Noteworthy Decision Summary

Decision: WCAT-2011-02457 **Panel**: Deirdre Rice **Decision Date:** September 29, 2011

Sections 23(3) and 23(3.1) of the Workers Compensation Act – Policy item #40.00[1] in the Rehabilitation Services and Claims Manual, Volume II – Significant Loss of Earnings – Interim Practice Directive #C6-2

The worker was in receipt of a permanent disability award (pension) based on 21.6% of total disability, in recognition of permanent functional impairment (PFI) of the right wrist, forearm, and elbow. The Workers' Compensation Board, which operates as WorkSafeBC (Board), decided that the worker was not entitled to an award based on loss of earnings because he could adapt to three other suitable alternate occupations. The worker sought a review, and the review officer also concluded that the worker would not suffer a significant loss of earnings, but on the basis that he had been retrained and was employed as an AutoCAD technician. The worker submitted that he was earning less at his AutoCAD job than he had earned in his pre-injury occupation as a lather.

The panel noted the non-binding interim Practice Directive #C6-2, which provides that in determining any anticipated loss of earnings under the "so exceptional test" in section 23(3.1) of the *Workers Compensation Act*, the following formula should be used:

> Pre-injury gross average earnings – Post-injury gross occupational earnings in a suitable occupation + Section 23(1) award.

The result is evaluated to determine if the section 23(1) award provides appropriate compensation. The Practice Directive sets 25% loss of wages as a general guideline for a "significant loss," although it states other losses may be significant. It also states that the Board recognizes that a significant loss of earnings does not exist when the calculated results is 5% or lower.

The worker's evidence at the oral hearing was that he did not think he could match his pre-injury earnings in the long-term. He was not fully trained as an AutoCAD technician but rather worked as a draftsperson. In order to become qualified the worker would have to take multiple courses through a formal two-year program in order to obtain 21 credits. The panel found it was reasonable for the worker to continue in his current, secure employment.

When comparing the worker's current gross salary to his pre-injury earnings, the worker's post-injury loss of wages amounted to just short of 25% of his pre-injury earnings. When the worker's PFI award was taken into account, the loss was 2.64%. This fell below the 5% threshold in the interim Practice Directive.

The panel referred to *WCAT-2008-02127*, in which the vice chair found that the PFI award was not provided as compensation for a loss of earnings and therefore should not be used in

[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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determining the percentage loss of earnings. The panel in this appeal observed that this analysis has not generally been followed by other WCAT panels, and declined to follow it, finding that the amount of a worker's award based on functional impairment is properly taken into account when determining whether, for the purposes of the third criterion in policy item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II*, a worker will sustain a significant loss of earnings.

In the worker's case, his loss of earnings was below the minimum threshold of 5%. While the 5% threshold was not binding on the panel, she considered it reasonable and consistent with the statutory requirement that a section 23(3) award be granted only where the combined effect of the worker's injury occupational and the disability that resulted from the injury "is so exceptional" that the functional award does not appropriately compensate the worker. The worker had been able to adapt to another suitable occupation without incurring a significant loss of earnings.

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Introduction

[1] On December 5, 2005, the worker was injured in the course of his employment as a lather when the planks he was walking on slipped underneath him and he fell 20 feet onto concrete. He filed a claim for compensation which has been accepted by the Workers' Compensation Board (Board)[2] for a comminuted fracture of the radial head and neck of his right elbow and a complicated fracture of the distal radius of his right wrist with intra-articular extension into the coronal and sagittal planes. The worker has also undergone three compensable surgeries under the claim: one on December 6, 2005, a second on August 9, 2006, and a third on October 8, 2008.

[2] In 2007, the worker was granted a permanent partial disability (PPD) award equal to 21.36% of total disability, in recognition of the fact that the work injury left him with a permanent functional impairment (PFI) of the right wrist, forearm, and elbow. This award was effective June 25, 2007, and will terminate when the worker reaches age 65. The worker has also been granted a lump sum award of $4,234.30 for the permanent disfigurement resulting from his compensable injuries and surgeries.

[3] In an April 30, 2010 decision, a case manager with the Board's Disability Awards Department determined that the worker was not eligible to be assessed for a loss of earnings award. Although the Board has accepted that the worker cannot return to his pre-injury employment, the case manager concluded that the worker could adapt to three suitable alternate occupations (retail salesperson or sales clerk, telemarketer, and customer service clerk) and, in so doing, would not suffer a significant loss of earnings.

[4] A review officer with the Board's Review Division upheld this decision on December 7, 2010 (*Review Decision #R0118165*). The review officer did not address whether the worker could adapt to the three occupations identified by the case manager. Instead, he concluded that the worker would not suffer a significant loss of earnings in his current occupation, which the review officer understood was that of AutoCAD Technician.

[5] The worker has appealed the December 7, 2010 Review Division decision to WCAT. He participated in the oral hearing of the appeal with the assistance of his representative, a lawyer. The employer is not participating in the appeal, although provided with the opportunity to do so.

[2] Operating as WorkSafeBC.

Issue(s)

[6] The issue is whether the worker is entitled to be assessed for a loss of earnings award.

Jurisdiction

[7] This appeal was filed with WCAT under section 239(1) of the *Workers Compensation Act* (Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background

[8] The worker is currently 36 years old.

[9] At the time the Board determined that the worker's injuries had plateaued, it also accepted that the worker is permanently restricted from lifting over 40 pounds or using tools which cause impact through his right arm. In addition, the Board accepted that the worker has limited tolerances for repeated lifting and carrying, hammering, and tasks that require right hand grip strength. These restrictions and limitations mean that the worker is no longer suited to work as a lather and, consequently, the Board provided him with vocational rehabilitation benefits. These benefits included Board sponsorship in three AutoCAD drafting courses at a community college and a period of job search benefits. The worker completed Level 1, 2 and 3 AutoCAD courses and, in 2007, found a training opportunity with a residential and commercial building design and drafting firm. He has been employed with the firm since that time.

[10] The worker's functional PPD award was granted under section 23(1) of the Act. This provision provides that, where a permanent disability results from a worker's injury, the Board must estimate the impairment of earning capacity from the nature and degree of the injury. Under the section 23(1) method of permanent disability assessment, a worker's percentage of disability is expressed as a percentage of total disability with 100% being the maximum possible rating for a totally disabled worker.

[11] Section 23(3) of the Act allows for the payment of a permanent disability award under what is referred to as the "loss of earnings" method. Section 23(3.1) outlines that the loss of earnings benefit can only be considered 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 the benefit determined under [the loss of function method] does not appropriately compensate the worker.

[12] Policy item #40.00 of the RSCM II sets out three criteria that must be considered under sections 23(3) and 23(3.1) of the Act. All three of the criteria must be satisfied in order for a worker to be eligible for a loss of earnings assessment. The criteria are:

- 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.

[13] An occupation is defined in the policy as being broader than a job, and includes a collection of jobs or employments that are characterized by a similarity of skills. For the purpose of policy item #40.00 of the RSCM II, occupations are generally determined by identifying the appropriate code from the *National Occupational Classification* (NOC).

[14] On July 29, 2009, the vocational rehabilitation consultant (VRC) responsible for the worker's file completed a memorandum in which she concluded that the worker could adapt to the occupations of drywall taper, interior systems mechanic, and fireproofing applicator.

[15] The VRC's recommendation was reviewed by a claims adjudicator in Disability Awards (CADA) in an April 6, 2010 section 23(3.1) determination memorandum. The CADA determined that the worker's pre-injury occupation fell within NOC Code #7284.3 (Lathers), and that the worker is unable to perform the essential skills of this occupation or one of a similar nature. Neither of these determinations were at issue in the Review Division proceeding. In accordance with the practice set out in item #3.3.1 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), I have not addressed these matters. Instead, I have limited my consideration to whether the worker meets the third criterion in policy item #40.00 of the RSCM II.

[16] With regard to that criterion, the CADA concluded that the three occupations identified by the VRC were not suitable for the worker, having regard to his post-injury functional abilities. The CADA determined that, since the worker was unable to perform the essential skills needed to continue in his injury occupation of lather, he would also likely not be able to perform the essential skills of an interior systems mechanic. The title "lather" is treated as being synonymous with "interior systems mechanic" in some provinces. Further, NOC Code #7284.2 (Drywall Installers and Finishers) does not differentiate between drywall tapers and lathers, and the same person is often required to both install and finish the drywall. Moreover, the NOC identifies the occupations as

having heavy strength demands and this, as well as other physical requirements of the occupations, would exceed the worker's post-injury functional capacity.

[17] In particular, as noted by the CADA:

> In the present case, the worker must avoid heavy strength demands. The worker is also limited by sustained reaching tasks and repetitive reaching tasks, according to the Discharge Report of the [occupational rehabilitation program the worker completed on June 5, 2006]. The worker would also have problems with tasks involving forceful gripping or sustained gripping with the right hand, given that he has a significant loss of grip strength of his dominant right hand. Job demands that require the use of non-neutral wrist positions when gripping items are also a barrier for the worker, as noted in the Discharge Report. Working as either a Drywall Taper or Fireproofing Applicator would require sustained reaching and sustained gripping with his right hand of tools, sanding equipment and applicators, and may require using the right wrist in a non-neutral position, such as when applying compound or sanding.

[18] However, the CADA considered that the three alternative occupations of telemarketer, customer service clerk, and retail salesperson or sales clerk were in keeping with the worker's post-injury functional abilities and would not require substantive vocational rehabilitation assistance. Further, were the worker to adapt to one of these occupations, he would not suffer a significant loss of earnings.

[19] The worker was earning less in his current job with the design and drafting business than he earned prior to his injury (and he continues to make less money than he did prior to his injury). However, statistical information that was available to the CADA confirms that, if the value of the worker's PPD award is added to the statistical average earnings of retail salespersons and sales clerks, telemarketers, and customer service clerks, the worker's earnings will exceed the occupational average earnings for lathers. The CADA relied on this information in concluding that the worker was not eligible for a loss of earnings assessment and the CADA's conclusion was incorporated by the case manager in the April 30, 2010 decision.

[20] In his request for review, the worker argued that there was no basis to assume that any of the three occupations identified by the CADA were suitable for the worker and, moreover, the CADA had no evidence to show that they were reasonably available to the worker with an earning potential as described. He submitted that the CADA's reliance upon "generic 'occupation' information is patently unreasonable." In addition, the worker argued that the CADA erred in the calculation of his potential loss of earnings.

[21] In *Review Decision #R0118165*, the review officer disagreed with the worker's position regarding the suitability and availability of the three occupations the CADA had

identified. He noted that the worker resides in one of the major urban centres of the province and he said that review "…of any cursory employment data will confirm that jobs within the class of Retail Sales Clerks, Telemarketers and Customer Service Clerks are reasonably available within the worker's geographical area." The review officer acknowledged that the CADA had not considered the demands of each of these occupations in light of the worker's accepted restrictions and limitations. However, the review officer concluded that this was not fatal to the CADA's conclusion. The review officer wrote:

> These three particular occupations are among the most commonly analyzed occupations, and it is fair to say that all three of these occupations have the potential to be able to accommodate the worker's accepted restrictions and limitations (which include: no lifting over 40 pounds or using tools which cause impact through the arm; limited tolerances for repeated lifting and carrying, hammering or tasks which require right hand grip strength).

[22] However, even though the review officer considered that the three occupations identified by the CADA were likely suitable for the worker, he concluded that he did not need to consider this issue in very much detail. This was because the worker had been retrained and had found work in his new career, which the review officer understood to be the "professional career" of AutoCAD technician. Although the CADA had not considered this occupation and the worker had not made submissions regarding it, the review officer considered this new occupation to be the most relevant focus for analysis. He was satisfied that this was a suitable occupation for the worker, noting as follows:

> AutoCAD drafting is a type of drafting done with the use of a computer to support engineers, architects and industrial designers. It is a technical field and has been identified under NOC #2253.2. The worker is to be lauded for his successful transition to this new field.

[23] The review officer then turned to the issue of whether the worker would experience a significant loss of earnings in his new occupation. It appeared to the review officer that the worker was earning less than he did before his accident while employed as a lather. However, in accordance with policy item #40.00 of the RSCM II, the review officer considered that this fact alone is not enough to establish a significant loss of earnings. Instead, the analysis required an assessment of the worker's future long-term earnings potential within his new field.

[24] In reaching the conclusion that the worker was not eligible for a loss of earnings assessment, the CADA had applied Practice Directive #C6-2, which provided Board staff with guidance in determining the extent of a worker's entitlement to a permanent disability award. At that time, the practice directive specified that a worker's actual earnings and wage rate were not to be used for the purpose of comparing to be assessed by comparing occupational average earnings.

[25] On June 30, 2010, the Board issued an interim practice directive to replace Practice Directive #C6-2. It provides that:

> In determining the extent of any anticipated loss of earnings under the "so exceptional" test, the CADA should apply the following formula:
>
> > Pre-injury gross average earnings - Post-injury gross occupational average earnings in a suitable occupation + Section 23(1) award)
>
> The result is evaluated to determine if the section 23(1) award provides appropriate compensation.

[26] The interim practice was in place at the time of Review Division decision and so the review officer applied the amended practice directive, which has clarified that the correct procedure is to use the worker's actual gross pre-injury earnings (as used to formulate the long-term wage rate).

[27] The review officer concluded as follows:

> The class average monthly earnings for NOC 2253 (which includes AutoCAD Technicians) is readily available from the website BC Work Futures (www.workfutures.bc.ca). It states that the average full time salary in this occupation is $47,882 per year. This almost exactly matches the worker's pre-injury earnings [of $47,883.74]. When one adds the amount of the worker's functional award (which exceeds $500 per month), the result is clear that the worker will not experience a significant loss of earnings over the long term in this new occupation.
>
> In addition, I have reviewed the monthly class average wage rates that have been compiled by the Board's Statistical Services Department. It includes data for the worker's home region. According to this information, the monthly class average earnings for AutoCAD Technicians in 2010 is approximately $4,500 per month. When this amount is added to the functional award, it is clear that the worker's potential long-term earnings as an AutoCAD Technician match or exceed his pre-injury earnings.

[28] The review officer therefore concluded that the third criterion in policy item #40.00 of the RSCM II had not been satisfied in the worker's case.

Oral Hearing

[29] The worker provided a comprehensive review of the symptoms and functional difficulties he experiences as a result of his permanent right arm and wrist conditions. The worker confirmed that he is right hand dominant. He said that the lack of grip strength in his right hand is probably one of his biggest problems and he estimated that he has about

half as much grip strength in the hand as he had prior to the injury. He said that his last surgery, in 2008, a wrist arthroplasty, has not changed this. In fact, following this surgery, he initially felt worse off and regretted having undergone the procedure. However, in the four or five months prior to the hearing, his wrist had started to improve. He continued to have pain in the wrist, but no longer to the extent he had before the surgery. The worker also has ongoing pain in his elbow. He has been told by a number of his doctors that he will have to have both the elbow and the wrist fused and so he tries not to overdo his use of these joints in the hope that he can avoid needing this as long as possible.

[30] The worker continues to have restrictions in the amount that he can lift. He said that lifting 20 pounds from the floor to his waist with the right hand "is not too bad," but lifting more than that is difficult. He can lift the same weight from his waist to shoulder height. However, he learned in the occupational rehabilitation program that he needs to keep the weight tucked in close to the core of his body in order to lift such weight and he said that, once he gets out of a neutral position, such as when lifting over the shoulder, he has problems. Since stocking shelves would involve extension of his right arm, the worker does not believe he would be able to work as a retail sales clerk.

[31] Another difficulty the worker has is with his finger dexterity, which he described as "terrible." In combination, his lack of grip strength and lack of finger dexterity lead him to spill things while at home, including coffee and food. The worker said that he has difficulty with fine motor movements and finds putting small pieces together, like washers and screws, or picking up coins frustrating. He thought this was compounded by the fact that he has lost sensation in his fingers, wrist, and forearm.

[32] I accepted a single exhibit at the hearing, exhibit #1. This is a series of occupational profiles that the worker's representative had run off the British Columbia Work Futures Internet website for the occupations identified by the CADA to be suitable and available. With the assistance of his representative, the worker reviewed the main duties of the occupation of a retail salesperson. The worker said that he is quite good at talking with people and would be comfortable with this aspect of the job. However, he does not have the dexterity to handle money and does not think he could pick up and give customers change. He also said that he would be able to stock and arrange displays on shelves if they were below waist level. However, once he got out of a neutral position and had to extend his right arm, he would not be able to do this duty. He would also not be able to bag and wrap products.

[33] The worker said that, in his current job, he uses the index finger on his right hand to click a computer mouse, and this is not too bad. This is the only thing that he uses that hand for. Most of his work is done using shortcuts, and for these he uses his left hand. There is very little typing required in his job and, instead, most of his work involves dragging, copying, and pasting templates which already contain all of the information that is required.

[34] The worker explained that, when he completed the three courses that the Board had sponsored, he did not receive a diploma. He said that he is not qualified to work as an AutoCAD technician and, instead, performs the functions of a draftsperson. He said that, in order to become an AutoCAD technician, he would have to take multiple courses through a formal two-year program, such as one that the British Columbia Institute of Technology offers. He said that qualifying as a technician did not involve simply picking up a few more courses; he would have to obtain 21 credits. Because the worker does not have this formal training, his employer does the design of the projects he is working on and all he has to do is turn the design into a working draft. He described his role as "filling in the blanks," and said that, at the end of the day, his employer has to verify that the draft is correct. In contrast, a fully qualified building technologist would know about building materials, would be able to do cost estimates, and would be able to certify the work. These are things that he is not qualified to do.

[35] As of the date of the hearing, the worker had been working for the employer for four years. He said that his current salary was approximately $36,720 per year, gross. He was unsure if this would be increased in the future, but also said that there was not a huge amount of money in his industry. He said that, although the Board seemed to believe that he could make a lot more, the fact is that the economy is down.

[36] The worker did not agree with the review officer's conclusion that he could match or exceed his pre-injury earnings in the long term and believes that the monthly class average earnings for AutoCAD Technicians that was identified by the review officer reflects the earnings of workers who are more qualified than him. He said that, if he had more education, he would be able to make more money. However, in order to get that education, he would have to enroll in a full-time program. Although he could have done this when he was engaged in the vocational rehabilitation process, it is no longer viable for him. He has three children and a mortgage and he must continue to earn an income. He noted that he was currently working on a project which involved the construction of thousands of homes. As a result, his employment is secure and he does not have to worry that he will be fired. In the worker's words, his situation is "as good as it gets." He said that he does not know very many people who can say that they do not have to worry about having a job in today's economy.

[37] The worker noted that the literature from the Board suggested that the purpose of a pension was to return the worker to the earnings position he or she was in prior to the injury. He feels that, in his case, this was false advertising because he did not get the proper training to restore his pre-injury earnings.

Submissions

[38] The worker's representative made a closing submission at the hearing. It is the worker's position that he is unable to adapt to the other forms of employment identified by the VRC and CADA because of his permanent functional restrictions and limitations. In addition, he has no training in the occupations the CADA identified and, with regard

to the position of retail sales clerk, would not be able to perform the majority of the job. There might be some jobs within the three occupations he could perform; however, he submitted that the reasoning in *WCAT-2008-0233*7 should be applied and that, in the absence of evidence that he could perform the majority of the jobs in the occupation, it was not suitable. He also raised a concern that the appearance of his arm would affect his ability to adapt to work in a public role as a sales clerk or customer service clerk, and he submitted that the wage rate for an entry level worker with no experience, such as he would be, would most likely be in the range of $28,000, if he were lucky enough to find full time work.

[39] With regard to his current position, the worker submitted that, since he is not in fact an AutoCAD technician, he cannot expect to attain the level of earnings that the review officer relied on. He also relied on *WCAT-2008-02127*, where the vice chair expressed concern about the Board's practice of including the section 23(1) award in determining whether a worker would sustain a loss of earnings. The vice chair also expressed concern with the direction in the version of Practice Directive #C6-2 that was in place at that time that a significant loss of earnings constituted a loss of more than 25% in all cases. In *WCAT-2008-022127* as well as in *WCAT-2009-03000*, WCAT vice chairs have determined that a loss of less than 25% can constitute a significant loss of earnings. This aspect of the practice directive has been modified in the current interim practice directive, although the 25% figure remains as a general guideline.

[40] In summary, the worker is currently earns in the range of $36,000 to $37,000. Prior to his injury, he was earning just under $48,000. He submits that he is eligible for a loss or earnings assessment.

Reasons and Findings

[41] The standard of proof that applies in this appeal is the balance of probabilities, but this is modified by section 250(4) of the Act. Like section 99(3) of the Act, which applies to the Board, section 250(4) provides that, where the evidence supporting different findings on an issue is evenly weighted, WCAT must resolve that issue in a manner that favours the worker.

[42] Section 23(3.2) of the Act provides that the Board must consider the worker's ability to continue in the injury occupation or to adapt to another suitable occupation.

[43] In order to provide guidance in the application of these provisions, the Board has implemented policy items #40.00, #40.01, #40.10, #40.12, #40.13, and #40.14 of the RSCM II. The Board's policy establishes a two-step process. In the first step, the three criteria in policy item #40.00 of the RSCM II which have been set out above are analyzed. If all three of the criteria are met, then the worker is entitled to be assessed for a loss of earnings award in accordance with the assessment formula established by policy item #40.10 of the RSCM II. Even if a worker meets the three criteria in policy

item #40.00, this does not necessarily mean that the worker will receive a loss of earnings assessment.

[44] In this case, the sole issue is whether the worker meets the third criterion in policy item #40.00.

[45] With the assistance of the Board, the worker has found employment within the broad occupation that was identified as an appropriate vocational objective during the vocational rehabilitation process. I agree with the review officer that the worker's ability to adapt to this occupation is the most relevant consideration. Given that the Board sponsored the worker in his new vocational direction, given that the worker participated fully and enthusiastically in the vocational process, and given that the worker has found long-term employment in his new occupation, I do not consider it reasonable or consistent with the Act to expect him to look for work in other occupations where he might have the potential to earn more than he does in his current job.

[46] In 2009, I held an oral hearing in conjunction with appeals the worker had filed regarding two earlier pension decisions on his claim. Both during the current hearing and during the prior hearing, I found the worker to be a credible witness who had a mature and balanced understanding of his compensable PFI. I have no trouble accepting his evidence that he does not have the professional qualifications to work as an AutoCAD technician and that, instead, he is only qualified to work as a draftsperson. I also have no trouble agreeing with his view, expressed at the hearing, that common sense dictates that he will be unable to achieve the same level of earnings as certified AutoCAD technicians. The worker has been employed by the same employer for four years. His decision to remain in secure employment is reasonable given that he is raising a young family. It was clear at the hearing that, had appropriate opportunities to advance in his new occupation presented themselves, he would have taken advantage of them. There have been no such opportunities. I am satisfied that, given his level of training, the worker has maximized his post-injury earning capacity in his current occupation, which I find is both suitable for him and available to him.

[47] When comparing the worker's current gross salary ($36,720 in 2011 dollars) to his pre-injury earnings ($47,883.74 in 2005 dollars) the worker's post-injury loss of wages amounts to just short of 25% of his pre-injury earnings. Taking account of cost of living adjustments, the loss probably exceeds that threshold. If the worker's functional pension award of 21.36% is not taken into account, it is clear that he has what the Board has defined in the interim practice directive as a "significant" loss of earnings. However, if one takes the functional award into account, the loss is 2.64% when comparing his current earnings (in 2011 dollars) to his pre-injury earnings (in 2006 dollars), and would not exceed 3.5% if these figures were adjusted by a cost of living factor.

[48] This places the question of whether, as was suggested by the vice chair in *WCAT-2008-02127*, it is inconsistent with the Act and Board policy to take account of

the worker's functional PFI award when considering the third criterion in policy item #40.00 of the RSCM II.

[49] In *WCAT-2008-02127* of the RSCM II, the vice chair noted that policy item #39.00 of the RSCM II included a statement a functional award, or section 23(1) award, reflects the extent to which a particular injury is likely to impair a worker's ability to earn in the future and also reflects other factors such as short term fluctuations in the compensable condition, reduced prospects of promotion, restrictions in future employment, reduced capacity to compete in the labour market, and, variations in the labour market. The vice chair said that, in that regard, a section 23(1) award is not provided as compensation for a loss of earnings which may result due to the compensable injury, and the fact that it is provided in cases where a worker may not have any loss of earnings further supports that it is not provided for this purpose. The panel also pointed out that if the section 23(1) award is provided in a lump sum amount, it is difficult to determine the award received by the worker on an annual basis, given that the lump sum award is determined using an actuarial calculation.

[50] However, this analysis has not generally been followed by other WCAT panels. Given that a functional award is specifically granted under section 23(1) to compensate for the "impairment in earning capacity" that is estimated on the basis of the nature and degree of the injury, I am unable to agree with the vice chair that such an award is not intended to compensate for the loss of earnings which may result due to the compensable injury. Instead, I am satisfied that both the awards that are granted under section 23(1) and those that are granted under section 23(3) are granted for the same purpose – compensating the worker for the "impairment in earning capacity" that has resulted from the compensable injury. The reason section 23(3) exists in addition to section 23(1) is so that an alternative method of calculating that impairment in earning capacity can be undertaken where an award that is based on the Board's generally applicable impairment schedule does not appropriately compensate the worker because the combined effect of the worker's occupation at the time of injury and the worker's disability is so exceptional. I decline to follow the reasoning of the vice chair in *WCAT-2008-02127* and I conclude that the amount of a worker's functional pension award is properly taken into account when determining whether, for the purposes of the third criterion in policy item #40.00 of the RSCM II, a worker will sustain a significant loss of earnings by adapting to a suitable alternative occupation.

[51] As noted above, Interim Practice Directive #C6-2 maintains the 25% threshold as a general rule. This is qualified as follows:

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

circumstances of each case to determine if a significant loss of earnings exists.

A lower figure than 25% may represent a significant loss of earnings.

The following examples suggest that a loss below 25% is a significant loss of earnings:

- A worker who is 62 years old, with limited transferable skills, has a calculated loss of earnings of 20%. The worker plans to retire at 65. The worker may experience a significant loss of earnings as his ability to adapt to a suitable occupation is affected by the combination of the relatively short duration left for him in the workforce and his post-injury vocational profile.

- A worker with pre-injury earnings that are at or near the provincial minimum wage may experience a significant loss of earnings where the calculated result is 10%. The impact of the loss relative to the percentage of loss is significant.

- A worker with pre-injury earnings that are well in excess of statutory maximum (e.g., $90,000) has a calculated loss of 18% using the significant loss of earnings formula. As the formula restricts consideration of the worker's pre-injury earnings to statutory maximum, it distorts the worker's true loss, which would be significantly higher than the calculated 18% loss.

- A worker's pre-injury employment was a heavy duty mechanic. The restrictions and limitation accepted on his claim precluded the worker from lifting beyond 9 kg (light lifting) and the worker was limited to working four days a week. The pre-injury employer was able to accommodate the worker in his post-injury employment as a partsperson, working four days a week, and removing all aspects of medium/heavy lifting from his current employment. The degree of accommodation provided by the accommodating employer is extraordinary. Extraordinary accommodation refers to an accommodation and employment that would not generally be found in the workforce. In addition, the worker is not able to perform the essential skills of his post-injury occupation without his employer's accommodation.

[52] Other considerations may also provide a basis for concluding that a worker's loss of earnings is significant in circumstances where that loss does not equal 25% of the worker's pre-injury salary. However, applying the above standard of proof to all of the evidence, I am unable to identify such circumstances in this worker's case. His loss of

earnings is below the minimum threshold of 5% that is suggested in the Board's policy. This threshold is also not binding on me but, in my view is reasonable and consistent with the statutory requirement that a section 23(3) award be granted only where the combined effect of a worker's injury occupation and the disability that resulted from the injury "is so exceptional" that the functional award does not appropriately compensate the worker for the injury. I conclude that the worker is not eligible for a loss of earnings assessment. He has been able to adapt to another suitable occupation without incurring a significant loss of earnings.

[53] In light of this conclusion, it is not necessary for me to consider whether the review officer was correct in concluding, in the absence of analysis that was specific to the worker's particular circumstances, that the three occupations the CADA identified had the potential to be able to accommodate the worker's accepted restrictions and limitations. I note, however, that the CADA did not explain the basis for concluding that the worker had the functional capacity to perform the essential duties of these occupations and also did not explain the basis for concluding that these occupations were reasonably available to the worker based on his particular circumstances. I also note that, although it is not necessary for me to make any finding in this regard, I am satisfied that, for the reasons provided by the CADA, by reason of his functional restrictions and limitations, the worker would be unable to adapt to the alternate occupations of drywall taper, interior systems mechanic, or fireproofing applicator that were identified by the VRC.

Conclusion

[54] The worker's appeal is denied. I conclude that the worker is not eligible for a loss of earnings assessment. He has been able to adapt to a suitable occupation without incurring a significant loss of earnings. The Review Division's December 7, 2010 decision is confirmed.

[55] Item #16.1.2 of WCAT's MRPP provides that when, as here, a party has requested an oral hearing, WCAT will generally order reimbursement of expenses for a party's own attendance at an oral hearing if that party was successful on appeal. The worker was not successful on this appeal. I see no compelling reason to depart from the general rule in this instance. Therefore, he is not entitled to reimbursement for any wages he may have lost in order to attend the hearing.

[56] There were no other reimbursable expenses associated with the appeal and I therefore make no order for reimbursement of expenses.

Deirdre Rice
Vice Chair
DR/tv