

BEST PRACTICES INFORMATION SHEET #17

TOPIC: Permanent Disability Benefits – Section 23(3) (“So Exceptional” Test)

ISSUE DATE: August 25, 2006

Objective

This information sheet is intended to provide guidance to WorkSafeBC officers in determining whether a worker’s permanent partial disability should be compensated under section 23(3) of the *Workers Compensation Act* (the “Act”).

Law & Policy

Section 23(1) of the *Act* requires WorkSafeBC to assess a worker’s entitlement to a permanent partial disability award by estimating the impairment of earning capacity resulting from the work injury. For this purpose, the *Act* enables WorkSafeBC to compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations.

Section 23(3) of the *Act* provides for a worker’s permanent partial disability to be compensated based on the difference between the pre-injury earnings of the worker and the earnings that the worker is earning, or is capable of earning in a suitable occupation, after the injury.

The *Rehabilitation Services and Claims Manual* (“RSCM”), Vol. II, Policy item #40.00, *Section 23(3) Assessment*, provides three criteria that must each be met in order for a worker to be assessed under section 23(3). They are

1. The occupation at the time of injury requires specific skills which are essential to that occupation or to an occupation of a similar type or nature.
2. As a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury or in an occupation of a similar type or nature.
3. The effect of the compensable disability is that the worker is unable to work in his or her occupation or in an occupation of a similar type or nature, or to adapt to another suitable occupation, without incurring a significant loss of earnings.

Adjudicative Guidelines

Section 23(1) is a mandatory provision that must be applied in the assessment of a worker's permanent partial disability. The section 23(3) method of calculating compensation is only used where it is determined 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 a functional impairment award does not appropriately compensate the worker for the injury (section 23(3.1)).

In order to make this determination, a WorkSafeBC officer considers the ability of the worker to continue in the worker's occupation at the time of injury or to adapt to another suitable occupation (section 23(3.2)).

It is important to note that the criteria presented in policy for the section 23(3) method of calculating compensation need not be viewed as sequential. If a single criterion is not met at any stage during the assessment process, the worker is not eligible for a section 23(3) permanent disability award.

If, after taking into account the effects of the disability, the worker is considered able to perform one or more jobs in the pre-injury occupation or similar occupation, the worker is not entitled to further consideration of a section 23(3) permanent disability award.¹

(A) Occupation and Similar Occupation

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

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

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

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

¹ "Occupation" is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills (see Policy item #40.00).

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

What is the worker's occupation?

As provided in Policy item #40.00, an occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills.

The primary tool for categorizing the worker's time of injury job or employment into an occupational grouping is the *National Occupational Classification System* ("NOC"). The worker's occupation is generally identified by choosing the 'Unit Group' or four-digit occupation code that best encompasses the characteristics of the worker's pre-injury job.

The following sources of information may assist in this process:

- a description of the worker's pre-injury duties;
- a NOC recommendation form; and,
- a comparison of the main duties from the identified NOC occupation to the worker's pre-injury job duties.

What would be considered a similar occupation?

Policy item #40.00 requires a WorkSafeBC officer to consider the worker's ability to return to work in an occupation that is of a similar type or nature to that of the worker's occupation at the time of injury.

Generally, similar occupations are those occupations that require a similar skill type (i.e., type of work performed and/or the industry sector) and skill level (i.e., nature of education, training required, and work experience).

The NOC system is the primary tool for determining the similarity of occupations. In particular, the first three digits of the occupational code may be used to determine whether the skills in an alternate occupation are sufficiently similar. For example, a carpenter (NOC Code 7271) and a cabinet maker (NOC Code 7272) are two different occupations that share similarity in skills as reflected in the first three digits in their NOC codes. The identified skills do not need to be exactly the same in order for occupations to be considered similar.

Other occupational codes that do not have the same first three digits may be relevant where the occupations in question present a similarity of essential skills.

(B) Identifying Essential Skills

The first criterion outlined in Policy item #40.00 provides that the pre-injury occupation requires “specific skills” which are essential to the occupation. Policy item #40.00 states that “skills” are defined in this context as the **learned application of knowledge and abilities**. Those skills that are an absolutely necessary element or quality for a specific occupation may be characterized as “essential skills” for that occupation.

Information that may assist in identifying the specific skills essential to an occupation includes

- the main duties and profiles in the four-digit occupational groupings in the NOC system;²
- relevant web sites such as *Work Futures – British Columbia Occupational Outlooks* at www.workfutures.bc.ca and BC WorkInfoNet at www.workinfonet.bc.ca;
- occupational site visits; and,
- the Occupational Skills Profile completed by the Vocational Rehabilitation Consultant.

Given the definition of skills and the first criterion outlined in policy, it is possible that a specific occupation may not require essential skills. This would typically be the case where the requirements are primarily physical in nature. As such, there is no specific feature of the occupation that could combine with the worker’s disability to produce a result that would not be adequately reflected in the amount determined under the functional impairment method of assessment (section 23(1)). For example, a requirement to manually lift heavy objects is a purely physical requirement and would not generally be characterized as a “learned application of knowledge and abilities.” The following example illustrates the distinction:

- An electronics technician needs fine motor skills to perform the occupation’s core duties. If a technician sustains a back injury, he or she still retains the fine motor skills necessary to be an electronics technician. The worker may experience difficulty with sitting, standing, lifting or carrying items or objects for prolonged periods. However, these are physical demands and, unlike the requirement for fine motor skills, are not essential skills of the occupation.

² The main duties section describes the most significant duties of the occupations in the group. An analysis of the main duties is needed to determine the skills required for that occupation.

Therefore, where it is determined that the worker's occupation at the time of injury does not require essential skills, the amount determined under section 23(1) of the *Act* for a permanent partial disability will be considered appropriate compensation for the injury.

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

(C) Ability to Perform Essential Skills

Where required and in accordance with Policy item #40.00, a WorkSafeBC officer determines if the worker is no longer able to perform the essential skills needed to continue in the pre-injury occupation, or a similar occupation, as a result of the compensable disability. For this determination, a worker is considered to retain the essential skills of the pre-injury occupation, subject to the effects of the disability.

The WorkSafeBC officer considers the impact of the disability on the worker's ability to perform the essential skills of the occupation, rather than the worker's ability to perform the actual job duties. The following examples illustrate this point:

- A specific job may be affected by circumstances that do not apply to the occupation as a whole. For example, a worker's job as a janitor may require that he or she climbs ten sets of stairs. However, the occupational grouping of this type of job (NOC Code 6663 Janitors, Caretakers and Building Superintendents) includes types of jobs that may not have the same physical stair-climbing requirements. The worker has the essential skills to continue in the occupation but his or her physical disability may preclude the worker from performing the physical aspects of the specific pre-injury job.
- The effects of the disability with respect to physical demands may be mitigated through workplace modifications and therefore, the worker may still be able to perform the essential skills of the occupation.³ For example, an electrician cannot perform heavy lifting. However, the heavy lifting can be mitigated if the electrician has the assistance of an electrician's helper to perform the heavy lifting.

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

³ Mitigation is not the test but is an approach or option when considering whether the impossible test is met. Mitigation is typically job or employer specific.

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

The medical evidence must confirm that the work injury makes it **impossible** for the worker to continue in the pre-injury occupation or in a similar occupation (Policy item #40.00). The worker retains the knowledge of the skills for the occupation but is medically unable to perform or apply the skills.

With respect to the “impossible” test, the worker's permanent impairment may be such that it is clear that the worker is functionally incapable of performing one or more of the identified essential skills. However, there are other circumstances that may lead to the same conclusion. Specifically, the worker's permanent impairment may create a significant and immediate risk of serious injury thus making it impossible for the worker to continue in the occupation.⁴ As well, the permanent impairment may make it legally impossible for the worker to return to the pre-injury or similar occupation. For example, a worker's disability may prohibit the worker from retaining the licensing requirement for the occupation.

Where a worker is employed in more than one occupation at the time of injury, the WorkSafeBC officer determines the worker's ability to perform the essential skills for each pre-injury occupation or similar occupation. The medical evidence must confirm that the work injury makes it impossible for the worker to continue in at least one of the pre-injury occupations or similar occupations.

(D) Another Suitable Occupation

When medical evidence confirms it is “impossible” for the worker to continue in the pre-injury occupation or a similar occupation, a WorkSafeBC officer determines whether the worker can adapt to another suitable occupation.

What is meant by “suitable occupation?”

Generally, an occupation will be considered suitable where the worker has or can easily attain the transferable skills and post-injury functional abilities that the occupation requires.

⁴ For example, a roofer has severe vertigo accepted under his or her claim. Although the worker could perform certain essential skills associated with roofing, medical evidence confirms that the vertigo would likely result in a significant and immediate risk of injury, such as loss of balance and falling off a roof, if the worker continued to work at heights.

When identifying possible suitable occupations for a worker, the WorkSafeBC officer considers the following:

- the essential skills of the occupation at the time of injury, which are retained by the worker, and may be applied or transferred to another occupation;
- the worker's transferable skills, which are those learned skills that are utilized in one context, but can be applied generally to another occupational context;
- the worker's formal and informal education, and previous work experience; and
- the worker's post-injury functional abilities, including the medical evidence of the effects of the compensable disability.

Where a worker is employed in more than one occupation at the time of injury, and it is impossible for the worker to continue in a pre-injury occupation or similar occupation, the WorkSafeBC officer identifies the corresponding suitable occupations to the affected pre-injury occupation or similar occupation. If the worker is able to return to only one of the pre-injury occupations, that occupation may be considered a suitable occupation to the affected pre-injury occupation to which the worker is unable to work. For example, a worker's pre-injury occupations may include part-time teaching and part-time carpentry. The worker may be unable to return to carpentry or a similar occupation. However teaching would be considered a suitable occupation to which the worker could adapt. The WorkSafeBC officer would still determine whether the worker would incur a significant loss of earnings through adapting to another suitable occupation (i.e., teaching) (see section E *Significant Loss of Earnings*).

(E) Significant Loss of Earnings

Where a WorkSafeBC officer determines that the worker would be able to adapt to another suitable occupation, the next step is to determine whether the worker would incur a significant loss of earnings in that occupation.

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

As provided in policy, the loss of earnings may be considered significant if, due to the combined effect of the worker's pre-injury occupation and the worker's disability, the degree of loss could not have been anticipated under the functional impairment method of assessment (section 23(1)).

The *Permanent Disability Evaluation Schedule* (“PDES”) is the primary tool used to determine compensation under the section 23(1) method of assessment. It is important to note that the percentage of impairment of earning capacity allotted under the PDES represents an effort to state in terms of percentages and on average, the extent to which a particular disability would impair a worker’s ability to earn. This method of assessment presumes that, on average, every worker who suffers the same type of disability will incur the same level of impairment of earning capacity. Consideration is not given to individual circumstances and classes of employment. The PDES, by its very nature of representing the average percentage of disability, does not recognize circumstances where a worker’s disability will fall well outside of the average. Non-scheduled awards are treated as awards granted under the section 23(1) method of assessment.

The policy requirement that the loss of earnings “could not have been anticipated under the section 23(1) method of estimating a worker’s long term loss of earning capacity” involves considering whether the worker’s individual loss is so far removed from the average anticipated impairment of earning capacity, that it suggests that an award granted under this method is not appropriate.

To assist in determining the extent of any anticipated loss of earnings under the “so exceptional” test, the WorkSafeBC officer compares the worker’s pre-injury occupational average earnings against the combined total of the post-injury suitable occupational average earnings and the amount of the section 23(1) award.⁵ The following formula illustrates this comparison:

$$\text{Pre-injury occupational average earnings} - (\text{Post-injury suitable occupational average earnings} + \text{section 23(1) award})$$

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

Policy item #40.00 does not define a “significant loss of earnings” in terms of a benchmark dollar value or percentage differential. As a result, a definitive figure cannot be presented in practice.

In an effort to assist decision makers with this criterion, it is worth noting that a number of Workers’ Compensation Appeal Tribunal (“WCAT”) panels have concluded that a “significant loss of earnings” is a financial test that requires a comparison of the difference in values of a worker’s net income before and after the injury, with the ultimate consideration being whether the section 23(1) award appropriately compensates the worker for the impairment of earning capacity resulting from the compensable disability. As well, a number of panels have

⁵ Given that the “so exceptional” test is based on the broader concept of “occupation,” the significant loss of earnings criterion does not require consideration of the worker’s actual loss of earnings flowing from the pre-injury employment.

concluded that a difference between the worker's pre- and post-injury average net earnings of 25 percent is a "significant loss of earnings," subject to an examination of the amount of the permanent functional impairment award.

Although in some cases a differential of 25 percent, as described above, has been considered significant, the individual circumstances of each case must be considered in order to determine whether a significant loss of earnings exists. **In other words, it must be determined whether the difference in pre- and post-injury occupational average earnings is significant to the point that the amount of compensation provided under section 23(1) does not provide appropriate compensation.**

Where a worker is employed in more than one occupation and is unable to return to a pre-injury occupation or similar occupation, but is able to adapt to another suitable occupation, the WorkSafeBC officer determines whether the worker would incur a significant loss of earnings in adapting to the suitable occupation. In this case, the officer considers the magnitude of the loss of earnings resulting from the occupational average earnings of the pre-injury or similar occupations to which the worker is no longer able to return. This loss is compared against the earnings or additional earnings from the occupational average earnings of the suitable occupation to which the worker can adapt, including the amount of the section 23(1) award. The result is evaluated to determine if the section 23(1) award provides appropriate compensation. For example, in the previously described teaching/carpentry case outlined in Section D *Another Suitable Occupation*, the worker may experience a loss of earnings from being unable to continue in the part-time carpentry occupation. However, the worker is able to adapt to teaching and may be able to replace the loss of earnings from the carpentry occupation through full-time teaching, based on a comparison of the average earnings from both occupations.

It should be noted that a section 23(3) permanent disability award cannot be made where, following the injury, the worker is earning or is able to earn at or above the maximum wage rate.

CROSS REFERENCES:	See also Practice Directive #45, <i>Permanent Partial Disability Benefits – Section 23(1)</i> .
HISTORY:	This item replaces Practice Directive #46, <i>Permanent Disability Benefits – Section 23(3)</i> .
APPLICATION:	This Information Sheet streamlines, updates and clarifies current practice.