

# DISCUSSION PAPER

## 1. TITLE

Loss of Earnings (“LOE”) Assessments

## 2. ISSUE

At issue is a review of the LOE assessment policy which establishes criteria for determining when the combined effect of a worker’s pre-injury occupation and disability is “so exceptional” that a permanent disability award based upon the worker’s loss of function is not appropriate. In cases where the loss of function award is not appropriate, a worker’s entitlement to an LOE award is assessed.

The current legislation and policy on LOE assessments resulted from the Bill 49 legislative changes in June 2002. It was recognized at that time that a future review of the new LOE assessment policy and practice would be required given the significant changes that were introduced into the workers’ compensation system.

## 3. BACKGROUND

A permanent partial disability award is granted once a worker's physical or psychological impairment has stabilized and it is considered to be permanent. The award compensates for the impairment of earning capacity resulting from the permanent impairment.

The *Act* sets out two methods of permanent partial disability assessment: the loss of function method under section 23(1) and the projected LOE method under section 23(3) of the *Act*. An overview of each is set out below.

### 3.1 Loss of Function Method

The use of the loss of function method is mandatory under the *Workers Compensation Act* (“*Act*”).<sup>1</sup> This method requires that WorkSafeBC (“WCB”) estimate the impairment of earning capacity from the nature and degree of the injury. The WCB is then directed to pay the worker a periodic payment that equals 90% of the WCB’s estimate of the loss of average net earnings resulting from the impairment.

The *Act* also provides that the WCB may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations

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<sup>1</sup> Section 23(1) of the *Act* and policy item #39.00, *Section 23(1) Assessment*, of the *Rehabilitation Services & Claims Manual* (“*RS&CM*”), Volume II, are set out in Appendix A.

which may be used as a guide in determining the compensation payable under the loss of function method.<sup>2</sup> Under this authority, the WCB has established the Permanent Disability Evaluation Schedule (“Schedule”).<sup>3</sup>

An award based upon the loss of function method reflects the average impact of a permanent physical impairment upon earning capacity. The intent is that the same percentage rate of disability is to be applied to all workers who suffer a similar work-related disability. The percentage of disability is then applied to the worker’s long-term average net earnings and the permanent disability award is 90 percent of this amount.

### **3.2 Projected Loss of Earnings Method**

The projected LOE method is designed to more closely approximate a worker’s loss of earnings that results from the impairment. An award based on the LOE method is calculated as the difference between the worker’s pre-injury earnings and what the worker is earning or is capable of earning in some suitable occupation after the injury. This award is intended to reflect a worker’s projected loss of earnings over the long-term.

A key aspect of the LOE assessment process is determining whether a worker is employable. In most cases this requires considerable vocational rehabilitation input.

Prior to the legislative changes that came into effect on June 30, 2002; the *Act* stated the following with respect to the assessment of LOE entitlement:

Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury...”

The *Act* gave the WCB the discretion to determine those “equitable” situations where the LOE method of assessment should be applied. The following section discusses how this discretion was applied in policy and practice.

### **3.3 The Dual System of Permanent Disability Award Assessment**

Prior to 1973, only the loss of function method of assessment was applied in determining a worker’s entitlement to a permanent disability award.

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<sup>2</sup> Section 23(2) of the *Act* and policy item #39.10, *Permanent Disability Evaluation Schedule*, of the *RS&CM*, Volume II, are set out in Appendix A.

<sup>3</sup> The Permanent Disability Evaluation Schedule attributes a percentage of total disability to each of the specified impairments.

Commencing in 1973, both methods of assessment were applied only in exceptional cases, specifically injuries involving the spinal column.

In 1977, following questions from the former Commissioners of the WCB about whether the usage of the loss of earnings method should be expanded, a Committee was struck to review 4,180 non-spinal column permanent partial disability awards. The review ran from October 1, 1977 to January 31, 1979, and the Committee determined that seven of the awards reviewed should have been calculated using the LOE method.

In a decision of the Commissioners in 1979, they rendered the following conclusions:<sup>4</sup>

In the case of non-spinal injuries, the evidence overwhelmingly supports the conclusion that awards based on the functional impairment method, with the use of the Disability Awards Evaluation Schedule as a guide, adequately represent the likely future loss of earnings of a worker.

They further concluded as follows:

We are satisfied that that system (i.e., the loss of function method) operates to the advantage of claimants and the vast majority of cases should be dealt with on that basis. Nevertheless, the exercise has pointed out those few exceptional cases where, in spite of the effectiveness of the percentages set out in the Schedule, some workers will lose earnings in the future in excess of the amounts yielded by application of the Schedule. We feel that Disability Awards Officers, and the Disability Awards Committee, should have the power in such exceptional cases to investigate, consider, and where appropriate, implement a pension based on the potential loss of earnings of the worker.

The use of both methods of assessment to determine a worker's permanent disability entitlement grew. In 1985, the former Commissioners established policy which expressly set out that the Disability Awards Department was to assess workers under both methods, with the worker receiving the higher of the two amounts calculated.<sup>5</sup>

Over the years, the assessment under both methods resulted in a sharp growth in the number of LOE awards, raising serious concerns about the long-term financial viability of the workers' compensation system.

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<sup>4</sup> Decision No. 297 (1979), 5 *WCR* 11.

<sup>5</sup> Decision No. 394 (1985), 6 *WCR* 23.

### 3.4 Core Services Review Report

As part of the 2002 Core Services Review of the workers' compensation system, the Core Reviewer examined the former permanent disability award system and made a number of recommendations. With respect to the 1985 policy to apply the LOE method in every case it results in a higher award, it was the Core Reviewer's opinion that this interpretation did not meet the original intent of the provision.<sup>6</sup>

The Core Reviewer recommended that the dual system of permanent disability assessment should be retained. However, he stressed that the emphasis must be placed upon utilizing the loss of function method when determining entitlement.

He recommended that the LOE method should only be used in "special instances" when the award calculated pursuant to the loss of function method is considered to be significantly inadequate. He considered that the determination of those situations where it was more "equitable" to apply the LOE method were a matter of policy and the responsibility of the governing body of the WCB to define. He noted that a proper determination of what is "equitable" cannot be based solely on one factor – which appears to be the focus of the policy which requires the LOE method be employed where it results in higher benefits.<sup>7</sup>

### 3.5 Current Permanent Disability Award System

On June 30, 2002, the Bill 49 legislation came into effect, which included significant changes to the permanent disability awards system. The legislation confirmed that a worker's entitlement to a permanent disability award must be assessed under the loss of function method. Policy now provides that the loss of function method is the primary means for calculating a permanent disability award.

The legislative changes confirmed that use of the projected LOE method is discretionary. In addition, two new provisions were introduced.<sup>8</sup> The first provision states that:

A payment may be made under subsection (3) only if the Board determines that the combined effect of a worker's occupation at the time of injury and a worker's disability resulting from the injury is so exceptional that an amount determined under the loss of function method does not appropriately compensate the worker for the injury. [emphasis added]

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<sup>6</sup> Page 204, Core Review Report.

<sup>7</sup> Page 205, Core Review Report.

<sup>8</sup> Sections 23(3.1) and (3.2) of the *Act*.

The second new provision requires that in making the above “so exceptional” determination, the WCB must consider the ability of the worker to continue in the worker’s occupation or to adapt to another suitable occupation.

Only where the combined effect is so exceptional that an amount determined under the loss of function method does not appropriately compensate a worker, will the WCB consider payment of the permanent partial disability award using the LOE method of assessment.

The LOE assessment policy that is the subject of this policy review aims to guide decision-makers through this very complex adjudication.<sup>9</sup>

Policy defines occupation broadly as a collection of jobs or employments that are characterized by a similarity of skills.<sup>10</sup> Policy also sets out the following criteria that must be considered and each must be satisfied in order for a worker to be assessed under the LOE method:

- 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; and
- 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.

Policy provides that the loss of function award may not appropriately compensate a worker in cases where the 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 must be considered unable to adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.

For the purposes of the policy, a significant loss of earnings means that the loss of earnings a worker will experience as a result of the combined effect could not have been anticipated under the loss of function method of estimating a worker’s long-term loss of earning capacity.

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<sup>9</sup> Policy item #40.00, *LOE Assessment, RS&CM*, Volume II is set out in Appendix A and includes the section 23(3) legislative provisions.

<sup>10</sup> Skills are defined in the policy as the learned application of knowledge and abilities.

Where a worker is found to satisfy each of the criteria in the policy, the WCB will then proceed with a determination of a worker's entitlement under the projected LOE method.

## **4. DISCUSSION**

### **4.1 Intent of the June 30, 2002 Legislation**

It is clear from the wording of the legislation that the loss of function method is intended to be the primary method of assessing a worker's entitlement to a permanent partial disability award. Even under the pre-June 30, 2002 system where workers received the higher of the two awards, the vast majority of workers received a permanent disability award based on the loss of function method of assessment. For example, 83% of workers in 2000 received a loss of function award.

The loss of function method provides compensation that reflects the average loss of earning capacity resulting from a disability. It is also intended to reflect 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 June 30, 2002 legislative changes have resulted in significant changes to the application of the projected LOE method of assessment. Under the former legislation, the words "where the board determines to be more equitable" were defined in policy so that both the loss of function and the LOE methods were calculated on every claim, with the worker receiving the higher of the two awards.

As a result of the legislation, the WCB may pay a worker an award based on the LOE method only where the so exceptional requirements are met. This necessitates that the WCB consider the worker's occupation at the time of injury, the disability resulting from the injury and the worker's ability to continue in their pre-injury occupation or to adapt to another suitable occupation. These considerations are quite different from simply calculating the loss of function and the LOE and granting the higher of the two awards.

The factors that the *Act* now require the WCB to consider appear to be aimed at identifying those "special instances" where a worker may be eligible for an LOE award.

## 4.2 Interpreting Key Aspects of the LOE Legislation

The current LOE assessment policy sets out the following example to illustrate when a worker might be considered so exceptional such that an LOE assessment would be undertaken. The policy provides as follows:

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.

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).

The challenge for the WCB is to provide appropriate guidance through policy on the application of the new legislation. Set out below is an overview of key aspects of the current LOE legislation and how they are being interpreted in the current policy and by appellate bodies.

### **(a) *Combined effect of pre-injury occupation and disability resulting from injury***

The current policy considers the combined effect of the occupation at the time of injury and the disability resulting from the injury with reference to a worker's ability to perform the essential skills needed to continue in the pre-injury occupation. The ability of a worker to perform the essential skills of the occupation, or an occupation of a similar type or nature, is seen as an indication that the worker can return to the pre-injury occupation and is therefore evidence that the combined effect is not so exceptional.

A significant area of debate with the current policy is with respect to identifying essential skills. Decision-makers currently rely primarily on the information provided by the National Occupation Classification ("NOC") to identify essential skills of an occupation rather than using a worker's actual pre-injury job skills and earnings. Other sources are used to obtain occupational skills and to verify labour market information, however, the NOC is considered the most reliable resource as it is the most well known and widely used in North America, albeit for different purposes.

The usage of the NOC stems in part from the definition of occupation that is set out in the policy. The policy broadly defines occupation as a collection of jobs or employments that are characterized by a similarity of skills. This approach has

been criticized by stakeholders and in appeals as being inconsistent with the ordinary meaning of that term. It has been put forward that the definition should reflect common definitions found in, for example, the *Gage Canadian Dictionary* which defines occupation as one's employment or trade.

On appeal the issue has been raised that the skills identified for an occupation need to be related to the worker's actual pre-injury job.<sup>11</sup>

The following additional issues have also been raised on essential skills:

- Practice currently provides that manual occupations do not have essential skills. In a recent Workers' Compensation Appeal Tribunal ("WCAT") decision the panel concluded that although in most cases heavy physical labour is not a skill in the sense that it is a learned application of knowledge and abilities, it is a necessary skill for a trades helper or labourer.<sup>12</sup>
- Questions have been raised regarding whether physical demands such as standing, sitting, lifting or carrying for prolonged periods, should be considered essential skills of an occupation.
- Another question raised is whether policy should provide that the WCB must also consider whether the worker has the physical ability to apply the essential skills. For example, a roofer may be able to apply shingles to a roof after his or her back injury. However, if the back injury prevents the worker from being able to climb the ladder to get to the roof, should the WCB determine that the worker can no longer perform the essential skills of the occupation.

**(b) Combined effect is so exceptional that the loss of function award does not appropriately compensate the worker**

The current policy provides that the combined effect is so exceptional when the worker is no longer able to perform the essential skills needed to continue in the pre-injury occupation or an occupation of a similar type or nature.

Policy states that the loss of function award does not appropriately compensate a worker in cases where:

- the 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; and
- the worker is considered unable to adapt to another suitable occupation without incurring a **significant loss of earnings** due to the injury.

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<sup>11</sup> Review Division Decision #R0069334.

<sup>12</sup> WCAT Decision #2004-06402.

The word “impossible” has generated considerable discussion on appeal with respect to its meaning. For example, in practice, the impossible requirement is considered to be a more stringent test than “unable”. As a result, a worker may be found to be unable to return to his or her pre-injury job, but it is not impossible for the worker to return to the pre-injury occupation as determined with reference to the NOC. However, a recent Review Division decision stated that impossible is the same as not able, which reflects a different approach than in practice.<sup>13</sup>

The phrase “significant loss of earnings” has also been questioned by stakeholders and the appellate bodies. A number of WCAT panels have 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. However, there is no basis for a percent threshold in the legislation and to place one in the policy would most likely be subject to challenge on appeal in individual claims.

In regards to how the WCB currently determines whether there is a “significant loss of earnings”, the current policy does not direct a comparison of pre-injury and post-injury earnings as long as the worker is capable of performing the essential skills of the occupation or an occupation of a similar type or nature. Where the worker is able to perform the essential skills, the WCB concludes that the worker’s circumstances are not so exceptional and the loss of function award is appropriate.

This approach is in keeping with the policy statement that a worker can incur a loss of earnings and not be entitled to an award based on the LOE method. However, it has been argued that a comparison of earnings is required in all claims under consideration in order to determine whether a worker is incurring a significant loss of earnings such that the loss of function award does not appropriately compensate the worker.

**(c) Ability of a worker to continue in the pre-injury occupation or adapt to another suitable occupation**

The *Act* requires that, in making a so exceptional determination, the WCB must consider the worker’s ability to continue in his or her occupation at the time of injury or to adapt to another suitable occupation.

As part of this consideration, a question has arisen regarding whether the WCB should specifically take into account non-compensable factors such as worker’s age, language and the location of the potential occupation. There is no specific direction within the current policy to consider these factors.

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<sup>13</sup> Review Division Decision # R0069334.

In a recent Review Division Decision, the Review Officer stated that these factors need to be considered when determining whether an occupation is suitable and whether the worker can continue to perform the pre-injury occupation.<sup>14</sup> In addition, the Review Officer noted that a decision-maker cannot presume that because the worker was previously working in an occupation, that he or she can actually perform the essential skills required to continue in the occupation.

The Core Reviewer also commented on the impact that non-compensable personal factors may have on a worker's ability to find alternate employment. He considered that on rare occasions these factors would need to be considered as part of the LOE assessment, however, he made no comment on their application to the so exceptional determination.

### 4.3 Statistical Overview of the Permanent Disability Award System

The nature of the life of a claim requires the WCB to adjudicate claims under both the former and current provisions. Permanent disability claims are complex and in many cases require significant medical and vocational rehabilitation. As a result, the WCB will continue to adjudicate claims under the former provisions for quite some time. This also means that it has taken a couple of years for claims to be adjudicated under the current LOE provisions.

In 2000, 4,601 loss of function awards and 800 LOE awards were granted. In 2006, there were 6,311 loss of function awards granted under both the current and former provisions and 653 LOE awards granted under both former and current provisions. The table set out below provides an overview of the volume of awards granted between 2000 and June 2007.

<b>Volume of Permanent Partial Disability Awards</b>								
<b>2000 to June 2007</b>								
	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007 YTD</b>
<b>Current Provisions</b>								
<b>Loss of Function</b>	0	0	1	668	2,235	4,244	4,322	2,537
<b>Loss of Earnings</b>	0	0	0	0	3	11	39	30
<b>Former Provisions</b>								
<b>Loss of Function</b>	4,601	4,784	5,819	5,623	3,633	2,161	1,989	779
<b>Loss of Earnings</b>	800	945	927	1,010	990	737	614	237

<sup>14</sup> Review Division Decision #R0069334.

The average dollar amount of the current provision of loss of function awards in 2006 was \$23,438, while the average dollar amount for the current provision LOE awards was \$100,332. By comparison, in 2000 the average dollar amount for a loss of function award was \$38,214, while the average dollar amount for an LOE award was \$217,113. Some of the difference between the average awards may be due to the legislative changes in 2002 which resulted in the conclusion of benefits at age 65 or retirement, whichever is later, and the provision of a retirement benefit. Under the former provisions, permanent disability award benefits were paid for life.

As noted previously, a key aspect of the new legislation is the so exceptional test. Between February 2006 and June 2007 there were 1,992 claims considered under the so exceptional test. Of these, 1,916, or approximately 96%, did not meet the so exceptional test. The vast majority of these claims did not meet the test as it was determined that the worker was capable of performing the essential skills of either the pre-injury occupation or a similar occupation. During the same period, 76 claims, or approximately 4% of all claims considered, met the so exceptional test and were assessed for an LOE award.

The current LOE policy and practice reflect the view that the LOE method of permanent disability assessment was to be applied in only exceptional circumstances. By limiting the application of the administratively onerous and costly LOE assessment process, it was anticipated that administrative costs and benefit costs would be reduced as was the intent of the legislation.

However, from an administrative perspective, WCB officers invest a significant amount of time and effort on each claim considered under the so exceptional test. Anecdotal evidence indicates that the current policy structure is requiring greater effort and resources to render a decision on whether a worker meets the so exceptional test than under the former provisions of the *Act*. As a result, despite the legislative intent of restricting the use of the LOE method of assessment, there has been no corresponding administrative streamlining.

The WCB also recognized that the new LOE legislation would require an even greater focus on return to work ("RTW") for injured workers, with this work commencing earlier in the claim. The Vocational Rehabilitation Services Department focuses on achieving positive RTW outcomes in consultation with injured workers, employers, unions and health care providers. The RTW percentage has gone up each year since 2001. As illustrated in the table below, the 2007 year-to-date RTW percentage is 81%, the highest ever recorded by the WCB.

<b>Return to Work Outcomes</b>								
<b>2000 to 2007</b>								
	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>
<b>RTW Percentage</b>	65.6%	57.2%	60.4%	63.0%	67.8%	70.4%	77.0%	81% YTD
<b>RTW Closures</b>	1,700	1,662	1,752	1,755	2,019	1,888	1,986	1,832*
<b>RTW Pre-Injury Employer</b>	725	690	739	688	958	852	932	916*
<b>RTW New Employer</b>	876	893	923	981	975	939	960	868*
<b>Self-Employment</b>	99	79	90	86	86	97	94	48*
<b>Non-RTW Closures</b>	890	1,241	1,153	1,037	958	795	592	430*

\* Projections based on data as of June 2007.

The above table also illustrates that the number of non-RTW closures has dropped over the 2001 to 2007 time period. In June 2007, the Vocational Rehabilitation Services Department completed a Non-RTW closure audit to analyze the reasons for closure. The audit examined 182 cases that had been closed between January and May 2007. Of the 182 cases closed:

- 60 workers were still actively looking for employment;
- 14 workers were deemed unemployable;
- 72 workers had removed themselves from the workforce. Reasons included waiting for appeals, choosing not to participate in job search, not looking for work and personal choice,
- 15 cases were closed due to medical reasons;
- 13 workers had retired; and
- 8 workers had declined a job opportunity.

## **5. OTHER JURISDICTIONS**

No other jurisdiction in Canada has a permanent partial disability award system that is comparable to the British Columbia system. The vast majority of jurisdictions provide a non-economic loss lump sum benefit with an actual loss of earnings periodic benefit. As a result, an analysis of other jurisdictional approaches is not helpful in identifying possible alternative approaches to the loss of earnings assessment policy.

## **6. QUESTIONS FOR CONSIDERATION**

Given the significance that the LOE method of assessment has on the workers' compensation system, the PRD wishes to seek stakeholder feedback on the following questions:

- 1. What is the relationship in terms of compensation entitlement between the loss of function section 23(1) provision and loss of earnings section 23(3) provision? What are the differences in the compensation payments contemplated between the two provisions?**
- 2. What, in your view, was the intent of section 23(1) and section 23(3)?**
- 3. Should the WCB be implementing the loss of function provisions under section 23(1) and section 23(2) of the Act in a different manner? Should a rating schedule be used exclusively, sometimes or at all?**
- 4. What are the key legislative provisions in sections 23(1) and 23(3) in regard to which the WCB must develop policy?**
- 5. Given the wording of the section 23(1) loss of function provision, should the section 23(3) loss of earnings provision be given a very limited application?**
- 6. What factors would determine 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 section 23(1) does not appropriately compensate the worker?**
- 7. What does "appropriately compensate the worker" mean? What factors would demonstrate that a worker was not appropriately compensated under section 23(1)?**
- 8. How should policy define "occupation"?**

## 7. CONSULTATION

Stakeholders are invited to provide feedback on the discussion paper, options, draft policy, and any additional comments that may be relevant to the issue.

Stakeholder comments will be accepted until **October 31, 2007**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

By mail: Susan Hynes  
Director, Worker and Employer Policy  
Policy and Research Division  
WorkSafeBC  
P.O. Box 5350, Stn. Terminal  
Vancouver, B.C. V6B 5L5

By fax: 604 279-7599

By e-mail: [policy@worksafebc.com](mailto:policy@worksafebc.com)

WorkSafeBC's governing body, the Board of Directors, will consider the options expressed by stakeholders before it adopts any amendments to the current policies.

Please note that all comments become part of the Policy and Research Division's database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.

## APPENDIX A

### LOSS OF FUNCTION LEGISLATIVE AND POLICY PROVISIONS

#### **Section 23(1) of the *Workers Compensation Act* (“*Act*”):**

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

- (a) estimate the impairment of earning capacity from the nature and degree of the injury, and
- (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.

#### **Policy item #39.00, Section 23(1) Assessment, Rehabilitation Services & Claims Manual (“*RS&CM*”), Volume II**

Section 23(1) of the *Act* provides:

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*

- (a) estimate the impairment of earning capacity from the nature and degree of the injury, and
- (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.

(emphasis added)

In all cases where a permanent partial disability results from a worker's injury, the Board must assess the worker's entitlement to a permanent partial disability award under section 23(1) of the *Act*. Section 23(1) is a mandatory legislative provision which sets out the rule the Board follows in determining a worker's impairment of earnings capacity resulting from a work injury.

The percentage of disability determined for the worker's condition 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.

A permanent partial disability award calculated under section 23(1) also reflects such factors as:

- short term fluctuations in the compensable condition;
- reduced prospects of promotion;

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- restrictions in future employment;
- reduced capacity to compete in the labour market; and
- variations in the labour market.

In assessing a worker's entitlement to a permanent partial disability award under section 23(1), the Board may make reference to section 23(2) of the *Act*. Section 23(2) of the *Act* provides

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.

Once the percentage of disability is determined, it is applied to the worker's long term average net earnings, and the permanent partial disability award is 90% of the amount so determined. The permanent partial disability award is granted following the determination of a worker's entitlement under section 23(1) of the *Act*.

Under the section 23(1) method of permanent partial disability assessment, a worker's percentage of disability is expressed as a percentage of total disability, with one hundred percent (100%) being the maximum possible rating for a totally disabled worker. A worker's percentage of permanent partial disability is based on the whole person. A worker, therefore, cannot be more than 100% disabled as a result of a work injury or combination of injuries.

## APPENDIX A

### LOSS OF FUNCTION LEGISLATIVE AND POLICY PROVISIONS

#### Section 23(2) of the Act:

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.

#### Policy item #39.10, *Permanent Disability Evaluation Schedule, RS&CM, Volume II*

Section 23(1) awards may be made with reference to the *Permanent Disability Evaluation Schedule* ("Schedule"), which is set out in Appendix 4. This is a rating schedule of percentages of disability for specific injuries or mutilations. (3)

The *Schedule* is a set of guide-rules, not a set of fixed rules. The Board officer in Disability Awards is free to apply other variables in arriving at a final award; but the "other variables" referred to means other variables relating to the degree of physical or psychological impairment, not other variables relating to social or economic factors, nor rules (including schedules and guide-rules) established in other jurisdictions. In particular, the actual or projected loss of earnings of a worker because of the disability is not a variable which can be considered. (4)

In cases where the specific impairment is not covered by the *Schedule*, but the part of the body in question is covered, the Board officer in Disability Awards must first determine the percentage loss of function in the damaged area. This determination is based on the findings of the section 23(1) evaluation and other medical and non-medical evidence available. The final award is arrived at by taking this percentage of the percentage allocated in the *Schedule* to the disabled part of the body. Because the *Schedule* is used in the calculation, this type of award is still considered as a scheduled one. For example, the amputation of an arm down to the proximal third of the humerus or its disarticulation at the shoulder is scheduled at 70% of total disability. Suppose a worker suffers a severe crush injury to the arm which culminates in a permanent loss of half its function. The final assessment would be 50% of 70%, i.e. 35% of total disability.

**EFFECTIVE DATE:** August 1, 2003  
**APPLICATION:** To all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.

## APPENDIX A

### LOSS OF EARNINGS LEGISLATIVE AND POLICY PROVISIONS

#### Policy item #40.00, Section 23(3) Assessment, RS&CM, Volume II

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.
- (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.
- (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 injury or to adapt to another suitable occupation.

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 the Board determine whether the combined effect of a worker's occupation at the time of injury and a 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. Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills.

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For the purposes of determining whether the worker meets the test set out under section 23(3) and (3.1), the Board must consider the combined effect of a worker's occupation at the time of injury and the resulting disability. 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 following is a list of criteria that must be considered under section 23(3) and (3.1). Each of these 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.

Skills are defined in this context as the learned application of knowledge and abilities.

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.

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.

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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### **LOSS OF EARNINGS LEGISLATIVE AND POLICY PROVISIONS**

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.

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).