

PRACTICE DIRECTIVE # C6-2

TOPIC: Permanent Disability Benefits – Section 23(3)

ISSUE DATE: May 29, 2008

Objective

This practice directive 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.

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

This test requires that WorkSafeBC determine whether 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 section 23(1) does not appropriately compensate the worker for the injury.

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

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

Overview

Section 23(1) is a mandatory provision that must be applied in the assessment of a worker's permanent partial disability. 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.

While a worker may experience a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under section 23(3) and (3.1). The 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.

In order to make this determination, a WorkSafeBC officer in Disability Awards ("DA officer") considers the effects of the disability on the worker's ability to continue in the worker's time of injury occupation or similar occupation, or to adapt to another suitable occupation without incurring a significant loss of earnings.

It is important to note that the criteria presented in policy for the section 23(3) method of calculating compensation does not need to 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.

Starting the Process

As the worker approaches medical plateau and if the Case Manager determines that an anticipated impairment will affect the worker's ability to return to the pre-injury job, the Case Manager sets up a meeting with the DA officer, Vocational Rehabilitation Consultant ("VRC") and a WorkSafeBC Medical Advisor and/or a Psychology Advisor, as appropriate.

Prior to the meeting, the DA officer requests a "NOC Recommendation"¹ from the VRC.

¹ The NOC Recommendation is described in detail on page 4 in the section titled "What is the worker's occupation?"

In order to clarify and determine whether the worker is unable to return to the pre-injury occupation, the following information is gathered/reviewed/discussed:

- critical job demands
- the permanent condition(s) accepted
- the anticipated permanent medical restrictions²
- the anticipated physical/psychological limitations³, and
- the classification of the worker's job at the time of injury into an occupation (the NOC Recommendation).

A meeting may not be necessary where evidence indicates any of the following:

- the worker is able to return to the pre-injury job or occupation,
- the worker has returned to alternate employment without incurring a significant loss of earnings, or
- there is an approved VR plan (which does not involve substantive VR⁴), that would return the worker to suitable employment and the worker would not incur a significant loss of earnings.

(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

² As may be required, the restrictions may be changed or confirmed at medical plateau.

³ As may be required, the limitations may be changed or confirmed at medical plateau.

⁴ Substantive vocational rehabilitation assistance may include: considerable skill enhancement, certification and/or other training—either formal or on the job. Minor vocational rehabilitation assistance may include: job search assistance, completion of a one day course, payment of a licensing fee, or lapsed standard first aid or other certification.

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 to the employment at the time of reopening the claim.⁵

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. Policy item #40.00 states that "skills" are defined in this context as the learned application of knowledge and abilities.

A worker's pre-injury occupation is identified by considering jobs that share similar, but not necessarily identical, duties, responsibilities, physical requirements, training and/or education requirements.

Nationally or provincially recognized methods of occupational classification may be used to assist in identifying the worker's time of injury occupation. By way of example, the *National Occupational Classification System* ("NOC") can be a useful tool in categorizing a specific job or employment into an occupational grouping. Generally, a worker's occupation may be identified by choosing the 'Unit Group' or four-digit/five-digit occupation code that best encompasses the characteristics of the worker's pre-injury job.⁶

The NOC Recommendation, completed by the VRC, may be a useful tool in categorizing a specific job or employment into an occupational grouping. The NOC Recommendation is developed to classify the worker's job/employment at the time of injury into the NOC code(s) that best represents the worker's pre-injury job/employment and duties. It uses the information in the NOC as a starting point and explains how the recommended NOC code(s) accurately represents the worker's job at the time of injury. Consideration is given to the physical demands and job requirements of the occupation. Where the pre-injury job is equally represented by more than one occupation, the descriptions of the applicable NOC occupation codes are used and the rationale for recommending more than one NOC code is explained in the NOC Recommendation. The VRC verifies and considers additional information prior to recommending a NOC occupation code to ensure that the recommendation appropriately reflects the

⁵ RSCM Policy item #70.20, *Reopening 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.

⁶ Some unit groups include subgroups that are characterized by a digit added to the unit group code and separated by a period—a five digit code (e.g., 6642.3 Dishwashers). These subgroups more fully differentiate the occupation group described in the four-digit group. Where they exist, the five-digit code may be used instead of the four-digit code.

pre-injury job/employment and duties. Sources of information may include the worker and employer, professional associations, on site visits, unions, job descriptions and/or internet sources.

The NOC Recommendation is one document the DA officer considers in determining the worker's pre-injury occupation. The DA officer may also consider other sources of information that may assist in identifying the worker's occupation:

- relevant web sites such as *Work Futures – British Columbia Occupational Outlooks* at www.workfutures.bc.ca and BC WorkInfoNet at www.workinonet.bc.ca;
- occupational site visits; and,
- the Initial Vocational Assessment and/or Vocational Assessment and Planning document completed by the VRC.

What is a similar occupation?

Policy item #40.00 requires a DA 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);
- skill level (i.e., nature of education, training required, and work experience); and,
- physical or functional demands.

Caution should be exercised where there is a significant difference between the average remuneration commanded by the time of injury occupation and the average remuneration commanded by a similar occupation. A significant difference in rates of remuneration may call into question whether the skill type and level, etc., are truly similar. However, differences in rates of remuneration, by themselves, should not necessarily lead to a conclusion that the two occupations in question are dissimilar for the purposes of policy item #40.00.

The NOC system can be a useful tool for determining the similarity of occupations. If it is used, it is important to consider the physical requirements of the occupations, to confirm whether there is sufficient similarity.

The guidance above applies to determining a similar occupation. Where a five-digit occupation code has been used to identify the worker's pre-injury occupation, the corresponding four-digit code can be used to identify the worker's similar occupation. Where a four-digit occupation code has been used to identify

the worker's pre-injury occupation, the corresponding three-digit code can be used to identify the worker's similar occupation.

It is recognized that there may be circumstances where occupations within the three digit NOC code, while similar in terms of skill level and skill type, have distinctly different duties and employment requirements. The skills required for the occupations, while of similar type and level as defined by the NOC, are distinctly different. In these circumstances, other NOC occupation codes may be considered.

(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. As noted earlier, 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.

In practice, every occupation should be viewed as requiring skills that are a necessary element or quality for the specific occupation. It is recognized that physical requirements may be captured by the definition of skills where they are appropriately characterized as "learned abilities". This is generally true where a physical requirement represents a necessary element for the majority of jobs in the occupational grouping. For example, a labourer's "learned abilities" may be the ability to swing a hammer efficiently, operate a jackhammer, or climb a ladder.

In determining the essential skills of an occupation, the DA officer can consider various sources such as the Occupational Skills Profile ("OSP"). The OSP is a tool prepared by VR Services that identifies the basic and specific skills required for an occupation. It uses the NOC as a starting point and, where appropriate, incorporates information from other sources to identify the skills and employment requirements of the occupation in British Columbia. Physical requirements that are part of the essential skills of an occupation may already be included in existing OSPs. Where these types of physical requirements have not been discussed in an OSP and where physical requirements are a necessary component of the pre-injury job, the DA officer may seek assistance from the VRC to identify ranges of physical requirement for the occupation⁷. This information will assist the DA officer in determining the physical demands that equate to essential skills of the occupation.

⁷ It is recognized that some occupations will be composed of a number of jobs which will have varying ranges of physical requirements, depending on the specific job.

The DA officer may consider other sources of information to assist in identifying the essential skills to an occupation. These include, but are not limited to:

- relevant web sites such as *Work Futures – British Columbia Occupational Outlooks* at www.workfutures.bc.ca and BC WorkInfoNet at www.workinfolnet.bc.ca;
- professional or industry associations
- employers
- trade unions
- Red Seal program
- education/training institutes
- job postings and
- occupational site visits.

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

(C) *Ability to Continue in the Pre-injury Occupation/Similar Occupation*

Where required and in accordance with Policy item #40.00, a DA 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.

This determination is undertaken once a worker's condition has stabilized and it has been decided that there is likely a permanent impairment. It includes consideration of both the worker's transferable skills and the worker's post-injury functional abilities, including physical abilities.

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:

- 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;

- the medical restrictions and physical limitations⁸ of the worker's impairment; and
- results from a functional capacity evaluation or an occupational rehabilitation program regarding the worker's post-injury functional abilities.

As part of the consideration for a section 23(3) award, 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.⁹ In practice, this means that there are no jobs in the pre-injury or similar occupation grouping where it would be medically possible for the worker to perform the essential skills. In other words, the worker's disability may directly prevent the worker from exercising an essential skill or may do so indirectly, for example, by preventing the worker from lifting the object on which or with which the worker applies an essential skill. For example, a worker who is no longer able to raise his hand over his head is no longer able to perform certain kinds of skilled repairs, even if he or she retains the necessary fine motor skills.

Where a worker is employed in more than one occupation at the time of injury, 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.

Where a worker can only return to the pre-injury occupation at a reduced capacity (e.g., worker can only return to work on a part-time basis, rather than maintain full-time employment), the DA officer may conclude that the "so exceptional" test is not met and the section 23(1) award is appropriate. However, in these cases, it may be appropriate for the VRC to explore the possibility of VR assistance to enable the worker to return to a different job or occupation.

(D) Another Suitable Occupation

Generally, an occupation will be considered suitable where the worker has, or can reasonably easily attain and perform, the necessary skills (i.e., duties,

⁸ Medical restrictions refer to activities that should not be undertaken because of risk of medical harm (i.e., something that a doctor tells a patient they should not do even if they wish to do it and are capable of doing it). Physical limitations refer to tasks that are not capable of being performed due to the condition. They may be described as "objective" meaning there is objective evidence of activities/actions that cannot be undertaken because of lack of physical capacity, or "subjective" meaning activities/actions that cannot be undertaken based on the worker's report to the doctor (e.g., tolerance of the symptoms). Where an occupational requirement is just outside of a worker's physical limitation (e.g., worker states that he cannot stand for more than 15 minutes; but occupational requirement is for standing for 20 minutes), it may suggest that the occupational requirement is not "medically impossible" for the worker to perform.

⁹ Policy item #40.00.

responsibilities, physical requirements, training and/or education) that the occupation requires.

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

- the worker's transferable skills,¹⁰
- the worker's formal and informal education, and previous work experience; and
- the worker's post-injury functional abilities, including physical abilities.

The officer may also request an Ability To Adapt To Another Suitable Occupation Recommendation ("ATAR")¹¹, prepared by the VRC. The ATAR provides information about the worker's post-injury vocational capabilities and identifies occupations that the worker could perform without substantive vocational rehabilitation assistance.¹² It is designed specifically to address whether the worker retains the ability to adapt to another suitable occupation.

Where a worker is employed in more than one occupation at the time of injury, and is unable to continue in one of the pre-injury or similar occupations, the DA officer identifies the corresponding suitable occupation to the affected pre-injury 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.¹³

(E) Significant Loss of Earnings

Where a DA officer determines that the worker would be able to adapt to another suitable occupation, the DA officer also considers whether the worker would incur a significant loss of earnings in that alternative occupation.

¹⁰ In considering the worker's transferable skills, the officer looks at the skills that the worker currently holds or can easily attain without significant vocational rehabilitation assistance.

¹¹ The ATAR builds upon the systematic evaluation of the worker's transferable skills (found in the Composite Vocational Profile) and identifies occupations that correspond to the worker's post-injury vocational profile. Generally, the ATAR does not include reference to earnings potential, availability of occupations, general labour market information, worker preferences and/or age factors.

¹² Substantive vocational rehabilitation assistance may include: considerable skill enhancement, certification and/or other training—either formal or on the job. Minor vocational rehabilitation assistance may include: job search assistance, completion of a one day course, payment of a licensing fee, or lapsed standard first aid or other certification.

¹³ 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 DA 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*).

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 significantly higher than the average anticipated impairment of earning capacity, that it suggests that an award granted under this method is not appropriate.

While policy item #40.00 does not define a "significant loss of earnings" in terms of a benchmark dollar value or percentage differential, it is reasonable to conclude that a "significant loss of earnings" is a financial test that requires a comparison of the difference in values of a worker's earnings 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.

In determining the extent of any anticipated loss of earnings under the "so exceptional" test, the DA officer compares the worker's pre-injury occupational average earnings (gross) against the combined total of the post-injury suitable occupational average earnings (gross) and the amount of the section 23(1) award.¹⁴ The pre- and post-injury occupational average earnings are subject to

¹⁴ 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. Gross earnings are used as they reflect the typical level of remuneration in an employment relationship.

the statutory maximum. If the worker's pre-injury employment was on a less than full-time basis, the full-time occupational average earnings figure may be prorated accordingly. This would also apply where the worker's post-injury earning capacity is on a less than full-time basis.

The following formula illustrates the comparison:

$$\text{Pre-injury gross occupational average earnings} - (\text{Post-injury suitable gross occupational average earnings} + \text{section 23(1) award})^{15}$$

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

WorkSafeBC considers that a “significant loss of earnings” typically occurs where a difference between the worker's pre- and post-injury occupational average earnings is at least 25%, subject to an examination of the amount of the permanent functional impairment award.

Although it is generally accepted that a differential in the range of 25%, as described above, is 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 (gross) 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 DA officer determines whether the worker would incur a significant loss of earnings in adapting to the suitable occupation. The above formula is applied to the total pre-injury occupational average earnings (gross) and the total post-injury suitable occupational gross average earnings (gross). The result is evaluated to determine if the section 23(1) award provides appropriate compensation.

(F) Loss of Earnings Assessment Process

Where a DA officer determines that the worker meets the test set out in section 23(3) and (3.1), the officer makes a specific recommendation to the Disability Awards Committee regarding the worker's eligibility for a section 23(3) assessment. If the Disability Awards Committee approves the recommendation,

¹⁵ The pre- and post-injury gross occupational average earnings are subject to the statutory maximum and may be prorated where the worker's pre-injury employment or post-injury earning capacity is on a less than full-time basis.

the officer proceeds with the loss of earnings assessment.¹⁶ This assessment will usually include a request for completion of an employability assessment¹⁷ and considers the worker's earning potential in light of transferable skills and all possible rehabilitation measures that may be of assistance, including the possibility of retraining or other measures that may be appropriate to the worker.

After proceeding through the loss of earnings assessment process, the officer may conclude that the worker is not eligible for a loss of earnings award under section 23(3) even though initially the officer may have recommended that the worker be eligible for a section 23(3) assessment. Initially, it may have appeared that the worker would not be able to adapt to another suitable occupation without incurring a significant loss of earnings. However, the DA officer may conclude that, subsequent to the assessment, the worker is not eligible for a section 23(3) award as a result of additional skills gained or employment opportunities available to the worker following vocational rehabilitation assistance and effort.

CROSS REFERENCES:	See also Practice Directive #C6-1, <i>Permanent Partial Disability Benefits – Section 23(1)</i> .
HISTORY:	This item replaces Best Practices Information Sheet #17, <i>Permanent Disability Benefits – Section 23(3) (“So Exceptional” Test)</i> and the former BPIS#22. BPIS#17 replaced Practice Directive #46, <i>Permanent Disability Benefits – Section 23(3)</i> on August 25, 2006. Changes in practice regarding the determination of time of injury/similar occupation, essential skills of an occupation, and the ability to continue in the time of injury/similar occupation were added in May 2008.
APPLICATION:	This Practice Directive was developed to provide guidance on RSCM Policy item #40.00. The PD applies to all disability award decisions made on or after May 29, 2008.

¹⁶ The loss of earnings assessment process and decision is described in Policy items #40.10 to #40.14.

¹⁷ The employability assessment process may be waived by the DA officer where the worker's impairment is so great and obvious that the employability assessment process would prolong the loss of earnings award decision.