

PRACTICE DIRECTIVE #46

**PERMANENT DISABILITY BENEFITS -  
SECTION 23(3)**

**BACKGROUND**

Effective June 30, 2002, the *Workers Compensation Act* ("Act") was amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. As a result, the Panel of Administrators approved amendments to the Board's policies concerning permanent disability awards.

**EFFECTIVE DATE**

Please see Practice Directive #38A, *Effective Dates & Transition Rules* and Practice Directive #38B, *Recurrences*.

**LAW**

Section 23(3) of the Act provides:

*Subject to sections 34 and 35, if*

- (a) a permanent partial disability results from a worker's injury; and*
- (b) the Board makes a determination under subsection (3.1) with respect to the worker, the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between*
- (c) the average net earnings of the worker before the injury, and*
- (d) whichever of the following amounts the Board considers better represents the worker's loss of earnings:*
  - (i) the average net earnings that the worker is earning after the injury;*
  - (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.*

Section 23(3) (3.1) of the Act states:

*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.*

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Section 23(3)(3.2) states:

*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.*

### **POLICY**

*Rehabilitation Services & Claims Manual* ("RSCM") Volume II, Policy items #38.00, #40.00, #40.01, #40.10, #40.12, #40.13 and #40.30 have been amended to reflect the changes in the method of assessing permanent disability under section 23(3) of the Act.

### **Adjudicative Guidelines**

#### **(a) Early Investigations and Interventions**

The Case Manager is responsible for determining whether an injury to a worker has likely resulted in a permanent impairment. The Case Manager can make this determination through consultations or team meetings. If the worker's injury is unlikely to result in a permanent impairment, there is no referral to Disability Awards.

Through consultations and team meetings, including the 10-week rate review, the Case Manager will also determine whether the worker is able to return to his or her pre-injury employment and if not, determine whether any such inability is due to permanent restrictions resulting from the accepted condition.

If a permanent impairment appears likely and the impairment may prevent the worker from returning to the pre-injury job, the Case Manager will liaise with the Vocational Rehabilitation Consultant ("VRC") to determine whether vocational rehabilitation is appropriate or required to assist the worker in returning to work. Depending on the nature and severity of the injury, the Case Manager may also choose to involve an Officer from Disability Awards, a Medical Advisor and/or Psychologist. The team meeting will assist the Case Manager in determining whether the worker is medically fit to return to pre-injury employment.

If there are indications that the worker will have difficulty returning to his or her pre-injury employment for reasons related to permanent restrictions arising out of the injury, the team will also investigate whether the worker meets the "so exceptional" requirements of section 23(3) for assessment of permanent disability benefits. At the team meeting the Claims Adjudicator Disability Awards ("CADA") will determine what additional relevant information may be needed to complete a permanent partial disability assessment. The Case Manager, in consultation with the Officer in Disability Awards and the VRC, will arrange for this information to be gathered at the appropriate time in the worker's recovery.

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Information required may include a description of the essential skills required for the worker's occupation. Occupation for this purpose is defined by the collection of job titles that fall within a four digit occupation code as categorized by the National Occupational Classification ("NOC"). In describing the essential skills of an occupation, information may be gathered from a variety of sources including, but not limited to, data collected from specific jobs and other occupational descriptions such as is found in the NOC publications. Consideration will also be given to a worker's transferable skills and residual functional abilities.

If the worker was employed at more than one occupation at the time of injury, consideration would have to be given to the effects of the disability in each of the occupations. Disability Awards will be concerned with the impact of the disability in the long term and the skills associated with the worker's occupation, as opposed to the worker's actual job and fitness to return to that job.

Prior to medical plateau, another meeting should be held with VRC, the CADA, Medical Advisor and/or Psychologist, and Case Manager to discuss the claim and ensure that all the necessary information has been gathered.

### **(b) Disability Awards Process:**

Where a worker has a permanent partial disability, the Case Manager will refer the file to Disability Awards for an immediate section 23(1) assessment. See Practice Directive #45, *Permanent Partial Disability Awards – Section 23(1)*.

Where the worker is capable of returning to his or her occupation or an occupation of a similar type or nature, but has not done so for economic or other factors not related to the nature and degree of the injury, the worker is considered appropriately compensated under section 23(1). Where a combination of compensable and non-compensable factors result in an impediment for return to work, the file may be referred to Vocational Rehabilitation Services to determine if any assistance would be appropriate.

Where it appears that the worker may not return to his or her occupation or an occupation of a similar type or nature as a result of the permanent disability, but no decision has been rendered in that regard, the Case Manager will refer the file to Disability Awards to commence the process of determining whether the worker meets the "so exceptional" test in section 23(3). Any entitlement under section 23(3) will not be implemented, however, until a determination has been reached under section 23(1).

The CADA is responsible for making a recommendation regarding whether the "so exceptional" test has been met. The Medical Advisor may be asked to provide an opinion on whether the compensable injury makes it impossible to perform the essential skills of the worker's occupation. The VRC may be asked to provide an occupational analysis, transferable skills analysis, or other appropriate assessment to confirm the occupational skills possessed by or required by the worker. The CADA's decision will be

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based on the impact of the disability on the worker's ability to perform the essential skills needed to continue in the occupation at the time of injury or an occupation of a similar type or nature in the long term.

If the CADA considers that the "so exceptional" test is met, the file will be referred to the Disability Awards Committee to approve the recommendation. If the Committee agrees with the recommendation, the worker is entitled to a section 23(3) assessment.

Where a worker is eligible for a section 23(3) assessment, consideration is given to what the worker is earning after the injury as well as what the Board estimates the worker is capable of earning after the injury. The benefit will be based on 90% of the difference between the worker's average net earnings before the injury and average net earnings that the worker is earning or capable of earning in a suitable occupation after the injury. The worker's income tax status used for the pre-injury wage rate determination will also be used for the post-injury net earnings calculation. Where applicable, post-injury earnings will be adjusted by the Board's cost of living adjustment figures back to the date of injury or reopening.

Where a decision is made that a worker does not meet the "so-exceptional" test, the worker is considered appropriately compensated by the section 23(1) award.

### **So Exceptional**

The policy requires that three criteria must be satisfied 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;*

Policy defines skills as the learned application of knowledge and abilities.

Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills.

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.

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;*

A similar occupation is defined 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. 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

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code, or any one or more of the jobs under a similar four digit occupation, the worker does not meet the “so exceptional” test.

The medical evidence must confirm that the disability makes it impossible for the worker to perform the essential skills of the occupation. The duties for an occupation must be considered in terms of the essential skills necessary to perform those duties.

Skills are not to be confused with physical demands such as standing, sitting, etc. The impact of limitations on physical demands may be mitigated through workplace modifications and therefore, the worker would still be able to perform the essential skills of the occupation.

For example, an ironworker with a knee injury may not be able to return to his pre-injury job because it requires that he climb ladders several times a day, which he is no longer able to do. Climbing ladders would not necessarily be determined to be an essential skill for the occupation of ironworkers. The worker still has the skills to be an ironworker. The NOC four-digit code for ironworkers (7264) lists various jobs within that occupation, which a worker may still be able to perform, even with the knee injury.

For example, an electronics technician is required to have fine motor skills to perform the core duties of his occupation. If the technician sustains a back injury, he still retains the fine motor skills necessary to be an electronics technician. The worker may experience difficulty with physical activity of prolonged sitting or standing. However, these are physical demands, not skills of the occupation required to perform the duties of an electronics technician.

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.*

Where a worker is unable to return to the pre-injury occupation or a similar occupation, consideration will then be given to whether the worker can adapt to another suitable occupation. For this purpose a worker is considered to retain all the essential skills of the pre-injury occupation, with the exception of the limitations caused by the permanent disability. Pre-injury transferable skills (considering as well the possibility of enhancements or re-certifications, through vocational rehabilitation assistance) will also be included to determine the worker's residual (post-injury) skill set. Where the worker is considered able to return to a suitable occupation, it must further be determined whether the worker will incur a significant loss of earnings.

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For the purposes of the policy, a significant loss of earnings means the Board may conclude in these so 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. A loss of earnings is not sufficient to meet the requirements of the "so exceptional" test. Consideration must also be given to the nature of the section 23(1) award in relation to the Permanent Disability Evaluation Schedule and/or other schedules, judgements and considerations used to determine the functional impairment and whether these could not have anticipated this worker's disability and resulting loss of earnings capacity. In considering such loss, consideration may also be given to comparing the extent of loss through aggregate statistical references on average occupational earnings.

For example, a logging helicopter pilot suffers a moderate head injury and has residual audiovestibular disturbance assessed at 10% disability. The disability is such that it renders it impossible for him to meet the physical requirements for holding a helicopter pilot's license and he is also unable to return to a different job in the same occupation or a similar occupation. The 10% award may be appropriate compensation for the average worker. However, it may not represent appropriate compensation in the case of the helicopter pilot.

### **Section 23(3) Assessment**

Where a worker is considered to meet the "so exceptional" test, the worker will be entitled to a section 23(3) assessment, which includes an employability assessment. This will identify the suitable occupations that will maximize the worker's long-term earnings. This may include additional occupations in light of all reasonable vocational rehabilitation assistance that may be offered to the worker.

### **Permanent Disability Reviews**

The policy regarding reviews of section 23(3) awards remains unchanged substantively. See Policy item #40.30 of the RSCM.