

COMPENSATION PRACTICE AND QUALITY DEPARTMENT

INTERIM PRACTICE

PRACTICE DIRECTIVE # C6-2

TOPIC: Permanent Disability Benefits – Section 23(3)

ISSUE DATE: April 29, 2011

PRACTICE ALERT: BC Supreme Court Decision

DATE: May 31, 2011

BACKGROUND

On March 18, 2011, the B.C. Supreme Court issued a decision in the matter of *Jozipovic v. British Columbia (WCAT and Workers' Compensation Board)*. The focus of the proceeding was WorkSafeBC's policy on loss of earnings awards (Policy item #40.00).

The court found that the portion of the policy that requires an officer to consider whether the worker can perform the essential skills of "an occupation of a similar type or nature" is not supported by the *Act*.

WorkSafeBC has initiated an appeal of this decision to the B.C. Court of Appeal.

INTERIM DIRECTION TO STAFF

Pending a decision of the Court of Appeal, the words "*an occupation of a similar type or nature*" found in Policy item #40.00 and Practice Directive #C6-2, are suspended and will not form part of the adjudicative criteria for determining eligibility for a permanent disability award under section 23(3) of the *Act*.

Objective

This practice directive provides guidance to WorkSafeBC officers in determining whether a worker's permanent partial disability award should be assessed under section 23(3) of the *Workers Compensation Act* (the "*Act*").

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Law & Policy

There are two methods of permanent partial disability assessment. The section 23(1) loss of function method is a mandatory provision which must be applied when assessing a worker's permanent partial disability.

The section 23(3) loss of earnings method of assessment is discretionary and 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 the worker's occupation at the time of the injury, and the worker's disability resulting from the injury, is *so exceptional* that an amount determined under section 23(1) does not appropriately compensate the worker for the injury.

Policy item #40.00, *Section 23(3) Assessment*, of the *Rehabilitation Services and Claims Manual ("RSCM")*, Vol. II, provides the following three criteria that must each be met in order for a worker to be assessed under section 23(3) of the *Act*.

1. 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.
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.
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.

Adjudicative Guidelines

The criteria presented in Policy item #40.00 for the section 23(3) assessment does not need to be viewed as sequential. If a single criterion is not met at any stage during the assessment process, the worker is not eligible for a section 23(3) permanent disability award.

A. Starting the Process

Prior to finalizing temporary disability benefits, the following information is gathered and documented by the Case Manager:

- critical job demands;
- the permanent condition(s) accepted;

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- the permanent medical restrictions resulting from the compensable disability - activities that should not be undertaken because of risk of injury or further injury; and
- the physical/psychological limitations resulting from the compensable disability - tasks that cannot be performed due to the compensable condition.

B. Occupation and Similar Occupation

In order to consider the criteria provided in Policy item #40.00, the worker's occupation "at the time of injury" must be identified. It is recognized that "time of injury" is a broader concept than "date of injury," which is used elsewhere in the *Act*. As a result, consideration is given to situations where a worker may have been employed in more than one job at the time of injury.

It is important to identify all occupations that the worker was employed in at the time of injury and not just the predominant or accident occupation. The criteria provided in Policy item #40.00 will be applied equally to each occupation in order to determine eligibility for a section 23(3) permanent disability award.

If the worker is disabled due to the effects of an occupational disease, the occupation "at the time of injury" will be the worker's occupation at the time of disablement. As required by section 6 of the *Act*, the date of disablement is treated as the occurrence of the injury.

Where an increased degree of permanent disability occurs more than three years after the date of injury, the worker's occupation may be identified with reference

to the employment at the time of reopening the claim.¹

i) What is the worker's occupation?

As provided in Policy item #40.00, an occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills. Policy item #40.00 states that "skills" are defined in this context as the learned application of knowledge and abilities.

A worker's pre-injury occupation is identified by considering jobs that share similar, but not necessarily identical, duties, responsibilities, physical requirements, training and/or education requirements.

¹ RSCM Policy item #70.20, *Reopening Over Three Years*. Section 32(3) of the *Act* gives WorkSafeBC discretion to determine whether compensation benefits should be calculated based on the average earnings of the worker at the date of the occurrence of the permanent disability or the date of the increased degree of permanent disability.

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Nationally or provincially recognized methods of occupational classification may be used to assist in identifying the worker's time of injury occupation. By way of example, the *National Occupational Classification System* ("NOC") can be a useful tool in categorizing a specific job or employment into an occupational grouping. Generally, a worker's occupation may be identified by choosing the 'Unit Group' or four-digit/five-digit occupation code that best encompasses the characteristics of the worker's pre-injury job.²

The NOC Recommendation, completed by the Vocational Rehabilitation Consultant ("VRC"), may be a useful tool in categorizing a specific job or employment into an occupational grouping. The NOC Recommendation is developed to classify the worker's job/employment at the time of injury into the NOC code(s) that best represents the worker's pre-injury job/employment and duties.³

ii) — What is a similar occupation?

~~Generally, similar occupations are those occupations that require a similar~~

- ~~• skill type (i.e., type of work performed and/or the industry sector);~~
- ~~• skill level (i.e., nature of education, training required, and work experience); and,~~
- ~~• physical or functional demands.~~

~~In some circumstances, a similar occupation to a pre-injury occupation may not exist. For example a ward nurse occupation has different physical demands from a nurse advisor occupation.~~

~~Caution should be exercised where there is a significant difference between the average remuneration commanded by the time of injury occupation and the average remuneration commanded by a similar occupation. A significant difference in rates of remuneration may call into question whether the skill type and level, etc., are truly similar. However, differences in rates of remuneration, by themselves, should not necessarily lead to a conclusion that the two occupations in question are dissimilar for the purposes of policy item #40.00.~~

² Where they exist, the five-digit code (which more fully differentiates the four-digit occupational group) may be used instead of the four-digit code.

³ In some instances, it will be obvious that a specific job falls into a specific NOC code. In other cases, the VRC uses the information in the NOC as a starting point and explains how the recommended NOC code(s) accurately represents the worker's job at the time of injury. Consideration is given to the physical demands and job requirements of the occupation. Where the pre-injury job is equally represented by more than one occupation, the descriptions of the applicable NOC occupation codes are used and the rationale for recommending more than one NOC code is explained in the NOC Recommendation. The VRC verifies and considers additional information prior to recommending a NOC occupation code to ensure that the recommendation appropriately reflects the pre-injury job/employment and duties. Sources of information may include the worker and employer, professional associations, on site visits, unions, job descriptions and/or internet sources.

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The NOC system can be a useful tool for determining the similarity of occupations. If it is used, it is important to consider the physical requirements of the occupations, to confirm whether there is sufficient similarity.

iii) How are essential skills identified?

Policy item #40.00 states that “skills” are defined in this context as the learned application of knowledge and abilities. Those skills that are an absolutely necessary element or quality for a specific occupation may be characterized as “essential skills” for that occupation.

In practice, every occupation should be viewed as requiring skills that are a necessary element or quality for the specific occupation. It is recognized that physical requirements may be captured by the definition of skills where they are appropriately characterized as “learned abilities”. This is generally true where a physical requirement represents a necessary element for the majority of jobs in the occupational grouping. For example, a labourer’s “learned abilities” may be the ability to swing a hammer efficiently, operate a jackhammer, or climb a ladder.

The Claims Adjudicator, Disability Awards (“CADA”) identifies the essential skills of an occupation that are impacted by the worker’s medical restrictions and physical/psychological limitations. In determining the essential skills of an occupation, the CADA may seek assistance from the VRC to identify ranges of physical requirement for the occupation.⁴ This information will assist the CADA in determining the physical demands that equate to essential skills of the occupation that are affected by the worker’s restrictions and limitations.

Where the worker was employed in more than one occupation at the time of injury, the CADA identifies the essential skills for all of the occupations.

C. Ability to Continue in the Pre-injury Occupation/~~Similar Occupation~~

Where required and in accordance with Policy item #40.00, a CADA determines if the worker is no longer able to perform the essential skills needed to continue in the pre-injury occupation, ~~or a similar occupation~~, as a result of the compensable disability.

This determination is undertaken once a worker’s condition has stabilized and it has been decided that there is likely a permanent impairment. It includes consideration of both the worker’s transferable skills and the worker’s post-injury functional abilities, including physical abilities.

⁴ It is recognized that some occupations will be composed of a number of jobs which will have varying ranges of physical requirements, depending on the specific job.

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The following types of evidence may assist in considering the effects of the disability and in determining whether a worker has the ability to perform the essential skills needed in the pre-injury ~~or similar occupation~~:

- medical evidence on the claim related to the severity of the injury and the resulting disability such as x-rays, operative reports, specialist consultation reports, clinical examinations, and WorkSafeBC Medical Advisor opinions;
- the medical restrictions and physical/psychological limitations of the worker's impairment; and
- results from a functional capacity evaluation or an occupational rehabilitation program regarding the worker's post-injury functional abilities.

As part of the consideration for a section 23(3) award, the medical evidence must confirm that the work injury makes it impossible for the worker to continue in the pre-injury occupation ~~or in a similar occupation~~.⁵ In practice, this means that there are no jobs in the pre-injury ~~or similar~~ occupation grouping where it would be medically possible for the worker to perform the essential skills. In other words, the worker's disability may directly prevent the worker from exercising an essential skill or may do so indirectly, for example, by preventing the worker from lifting the object on which or with which the worker applies an essential skill. For example, a worker who is no longer able to raise his hand over his head is no longer able to perform certain kinds of skilled repairs, even if he or she retains the necessary fine motor skills.

Where a worker is employed in more than one occupation at the time of injury, the medical evidence must confirm that the work injury makes it impossible for the worker to continue in at least one of the pre-injury occupations ~~or similar occupations~~.

Where a worker can only return to the pre-injury ~~occupation or a similar occupation~~ at a reduced capacity (e.g., worker can only return to work on a part-time basis, rather than maintain full-time employment), the VRC may consider VR assistance to enable the worker to return to a different job or occupation. In cases where the worker's return to the pre-injury occupation ~~or a similar occupation~~ at a reduced capacity results in a significant loss of earnings to the worker, it may suggest that the worker is unable to perform the essential skills needed to continue in the occupation. Therefore, the CADA may consider whether the worker is able to adapt to another suitable occupation, and whether the worker would incur a significant loss of earnings in adapting to the suitable occupation.

⁵ Where an occupational requirement is just outside of a worker's physical limitation (e.g., worker states that he cannot stand for more than 15 minutes; but occupational requirement is for standing for 20 minutes), it may suggest that the occupational requirement is not "medically impossible" for the worker to perform.

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D. Another Suitable Occupation

Generally, an occupation will be considered suitable where the worker has, or can reasonably attain and perform, the necessary skills (e.g. duties, responsibilities, physical requirements, training and/or education) that the occupation requires.

When identifying possible suitable occupations for a worker, the following are considered:

- the worker's transferable skills
- the worker's education, training, and previous work experience; and
- the worker's post-injury functional abilities, including physical abilities.

The CADA may use information from the VRC to identify other suitable occupations and address whether the worker retains the ability to adapt to another suitable occupation. The information may include:

- occupation(s) that the worker is employed in post-injury that are suitable and maximize the worker's long-term earning capacity; and/or
- occupation(s) identified in a Rehabilitation Plan.

Where a worker is employed in more than one occupation at the time of injury, and is unable to continue in one of the pre-injury ~~or similar~~ occupations, the CADA identifies the corresponding suitable occupation to the affected pre-injury ~~or similar~~ occupation. If the worker is able to return to only one of the pre-injury occupations, that occupation may be considered a suitable occupation to the affected pre-injury occupation to which the worker is unable to work.⁶

E. Significant Loss of Earnings

Where the CADA determines that the worker would be able to adapt to another suitable occupation, it is necessary to consider whether the worker would incur a significant loss of earnings.

⁶ For example, a worker's pre-injury occupations may include part-time teaching and part-time carpentry. The worker may be unable to return to carpentry or a similar occupation. However, teaching would be considered a suitable occupation to which the worker could adapt. The CADA would still determine whether the worker would incur a significant loss of earnings through adapting to another suitable occupation (i.e., teaching) (see section E *Significant Loss of Earnings*).

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The sole fact that a worker may experience a loss of earnings as a result of a work injury is not sufficient to meet the test set out in section 23(3.1) of the *Act* and does not mean the worker is entitled to an assessment under section 23(3).

While policy item #40.00 does not define a “significant loss of earnings” in terms of a value or percentage differential, it is reasonable to conclude that the determination of whether there is a “significant loss of earnings” requires a comparison of the difference in values of a worker’s earnings 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.

In determining the extent of any anticipated loss of earnings under the “so exceptional” test, the CADA applies the following formula:

$$\text{Pre-injury gross average earnings}^7 - (\text{Post-injury gross occupational average earnings in a suitable occupation}^8 + \text{Section 23(1) award})$$

The result is evaluated to determine if the section 23(1) award provides appropriate compensation.⁹

If the worker’s post-injury earning capacity is on a less than full-time basis, the full-time occupational average earnings figure may be prorated accordingly.

WorkSafeBC recognizes that a “significant loss of earnings” exists where the difference between the worker’s pre-injury earnings against the combined total of the post-injury earnings and the amount of the section 23(1) award is at least 25%. In addition, WorkSafeBC recognizes that a “significant loss of earnings” does not exist when the calculated result is 5% or lower. However, consideration is given to the individual circumstances of each case to determine if a significant loss of earnings exists.

A lower figure than 25% may represent a significant loss of earnings. The following examples suggest that a loss below 25% is a significant loss of earnings:

- A worker who is 62 years old, with limited transferable skills, has a calculated loss of earnings of 20%. The worker plans to retire at 65. The worker may experience a significant loss of earnings as his ability to adapt to a suitable occupation is affected by the combination of the relatively

⁷ The pre-injury gross average earnings are the worker’s long-term gross average earnings used to determine the worker’s long-term wage rate.

⁸ The worker’s post-injury actual earnings (gross) are used instead of the “post-injury gross occupational average earnings” when these earnings are greater than the post-injury occupational average earnings (gross).

⁹ The pre- and post-injury earnings are subject to the statutory maximum.

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short duration left for him in the workforce and his post-injury vocational profile.

- A worker with pre-injury earnings that are at or near the provincial minimum wage¹⁰ may experience a significant loss of earnings where the calculated result is 10%. The impact of the loss relative to the percentage of loss is significant.
- A worker with pre-injury earnings that are well in excess of statutory maximum (e.g., \$90,000) has a calculated loss of 18% using the significant loss of earnings formula. As the formula restricts consideration of the worker's pre-injury earnings to statutory maximum, it distorts the worker's true loss, which would be significantly higher than the calculated 18% loss.
- A worker's pre-injury employment was a heavy duty mechanic. The restrictions and limitation accepted on his claim precluded the worker from lifting beyond 9 kg (light lifting) and the worker was limited to working four days a week. The pre-injury employer was able to accommodate the worker in his post-injury employment as a partsperson, working four days a week, and removing all aspects of medium/heavy lifting from his current employment. The degree of accommodation provided by the accommodating employer is extraordinary. Extraordinary accommodation refers to an accommodation and employment that would not generally be found in the workforce. In addition, the worker is not able to perform the essential skills of his post-injury occupation without his employer's accommodation.

Where a worker is employed in more than one occupation and is unable to return to a pre-injury occupation ~~or similar occupation~~, but is able to adapt to another suitable occupation, the officer determines whether the worker would incur a significant loss of earnings in adapting to the suitable occupation. The above formula is applied to the total pre-injury average earnings (gross) and the total post-injury occupation average earnings (gross) in a suitable occupation. The result is evaluated to determine if the section 23(1) award provides appropriate compensation.

CROSS REFERENCES:

See also Practice Directive #C6-1, *Permanent Partial Disability Benefits – Section 23(1)*.

HISTORY:

This item replaces Practice Directive #C6-2, *Permanent Disability Benefits – Section 23(3)*, May 29, 2008 (Amended October 22, 2008). Changes to streamline the process as well as changes to the formula found in section (E) were made on June 30, 2010. Section (E) was amended on April 29, 2011 to identify situations where a significant loss of earnings exists and

¹⁰ Provincial minimum wage refers to the minimum wage established by BC employment standards legislation.

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APPLICATION:

does not exist. This Practice Directive represents interim practice while stakeholder consultation is underway.

This Practice Directive was developed to provide guidance on RSCM Policy item #40.00. The Practice Directive applies to all disability award decisions made on or after April 29, 2011.