Noteworthy Decision Summary

Decision: WCAT-2011-00833 **Panel:** J. Callan **Decision Date:** March 30, 2011

Loss of earnings permanent disability awards (pensions) – Section 23(3) of the Workers Compensation Act– The so exceptional test – Section 251 determination by chair – Item #40.00 of the Rehabilitation Services and Claims Manual– An occupation of a similar type or nature – Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal), 2011 BCSC 329

Portions of item #40.00[1] of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) are so patently unreasonable that the policy is not capable of being supported by the *Workers Compensation Act* (Act) and its regulations and should not be applied. Specifically, the inclusion of the phrase "an occupation of a similar type or nature" in the policy is patently unreasonable because the result is to add a restriction to entitlement to loss of earnings awards that is not consistent with or contemplated by section 23 of the Act. Section 23 only contemplates that a worker's occupation at the time of injury and ability to adapt to another suitable occupation be considered. Pursuant to section 251 of the Act the policy is referred to the board of directors of the Workers' Compensation Board, operating as WorkSafeBC (Board).

Where a permanent partial disability results from a compensable injury, the worker may be entitled to a permanent partial disability award (pension) under section 23 of the Act. The worker may be awarded either a permanent partial disability award under section 23(1) of the Act (a "loss of function" award) or under section 23(3) of the Act (a "loss of earnings" award). Section 23(3.1) provides that the Board may award a loss of earnings award to a worker only if the Board determines that the combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury is so exceptional that a loss of function award does not appropriately compensate the worker for the injury. Section 23(3.2) provides that in making a section 23(3.1) determination, the Board must consider the ability of the worker to continue in the worker's occupation at the time of the injury or to adapt to another suitable occupation.

Item #40.00 of the RSCM II provides, in part, that in order for the Board to make a determination under section 23(3.1) of the Act, three criteria must be satisfied (the "three so exceptional criteria"):

- the occupation at the time of injury requires specific skills which are essential to that occupation or to an occupation of a similar type or nature;

- as a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury or in an occupation of a similar type or nature; and

[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.

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- 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 chair's determination arose from the reconsideration of a worker's appeal ordered by the B.C. Supreme Court in *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 329. An earlier decision of the Workers' Compensation Appeal Tribunal (WCAT) had concluded that the worker was not entitled to a loss of earnings award as the worker did not satisfy the second of the three so exceptional criteria. On judicial review, the Court found that the WCAT decision, as well as a subsequent WCAT reconsideration decision, was patently unreasonable insofar as they assessed the worker's eligibility for a loss of earnings award by reference to policy item #40.00 which it found is not rationally supported by the Act. The Court ordered WCAT to reconsider the worker's appeal with due regard to the principles set out in the Court's reasons but declined to grant a declaration that the policy was of no force and effect.

The Court found the policy was not rationally supported by the Act on the basis that there is nothing in the Act that contemplates consideration of other occupations of a similar type or nature as the occupation performed by the worker prior to his injury. The only reference to other employment is the statutory requirement to consider "suitable occupations". The Court found that to import into sections 23(3.1) or (3.2) consideration of other occupations of a similar type or nature goes beyond the language of the provisions. The Court determined that there is no rationale for expanding the term "occupation" to include other occupations of a "similar nature or type". The additional criterion is inconsistent with section 23(3.2) which requires the Board to consider the worker's ability to continue in his occupation at the time of the injury and not in any other similar occupations except in the context of adapting to another suitable occupation. Lastly, the Court found that the additional criterion was not rationally connected to the purposes of section 23(3) because the expansive definition of "occupation" itself found in policy accomplished the objective of the board of directors in limiting section 23(3) awards to exceptional cases.

The chair agreed with the Court's reasoning and conclusions. She found that the addition of "an occupation of a similar type or nature" to each of the three so exceptional criteria in item #40.00 and elsewhere in the policy is so patently unreasonable that the inclusion of that phrase is not capable of being supported by the Act. The chair acknowledged that the Court applied a reasonableness standard of review to the policy and recognized that the standard of patently unreasonable which she was required to apply was a more deferential standard of review. However, the chair concluded that in addition to establishing unreasonableness, the Court's analysis supported the conclusion that the inclusion of the impugned phrase is also patently unreasonable. She noted that the Court concluded that the impugned phrase is unreasonable "because it is not rationally supported by the legislation." It was the chair's view that the fundamental question that arises under the patent unreasonableness standard applicable to policies of the board of directors under section 251(1) was the same, namely whether the policies are rationally supported by the Act.

This section 251 referral has been withdrawn. Please see the WCAT chair's June 1, 2011 letter, appended to the end of this decision.

WCAT Decision Number: WCAT-2011-00833
WCAT Decision Date: March 30, 2011
Panel: Jill Callan, Chair

Introduction

[1] This is a determination under section 251 of the *Workers Compensation Act* (Act).

[2] In February 2004, the worker, who was employed as a steel fabricator, sustained an injury to his low back. The Workers' Compensation Board (Board), operating as WorkSafeBC, accepted his claim for a disc protrusion and chronic pain. By decision dated March 14, 2005, the Board granted him a permanent partial disability award (also known as and referred to in this determination as a pension) of 2.5% of total disability for chronic pain. The Board declined to grant him an award for any decreased range of motion of his spine under section 23(1) of the Act or a loss of earnings pension under section 23(3). The worker requested a review and, by decision dated November 1, 2005, the Review Division confirmed the March 14, 2005 decision.

[3] The worker appealed the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). In *WCAT-2006-02312,* dated May 30, 2006 (2006 WCAT decision), a WCAT vice chair confirmed the Review Division decision. The worker applied for reconsideration of the 2006 WCAT decision on the ground of jurisdictional error. However, in *WCAT-2009-02631*, dated October 8, 2009 (the reconsideration decision), a second WCAT vice chair concluded that a ground for reconsideration had not been established.

[4] The worker applied for judicial review of both WCAT decisions. In *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal),* 2011 BCSC 329, the Court determined that the two WCAT decisions are patently unreasonable. Among other things, the Court found that portions of item #40.00 ("Section 23(3) Assessment") of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) are not rationally supported by the Act. In the section of the judgment entitled "Remedy," the Court stated:

> [140] The appropriate remedy in this case is to declare that the decisions of the WCAT panels are patently unreasonable insofar as they relate to the calculation of the petitioner's functional impairment award under s. 23(1) of the *Workers Compensation Act*. In addition, I declare that the

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> WCAT decisions are patently unreasonable insofar as they relate to the assessment of the petitioner's eligibility for a pension calculated under s. 23(3) of the *Workers Compensation Act* on the ground that the WCAT reconsideration panel applied a policy of the board of directors that is not rationally supported by the *Workers Compensation Act*.
>
> [141] The WCAT decisions are set aside and WCAT is ordered to reconsider the petitioner's pension entitlement under s. 23(1) and s. 23(3) of the *Workers Compensation Act.* Further, pursuant to s. 2(2) of the *Judicial Review Procedure Act,* I direct that WCAT have due regard to the principles outlined in these reasons for judgment when reconsidering the petitioner's entitlement to a pension under s. 23(1) and s. 23(3) of the *Workers Compensation Act*. …

[5] Although I will repeat the following paragraph of the judgment later in this determination, it is useful at this point to also note that the Court stated:

> [143] Lastly, I am not satisfied that I should grant a declaration that Policy #40.00 is of no force and effect. It is apparent that, insofar as the offending portions of the policy have an impact on the WCAT's reconsideration of the petitioner's pension entitlement under s. 23(3) of the *Workers Compensation Act*, WCAT must have regard to the principles outlined in these reasons for judgment. However, whether my conclusions with respect to Policy #40.00 should have a more general application is an issue that should be left with WCAT and the board of directors pursuant to the s. 251 review process.

[6] I have assigned the reconsideration of this appeal to myself. In accordance with the Court's decision, I must have due regard to the principles outlined in the Court's reasons.

Issue(s)

[7] This determination deals with a preliminary issue that arises out of the Court's judgment, which is whether the portions of item #40.00 of the RSCM II that require consideration of "an occupation of a similar type or nature" in determining workers' entitlement to loss of earnings awards under section 23(3) of the Act are so patently unreasonable that they are not capable of being supported by the Act. If I determine that those portions of item #40.00 are patently unreasonable, I must refer my determination to the board of directors of the Board under section 251(5) of the Act.

Section 251 of the Act

[8] Section 250(2) of the Act requires WCAT members to apply the applicable policy of the board of directors of the Board in deciding appeals and other applications. Section 251 of the Act establishes an exception and a process for determining if the applicable policy must be applied. It refers to WCAT as the "appeal tribunal." It provides:

> (1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.
>
> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.
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> (3) As soon as practicable after an issue is referred under subsection (2), the chair must determine whether the policy should be applied.
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> (4) If the chair determines under subsection (3) that the policy should be applied, the chair must refer the matter back to the appeal tribunal and the tribunal is bound by that determination.
>
> (5) If the chair determines under subsection (3) that the policy should not be applied, the chair must
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> > (a) send a notice of this determination, including the chair's written reasons, to the board of directors, and
> >
> > (b) suspend any other appeal proceedings that are pending before the appeal tribunal and that the chair considers to be affected by the same policy until the board of directors makes a determination under subsection (6).
>
> (6) Within 90 days after receipt of a notice under subsection (5) (a), the board of directors must review the policy and determine whether the appeal tribunal may refuse to apply it under subsection (1).

> (7) On a review under subsection (6), the board of directors must provide the following with an opportunity to make written submissions:
>
> > (a) the parties to the appeal referred to in subsection (2);
> >
> > (b) the parties to any appeals that were pending before the appeal tribunal on the date the chair sent a notice under subsection (5) (a) and that were suspended under subsection (5) (b).
>
> (8) After the board of directors makes a determination under subsection (6), the board of directors must refer the matter back to the appeal tribunal, and the appeal tribunal is bound by that determination.
>
> (9) The chair must not make a general delegation of his or her authority under subsection (3), (4) or (5), but if the chair believes there may be a reasonable apprehension of bias the chair may delegate this authority to a vice chair or to a panel of the appeal tribunal for the purposes of a specific appeal.

Section 23 and the "So Exceptional" Test

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

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

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

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

[12] The provisions of the Act that are central to this determination are sections 23(3), (3.1), and (3.2), which provide:

> (3) Subject to sections 34 and 35, if
>
> > (a) a permanent partial disability results from a worker's injury, and
> >
> > (b) the Board makes a determination under subsection (3.1) with respect to the worker,
>
> the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between
>
> > (c) the average net earnings of the worker before the injury, and
> >
> > (d) whichever of the following amounts the Board considers better represents the worker's loss of earnings:
> >
> > > (i) the average net earnings that the worker is earning after the injury;
> > >
> > > (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.
>
> (3.1) A payment may be made under subsection (3) only if the Board determines that the combined effect of the worker's occupation at the time of the injury and the worker's disability resulting from the injury is so exceptional that an amount determined under subsection (1) does not appropriately compensate the worker for the injury.
>
> (3.2) In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of the injury or to adapt to another suitable occupation.

[13] Section 23(3.1) establishes a test that must be met in order for a worker to be eligible for an award under section 23(3). The statutory test, which I will call the "so exceptional test," requires a determination by the Board that "the combined effect of the worker's occupation at the time of the injury and the worker's disability resulting from the injury is so exceptional" that an award under section 23(1) "does not appropriately compensate the worker for the injury."

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

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

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

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

Item #40.00 (Section 23(3) Assessment)

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

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

[18] Pursuant to the board of directors' *Decision No. 2003/02/11-04*, "Policies of the Board of Directors," item #40.00 of RSCM II became a policy of the board of directors as of February 11, 2003. There have been no amendments to item #40.00 since that date. There is no analogous policy in *Rehabilitation Services and Claims Manual*, *Volume 1* (RSCM I) because most policies in that volume deal with the former provisions of the Act, which did not include the "so exceptional" test.

[19] Item #40.00 sets out the criteria that must be met in order to satisfy the so exceptional test established by section 23(3.1), and they are as follows:

> Section 23(3) is a discretionary provision that establishes rules for compensating a worker for a permanent partial disability in exceptional circumstances. Section 23(3) is only applied where the test set out under section 23(3) and (3.1) is met.

This test requires that the Board determine whether the combined effect of a worker's occupation at the time of injury and a worker's disability resulting from the injury is so exceptional that an amount determined under section 23(1) does not appropriately compensate the worker for the injury. **Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills.**

For the purposes of determining whether the worker meets the test set out under section 23(3) and (3.1), the Board must consider the combined effect of a worker's occupation at the time of injury and the resulting disability. While a worker may experience a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under section 23(3) and (3.1).

The following is a list of criteria that must be considered under section 23(3) and (3.1). Each of these criteria must be satisfied in order for a worker to be assessed under section 23(3).

- The occupation at the time of injury requires specific skills which are essential to that occupation **or to an occupation of a similar type or nature;**

- As a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury **or in an occupation of a similar type or nature;**

- The effect of the compensable disability is that the worker is unable to work in his or her occupation **or in an occupation of a similar type or nature,** or to adapt to another suitable occupation, without incurring a significant loss of earnings.

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

In all cases, the Board must determine if, following recovery from a work injury, a worker is either able to return to the occupation at the time of injury or to adapt to another suitable occupation. This determination includes consideration of both the worker's transferable skills and the worker's post-injury functional abilities. In the vast majority of cases a worker's entitlement to a permanent partial disability award is determined under the section 23(1) method and this estimate of impairment of earning capacity is considered to be appropriate compensation.

> However, in exceptional cases, the amount determined under section 23(1) may not appropriately compensate a worker. In these cases, medical evidence confirms that the work injury makes it impossible for a worker to continue in the occupation at the time of injury **or in an occupation of a similar type or nature.** In addition, the worker is considered unable to adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.
>
> [emphasis added]

[20] Item #40.00 provides that each of the three bulleted criteria must be satisfied in order for a worker to be assessed for a loss of earnings award under section 23(3). I will refer to the three bulleted criteria in item #40.00 as the "three so exceptional criteria."

The Adjudication of the Worker's Entitlement Under Section 23 of the Act

[21] By decision dated March 14, 2005, the Board communicated its decision to the worker regarding his permanent partial disability award under section 23 of the Act. The Board established the worker's permanent functional impairment at 2.5% of total disability and granted him an award under section 23(1).

[22] The Board's analysis of whether the worker is entitled to a loss of earnings award under section 23(3) of the Act is contained in a Form 21 – Section 23(3.1) Determination dated March 3, 2005. In applying the three so exceptional criteria, the Board determined that the permanent conditions accepted under the worker's claim prevented him from returning to his occupation at the time of the injury. However, the Board concluded that he was able to return to an occupation of a similar type or nature. Accordingly, the Board declined to grant him a loss of earnings award under section 23(3) of the Act.

[23] The details of the Board's analysis of whether the worker could return to his occupation at the time of the injury or an occupation of a similar type or nature were summarized by the Court as follows (the Court refers to the worker as the petitioner):

> [24] As outlined above, "occupation" is defined by Policy #40.00 as, "a collection of jobs or employments that are characterised by a similarity of skills." The primary guide used to determine the occupation of the worker is the National Occupational Classification System ("NOC"). The NOC four digit code that best encompasses the employment of the worker at the time of the injury is used to identify the occupation. Because the petitioner was a steel fabricator, [the claims adjudicator] chose NOC Code 7263 - Structural Metal and Plate Work Fabricators and Fitters. There are 88 jobs within this four digit occupational code. [The claims adjudicator] then determined that jobs within Code 7263 met the first Policy #40.00 criteria: the occupation requires essential special skills.

> [25] Turning to the second criteria, [the claims adjudicator] concluded that the petitioner was not disabled from performing the essential skills required by his occupation or a similar occupation. While [the claims adjudicator] concluded that the limitations on the petitioner's functional mobility that were accepted by the WCB had an impact on his ability to return to full time employment in his pre-accident job, he could still perform the essential functions of other jobs within the occupation defined by NOC Code 7263 or similar occupations. Thus the second criteria described in Policy #40.00 was not satisfied and the inquiry was terminated. As [the claims adjudicator] says at p. 5 of his memo:
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> > ... In this case the NOC Code 7263 notes that similar occupations would include welders and related machine operators, 7265. The physical activity rating for this position is light. This would be within the worker's limitations. Consequently, as the worker retains his essential skills to perform the occupation or an occupation of similar type or nature, given the benefit of the Vocational Rehabilitation Consultant's input regarding this worker's overall presentation including his transferrable skills, etc., I must conclude that he could perform any number of jobs within the occupation or an occupation of a similar type or nature and his compensable disability would not limit him from applying his skills.
> >
> > ... Consequently, I find that the combined effects of the disability and the occupation at the time of the injury are not so exceptional as to warrant consideration under Section 23(3.1) of the *Act*. The functional award under Section 23(1) is the appropriate compensation.
> >
> > [reproduced as written except for the claim adjudicator's name]

The 2007 Section 251 Determination Regarding Item #40.00

In WCAT-*2007-03809,* which is a section 251 determination dated December 6, 2007, I considered whether certain elements of item #40.00 were patently unreasonable under section 251. The vice chair who initiated the referral of the policy to me raised the concern about the lawfulness of the inclusion of "an occupation of a similar type or nature" in the so exceptional test that has now been addressed by the Court.

In that determination, I declined to deal with that element of the policy. That determination provided:

> **An occupation of similar type or nature**
>
> In addition to referring to the worker's "occupation at the time of the injury," the three so exceptional criteria also refer to "an occupation of a similar type or nature."
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> In the referral memorandum, the vice chair stated:
>
> > In determining whether the worker meets the criteria for a loss of earnings assessment, RSCM II item #40.00 requires consideration of three "occupations": the worker's own "occupation at the time of injury," an "occupation of similar type or nature," and "another suitable occupation." The first and third of these occupations reflect the language of section 23(3.2), which requires the decision-maker, in making a determination under subsection (3.1)" to "consider the ability of the worker to continue in the worker's occupation at the time of injury or to adapt to another suitable occupation." The second "occupation" referred to [in] policy item #40.00 is not expressly mentioned in sections 23(3), (3.1) or (3.2). The addition of a category of "occupation" in item #40.00 ("of similar type or nature") not mentioned in the relevant sections of the Act is one of the elements of the policy which contribute to a threshold in the policy for a loss of earnings award that is higher or more onerous than the one found in Act.
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> The vice chair contends that it is patently unreasonable to include references to an occupation of a similar type or nature. The vice chair's concerns are shared by the worker's representative and the Workers' Advisers Office. The Employers' Advisers Office notes that section 23(3.2) provides that, in applying the so exceptional test, the Board must consider the ability of the worker "to adapt to another suitable occupation." They point out that "an occupation of a similar type or nature" fits within the meaning of "another suitable occupation."
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> In the circumstances of the appeal before the vice chair, the concept of "an occupation of a similar type or nature" was not considered in determining whether the worker's circumstances met the so exceptional test because the worker was found to be able to perform the essential skills of his own occupation. Section 251(2) of the Act requires a vice

> chair to refer a policy to me for a determination under section 251(3) if the vice chair considers that the policy should not be applied in the adjudication of an appeal. As the appeal before the vice chair does not require consideration of "an occupation of a similar type or nature," and therefore does not require the application of that portion of the policy, I decline to determine whether the inclusion of this concept in item #40.00 is patently unreasonable.
>
> If this question somehow becomes relevant in the adjudication of the worker's appeal, the vice chair may again refer it to me under section 251(2) and I will endeavour to render a determination under section 251(3) on an expedited basis.

The Standard of Review under Section 251

[24] In making a determination under section 251 of the Act, the WCAT chair is required to determine whether the impugned policy is "so patently unreasonable that it is not capable of being supported by the Act and its regulations." The meaning of patently unreasonable can be determined by considering the phrase that follows the term in section 251 - "not capable of being supported by the Act and its regulations" - and by a review of court decisions that consider the meaning of patent unreasonableness

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

> [47] The patently unreasonable test requires that a decision under review to [*sic*] be "openly, evidently, clearly" unreasonable. In the *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748, Iacobucci J. stated at ¶57:
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> > The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable….

> [50] Another description of this standard is that enunciated by Beetz J. in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412:
>
> > A mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it.
> >
> > As Dickson J. (as he then was) described it, speaking for the whole Court in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at p. 237, it is
> >
> > …so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review...

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

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

[27] Under section 82 of the Act, the board of directors has broad discretion to set and revise policies. The board of directors is not required to apply the correct interpretation of the Act in establishing policies. A policy is not patently unreasonable under the Act if it applies a rational interpretation of the Act. Therefore, in considering whether policies of the board of directors are patently unreasonable under the Act, I must accept that statutory provisions are often capable of more than one interpretation and that there may be a variety of rational policy options through which a statutory provision may be implemented. In this case, I interpret section 23(3.1) as potentially supporting a wide variety of policy options for implementing the so exceptional test.

The Standard of Review Applied by the Court in *Jozipovic*

[28] In *Jozipovic*, the Court held that the most deferential standard of patent unreasonableness found in the *Administrative Tribunals Act* does not apply to judicial review of policies of the board of directors as the *Administrative Tribunals Act* does not apply to the Board. The Court found that the less deferential common law standard of reasonableness applies.

[29] The leading case on the common law standards of review is the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9. The Court in *Jozipovic* noted, among other things, the following points made by the Supreme Court of Canada in defining the standard of reasonableness:

> [117] *Dunsmuir* also addressed the definition of the "reasonableness" standard at paras. 41 and 47:
>
> > .... both standards [patent unreasonableness and reasonableness] are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported.
> >
> > ...
> >
> > Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. ...

[30] The Court in *Jozipovic* articulated the precise standard of review it applied by stating the "issue is whether the terms of Policy #40.00 represent a rationally supported interpretation of s. 23(3) of the *Workers Compensation Act*" (at paragraph 120).

Principles of Statutory Interpretation

[31] At the heart of the matter before me is the question of whether the references to "an occupation of a similar type or nature" in item #40.00 are rationally supported by sections 23(3), 23(3.1), and 23(3.2) of the Act. Accordingly, it is necessary to consider and apply the principles of statutory interpretation.

[32] Statutory interpretation in Canada is governed by the "modern principle." This principle was formulated in 1974 by Professor Elmer Driedger in the first edition of the *Construction of Statutes*[2] as follows:

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

[33] In 1998, the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd*.[3], declared the modern principle as the preferred approach to statutory interpretation. In 2002, in *R. v. Jarvis,*[4] the court restated the modern principle in this way (at paragraph 77):

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

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

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

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

[36] In my view, the issues raised by the Court in *Jozipovic* largely turn on the question of whether item #40.00 is supported by a rational interpretation of the so exceptional test in section 23(3.1) of the Act and the criteria in section 23(3.2) for making the so exceptional determination. In applying the modern principle for the purposes of interpreting sections 23(3.1) and 23(3.2), I will consider the objects of the Act, its legislative history, the Core Review, and the debates in the legislature. I will also consider the ordinary meaning of the words in sections 23(3.1) and 23(3.2) and consider them in the context of section 23 and the Act as a whole.

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

Context for Interpreting Sections 23(3.1) and 23(3.2)

(a) The objects of the Act

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

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

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

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

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

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

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

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

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

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

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

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

> … **In my opinion, the current provision in the *Act* adequately captures the initial intent to permit the WCB to apply the loss of earnings method in those "special instances" where the WCB considers it is equitable to do so.** To revise the legislation to narrow

> the focus of Section 23(3) (for example, by replacing the words "where the board considers it more equitable" with "in those exceptional circumstances as determined by the board") would unnecessarily restrict the broad discretion currently provided to the governing body of the WCB to respond to emerging circumstances.
>
> The concerns associated with the mandatory application of the Dual System (such as the concern expressed in the WCB Briefing Paper, referred to previously, with respect to the long-term viability of the workers' compensation system as a result of the growth of the pension reserve) have arisen as a result of the previous policy choices made by the applicable governing bodies of the WCB. In my opinion, these existing concerns can be, and must be, similarly addressed and rectified through policy.
>
> [emphasis added]

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

(d) The debates in the legislature

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

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

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

(e) The purpose of section 23

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

Analysis

[48] In *Jozipovic*, the Court provided the following analysis of section 23(3) of the Act:

> [127] In my view, s. 23(3) of the *Workers Compensation Act* grants the WCB a broad discretionary authority to award a pension based primarily on a loss of earnings in cases that are so exceptional that the functional impairment method of calculating the worker's pension does not "appropriately compensate" the worker for the injury. The primary and mandatory method of pension calculation is the functional impairment assessment defined in s. 23(1) and a pension award under s. 23(3) is an exception to the general rule.
>
> [128] Where the WCB is granted such a broad discretion to grant or refuse pensions pursuant to s. 23(3), it is clear that the board of directors have authority to delineate the circumstances in which this discretion may be exercised by the enactment of policies. In drafting such policies the board of directors may take into consideration the broad policy objectives of the workers' compensation scheme as well as the specific underlying rationale for the 2002 amendments to the *Workers Compensation Act*. In particular, the board of directors may consider the costs of pension awards and the sustainability of the accident fund; the need to provide incentives for workers to maximize their rehabilitation efforts and their post-injury earnings; and the emphasis on the functional impairment method of calculating pensions as the primary method to achieve the foregoing objectives.
>
> [129] What the board of directors cannot do, however, is enact a policy that is not rationally supported by the *Workers Compensation Act*. In particular, where the *Workers Compensation Act* requires the WCB to consider specific factors when determining eligibility for a pension under s. 23(3), the board of directors cannot enact a policy that ignores these factors, alters these factors, or adds other factors inconsistent with the statute.

[49] Although the Court rejected various arguments advanced by the petitioner regarding the lawfulness of item #40.00, the Court concluded that requiring consideration of a worker's ability to perform the essential skills of "an occupation of a similar type or nature" is not rationally supported by the Act. Specifically, the Court stated:

> [135] Lastly, the petitioner argues the board of directors has improperly imported into s. 23(3) additional requirements that are not contemplated by the legislation. By requiring the worker to prove that he is not only unable to perform his pre-injury occupation but also any "occupation of a similar type or nature" the board of directors has excluded a broad category of workers who would otherwise be entitled to consideration under step three of Policy #40.00, where both the loss of earnings and the ability to adapt to other occupations is considered. Essentially, the board of directors has excluded workers from consideration under s. 23(3) based on factors not found in this provision either expressly or by necessary implication.
>
> [136] I agree with the petitioner that there is nothing in ss. 23(3), (3.1) or (3.2) of the *Workers Compensation Act* that contemplates consideration of other occupations "of the same type or nature" as the occupation performed by the worker prior to his injury. The only reference to other employment is in (3.2), where the WCB is mandated to consider whether the worker can adapt to "another suitable occupation." To import into (3.1) or (3.2) consideration of "other occupations of the same type or nature" goes beyond the language of the provisions and is ostensibly redundant. In this regard, when the WCB assesses whether the worker is able to adapt to another suitable occupation, it may consider other occupations that are similar in type or nature to the worker's occupation prior to the injury. There is no rationale for expanding the term "occupation" to include other occupations of a "similar nature or type." This additional criterion is also inconsistent with (3.2) which requires the WCB to consider the worker's ability to continue in his occupation at the time of the injury and not in any other similar occupations except in the context of adapting to another suitable occupation.
>
> [137] I am also unable to conclude that this additional requirement is rationally connected to the purposes of the workers' compensation scheme generally or s. 23(3) in particular. By including in the definition of occupation a broad collection of jobs and employments characterized by similar skills, the WCB has effectively accomplished its objective to limit pensions under s. 23(3) to exceptional cases. If under this expanded definition of occupation the worker proves it is impossible to return to work, the WCB must still go on to consider his ability to adapt to other occupations. Thus requiring the worker to prove he cannot perform the

> essential skills of all similar occupations is not necessary to accomplish the objectives of s. 23(3) described above.
>
> [138] Accordingly, I find that portion of Policy #40.00 which requires the WCB to consider whether the worker can perform the essential skills of "an occupation of a similar type or nature" as a precondition to eligibility for an award under s. 23(3) is unreasonable because it is not rationally supported by the legislation.

[50] Regarding the remedy, the Court stated the following regarding item #40.00:

> [143] …I am not satisfied that I should grant a declaration that Policy #40.00 is of no force and effect. It is apparent that, insofar as the offending portions of the policy have an impact on the WCAT's reconsideration of the petitioner's pension entitlement under s. 23(3) of the *Workers Compensation Act*, WCAT must have regard to the principles outlined in these reasons for judgment. However, whether my conclusions with respect to Policy #40.00 should have a more general application is an issue that should be left with WCAT and the board of directors pursuant to the s. 251 review process.

[51] I agree with the Court's analysis and conclusions in paragraphs 135 to 138 of the judgment and I adopt them as my own in this section 251 determination. I find that the addition of "an occupation of a similar type or nature" to each of the three so exceptional criteria in item #40.00 and elsewhere in the policy is so patently unreasonable that the inclusion of that phrase is not capable of being supported by the Act.

[52] I acknowledge that, in reviewing item #40.00, the Court applied the reasonableness standard established in *Dunsmuir*. The standard of patent unreasonableness that I must apply in making a determination under section 251 is a higher standard, which requires me to accord a higher level of deference to the board of directors' policy. However, in addition to establishing unreasonableness, I find the Court's analysis supports the conclusion that the inclusion of the impugned phrase is also patently unreasonable. In fact, I note that (at paragraph 138) the Court concluded that the impugned phrase is unreasonable "because it is not rationally supported by the legislation." In my view, the fundamental question that arises under the patent unreasonableness standard applicable to policies of the board of directors under section 251(1) is whether the policies are rationally supported by the Act.

[53] In considering this matter, I have turned my mind to the principles of statutory interpretation and the purpose of the changes to section 23 that flowed from the Amendment Act. While I fully acknowledge the intention of the legislature to limit the

circumstances in which the Board would grant loss of earnings awards, that intention will still be met if the three so exceptional criteria in item #40.00 are amended to eliminate the phrase "an occupation of a similar type or nature" and if, similarly, that phrase is eliminated where it appears elsewhere in the policy.

[54] It is patently unreasonable to add this additional phrase to the policy because the result is to add a restriction to entitlement to loss of earnings awards that is not consistent with or contemplated by section 23 of the Act. The inclusion of this phrase in the first two of the three so exceptional criteria adds a barrier to consideration of whether the worker is actually experiencing a significant loss of earnings which was not contemplated by the legislature and is not supported by a rational interpretation of sections 23(3), (3.1), and (3.2).

[55] The inclusion of the phrase in the third of the three so exceptional criteria may be less objectionable because the third criterion introduces the significant loss of earnings consideration. In addition, as the Court noted, when the Board assesses whether the worker is able to adapt to another suitable occupation it may consider other occupations that are similar in type of nature. Nonetheless, the Court determined that the requirement to consider whether the worker is unable to work in "an occupation of a similar type or nature" goes beyond the criteria in section 23(3.2) of the Act, which only requires consideration of whether the worker is able to continue in his or her time of injury occupation or adapt to another suitable occupation. For this reason, I also refer this aspect of item #40.00 to the board of directors under section 251.

Procedural Matters

[56] In considering the Court's decision and its application to the worker's appeal, I have considered whether it is appropriate to simply read down item #40.00 in accordance with the judgment and apply the policy to the worker's appeal. However, I find that it is absolutely necessary to suspend the worker's appeal under section 251(2) and refer this important matter to the board of directors under section 251(3). First, given the Court's finding that the policy is not rationally supported by the Act, the decision has wide implications and creates uncertainty throughout the workers' compensation system. Second, the Court did not actually strike down the impugned portions of the policy and declare them of no force and effect and, for this reason, WCAT remains bound by the policy unless the board of directors of the Board determines otherwise pursuant to the section 251 process.

[57] In my view, it is important to expedite the referral of the impugned portions of item #40.00 to the board of directors. Accordingly, I have considered whether it is appropriate to do so in light of the two matters I have addressed below.

(a) The section 251 process

[58] If, in considering an appeal, the appeal tribunal considers that a policy should not be applied, section 251(2) requires the appeal tribunal to refer the policy to the chair for a determination under section 251(3). The definition of "members of the appeal tribunal" in section 231 of the Act includes the chair and, in this case, I am the member of the appeal tribunal assigned to decide the appeal.

[59] Section 251 does not specifically establish a process for circumstances in which the chair is the WCAT member who determines that a policy should not be applied in an appeal. In these circumstances questions arise as to the appropriate procedure. Is the chair prevented from hearing such an appeal? Is the chair required to refer the policy to himself or herself under section 251(2) and then make the required determination or is it open to the chair to simply make the determination contemplated under section 251(3)?

[60] In my view, the legislature could not have intended that the chair only decide appeals where the section 251 process would not be invoked. The chair has the power to assign appeals to himself or herself and it is not possible for the chair in every case to determine in advance which appeals will raise a lawfulness of policy question. It makes little sense in these circumstances to require the chair to reassign the appeal to another member if a lawfulness of policy issue arises.

[61] I am also of the view that it could not have been the legislature's intention, in cases where the chair is sitting as the tribunal member, to refer the policy to the chair in order for the chair to make the lawfulness of policy determination. To have to do so would be to require the chair to effectively decide the same question twice. Such a duplication would create unnecessary delay in the appeal process and possibly result in additional expense to the parties involved in the appeal.

[62] I have concluded that the only logical interpretation of section 251 is that if, in deciding an appeal, the chair considers that a policy is not supported by the Act or regulations, he or she must make a determination under section 251(3) of the Act. In other words, if the chair is deciding the appeal, the processes in sections 251(2) and (3) are collapsed into one step. Accordingly, I have collapsed those processes into one step in this appeal.

(b) No submissions invited

[63] Typically, when a court returns a matter to WCAT for reconsideration or rehearing, WCAT will invite the parties to make further submissions before the matter is decided by a panel. In this case, I have proceeded to make this determination on the preliminary issue without doing so because the Court's judgment has the potential to affect or delay

a considerable number of decisions regarding loss of earnings awards that are in progress in the workers' compensation system and, for the reasons set out below, I have determined that it is not unfair to the parties to proceed with this determination without inviting submissions. In this regard, the following two factors are relevant to both parties:

- Under section 251(8), the board of directors has the authority to make the final determination as to whether the policy must be applied. Accordingly, my determination is merely a referral of this matter to the board of directors and is not determinative.

- Under section 251(7) the board of directors is required to invite further submissions from both parties. Therefore, they will have the opportunity to make submissions to the body that will make the ultimate determination regarding this matter.

[64] In addition, I found it unnecessary to invite further submissions from the worker because this determination is favourable to him.

[65] In respect of the employer, I note that, although invited to do so, the employer did not participate in the appeal that led to the 2006 WCAT decision or in the reconsideration application. In addition, since the worker's claim is a 2004 claim, the costs associated with it no longer affect the employer's claims costs for experience rating purposes. Finally, when the worker's appeal is reheard following the board of directors' determination in this matter, WCAT will invite the employer to participate.

[66] I have also declined to exercise my discretion under paragraphs (d) and (e) of Practice Directive 10.1 of WCAT's *Manual of Rules of Practice and Procedure* to invite representative groups to make submissions in this matter. My understanding is that the board of directors typically invites submissions from the representative groups when considering section 251 referrals and it makes sense for them to do so, given that they are making the binding determination regarding whether the policy must be applied.

Conclusion

[67] I find that the inclusion of the phrase "an occupation of a similar type or nature" in the three so exceptional criteria and elsewhere in item #40.00 of the RSCM II is so patently unreasonable that it is not capable of being supported by the Act or its regulations. Accordingly, I find that the policy should not be applied in the reconsideration of the worker's appeal.

Operation of Section 251

[68] Section 251 prescribes a series of steps that must be taken as a result of my determination that item #40.00 should not be applied. Those steps include the following:

- In accordance with section 251(5), I will send notice of this determination and my reasons to the board of directors.

- In accordance with section 251(5), WCAT will suspend any other appeal proceedings that I consider to be affected by the impugned portions of item #40.00 until the board of directors makes a determination under section 251(6).

- As soon as practicable, WCAT will forward to the board of directors a list of parties to the appeals that WCAT has suspended under section 251(5).

- In accordance with section 251(6), within 90 days of receipt of notice of this determination, the board of directors must review item #40.00 and determine whether WCAT may refuse to apply the portions I have found to be patently unreasonable.

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

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

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

Jill Callan
Chair

JC/gn

June 1, 2011

By email and mail

George Morfitt, Chair
Board of Directors
WorkSafeBC
6951 Westminster Hwy.
Richmond, BC V7C 1C6

Dear Mr. Morfitt:

Re: *WCAT-2011-00833* – Section 251 Referral

Dear Mr. Morfitt,

Thank you for your May 31, 2011 letter confirming the board of directors' direction to the Workers' Compensation Board's Worker and Employer Services Division and Review Division to not apply the impugned portions of item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). I hereby withdraw my referral under section 251 of the Workers Compensation Act in WCAT-2011-00833.

As you are aware, a "practice directive" or direction is not binding on the Workers' Compensation Appeal Tribunal. In your letter you indicate that WCAT should adjudicate appeals as if the impugned portions were not a part of item #40.00. As section 250(2) of the Act requires WCAT to apply a policy of the board of directors, and item #40.00 has not been amended, it is possible that the policy may be referred to me in another appeal under section 251 of the Act.

Yours truly,

Jill Callan
Chair

JC/gn