To: Jill Callan, Chair

From: Guy Riecken, Vice-Chair

Date: July 10, 2006

RE: Policy item RSCM II #40.00; s.251 Referral

This is a referral to the chair under s. 251 of the *Workers Compensation Act* (*Act*). I consider policy item #40.00, "Section 23(3) Assessment," of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) to be so patently unreasonable that it is not capable of being supported by the Act and its regulations pursuant to s. 251(1) of the Act.

1.0 INTRODUCTION

Under sections 239(1) and 241(1) of the Act the worker is appealing the September 29, 2005 decision of a review officer in the Review Division of the Workers' Compensation Board. The review officer varied the Board's decision, communicated in a letter dated February 17, 2005, to grant the worker a permanent partial disability award for his low back injury based on a permanent functional impairment (PFI) of 8.15% of total disability. The review officer found that the worker is entitled to an additional award of 2.5% for chronic pain, increasing the PFI award under section 23(1) of the Act to 10.65%. The review officer also found that the Board had correctly determined that the worker is not entitled to an assessment of a loss of earnings award under section 23(3).

The employer was notified of the appeal but is not participating.

At the oral hearing on June 12, 2006 the worker's representative stated that the worker does not take issue with the review officer's 10.65% PFI rating or with the effective date of the award, and that the only issue in the appeal is entitlement to a loss of earnings award. In written post-hearing submissions the representative argues that RSCM II item #40.00, which addresses a worker's eligibility to receive a loss of earnings assessment in relation to an award under section 23(3) of Act, should not be applied in this case because it is patently unreasonable and not capable of being supported by the legislation.

2.0 BACKGROUND

On August 22, 2002 the worker was working in a utility tire maintenance position for a trucking company when he experienced the onset of low back pain immediately after bending down and lifting an approximately 185 pound truck tire and wheel from an horizontal position to a vertical position.

The Board accepted the claim for a left sided disc herniation at the L5-S1 level, an L5-S1 discectomy on October 22, 2003 and chronic pain specific to the lumbar spine injury.

The worker participated in an occupational rehabilitation program from April 26 to June 4, 2004. The discharge report notes that the worker was discharged as fit to return to work to modified duties with limitations. The limitations described in the report for lifting, carrying, trunk rotation, stooping, climbing and sitting meant that he was unable to return to his full pre-injury job duties. The limitations were described as permanent and no further formal rehabilitation was recommended.

In a memo dated May 25, 2004 a Board medical advisor described the worker's back surgery as "failed," in light of an MRI on February 13, 2004 that showed the presence of scar tissue about the descending left S1 nerve and minimal fibrosis around the L5 nerve. The medical advisor predicted that the worker would not have any "absolute medical restrictions," but had limitations because of pain, poor balance and some reduced range of back movement.

A claim log memo from the case manager records that at a "sec. 23(3) team meeting" attended by the case manager, a Board medical advisor, a vocational rehabilitation consultant and a claims adjudicator in Disability Awards (CADA) on July 7, 2004, it was determined that as a result of his accepted limitations, the worker was unable to return to his pre-injury job. His pre-injury job was considered to fall under the National Occupational Classification (NOC) code #7443 – "Automotive Mechanical Installers and Servicers (Tireman)." The memo states that although the worker was unable to return to his pre-injury job, this occupation includes other jobs in the medium strength category which would be suitable for the worker in terms of his limitations.

The case manager terminated the worker's temporary disability (wage loss) benefits on July 11, 2004, on the basis that his condition had stabilized or reached a medical plateau.

In the July 7, 2004 referral memo to the Board's Disability Awards Department the case manager confirmed that the permanent conditions accepted under the claim were the left L5-S1 herniation, the L5-S1 discectomy and chronic pain.

On July 26, 2004 a claims adjudicator in Disability Awards (CADA) completed a section 23(3.1) determination memo (form 21). The CADA stated that the memo outlined his consideration of the worker's entitlement to an assessment under section 23(3) of the Act. The CADA confirmed that although the worker had been employed both as a welder and a tireman for the employer, the tireman duties were predominant and were the duties he was performing at the time of his injury. Therefore his occupation at the time of injury was identified as tireman. The CADA undertook an analysis in relation to the criteria in RSCM II item #40.00 and concluded that:

- The worker's occupation (defined in the policy as a collection of jobs or employments characterized by a similarity of skills) at the time of injury required specific skills (defined in the policy as the "learned application of knowledge and abilities") essential to the occupation or to an occupation of a similar type or nature
- Based on the limitations accepted as biologically plausible under the claim, it would be impossible for the worker to continue to apply his skills in relation to heavy equipment and/or truck tire repair (his pre-injury job), but he would be able to apply the essential

skills on motor vehicles/cars where the tire and rim weights would be within his accepted limitations.

- The second criteria under RSCM II item #40.00 was not met, in that the worker was able to perform the essential skills needed to continue in the occupation at the time of injury.

Because the second criteria under policy item #40.00 was not met, the CADA found that compensation under section 23(1) was considered to be appropriate and the worker was not entitled to a loss of earnings assessment under section 23(3) of the Act. The form 21 was included with the permanent partial disability award letter and forms part of the decision that the worker requested be reviewed by the Review Division.

The worker received vocational rehabilitation assistance from the Board including some training in computers, job search support and a period of training on the job.

The worker underwent a PFI evaluation on November 25, 2004. The disability awards officer (DAO) relied on this evaluation, including findings of limited range of motion of the lumbar spine, in assessing the worker's permanent disability under section 23(1) of the Act. The DAO determined that the worker is entitled to an award based on a PFI of 8.15% for his objective impairment. He did not consider the worker to be entitled to an award for chronic pain.

The February 17, 2005 permanent partial disability award under section 23(1) was calculated using the long-term wage rate set for the claim based on the worker's earnings during the one-year period prior to the date of injury ($47,139.28). Taking into account deductions from the gross earnings for income tax, Canada Pension Plan (CPP) and employment insurance (EI), the Board calculated the worker's net average earnings at the time of injury to be $35,043.27 yearly ($672.06 net per week). The long-term compensation rate (90% of net earnings) was $31,538.94 ($604.86 per week). Based on a PFI of 8.15% the permanent disability award payments are $215.44 per month, effective from July 12, 2004.

As already noted, the review officer varied the DAO's decision to the extent of allowing an award of 2.5% for chronic pain (increasing the PFI to 10.65%), but found that the worker is not entitled to a loss of earnings assessment under section 23(3) of the Act.

Because the CADA determined that the worker retains the ability to apply his skills in the same occupation as at the time of injury and does not satisfy the second criteria in policy item #40.00, the CADA did not address the worker's potential earnings in different suitable jobs within his occupation. At the hearing I disclosed to the worker and his representative that I had referred to information about tire repair jobs within NOC #744, "Other Installers, Repairers and Servicers," on the B.C, Work Futures internet site. That internet site includes publicly available information about occupations in B.C. and is organized using the NOC classification system. The information for NOC #744 includes information on "automotive and mechanical intallers," including jobs repairing tires on automobiles and trucks, which are the kinds of jobs the CADA determined to be suitable for the worker. According to this internet site, workers in the "other installers, repairers and servicers" occupation have below-average earnings. Workers employed full-time all year long in this occupational group earned on average $34,000 (in 2000 dollars), which was below the provincial average earnings rate of

$44,200. The salaries of different workers within this occupational group vary, depending on the specific field. The lowest earnings in the group were for automotive installers (which includes tire repairers and installers). They have average full time year round employment earnings of $31,500.00 (in 2000 dollars).

At the hearing the worker explained that through the vocational rehabilitation process the Board had supported him in taking courses over the internet in "A+", a computer technician program. He successfully completed the courses but the Board declined to support him in obtaining the "A+" certification, which he stated was necessary to obtain the better paying computer technician jobs. The Board had also supported him in a job search after he completed the computer courses. He stated that the only job he had been able to obtain was as a computer service technician and sales person in a computer store. He is paid $10.00 per hour ($400.00 per week) in that full time position.

3.0 ACT and POLICY

Because the worker's injury and permanent disability occurred after June 30, 2002, the transition date for changes to the Act under the *Workers Compensation Amendment Act 2002* (Bill 49), his entitlement to a permanent partial disability award is adjudicated under the current provisions of the Act as amended by Bill 49. (See: section 35.1 of the Act)

Section 23 of the Act provides two methods of calculating permanent partial disability awards, often referred to as the functional impairment method (under section 23(1)) and the loss earnings method (under section 23(3)). Section 23 states that:

> 23 (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
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> (a) estimate the impairment of earning capacity from the nature and degree of the injury, and
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> (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.
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> (2) The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.
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> (3) Subject to sections 34 and 35, if
>
> (a) a permanent partial disability results from a worker's injury, and
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> (b) the Board makes a determination under subsection (3.1) with respect to the worker,
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> 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.

…

On July 30, 2002 the panel of administrators, at that time the body authorized under section 82 of the Act to approve and superintend the Board's policies, approved extensive amendments to the Board's policies with respect to permanent partial disability awards. These amendments, found in Resolution 2002/08/27-01, addressed the changes to permanent partial disability award entitlement brought into force by Bill 49. The resolution applies to decisions made on or after July 16, 2002, in respect of permanent disability where the permanent disability first occurs on or after June 30, 2002.

Bill 49 amended the governance structure of the Board effective January 2, 2003 by establishing the board of directors of the Board as having the authority under section 82 of the Act to set and revise the Board's policies.

In resolution No. 2003/02/11-04, "Policies of the Board of Directors," published at 19 WCR 1, the board of directors established that as of February 11, 2003 the policies of the board of directors include the *Rehabilitation Services and Claims Manual* Volume I and Volume II (RSCM I and RSCM II). Under this resolution the policies of the panel of administrators relating to permanent disability awards, found in chapter six of RSCM II as of February 11, 2003, became policies of the board of directors. These include the policies described below.

Policy item #38.00 provides that in all but exceptional cases, the effect of the disability on a worker will be appropriately compensated under section 23(1) of the Act. In cases where the combined effect of a worker's occupation at the time of injury and the disability resulting from the injury is so exceptional that the section 23(1) method does not appropriately compensate the worker for the injury, the Board "has a discretion to assess the worker's entitlement to a PPD award under section 23(3) of the Act."

Policy item #39.00 explains that in assessing the worker's entitlement under section 23(1) the Board may have reference to a rating schedule of percentages of impairment established

under section 23(2) of the Act. This policy provides that the percentage of disability determined under section 23(1)(a) reflects the extent to which a particular injury is likely to impair a worker's ability to earn in the future. An award calculated under section 23(1) also reflects such factors 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 Board's policies in relation to loss of earnings awards under sections 23(3) set out a two-step process. Policy item #40.00 addresses the first step, which involves the determination of whether the Board should undertake a loss of earnings assessment. This policy refers to the test in section 23(3.1) (whether the combined effect of the worker's occupation at the time of injury and the disability is so exceptional that an amount determined using the functional impairment method under section 23(1) does not appropriately compensate the worker for the injury) in relation to the question of whether a loss of earnings assessment should be undertaken. If the Board determines in this first step that the section 23(1) award "may not be considered to appropriately compensate the worker for the impact of the combined effect, and may result in an award under section 23(3)," the policy says that the case proceeds to the second step, which is a loss of earnings assessment.

For cases that satisfy the criteria under policy item #40.00, policy items #40.01, #40.10, #40.12, #40.13 and #40.14 set out the decision-making process and the guidelines for assessing, in the second step, whether an award should be made under section 23(3) of the Act.

Policy item #40.00 provides that, in considering the test under sections 23(3) and (3.1), an "occupation" is "broadly defined as a collection of jobs or employments that are characterized by a similarity of skills." This policy also provides that in considering whether the worker satisfies the "so exceptional" test, the fact that the worker experiences a loss of earnings is not alone sufficient. The policy provides that all of the following 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.

Item #40.00 defines “skills” in this context as “the learned application of knowledge and abilities.” The policy goes on to state that:

> 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.
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> 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.
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> For the purposes of this policy, a significant loss of earnings means the Board may conclude in these exceptional cases, that the loss of earnings a worker will experience as a result of the combined effect could not have been anticipated under the section 23(1) method of estimating a worker's long term loss of earning capacity.
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> An example of when the combined effect may be considered so exceptional is one where a work injury results in a significant disability of two digits on the dominant hand of a worker whose occupation requires fine motor skills. As a result of the disability, the worker is no longer able to perform fine motor skills, and consequently, is unable to continue in the pre-injury occupation, or another occupation of a similar type or nature. In addition, due to the disability, the worker is unable to adapt to another suitable occupation without incurring a significant loss of earnings.
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> As a result, the section 23(1) award may not be considered to appropriately compensate the worker for the impact of the combined effect, and may therefore result in a consideration under section 23(3).

Where the Board determines that the criteria under policy item #40.00 have been met, item #40.10 provides the formula for an assessment under section 23(3), including a comparison of the worker’s average net earnings at the time of injury with the net amount the worker is actually earning after the injury or the amount the Board considers the worker is capable of earning after the injury. The policy states that this comparison requires an employability assessment. In estimating what a worker is capable of earning after the injury, the Board has regard to evidence, including the medical evidence, of the limitations imposed by the compensable disability, and evidence about suitable occupations the worker is able to undertake within those limitations.

The Board established a practice directive which guides Board officers in determining permanent disability awards under section 23(3) of the Act. Although not policy, and not

binding on WCAT, practice directive #46 provides useful insight and guidance with respect to the Board's application of policy item #40.00. This practice directive elaborates on the definition of "occupation" in policy item #40.00 and states that for the purposes of this policy "occupation" is defined by the collection of job titles that fall within a four digit code as categorized by the National Occupational Classification (NOC). It also states that in undertaking the determination under item #40.00, the worker's occupation at the time of injury will be identified in terms of the NOC classification system, at the four-digit (unit group) code level. The practice directive defines a "similar occupation" as an occupation where the first three digits of the NOC code (minor group) are the same as the worker's pre-injury occupational code. The practice directive goes on to state that:

> Where a worker is considered to be able to perform any one or more of the jobs listed in the pre-injury four digit NOC occupation code, or any one or more of the jobs under a similar four digit occupation, the worker does not meet the "so exceptional" test.

Section 250(2) of the Act states that WCAT "must make its decision based on the merits and justice of the case, but in so doing [WCAT] must apply a policy of the board of directors that is applicable in that case."

Section 251 provides that:

> 251 (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.
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> (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.
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> (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
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> > (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).

…

3.0 PRIOR CONSIDERATION OF POLICY

Some WCAT vice chairs have found that the identification of the worker's skills for the purposes of the item #40.00 analysis is a question of fact rather than a presumption that certain skills exist based solely on the job title that a particular worker held. Accordingly, the use of the NOC three and four digit occupational titles and the associated skill descriptions may be a starting place rather than the conclusion of the analysis of the worker's skills. See: *WCAT Decisions #2005-03022* and *#2006-02577*.

A number of vice chairs have found that the term "skills" used in policy item #40.00 includes, for some occupations, the ability to perform the physical demands of the occupation. For example, physical abilities for heavy labour, climbing over and around locomotive equipment, lifting, carrying, pinch grip and manual materials handling have been found to come within the notion of "skills" in policy item #40.00. See: *WCAT Decisions #2005-01733, #2004-06402, #2005-04330, #2005-03022, #2005-05557* and *#2006-01590*.

In *WCAT #2005-05834,* the vice chair found that the "so exceptional" assessment is not a solely medical question. The "so exceptional" test requires consideration of a number of factors, of which medical opinion evidence is only one. It is the adjudicator who must determine whether all the evidence, both medical and non-medical, is sufficient to satisfy the criteria in policy item #40.00. The vice chair went on to state that the worker's entitlement to a loss of earnings assessment does not turn on the adequacy to date of vocational rehabilitation assistance provided by the Board. The worker's eligibility turns on the evaluation of the residual skills and functional abilities as compared against the requirements of similar occupations.

A number of WCAT decisions have confirmed that under policy item #40.00, if a worker is unable to return to the pre-injury job, but retains the essential skills of the pre-injury occupation, or a similar occupation, the fact that the worker is experiencing a loss of earnings does not entitle him or her to a loss of earnings assessment under section 23(3). For example, in *WCAT Decision #2005-04148*, as in the present case, the worker was unable to return to his pre-injury employment because of limitations, including the inability to do heavy lifting. The worker retained the ability to perform the essential skills of the pre-injury occupation, and had returned to work in a lower paying job. The vice chair found that the worker's circumstances did not meet the criteria in policy item #40.00 because the injury had not rendered the worker unable to perform the essential skills needed to continue in the occupation at the time of injury, or in a similar occupation. That finding meant that under policy item #40.00 he was not entitled to a loss of earnings assessment. The same vice chair reached the same conclusion in *WCAT Decision #2005-04392,* where the worker was not rendered incapable of performing the essential skills of the pre-injury occupation, but was

working fewer hours and earning less. Under the item #40.00 criteria the worker was not entitled to a loss of earnings assessment.

Likewise, in *WCAT Decision #2006-00317,* another vice chair found that under the criteria in RSCM II item #40.00, where the worker, a truck driver, had been able to return to work in a different truck driving position with the same employer, but with lower earnings, the worker was not entitled to a loss of earnings assessment under section 23(3).

A similar conclusion was reached by a vice chair in *WCAT Decision #2005-02193* with respect to the criteria in policy item #40.00, where the worker had some loss of income in a different job in the same occupation after the injury.

Some WCAT decisions have addressed the meaning the of the phrase "significant loss of earnings" in the third criterion in policy item #40.00. That criterion provides that where the worker satisfies the first two criteria, the Board must then determine whether he or she can adapt to another suitable occupation without incurring a "significant loss of earnings." If the worker also satisfies the third criterion, a loss of earnings assessment is undertaken. In *WCAT Decision #2005-05557* the vice chair found that in determining whether there has been a "significant loss of earnings" resulting from the injury for the purposes of policy item #40.00, the evaluation is in relation to the resulting financial impact on the worker. Where the worker's net compensation rate was $2,610.27 per month and the estimated net earnings in the other suitable occupation would be $1,940.00 per month, this was a "significant" reduction in earnings not contemplated by the section 23(1) award based on a 2.5% PFI.

In *WCAT Decision #2006-01383* the vice chair agreed that in considering the third criterion in item #40.00, a financial test is used for determining whether a significant loss of earnings exists, with the ultimate consideration being whether the section 23(1) award appropriately compensates the worker for the impairment of earning capacity resulting from the compensable disability. There was a "significant loss of earnings" in the "other suitable occupation" where the pre-injury average gross earnings were $30,475.00 per year and the worker's potential gross earnings in the "other suitable occupation" would be $16, 640.00 per year, a loss of $13,835.00 per year in gross earnings, or about 40%. The section 23(1) award was based on a PFI of 35.04%. The vice chair found that the worker was entitled to a loss of earnings assessment under section 23(3).

In *WCAT Decision #2006-01383,* the vice chair also commented on the factors that could be considered in relation to the third criterion in policy item #40.00. She found that policy item #40.12 was relevant to determining what was a "suitable occupation" for the purposes of the third criterion in item #40.00. Item #40.12 provides that, in assessing a worker's ability to adapt to a "suitable occupation," regard must be had to, among other things: the ability of the worker to perform different occupations; the worker's earning potential in light of transferable skills and all possible rehabilitation measures that may be of assistance, including retraining; whether the worker has the skills, education and functional abilities that the occupation requires; and, whether the occupation is reasonably available within a reasonable commuting distance of the worker's home. The worker's limited literacy and numeric skills, as well as his learning disability, were also relevant factors in determining whether he could adapt to a suitable occupation.

In *WCAT Decision #2005-04330,* the lawfulness of the "impossible" standard in policy item #40.00 was raised, but the vice chair found that he did not have to decide it in light of his other findings that the worker was unable to perform the essential skills of his pre-injury occupation and that the Board was required to further evaluate the worker with respect to the other criteria in policy item #40.00.

In *WCAT Decision #2005-05191* the vice chair addressed the argument by the appellant's representative that policy item #40.00 is patently unreasonable and unlawful. The representative argued that because of such factors as age, language skills, experience, limitations and restrictions resulting from the compensable injury, the worker's disability could be greater than what is reflected in the 23(1) award. The representative argued that section 23(3) required the Board to consider the worker in his entirety, but that item #40.00 did not allow for consideration of the worker's noncompensable inherent personal characteristics. According to the representative this made item #40.00 a patently unreasonable interpretation of section 23(3) of the Act. The vice chair found that the policy set out in item #40.00 is not patently unreasonable.

4.0 ANALYSIS

Pursuant to the former Panel of Administrators'' Resolution No. 2002/08/27-01 and Board of Directors' Resolution No. 2003/02/11-4, the policies that apply to permanent disability awards where, as in this case, the injury and permanent disability occurred on or after June 30, 2002, are set out in Chapter 6 of RSCM II, including policy items #38.00 and #40.00. Those policies are applicable to the worker's entitlement to a permanent partial disability award in this case.

Under section 250(2) of the Act, unless I am able to refuse to apply them as a result of a determination under section 251, I must apply policy item #40.00 in this case. On my reading of this policy, if I am required to apply it the worker will not be eligible for consideration for a loss of earnings award under section 23(3) of the Act. This result arises from the evidence that the worker is able to perform the essential skills of some jobs within his occupation at the time of injury (the "tireman" occupation), regardless of whether those jobs would pay significantly less than his pre-injury average earnings. If, as a result of the section 251 process, I am not required to apply those policies, the worker would be eligible for a possible award under section 23(3).

The section 251 process involves the issue of whether the impugned policy is "so patently unreasonable that it is not capable of being supported by the Act and its regulations."

In *WCAT-Decision #2005-01710* the chair reviewed the relevant jurisprudence on the meaning of the "patently unreasonable" standard of review, including the judgment of Dickson J in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.,* [1979] 2 S.C.R. 227 (S.C.C.), at page 237, where he stated that a decision will be only patently unreasonable if it "cannot be rationally supported by the relevant legislation." The chair also observed that the following

description of the standard from the *Core Services Review of the Workers' Compensation Board* (March 2002) reflected the jurisprudence:

> 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.*

The following analysis is based on the discussion of the patently unreasonable standard in *WCAT Decision #2005-01710*.

4.1 The Two-Stage Process

Section 23(3) payments as stated in 23(3.1) is that:

> (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 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.
>
> [emphasis added]

Section 23(3.1) establishes the threshold that must be met in order for the Board to make payments under section 23(3). This involves consideration of whether the section 23(1) award appropriately compensates the worker. Two factors are to be considered when considering whether the section 23(1) compensation is appropriate: the worker's occupation at the time of injury and the disability resulting from the injury. Section 23(3.2) requires consideration of the worker's ability to continue in the occupation at the time of injury or to adapt to another suitable occupation.

On their ordinary meaning these sections do not establish a threshold that has to be met in order for the Board to **assess** or **consider** the worker for section 23(3) payments. They only provide for one threshold that has to be met before the worker can receive a section 23(3) **payment**.

Policy item #40.00, in the context of the related section 23(3) policies, establishes a second threshold that has to be met before the worker can be assessed or considered for payments under section 23(3).

The last sentence of item #38.00 states that only in "exceptional cases" (where the "so exceptional" threshold in section 23(3.1) is met) will "the Board have the discretion to assess a worker's entitlement to a permanent partial disability award under section 23(3) of the Act." This reflects the two-stage process established in the Board's section 23(3) policies, and in particular item #40.00.

Policy item #40.00 sets out the criteria for the first stage of the process. The last sentence states that if the worker satisfies the criteria, "the section 23(1) award may not be considered

to appropriately compensate the worker for the impact of the combined effect [of the occupation at the time of injury and the injury], and may therefore result in **a consideration** under section 23(3)." [emphasis added]

The guidelines in policy item #40.10, which only apply in the second step of the process, address how the pre-injury and post-injury earnings information is gathered and analyzed to determine if the worker will receive an award under section 23(3). Under these guidelines the adjudication of the worker's possible entitlement to a loss of earnings award at this stage will be based on difference between the pre-injury earnings and the actual or potential post-injury earnings, reflecting the language of section 23(3). By omitting the mechanism for gathering and assessing earnings information from the first stage criteria in item #40.00, the information that can be considered in the first stage is limited.

The language of sections 23(3) and (3.1) does not support the use of the two stage process established in item #40.00, particularly since the mechanism, including an employability assessment, for a comparative assessment of the worker's pre and post injury earnings is precluded from the first stage of the process. While sections 23(3) and (3.1) contemplate a process in which payment may be made under section 23(3) only if the worker has passed the "so exceptional" threshold under section 23(3.1), policy item #40.00 involves a different framework than that. It involves a process in which the Board will only consider exercising its discretion to make section 23(3) payments if the worker satisfies the item #40.00 criteria in the first-stage determination. In effect, the worker must pass a threshold set out in item #40.00 just to be considered for the exercise of discretion established under section 23(3), and must also pass the threshold established by 23(3.1) before being able to receive payments under section 23(3). While item #40.00 refers to the "so exceptional" threshold found in 23(3.1), it also introduces criteria that are different from that threshold. In the context of the two-step process, those additional criteria establish another threshold beyond the one which must be satisfied under section 23(3.1).

4.2 The "Occupations" in the Policy Item #40.00 Criteria

Although the word "occupation" is mentioned in sections 23(3.1) and (3.2), it is not defined in the Act. Policy item #40.00 states that "occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills."

The definition of "occupation" adopted in item #40.00 is more expansive than the ordinary meaning of the word. In the context of employment (as opposed to non-work or recreational pastimes), the ordinary usage of "occupation" refers to what a person does for a living. Depending on the context, this can have a narrower meaning, the person's immediate job, or a wider meaning, which refers to a career or profession. This is reflected in how "occupation" is defined in the *Concise Oxford English Dictionary*, 10th edition: "**2** a job or profession."

Similarly, *Black's Law Dictionary*, 8th edition, provides the following definition of "occupation": "**1.** An activity or pursuit in which a person is engaged; esp., a person's usual or principal work or business."

Although the policy does not refer to the NOC, in item #40.00 the Board appears to have adopted the concept of "occupation" from the NOC. The *Career Handbook* (publicly available

on the Internet at http://www23.hrdc-drhc.gc.ca/), the counseling component of the NOC, states that:

> Counsellors should note the difference between the definitions of an "occupation" and a "job" when using the NOC and the *Career Handbook*. An "occupation" is a theoretical concept which includes specific types of skills and responsibilities held in common by those who work in an occupation. A "job" on the other hand, is defined as a specific position in a particular establishment. An occupation is a collection of similar jobs. The list of example titles within each NOC unit group provides a frame of reference for the boundaries of that occupational group. The jobs within the group are characterized by a homogeneity or similarity of skills.
>
> To make sense of current trends in the labour market, it is important to focus on occupations rather than jobs, and on skills rather than the specific tasks of individual jobs. Identifying the fundamental similarities of skills within an occupation allows users to examine concepts such as occupational mobility, transferability of skills and career shifts in today's labour market.

The definition of "occupation" and the focus on occupational skills in the item #40.00 criteria reflect the NOC terminology and structure, and as such involve a technical use of the word from the context of vocational counseling.

The definition of "occupation" adopted in item #40.00, raises a question as to whether it is consistent with the use of the word in sections 23(3), (3.1) and (3.2). As stated by Professor Sullivan in *Construction of Statutes,* 4th edition, at page 20, the starting point of statutory interpretation is the ordinary meaning rule, the foundation of which is the assumption that the author of a text is using the words in their grammatical and ordinary sense. Even if the ordinary meaning of the word is not determinative, as Professor Sullivan explains, and the word must also be considered in the entire context of the Act, the references to "occupation" in sections 23(3), (3.1) and (3.2) are linked to the worker's earnings at the time of his injury and his earnings after the injury in the same or a different occupation. The focus in those sections on what the worker earned and can earn is consistent with actual jobs or employments, rather than the broad conceptual or theoretical categories that are used in the NOC to create an analytical framework for overall trends in the labour market. In the following passage of its introductory section, the authors of the NOC *Career Handbook* specifically warn readers against utilizing it for insurance benefits purposes:

> The Career Handbook is intended for career counselling, development and exploration purposes. HRSDC neither condones nor recommends the use of this information for other purposes. The profiles presented here are not appropriate for other uses such as screening applicants for particular positions or determining insurance benefits. The data do not replace the use of criterion-referenced testing to establish performance requirements for work as it occurs in the labour market. There are three major reasons for this limitation:
>
> - The conceptual foundation of the NOC and the Handbook is occupations, not jobs. An occupation is a collection of similar jobs that share some or all of a set of Main Duties. The tasks of specific jobs vary from establishment to establishment.

- The rated information in the Handbook is not based on experimental data collected from representative samples of the employed labour force for the occupations of the NOC.

- Development of the NOC and the Handbook did not include the collection of data on specific working conditions for jobs contained within occupational groups of the NOC.

The foregoing indicates that the concept of "occupation" used in the NOC and the *Career Handbook* is not suitable for assessment of disability entitlement. The NOC concept of "occupation" is theoretical and does not include information based on the actual working conditions or demands of jobs within the occupational groups. The adoption of the NOC concept of an "occupation" in policy item #40.00 involves a use of the word that is inconsistent with its ordinary meaning and with the meaning that is supported by the statutory context, which is concerned with the impact of disability on earning ability.

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 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.

4.3 Omission of financial evidence when considering the first and second "occupations"

RSCM II item #40.00 states that "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)." This is true, in that section 23(3.1) requires consideration of "the worker's occupation at the time of injury" and the "resulting disability" in determining whether "the amount determined under subsection (1) does not appropriately compensate the worker for the injury."

A related proposition, also part of the policy, is not true. Section 23(3.1) does not contemplate exclusion of evidence of a loss of earnings from the "so exceptional test." The reference to appropriate compensation incorporates a financial test into the section 23(3.1) threshold. While a loss of earnings on its own may not result in entitlement to payments under 23(3), consideration of whether there is a loss of earnings is inherent in the language of section 23(3.1). It is impossible to contemplate whether the 23(1) compensation is "appropriate" without any reference to the worker's earnings. Moreover, section 23(3.1) does

not stand alone, but is included by reference into the language of section 23(3), which involves a comparison of the worker's pre and post-injury earnings. While "appropriate" is not defined in the Act, its use in the context of section 23 involves making a comparison between the effect of the injury on a permanently disabled worker's earnings and the amount of the award that would occur under 23(1). Accordingly, some consideration of the effect of the injury on the worker's earnings is required when undertaking the section 23(3.1) analysis.

As confirmed in a number of WCAT decisions, policy item #40.00 excludes any consideration of the worker's loss of earnings in situations where the worker is able to perform the essential skills of his own occupation or an occupation of a similar type or nature. (See: *WCAT Decisions #2005-04148, #2005-04392, #2006-0031,* and #*2005-02193*). Policy item #40.00 limits consideration of the financial impact of the injury to its third criterion. Only if it is impossible for the worker to perform the skills of his own occupation or a similar occupation, does the policy allow consideration of whether the worker will sustain a "significant loss of earnings" in another suitable occupation. In other words, all that may be considered in relation to the worker's own occupation or a similar occupation is whether the worker possesses the essential skills and is able to perform them. The exclusion of any consideration of the financial impact of the injury from the first and second criterion is at the core of the more onerous threshold established by policy #40.00.

In a case such as the present one, once it has been determined that the worker retains the essential skills of his original occupation ('tireman"), and that he is capable of performing those skills in some job within that "occupation," item #40.00 does not permit any consideration of the worker's actual or potential earnings in that job. In the present case the worker's pre-injury average gross earnings were $47,139.28 ($35,043.27 net). There is evidence that on average full time workers within the occupational group that includes tire repairers and installers have gross annual earnings of $31,500.00, significantly less than the worker's gross average earnings at the time of injury. While section 23(3) requires comparison of net earnings, and the worker's potential net earnings as a tire repairer/installer are not available, I agree with the vice chair in *WCAT Decision #2006-01383* that where there is a stark difference between the pre-injury and the post-injury gross earnings it is possible to infer that there is a significant loss of net earnings. It is likely that after tax, employment insurance and CPP deductions there would be a substantial difference between the net earnings in the tire repairer/installer job and the worker's net pre-injury earnings. The difference between the worker's pre-injury gross earnings and the potential earnings as a tire repairer/installer involves a reduction of approximately 33% (compared to the 10.65% PFI rating). Under the criteria established by policy item #40.00, because this loss would occur within the same "occupation" as at the time of injury, or within an "occupation of similar type or nature", it cannot be considered as part of the section 23(3.1) determination.

Likewise, policy item #40.00 does not allow for consideration of the worker's actual earnings in his current job as a computer technician/sales person. While this is possibly "another suitable occupation," as contemplated by section 23(3.2), item 40.00 only permits consideration of earnings in "another suitable occupation" if it is impossible for the worker to continue in his original occupation or a similar occupation. Where, as in this case, it has been determined that the worker is able to perform the essential skills of some job within the original occupation or a similar occupation, there is no consideration of his earnings in another suitable occupation in which he has taken up employment.

Whether looking at the evidence of the worker's potential earnings as tire repairer/installer or his actual earnings as a computer technician/salesperson, there is evidence that can support the conclusion that the section 23(1) award based on a 10.65% PFI does not appropriately compensate the worker for the injury. However, under the two-step procedure established by the Board's policies, and the criteria established by policy item #40.00, that evidence cannot be considered.

5.0 CONCLUSION

In summary, I consider policy item #40.00, of RSCM II to be so patently unreasonable that it is not capable of being supported by the Act and its regulations pursuant to s. 251(1) for the following reason(s):

1. The policy establishes a two-step procedure for considering section 23(3) payments which is not contemplated by sections 23(3), (3.1) and (3.2).
2. The policy adopts a definition of "occupation" which is inconsistent with the ordinary meaning of that term with and its use in the statutory context.
3. The policy introduces a category of "occupation" (an "occupation of similar type or nature") that is not contemplated by sections 23(3), (3.1) and (3.2).
4. In implementing the two-step process the policy prevents consideration of the worker's loss of earnings if it occurs within the same occupation as at the time of injury, or within an occupation of a similar type of nature. As long as the worker is capable of performing the essentials skills of the original occupation, or an occupation of similar type or nature, the policy does not permit any consideration of a loss of earnings resulting from the injury, and presumes that the compensation under section 23(1) is appropriate. Sections 23(3), (3.1) and (3.2) do not create such a presumption.
5. Individually and cumulatively the aforementioned aspects of the policy establish a higher or more onerous threshold for section 23(3) payments than the threshold actually established by sections 23(3), (3.1) and (3.2). As a result of the higher threshold established by the policy, in some cases of permanent partial disability, such as the present one, a worker is prevented from being considered for section 23(3) payments even where there is evidence which can support the conclusion that the combined effect of the occupation at the time of injury and the disability resulting from the injury is so exceptional that an amount determined under 23(1) does not appropriately compensate the worker.

Guy Riecken
Vice Chair