 8, No. 3, pp. 3546-7). Among other things, the Minister said that:

> … This bill is designed to make British Columbia's workers compensation system sustainable, so it can protect workers and employers in the future. 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. This bill will make it possible for the Workers Compensation Board to maintain employer rates at levels comparable to other provinces, to clarify coverage of conditions related to mental stress and to improve management of the system by providing a new permanent structure for directing WCB.

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> This bill furthers the government's new-era commitment to make the Workers Compensation Board more responsive to the needs of workers and employers alike. It also follows through on our January 2002 strategic plan, which calls for a more accountable, responsive and cost-effective workers compensation system.

In his second reading speech, the Minister continued to emphasize the need to ensure sufficient and stable financial resources are available to secure, over the long run, benefit payments to injured workers. It is thus made manifestly clear that an important and overriding goal of the *Amendment Act* is that of ensuring the future fiscal sustainability of the workers' compensation system through a change in the way in which future benefits are to be calculated and paid.

The Minister also made some comments (at p. 3548) respecting existing benefit awards:

> Let me emphasize again that this bill does not reduce any benefits already awarded to injured workers. I just want to say that again for people to understand because there could be people who are fearful that these changes relative to the benefit they're receiving today will be changed. That is not correct. I will say it again. This bill does not reduce any benefits already awarded to injured workers. The new method of calculating benefits applies only to those benefits awarded after this legislation comes into force.

Based on these and like comments by the Minister, it is fair to characterize another important objective of the *Act* as that of preserving any existing benefits, but changing the methods of calculating benefits awarded after the legislation is enacted. Expressed somewhat differently, the transitional objective is that of transferring new events on old claims into the amended *Act.*

Given the BOD's determination that policy item #1.03(b)(4) is rationally supported by the legislation, it is the BOD's decision that the WCAT cannot refuse to apply the policy on the basis that it is patently unreasonable. As required under section 251(8), this matter is referred back to the WCAT pursuant to section 251(8) of the *Act* to apply the policy.

Yours truly,

ORIGINAL SIGNED BY

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