Noteworthy Decision Summary

Decision: WCAT-2006-01383 **Panel**: Deirdre Rice **Decision Date:** March 24, 2006

Permanent Disability Award - Loss of earnings – Worker's ability to adapt to another suitable occupation without incurring a significant loss of earnings – Manual labour – Current sections 23(3), 23(3.1), and 23(3.2) of the Workers Compensation Act – Policy items #40.00[1] and #40.12 of the Rehabilitation Services and Claims Manual, Volume II

The worker, a manual labourer, suffered multiple injuries. The medical evidence showed that he was unable to work for more than two to three hours a day and had several physical limitations. The worker's ability to sustain full time employment was a fundamental consideration in determining whether he would be able to adapt to another suitable occupation without incurring a significant loss of earnings. The Workers' Compensation Board (Board) should have considered the worker's limited learning abilities, his lack of literacy skills, and the lack of available jobs in his community when determining his eligibility for an assessment for a loss of earnings award. A financial test is used for considering whether a significant loss of earnings exists.

The worker, a farmhand, suffered multiple injuries when a bale of hay fell on him. The Board accepted his claim for a fracture dislocation of the hip, knee injury, sciatic nerve injury, and chronic pain and granted the worker a permanent disability award (PDA) of 35.04% on a functional impairment basis. The Board did not assess the worker for a PDA on a loss of earnings basis. The worker requested a review by the Review Division of the Board, which confirmed the Board decision. The worker appealed to the Workers' Compensation Appeal Tribunal (WCAT).

The panel noted that policy item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* sets out three requirements for a worker to be eligible to be assessed for a loss of earnings award under section 23(3). The panel concluded that the first two requirements were met in this case – the worker's occupation required specific skills that were essential to its performance and, due to his compensable disability, the worker was no longer able to perform the essential skills needed to continue in his occupation or in an occupation of a similar type or nature.

The key issue was whether the worker met the third criterion – the effect of his compensable disability was such that he was unable to adapt to another suitable occupation without incurring a significant loss of earnings. The panel held that the worker's ability to sustain full time employment was a fundamental consideration under the third criterion. The panel concluded it was not realistic to expect the worker to resume full-time employment in any capacity. As the only employment opportunities identified by the Board were minimum wage positions, the worker would not be able to adapt to another suitable occupation without incurring a significant loss of earnings.

The panel agreed with the conclusion of the panel in *WCAT Decision #2005-05557* that a financial test is used for considering whether a significant loss of earnings exists, and that the proper

[1] This decision is noteworthy for the points discussed in this summary but should be viewed with some caution as policy item #40.00 was significantly amended on April 26, 2012. Click here for more information.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

approach is to consider the difference in the values of net income figures before and after the injury. The panel concluded that, even if the worker were capable of adapting to a suitable, full time minimum wage position, his actual loss of earnings would be significant. Thus, the PDA on the functional impairment basis did not appropriately compensate the worker for his impairment of earning capacity resulting from the compensable disability.

The panel also noted, in passing, that it was contrary to Board policy to disregard other factors such as the worker's limited learning abilities, his level of literacy skills, and the lack of available jobs in his community. The panel distinguished this case from *WCAT Decision # 2005-05191*, in which the panel concluded it was not appropriate to consider the worker's non-compensable limitations in determining whether the worker could return to his pre-injury employment. In this case, the evidence was that it was impossible for the worker to return to his pre-injury occupation or to an occupation of a similar type or nature by reason of his compensable injury, and not his other personal characteristics.

The worker's appeal was allowed. The panel referred the worker's claim file back to the Board to assess him for a loss of earnings award under section 23(3) of the Act.

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

WCAT Decision Number: WCAT-2006-01383
WCAT Decision Date: March 24, 2006
Panel: Deirdre Rice, Vice Chair

Introduction

On May 28, 2003, the worker was crushed when a 1,000-pound bale of hay fell on him while he was working as a farmhand. The Workers' Compensation Board (Board) accepted the claim that the worker filed as a result of this accident and paid him wage loss benefits until May 16, 2004. After that, the worker received vocational rehabilitation benefits.

On November 16, 2004, the Board granted the worker a permanent partial disability (PPD) award equal to 34.69% of total disability for the permanent functional impairment (PFI) resulting from the accident, specifically: a fracture dislocation of his right hip; injury to the right knee; significant right sciatic nerve injury resulting in impairment of the right foot; and chronic pain secondary to the injuries. This award was increased by an age adaptability factor of 0.35%, bringing the overall award to 35.04% of total. The award was granted on a loss of function basis as the Board's Disability Awards Committee (DAC) does not consider that the worker's circumstances are exceptional so as to warrant assessment for a loss of earnings pension.

The worker asked the Board's Review Division to review the November 16, 2004 decision. In a June 13, 2005 decision (*Review Decision #26346*), a review officer confirmed the decision that the PPD award would be granted on loss of function basis only.

The worker is appealing this decision. He participated in the oral hearing of his appeal with the assistance of his representative. Although provided with an opportunity to participate in the appeal, the employer did not do so.

Issue(s)

The issue is whether the worker is entitled to be assessed for a loss of earnings award pursuant to section 23(3) of the *Workers Compensation Act* (Act).

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the Act. As the worker's compensable injuries occurred after June 30, 2002, his entitlement to benefits is to be determined under the provisions of the Act as amended by the *Workers Compensation Amendment Act, 2002*. WCAT panels are

bound by published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002*. Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background and Evidence

The worker is currently 48 years old. The Board set his long-term wage rate on the claim on the basis of the statistical regional class average earnings for a general farm worker of $22,860.00 per year. However, a review officer varied this decision in an August 8, 2005 decision (*Review Decision #25576*). As a result of this decision, the long-term wage rate on the claim has been established at a weekly rate of $459.51. The worker had a pre-existing condition in his right knee. For relief of costs purposes, the Board has estimated the contribution of this pre-existing condition to the worker's permanent right knee impairment to be approximately 25%. The right knee impairment represents approximately 22% of the worker's total impairment.

As a result of the May 28, 2003 accident, the worker underwent surgery on his right hip on May 31, 2003 and on his right knee on October 25, 2003. Among other interventions, he participated in an occupational rehabilitation program (ORP) from February 20, 2004 to April 16, 2004. In the discharge report, the physiotherapist at the ORP documented that the worker did not meet the functional requirements of his pre-injury job.

The Board has accepted that the worker has the following limitations related to his compensable condition: hip: moderate weakness with resisted external hip rotation and abduction as well as severe weakness with extension; right knee: resisted right knee flexion moderately weak; right ankle: unable to heel raise in full weight bearing, significantly limited in weight bearing capabilities through the right leg, which decreases the worker's ability to lift and carry moderate heavy loads.

There is no dispute that the worker is not capable of returning to his pre-injury job.

The worker has always been employed in work involving heavy physical labour such as ranch work, logging, mining and building maintenance. While working for the employer, he was a "jack of all trades." His job duties included welding, building repairs, the repair, maintenance and operation of equipment, fence mending, cleaning stables, feeding cattle, and just about any other job that came up on the dairy farm where he was working at the time of his injury. However, as the worker clarified at the oral hearing, he does not have formal training in any trade: he can fix a leaking sink, but has never actually put in pipe; he can put in a light switch and do basic wiring, but he could absolutely not run wire through a whole house; from past experience in sawmills, he can make two pieces of steel stick together or spot weld, but he does not have the skills to work as a welder; prior to his injury, he could change his own oil, change a bearing,

and undertake minimal mechanical tasks, but he could not tune up a car or undertake major engine repairs. Since his injury, he can no longer change oil or change tires.

The worker's formal education is extremely limited. He did not complete grade 3 in school. His wife has completed all necessary paper work and bookkeeping for any business venture they undertook (running a motel and apartment management). The worker can get by enough to read a menu, but cannot read a newspaper or a book. He has tried to learn how to read, but is unable to do so. The worker is unable to count change. At the hearing, he confirmed that if he purchases something, he is dependent on the honesty of the cashier in giving him change. His wife looks after all of the household accounts and pays the bills. The worker has obtained airbrakes, food safe, wilderness guiding, and taxidermy certifications.

The results of psychosocial testing the Board arranged are set out in a May 24, 2004 report. In summary, the registered psychologist who conducted this testing, Dr. L. Popham, reported the following results:

> Borderline verbal intelligence (4th percentile); Average Performance intelligence (30th percentile); Difference between two is reliable.
> Academic achievement – Low to very low in all areas of reading (Grade 2 – 3) and written expression (Grade 2 – 3). Low average performance in mathematics (Grade 5 – 6).
> Very low manual dexterity (<1st percentile).
> Average fine finger dexterity for assembly (34th percentile) hourly production workers.
> Average mechanical aptitude (65th percentile) applicants for gas fitter and glass production jobs.

Dr. Popham also concluded that the worker exhibited a learning disability with respect to written expression and recommended against academic training. She did not think that it would be possible for the worker to achieve sufficient academic retraining to become capable of reading, mathematical calculations and written expression and performing such tasks in the workplace. Dr. Popham did think that the worker might be able to perform some type of rehabilitative bench mechanical repair. However, she said that it was unlikely he would be able to perform such an activity for more than two to three hours daily, and that such work would have to be performed in a sitting position. Further, the worker would require hands-on instruction as he would not be able to learn by reading manuals. Dr. Popham concluded that the worker was competitively unemployable, in terms of his physical disability, low level of verbal intellectual function and low to very low levels of reading and written expression abilities.

On May 27, 2004, a Board vocational rehabilitation consultant (VRC) completed an employability review. The VRC concluded that, realistically, the worker did not bring any transferable skills to assist him in locating sustainable employment in the sedentary

to light work category. In the review, the VRC provided her reasons for concluding that the worker could not find paid employment as a gas station attendant, convenience store clerk, retail building supply worker, telemarketer, apartment manager, security work, work in a sheltered work shop or community thrift store, or light assembly cabinet making. In addition, the VRC noted that bench work requires standing and sitting, alternating between the two; further, employers require their workers to have basic entry level qualifications for bench work in the electrical and mechanical fields. The VRC noted that the worker has none of these skills and, given his academic limitations, could not handle a seven-month pre-trade college course. Moreover, since the worker has no reading and writing skills and is physically limited to sedentary to light work, the VRC considered that training on the job would be problematic. The VRC concluded as follows:

> In conclusion, I am not seeing any marriage of the worker's transferable skills; taking into consideration his physical limitations, and available/sustainable employment.

On June 2, 2004, a disability awards officer (DAO) referred the worker's claim to the DAC with a recommendation that the worker be considered for a loss of earnings award under section 23(3) of the Act. The DAO noted that the worker has restricted movement due to the combination of his injuries and that a Board medical advisor had confirmed that: the worker should not work on uneven terrain and slopes; he should limit work on ladders; the injury will likely prevent him from being able to squat or kneel; and, he may require a cane at times to ambulate. The DAO also noted that vocational testing had confirmed that the worker has very marginal literacy and mathematic skills (less than grade 6), and that the VRC had provided a report indicating that the worker has no transferable skills that would allow him to adapt to a suitable sedentary/light job.

In the June 2, 2004 referral, the DAO reviewed the three criteria set out in policy item #40.00 of the RSCM II that must be satisfied before a worker will be assessed for a section 23(3) pension. The first criterion provides that the occupation at the time of injury required specific skills which were essential to that occupation or to an occupation of a similar type or nature. The DAO noted that policy item #40.12 of the RSCM II provides that "An occupation differs from a "job" which is defined as a specific position with a particular employer. Occupation is a collection of jobs or employments that are characterized by a similarity of skills." The DAO also noted that the primary guide for determining the occupation at the time of injury is the National Occupational Classification System [NOC], and said that the four digit unit group code that best encompasses the employment at the time of injury is used to identify the occupation at the time of injury. In this case, the DAO determined that the worker's occupation at the time of injury falls within NOC 8431 (general farm labourer), and that an occupation of a similar type or nature was NOC 8611 (harvesting labourer). The DAO said that he had selected these unit groups because the worker was a labourer on a dairy farm: he described that he was a jack of all trades; he did some welding, fence mending, ran a

tractor and other farm equipment, cleaned stables, hayed, and fed the cattle and did any other duties as required; and, he indicated the ability to carry out simple repairs of milking equipment.

In accordance with policy item #40.00 of the RSCM II, the DAO also determined that the occupation requires specific skills which are essential to that occupation or to an occupation of a similar type or nature. The DAO wrote:

> Policy Item 40.00, RSCM Vol. II, defines **skills** as follows***:***
>
> "Skills are defined in this context as the learned application of knowledge and abilities."
>
> These skills include:
>
> - General learning ability to plant, cultivate and harvest crops, raise livestock and poultry, and maintain and repair farm equipment and buildings.
> - Motor co-ordination and manual dexterity to plant, fertilize, cultivate, spray, irrigate and harvest crops; and to milk cows.
> - The ability to feed and tend livestock and poultry, and to clean stables, barns, barnyards and pens.
> - Objective interest in driving – operating and maintaining farm machinery and equipment.
>
> I would consider that these are the essential skills of this occupation. The previous report [May 27, 2004 Employability Review by the VRC] has included all of the main characteristics of the occupation as outlined in the NOC Career Handbook. These included items that were more job specific. It is noted that under the Education/Training heading the employment requirements ranged from no formal education or training to college or technical school qualifications. It is my conclusion, however, that formal education or even basic literacy is not an essential skill of this occupation or the similar occupation of Harvesting Labourers.
>
> In view of this information, the first criterion has been met and I have determined that the occupation of NOC Code 8431 – General Farm Workers has specific skills essential to the occupation or to an occupation of a similar type or nature.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

The second criterion in policy item #40.00 requires that, 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 DAO noted that the policy in item #40.00 of the RSCM II states, in part, 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 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."

The DAO said that he had considered the worker's ability to perform the essential skills needed to continue in this occupation and noted that the limitations and restrictions accepted under the claim were discussed during a January 29, 2004 Board team meeting. A Board medical advisor and the case manager confirmed that the worker has limited mobility as a result of the accepted injuries, he is unable to kneel or squat, and he mobilizes with a cane. More specifically, the accepted restrictions include:

- Lifting limited to 20 lbs.
- Limit use of stairs and ladders.
- Not to work on uneven ground.
- No prolonged standing or walking.
- Limited to sedentary physical demands overall.

The DAO wrote:

> Based on the nature of the anticipated permanent functional impairment it is my conclusion that the injury makes it impossible for the worker to apply his retained essential skills. It is unlikely that the employer could modify the job to accommodate the worker's restrictions/limitations. The very nature of this occupation and similar occupations requires the worker to retain good physical functioning. The residual functional capacity described by the Medical Advisor leaves it difficult to conclude that the worker is capable of continuing in this or similar occupations. It would be an outrageous or intolerable conclusion to consider that it is not impossible to do so.
>
> Therefore the second criterion is met. As the medical evidence confirms that it is impossible for the worker to apply the essential skills of his pre-injury occupation or similar occupations we must move on to the third part of the so exceptional test – is the worker able to adapt to another suitable occupation, without incurring a significant loss of earnings?

This third criterion requires that 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. The DAO noted that the VRC had concluded in her May 27, 2004 employability assessment that the worker has virtually no transferable skills that do not involve physical demands beyond the restrictions and limitations accepted on the claim. He also noted that the worker had been referred for psycho-vocational testing and that the resulting report indicates that: the worker is currently functioning in the borderline range in terms of verbal intellectual abilities (4th percentile) and in the average range in terms of performance intellectual abilities (30th percentile); his academic achievement levels are generally low to very low in all areas of reading and written achievement (< grade 5.9), with low average abilities in mathematics, math calculation and academic applications; he demonstrated very low manual dexterity, although fine finger dexterity was average; he did have strengths in the area of comprehension of mechanical principles; and, academic retraining was not thought possible in light of the worker's borderline verbal intelligence, approximately grade 2 level of reading ability, grade 5 – 6 math calculation ability, grade 2 written expression ability, and demonstrated a learning disability.

The DAO wrote:

> Based on the testing results and the accepted limitations/restrictions, it is the conclusion of the Psychologist that he is likely competitively unemployable. The Vocational Rehabilitation Consultant has considered … all of the factors affecting a return to employment and at the present time has been unable to identify any suitable employment options.
>
> The Consultant notes that the worker has never had to work in an environment [that] required that he read or write. He learns hands-on and through trial and error. Over the years this has lent itself to expressions of anger and frustration. The VRC in analyzing his transferable skills notes that he has difficulty expressing himself verbally. He can't read even [basic] instruction on how to assemble products. He does bring as a transferable skill his ability to follow basic instructions and complete tasks once he has mastered the skill. An example of this was his ability to gain general knowledge of vehicle maintenance.
>
> Taking into consideration the worker's limited transferable skills and accepted physical limitations the VRC considered a number of vocational options. Unfortunately most options that would be physically suitable required the ability to read and write and in most cases, the ability to carry out basic computer functions. [The worker] does not have such skills.

> The average monthly wages for all workers in the occupation of General Farm Workers is $1,107.50. Based on the recommendations of the Vocational Rehabilitation Consultant there is no suitable occupation identified and for comparison purposes the occupational average wage rate for "another suitable occupation" is $0.00.
>
> Although the worker's Section 23(1) award has not been calculated it is apparent that this worker will likely experience a loss of earnings as a result of the nature of his impairment and lack of transferable skills. It is unlikely that the Section 23(1) functional loss award would have anticipated the impact of this injury on the worker's earnings capacity.
>
> As noted above, policy item 40.00, RSCM, Vol. II states in part, "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)."
>
> In considering such a loss, consideration will be given to comparing the extent of loss through aggregate statistical references on average occupational earnings. When comparing the two occupational averages the worker will likely experience a significant loss of earnings.
>
> It is my conclusion that the third criteria is met, the worker's circumstances are so exceptional as to be considered for an award under Section 23(3).

In a June 3, 2004 memorandum, the Board's director of long term disability advised the DAO that he was comfortable forwarding the conclusion that the worker could not continue in his occupation or a similar occupation to the DAC for consideration. However, he returned the file to the DAO so that a more thorough review of the worker's ability to adapt could be undertaken. In particular, the director noted that the DAO had outlined that the worker's occupation had included basic mechanical work, welding, and equipment operation. Although the director accepted that the worker might not have other transferable skills to add to these skills, he said that the worker nevertheless retained those skills and it was the worker's ability to apply them that was compromised. The director said that he would certainly expect a worker with those retained skills to be able to adapt to sedentary bench assembly and like type jobs.

The worker's file was returned to the VRC. In a May 30, 2004 memorandum, the VRC requested funding for one-on-one job coach assistance with a view to locating suitable physical and sustainable employment for the worker. The funding was approved, and the Board retained the services of an external job placement provider to assist the worker in locating light bench assembly jobs, as well as to explore other employment possibilities that would match the worker's physical restrictions and limitations and limited education.

In a July 21, 2004 report, Dr. D. Lake, the orthopedic surgeon who was treating the worker, questioned the viability of vocational training. He noted that the worker could not sit comfortably due to his sciatic nerve injury and was certainly not fit for any type of work on his feet. Dr. Lake also said that the worker's right hip pain would likely progress in time.

On August 23, 2004, the DAO referred the worker's file to the DAC for a second time. The DAO again recommended that the worker be considered for a loss of earnings pension under section 23(3) of the Act. In the referral memorandum, the DAO noted that, following the original review of the file by the DAC, the claim was referred to the VRC, who was asked to provide further information regarding the worker's transferable skills and his ability to adapt to a suitable occupation. The DAO said that the worker had been referred to an external provider to explore vocational and occupational options. Although a final report was still pending, the DAO noted that no alternative occupations had been identified that would be compatible with the worker's skills and physical restrictions and limitations. The DAO wrote:

> The worker's retained essential skills are limited to those of general farm labour. His other employment experience is also as a labourer. Although the occupational skills of a general farm labour[er] fall in the NOC skill level C, this is primarily due to the inclusion of job titles and duties in the occupation that require some secondary school education or higher. Based on the "essential skills" identified I would consider that this falls more in skill level D. The NOC indicates for this skill level on-the-job-training is usually provided.
>
> Given that the worker has been engaged [in] physically demanding occupations requiring good mobility and strength the consultant has indicated that she has been unable to identify any suitable alternate occupation that the worker could adapt to.
>
> The worker has no additional transferable skills to add to those outlined. Most if not all of the alternate occupations considered (wood products assemblers, plastic products assemblers, etc) require some high school education, on-the-job training or experience. In most cases some very basic literacy skills were required.
>
> The worker has little formal education having never completed elementary school. He is functionally illiterate. The transferable skills that he retains relate to physically demanding work ranging from medium level to very heavy. Although the Consultant continues to seek possible options, none have been identified. She has advised that there is little likelihood of [the worker] being able to adapt to another suitable occupation.

The DAO confirmed that he had concluded that the worker's circumstances are so exceptional as to warrant consideration for an award under Section 23(3).

In a September 15, 2004 memorandum, the director of long term disability said that the DAC had met to discuss the DAO's recommendation. He stated that, once again, it was noted that the worker's occupation at the time of injury required skills such as basic mechanical work, welding, and equipment operation, and that it appeared to the DAC that occupations had been identified that a worker with the retained skills of the injury occupation could be expected to adapt to. However, the DAC had decided to wait for the final report from the job placement provider.

On September 30, 2004, the VRC's manager approved further vocational funding so that the worker could continue his job search. The manager noted that the worker's employment history demonstrated that he was able to prove himself successful in a number of roles even with his literacy challenge. The manager acknowledged that the employment market today might not permit the worker to do this again, but said that it may be that all it would take to secure employment opportunities for the worker would be a work assessment. The manager asked the VRC to work with the worker and to market him with prospective employers.

In October 2004, the DAC met again to review the DAO's recommendation. At that time, the final September 13, 2004 report from the job placement provider was available. The job placement provider confirmed that, during the period August 14 to September 8, 2004, the worker had presented as a willing participant in the job search process. However, he was unable to complete employment application forms, or to read either the telephone book or street signs. The provider said that these barriers, along with the worker's physical restrictions and the Board's request that employment be found in the worker's immediate geographical area, had severely impacted her ability to find suitable employment or a work trial for the worker.

The conclusions reached by the DAC are set out in an October 5, 2004 memorandum as follows:

> As you are aware, upon first review of the recommendation, it was noted that the worker likely was unable to apply the essential skills of the occupation and that the first two criteria had been met. However, there were some concerns regarding the third criteria and the worker's ability to adapt to another suitable occupation without incurring a significant loss of earnings.
>
> As is noted in the log entry dated June 3, 2004, the Vocational Rehabilitation Consultant completed a preliminary Employability Assessment. Employability Assessments do not provide the necessary information in order to answer the questions raised in the third criterion.

The information provided in the Employability Assessment takes into consideration issues like the worker's age, geographic location and literacy skills in addition to the impacts of the compensable injury.

Section 23(3.1) of the *Workers Compensation Act* requires that the Board look at the combined effects of the occupation at the time of injury and the effects of the disability resulting from that injury in order to determine if the worker has met the so exceptional tests. In this case, the Vocational Rehabilitation Consultant has provided you with information that does not pertain directly to the occupation at the time of injury or the effects of the disability.

As noted previously, although the worker has significant barriers in applying the skills of the pre-injury occupation, it is deemed that he retains the essential skills of that occupation. You have identified that the worker's occupation at the time of injury requires skills such as basic mechanical work, welding abilities and equipment operation. Therefore, it appeared to the Committee that occupations that need to be identified are ones to which the worker has the ability to adapt, and to which he could apply the skills that he has demonstrated by virtue of his successful work in the pre-injury occupation. The worker retains the knowledge of and ability to apply the skills of the occupation except where these are impacted by the compensable injury. As an example, the worker has demonstrated the ability to work in an environment where some basic literacy is a requirement. He retains the ability to receive and carry out basic work and task direction. He retains his mechanical skills and manual dexterity. This must be taken in to account when considering ability to adapt. As noted previously, it is recognized that the worker does not have many other transferable skills that can be taken into consideration when assessing his ability to adapt to another suitable occupation.

With these considerations, the Committee had asked that more work be done with regards to information about the worker's ability to adapt to another suitable occupation.

The retention of a Placement Officer is an excellent tool in assisting the worker in finding alternate work. We note that work continues in an effort to place this worker, and agree that placement assistance in targeted areas is appropriate. However, the reports did not provide further information in determining if the third criterion had been met.

In determining if the third criterion has been met, we must consider the worker's ability to adapt to another suitable occupation without incurring a

> significant loss of earnings. Having regard for the occupational average at the time of injury, we accept this as $1,107.50 per month. However, we do not accept that there are no suitable occupations available for comparison purposes. Noting the retained skills, it is felt that the worker does retain the skills to adapt to minimum wage sedentary positions. Since the minimum wage would in fact exceed the wage rate on this claim, the Committee feels that the functional award is appropriate compensation in this case.

Commencing November 1, 2004, the worker began an independent job search. The VRC advised the worker in a November 2, 2004 letter that he was expected to make a minimum of ten applications per week, at a rate of two to three applications per day. However, at the hearing, the worker said that the VRC had told him that she was very embarrassed about making him apply for jobs, and that she would be more than happy if he applied for three jobs per week. The worker also said that the VRC mentioned something about a job placement at a sawmill, but nothing ever came of it. Further, he said that neither the VRC nor the job placement provider mentioned the possibility of him doing bench work, and that the job placement provider had told him that he had so many things going on (his disabilities, being hurt, reading, his age, everything) that he was unemployable. The worker said that he applied for jobs in the areas suggested, at sporting good shops, pet stores and gas stations, but he had a very poor reaction. Most of these businesses would not take his application, and he believes that the people who did were just humouring him. The worker said that there was no doubt in his mind that his application was going to go in the garbage as soon as he walked out the door. He did not receive any calls back.

Following receipt of the November 16, 2004 pension decision, the worker continued his search for employment. The Board continued to pay him a vocational rehabilitation allowance until January 23, 2005.

In *Review Decision #26346*, the review officer noted that the Board had determined that the worker meets the first two criteria set out in policy item #40.00, but not the third. The review officer wrote:

> According to policy item #40.00, skills are defined as the learned application of knowledge and abilities. The worker's skills, as identified by the CADA [claims adjudicator disability awards] in the Section 23(3.1) determination, include the general learning ability to maintain and repair farm equipment and buildings, motor co-ordination and manual dexterity to plant and harvest crops and milk cows and an objective interest in driving, operating and maintaining farm machinery and equipment. I also note that the employer has indicated that the worker was a jack of all trades, able to perform tasks involving the repair and maintenance of equipment, plumbing, wiring and welding. According to the medical

restrictions outlined, these skills have not been affected by the compensable disability. I also note that the worker's medical restrictions do not preclude him from sedentary work.

Based on the evidence before me, I agree with the Board's decision that the worker does not meet the third criterion set out in policy item #40.00, which speaks of the effect of the compensable disability only. The policy refers to a consideration of the worker's transferable skills and post-injury functional abilities. That does not include factors such as the worker's limited learning abilities, his level of literacy skills or the lack of available jobs in his community, factors cited by the VRC and the external job placement agency in arriving at conclusions about his employability. I fully agree with the worker's submission that his vocational profile and other non-compensable barriers are significant and would likely have an impact on his employability. However, I do not agree that they are factors for consideration under policy item #40.00. I find that the effects of the compensable disability do not preclude him from adapting to another suitable occupation.

Policy item #38.00 provides that only in exceptional cases will the loss of function method not be the method of assessment used to determine a worker's entitlement to a permanent partial disability award. In this case, I find that the Board has properly determined that the worker's case is not so exceptional and that he is appropriately compensated by the loss of function award.

New Documentary Evidence

The worker's representative provided the panel with a January 9, 2005 employability assessment (exhibit #3) that was prepared by John Wilcox. Mr. Wilcox's *curriculum vitae* (CV) was also provided (exhibit #2), together with the December 4, 2005 letter in which the worker's representative requested the assessment (exhibit #1). Mr. Wilcox has a Master of Arts in Psychological and Social Foundations, as well as a Bachelor of Arts in Psychology. He has been employed in a variety of vocational rehabilitation positions dating back to 1981. It appears that Mr. Wilcox has been largely a hands-on vocational rehabilitation consultant, as he lists no publications, papers or research in his CV.

Mr. Wilcox said that he met with the worker on December 17, 2005. After reviewing the worker's past employment history in detail, Mr. Wilcox concluded that the worker's only skill sets are physical and manual, and that his employment has always been in occupations that have profiles that rely on being physically sound. Mr. Wilcox also said that the worker's manual aptitudes are "very, very low."

Mr. Wilcox concluded that the worker is not capable of adapting to retail work (such as working in a sporting goods store) in view of his virtually non-existent reading and writing skills, and low numeracy skills. He also said that bench assembly work is not commonly available in the geographic area where the worker resides. Based on his experience working in that area from 2003 to 2005, Mr. Wilcox said that there are no such openings in the area and that, unless a wage subsidy in perpetuity was a possibility, bench assembly employment will not be found in that area; furthermore, should it be found, the worker will not be competitive in it, since such employment "may well require reading written instructions, calculating, dividing and multiplying units."

Mr. Wilcox then went on to explain the basis for his view that the DAC and Review Division were wrong in determining that the worker's injuries are not so exceptional as to lead to a loss of earnings greater than the functional award that had been assessed. In the bulk of the letter (pages 7 through 20), Mr. Wilcox engaged in a debate about the correctness of the conclusions reached by the DAC and the Review Division and about the meaning of the phrase "disability resulting from the injury" and of sections 21(3), 23(3), 23(3.1) and 23(3.2) of the Act and policy items #40.00 of the RSCM II. He also challenged the reasonableness of the Board's practice of using statistical averages for the purpose of setting wage rates. In fairness to Mr. Wilcox, much of this debate was invited by the questions that the worker's representative put to him. Nevertheless, in this portion of the report, Mr. Wilcox strayed far beyond his expertise as a vocational rehabilitation and employment consultant. Instead, Mr. Wilcox's comments amount to a legal argument. I have therefore not summarized them here.

Submissions

The worker's representative made extensive submissions, all of which I have considered. These were: the oral submissions he made at the hearing; a 23 page written submission which contains a thorough review of the evidence as well as legal argument; and, a follow-up submission which addresses the meaning of the word "impossible." The representative also provided the panel with a copy of the written submission he filed in the appeal considered in *WCAT-2005-05191*. In that appeal, the panel rejected the representative's argument that policy item #40.00 is inconsistent with the legislative requirements of section 23(3.1) and 23(3.2) and therefore unlawful, and declined to refer the matter to the Chair of WCAT as permitted in sections 251(1) and (2) of the Act.

The representative did not challenge the lawfulness of policy item #40.00 in this appeal. Rather, it was his position that, from a practical perspective, the worker does not retain sufficient essential skills that would allow him to adapt to a minimum wage sedentary occupation; his previous physical skills are not transferable, and his chief difficulty is that he does not have the type of skills required to make such an adaptation. The representative said that, as a result of his compensable "disability," the worker does not have the residual ability to obtain any employment in the competitive job market. He is

thus unable to adapt to another suitable occupation without incurring a significant loss of earnings. His loss of earnings (100%) is significant as it is much greater than the loss (35.04%) anticipated by his present section 23(1) disability award. As such, the representative argued that the worker should be eligible for a 100% loss of earnings disability award.

The representative submitted that the type of work that the DAC envisioned the worker adapting to is unclear and a realistic examination of the available evidence leads to an inescapable conclusion that the worker does not have sufficient residual, un-impacted skills to allow him to adapt to alternate competitive employment. Further, he said that the view of the Board's director of long term disability that bench work is physically suitable and reasonably available to the worker cannot be sustained in view of the qualifications required for this work, as set out in the NOC, and Dr. Popham's conclusion that the worker could only work two to three hours per day in some highly accommodated bench work position. While theoretically there may be some physically suitable sedentary employment that the worker may be able to perform for a limited period of time (according to Dr. Popham two to three hours in a supportive environment where workplace accommodations allow him to perform such work), there was no evidence to indicate that the accommodations Dr. Popham identified would be provided by any employer.

The representative submitted that the review officer's conclusion that the Board's policy means that the Board does not need to consider any non-compensable factors in assessing a worker's entitlement to a loss of earnings pension is "plain wrong." He argued that section 23(1) requires an assessment of the impairment of earning capacity from the nature and degree of the injury, and thus requires assessment of the actual physical functional impairment relative to the whole person. Section 23(3), in combination with sections 23(3.1) and (3.2), requires something different: that is, a consideration of the worker's "disability" resulting from the injury. Thus, the Act requires complete consideration of worker's compensable and non-compensable factors in considering his "disability" and his residual ability to adapt to some other suitable occupation.

The representative made extensive submissions regarding the meaning of the term "disability" in section 23(3.1). He submitted that "disability" means more than a physical functional impairment and instead has to do with the worker's capacity to deal with a variety of interactions, including social and occupational interactions. He said that the worker must be considered as a whole person. In addition to referencing the definition of the term provided by Mr. Wilcox in his January 9, 2005 report, the representative also referred to: the *American Medical Association Guides to the Evaluation of Permanent Impairment* (5th ed.) (*AMA Guides*), where "disability" is defined as an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory requirements because of impairment; the Board's *Medical Advisor's Training Guide*, where it is noted that disability is not a purely medical condition; the Board's *Vocational*

Rehabilitation Procedural Handbook (2003), where different definitions of the terms "disability" and "impairment" are set out; Alan Winter's 2002 *Core Services Review of the Workers' Compensation Board*, where Mr. Winter concluded that it would be impracticable if not impossible to attempt to carve out part of the worker's individual inherent characteristics in determining the impact that the compensable permanent disability had on the worker's ability to find alternate employment; and, policy item #40.12 of the RSCM II, which requires that a worker's non-compensable personal characteristics must be included in the consideration of whether an occupation is suitable and reasonably available.

The representative also said that consideration of transferable skills includes consideration of non-compensable factors such as limited learning abilities, level of literacy skills, age, and so on, an approach that is consistent with the Board's *Vocational Rehabilitation Services Handbook* (2003). The representative submitted that, in this case, most of the worker's transferable skills and experience were inextricably linked to his physical capacity and that, since he has lost a significant portion of his physical capacity, the bulk of his transferable skills and experience are no longer of any vocational utility. The representative submitted that the term "adapt" in policy item #40.00 should be accorded its generally understood meaning and that, again, the worker's "whole person" must be considered when determining his ability to adapt to some other occupation that is physically suitable and reasonably available to the worker in the long-term.

The representative also submitted that the interpretation of sections 23(3), (3.1) and (3.2) and the relevant Board policy should not be influenced by financial considerations. He submitted that, contrary to what was said by the panel in *WCAT-2005-05191* (on the basis of the written submission he filed), the legislative debates regarding the amendments which preceded enactment of the current loss of earnings provisions do not mention that the amendments were intended to reduce the level of benefits to workers in order to make the system more viable and the cost more reasonable for employers. Further, he provided statistics and financial figures to demonstrate that: the worker's compensation system is more than fully funded; the number of loss of earnings awards under the new legislation is substantially lower than those awarded under the former legislation (in 2004 there were 990 such awards made under the old legislation, and only 3 made under the new legislation); and, the cost of loss of earnings awards and vocational rehabilitation undertakings has been significantly reduced.

Finally, the representative submitted that the relevance of a statistical class average to the determination of whether the worker suffered a loss of earnings greater than that which could have been anticipated through the section 23(1) pension award is unclear. He said that the worker's potential loss of earnings should be assessed based on the wage rate established on the claim.

Reasons and Findings

The worker did not take issue with the percentage of functional impairment recognized in the November 16, 2004 decision, nor did he challenge the effective date of the award. I can find no error in these aspects of the decision and I confirm them.

Although I have summarized the submissions that the worker's representative made above, I find that it is not necessary to consider most of them in reaching my decision. I admit to finding the language that the Legislature chose to use in section 23(3.1) difficult. However, I am bound by the interpretation of that language that the Board's board of directors has set out in the policy contained in the RSCM II. Since this appeal can be decided on the basis of that policy, it is not necessary to deal with the extensive arguments regarding the meaning of the term "disability" in section 23(3.1).

In summary, the policy in the RSCM II establishes a two-step process. The first stage requires a determination of whether the worker is eligible for an assessment under section 23(3) of the Act. In accordance with policy item #40.01 of the RSCM II, it is only if the DAC agrees that the worker is eligible for such an assessment that the second step can be undertaken: that is, that the worker's entitlement to a loss of earnings pension be determined in accordance with the assessment formula in policy item #40.10.

Although the worker's representative has submitted that the worker is entitled to a 100% loss of earnings pension, the extent of the worker's entitlement to such a pension is not before me. Rather, the issue to be determined is whether the worker meets the three preconditions to eligibility for assessment that are set out in policy item #40.00 of the RSCM II.

The three elements of policy item #40.00 have been set out above and need not be repeated here. I agree with the conclusions of the DAO and the DAC that the worker's occupation required specific skills that were essential to its performance and that due to his compensable disability, the worker is no longer able to perform the essential skills needed to continue in that occupation or in an occupation of a similar type or nature. The DAO concluded that it was unlikely that the employer could modify the job to accommodate the worker's restrictions and limitations, and the very nature of the worker's occupation and similar occupations require the worker to retain good physical functioning.

Clearly the worker has not retained good physical functioning. Further, in light of the minimal contribution to the worker's current disability that has been attributed to the worker's pre-existing right knee condition, the reason for this is the worker's compensable injury. The DAO accepted, and the DAC agreed, that the medical evidence confirms that the worker's injury makes it impossible for him to continue in his pre-injury occupation or in an occupation of a similar type or nature. I agree.

The key issue in this case, therefore, is whether the effect of the worker's compensable disability is such that he is unable to adapt to another suitable occupation without incurring a significant loss of earnings.

As set out above, the review officer concluded that the worker is not precluded from returning to sedentary work, and appears to have assumed that the worker could do so on a full time basis. It is also implicit in the DAC's conclusions that the worker was capable of resuming full time sedentary employment. However, the Board has not reached any definitive conclusions regarding the extent of the worker's residual ability to return to the workforce. The worker's PFI has been assessed, but no decision was made regarding whether the worker is capable of working part time or full time.

In this regard, on June 16, 2004, the VRC asked the case manager to comment on the worker's ability to sustain full-time employment in the long run, noting that there was no comment on file regarding the number of hours of work that were sustainable in view of the worker's limitations and restrictions. The case manager asked a Board medical advisor to assist in estimating the number of hours of work the worker could work. In a June 18, 2004 response, the Board medical advisor said that limitations are activities that the worker can try, but may be unable to do. The medical advisor also noted that the limitations described on file do not really describe the worker's endurance for full or part time hours in whichever job the case manager was discussing, and that most limitation lists tend to leave this open. The medical advisor suggested that the case manager ask the worker what he thought, and try him on part time hours first before progressing to full time. The medical advisor also suggested that the case manager discuss any proposed job plan with a nurse advisor if more specific suggestions were required.

In her June 18, 2004 response to the VRC, the case manager advised that, without a trial, or perhaps a functional capacity evaluation, she was unable to give a specific answer to the VRC's query. The case manager also said that the worker's capacity to work would depend on the type of work as well. She wrote: "I am sure some sedentary work could result in F.T., other types – P.T. max."

The worker's ability to sustain full time employment is a fundamental consideration under the third criterion in policy item #40.00. That criterion provides that 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. Based on the evidence from the medical advisor, Dr. Popham and Dr. Lake, I find that the expectation that the worker can resume full-time employment in any capacity is unrealistic. Given that the only employment opportunities identified were minimum wage positions, this finding alone means that the worker cannot adapt to another suitable occupation without incurring a significant loss of earnings.

Although the worker's representative questioned the relevance of using a class average in assessing the worker's potential loss of earnings, it is clear that, at the time of the DAC's consideration of this case, this was the basis upon which the worker's wage rate had been established. In light of the subsequent August 8, 2005 decision by the Review Division, the question of whether the worker will sustain a significant loss of earnings must now be determined on the basis of a weekly rate of $459.51.

Policy item #40.00 of the RSCM II confirms that the mere fact that a worker may experience a loss of earnings as a result of the work injury is not sufficient to meet the test set out under section 23(3) and 23(3.1). Rather, a significant loss of earnings means that the loss of earnings a worker will experience as a result of the combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury could not have been anticipated under the section 23(1) or functional method of estimating a worker's long term loss of earning capacity. As noted by the panel in *WCAT-2005-05557*, the policy does not define what considerations are necessary in order to evaluate whether a "significant" loss of earnings exists. However, Practice Directive #46 indicates that consideration must be given to the nature of the section 23(1) award, the *Permanent Disability Evaluation Schedule* and/or other schedules, judgements and considerations used to determine the functional impairment and whether these could not have anticipated the worker's disability and resulting loss of earning capacity. I agree with the panel in *WCAT-2005-05557* that a financial test is used for considering whether a significant loss of earnings exists, 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. I also agree with the panel's conclusion that the proper approach is to consider the difference in the values of net income figures before and after the injury.

In this case, the functional award granted by the Board recognizes that the worker's compensable injury has resulted in a diminishment in earning capacity of 35.04%. The worker's gross earnings in the 12-month period prior to the injury were, as recognized by the Review Division, $30,475.00. A full time minimum wage, non-entry level worker in British Columbia has a gross income of $16,640.00 ($8.00 x 40 hours per week x 52 weeks). Such a worker therefore earns $13,835.00 less per year than did the worker prior to his injury, representing a reduction in earnings of 45.40%. I recognize that the Board uses net earnings in these calculations, but in view of the stark difference between the two figures, it is not necessary to undertake a net calculation in order to illustrate the significance of the worker's likely loss of earnings in this case. Even if the worker were capable of adapting to a suitable, full time minimum wage position, his gross loss of earnings after payment of his pension would exceed $1,380.00. Since I find that it is unrealistic to expect the worker to work full time, and the available evidence indicates that two to three hours is a more reasonable estimate of his daily working capacity, the worker's actual loss of earnings will be considerably more substantial. I find that the effect of the compensable disability is that the worker is unable to work in his or her own 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.

As noted, this conclusion alone is sufficient to warrant assessment referring the worker's file back to the Board for assessment of his entitlement to a loss of earnings pension. However, in view of the conclusions reached by the DAC and the review officer, I consider it appropriate to comment further. The review officer concluded that policy item #40.00 requires consideration of the worker's transferable skills and post-injury functional abilities and precludes consideration of the worker's limited learning abilities, his level of literacy skills and the lack of available jobs in his community. In essence, it was the review officer's understanding that entitlement to a loss of earnings pension must be determined on the basis of the "effects of the compensable disability," to the exclusion of all other factors. The DAC also subscribed to this view when, in the October 5, 2004 memorandum, the DAC stated as follows:

> As is noted in the log entry dated June 3, 2004, the Vocational Rehabilitation Consultant completed a preliminary Employability Assessment. Employability Assessments do not provide the necessary information in order to answer the questions raised in the third criterion. The information provided in the Employability Assessment takes into consideration issues like the worker's age, geographic location and literacy skills in addition to the impacts of the compensable injury.

I find that this approach is not consistent with the Board's policy. Specifically, the third criterion in policy item #40.00 RSCM II requires assessment of a worker's ability to adapt to another "suitable occupation." Policy item #40.12 of the RSCM II provides a comprehensive discussion of what is a "suitable occupation." Among other things, the policy states:

> 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, <u>and the ability of the worker to perform different occupations</u>. <u>Regard is also given to the suitability of the worker for occupations that could reasonably become available over the long run</u> that will maximize the worker's long-term earnings potential, up to the pre-injury wage rate. In most cases, "long-term" refers to three to five years.
>
> <u>The Board officer assesses the worker's earning potential in light of transferable skills and all possible rehabilitation measures that may be of assistance, including the possibility of retraining or other measures that may be appropriate to the worker</u>.

> The guidelines set out below are followed in determining suitable and reasonably available occupations for a worker:
>
> …
>
> - The occupation must, in practice, be reasonably available. ….
> - <u>The worker has the skills, education and functional abilities that the occupation requires</u>.
> - A reasonably available occupation must be one that the worker is medically fit to undertake, and that does not endanger the worker's recovery or the health and safety of the worker and/or others.
>
> …
>
> - <u>A reasonably available job is usually within a reasonable commuting distance of the worker's home</u>. (See policy C11-88.90, "Relocation".)
>
> [emphasis added]

I accept that the Board is not responsible for granting a worker a loss of earnings pension where the worker is unemployed, unemployable or has a reduced earning capacity for reasons unrelated to the compensable injury. In *WCAT-2005-05191*, the panel determined that it was not appropriate to consider the worker's non-compensable limitations, specifically education, language difficulties and age, in determining whether the worker could return to his pre-injury employment. However, the Board concluded, and the panel agreed, that the worker had retained the essential skills necessary to meet the requirements of his pre-injury occupation. Moreover, the panel also concluded that the farm worker in that case could perform limited, light-duty farm work within the limitations accepted under his claim. This is not the case here. Rather, the evidence demonstrates that it is impossible for the worker to return to his pre-injury occupation or to an occupation of a similar type or nature by reason of his compensable injury, not his other personal characteristics. Further, the reason the worker in the present appeal has not found new employment is because no reasonably available occupation to which he can adapt has been identified.

I agree with the submission that the worker's representative made to the Review Division that, on reading the DAC's October 5, 2004 decision, it is apparent that the DAC thought that attempts to find a work placement for the worker were ongoing and would likely be successful. However, the final report from the external job placement provider confirms that 13 potential employers were contacted on behalf of the worker, and none was able to accommodate him or provide a work trial. Further,

notwithstanding the manager's September 20, 2004 request that the VRC continue to market the worker with prospective employers, there is no indication in the claim file that any additional potential employers were ever identified or approached.

I also note that the Board did not require the worker to explore employment opportunities beyond the immediate geographic area where he resides because his wife is employed in the community where the couple lives and because it was acknowledged that the worker's physical limitations would make traveling to search for work difficult, if not impossible. Based on the conclusions reached by the external job placement provider and the VRC, as well as the evidence provided by Mr. Wilcox, I find that the chances of the worker finding suitable employment within the community where he lives are so negligible as to be nonexistent. In assessing the extent of the loss of earnings pension to which the worker is entitled, the Board may wish to explore whether, notwithstanding the considerations militating against relocation of the worker, the worker would be able to adapt to a suitable occupation if the Board were to provide him with relocation assistance. However, in view of the evidence available, I am satisfied that the worker is unable to adapt to a suitable occupation in the immediate geographic area where he lives.

Conclusion

The appeal is allowed. I find that the worker is entitled to be assessed for a loss of earnings award pursuant to section 23(3) of the Act. The worker's claim file is referred back to the Board so that the Board can undertake that assessment in accordance with the above reasons. In particular, I find that:

- The worker's occupation required specific skills that were essential to its performance.

- Due to his compensable disability, the worker is no longer able to perform the essential skills needed to continue in that occupation or in an occupation of a similar type or nature.

- It is not realistic to expect the worker to work full time hours in light of his compensable disability and the available evidence indicates that two to three hours is a more reasonable estimate of his daily working capacity. Although the Board has not yet determined the worker's daily working capacity and this is a matter that the Board will need to address if it is determined that anything less than a 100% loss of earnings award should be granted to the worker, the fact that the worker is not capable of working full time hours in any capacity is alone a sufficient basis for concluding that the effect of the compensable disability is that he is unable to work in his or her own 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.

- Policy item #40.12 of the RSCM II confirms that, in assessing a worker's ability to adapt to a "suitable occupation," regard must be had to, among other things: the ability of the worker to perform different occupations; the worker's earning potential in light of transferable skills and all possible rehabilitation measures that may be of assistance, including retraining; whether the worker has the skills, education and functional abilities that the occupation requires; and, whether the occupation is reasonably available within a reasonable commuting distance of the worker's home. The worker's limited literacy and numeric skills, as well as his learning disability, are relevant factors in determining whether he can adapt to a suitable occupation.

- In assessing the extent of the loss of earnings pension to which the worker is entitled, it is open to the Board to explore whether, notwithstanding the considerations militating against relocation of the worker, that avenue is viable. However, the evidence confirms that the worker is unable to adapt to a suitable occupation in the immediate geographic area where he lives.

The Review Division's June 13, 2005 decision is varied accordingly.

The worker is entitled to reimbursement for the return expense of traveling from his home to the hearing, in accordance with the applicable Board tariff. There were no other reimbursable expenses associated with the appeal.

Deirdre Rice
Vice Chair

DR/dw