



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1586/17

BEFORE: A.T. Patterson: Vice-Chair

HEARING: May 23, 2017 at Toronto
Oral

DATE OF DECISION: September 15, 2017

NEUTRAL CITATION: 2017 ONWSIAT 2827

DECISION UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) C. Marr
dated May 8, 2015

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not participating

Interpreter: H. Goel, Hindi

**Workplace Safety and Insurance
Appeals Tribunal**

505 University Avenue 7th Floor
Toronto ON M5G 2P2

**Tribunal d'appel de la sécurité professionnelle
et de l'assurance contre les accidents du travail**

505, avenue University, 7^e étage
Toronto ON M5G 2P2

REASONS

(i) Introduction

[1] The worker appeals a decision of the ARO, which concluded that the medical treatment provided and the referral to Work Transition services in 2010 were appropriate, that the revised Work Transition plan and Suitable Occupation were suitable, and that the partial loss of earnings (LOE) benefits based on a deemed ability to work 20 hours a week in the Suitable Occupation was correct.

[2] At the outset of the hearing the worker's representative indicated that the worker was withdrawing her appeal with respect to the appropriateness of the medical treatment provided and referral to Work Transition services.

[3] An interpreter of the English and Hindi languages, H. Goel, attended the hearing.

(ii) Issues

[4] The issues under appeal are as follows:

1. Suitability of the Work Transition (WT) plan and Suitable Occupation (SO) of Other Elemental Service Occupation, and
2. Quantum of loss of earnings (LOE) benefits from April 23, 2012 to age 65.

(iii) Background

[5] The following are the basic facts.

[6] The now-51-year-old worker started with the accident employer, a coffee shop, in July 2004.

[7] She had two compensable accidents. The first accident occurred on August 3, 2004. On that occasion she slipped and fell on her right knee. She was treated that same day at a local hospital. X-ray imaging revealed a comminuted non-displaced transverse fracture of the right patella. Initial entitlement to benefits was granted.

[8] By September 20, 2004, X-rays indicated that a radiological union was evident and the worker was encouraged to be more active and increase her walking. She returned to work on October 5, 2004, at 6 hours a day, and increased her daily hours to seven the following week.

[9] On October 19, 2004, she had a second slip and fall accident. In this second accident, she had a second patellar fracture of the right knee.

[10] X-ray imaging performed on December 15, 2004, and January 26, 2005, indicated that the "fracture is essentially healed with no fracture lines apparent [...] The alignment is anatomical. There is disuse osteoporosis. No new remarkable findings are appreciated." Nonetheless, the worker continued to have weakness of the quadriceps and began complaining of right hip pain in March 2005; continued physiotherapy was recommended. She was referred to the Knee and Hip Specialty Clinic where she was examined on April 29, 2005, May 26, 2005, and June 22, 2005.

- [11] The worker was offered modified work on a graduated basis starting on July 18, 2005. The worker participated in the modified work, but complained of being unable to extend her hours.
- [12] On September 13, 2006, orthopaedic surgeon Dr. B.V. McGoey, noted pain behaviours, and observed that the patella had healed in an elongated position and “does indeed sit it low on the femur.” He further noted: “This woman has chronic pain syndrome. She feels very strongly that she is never going to be able to work again.”
- [13] On July 11, 2007, Board Medical Consultant Dr. Hokim provided the following opinion with respect to a diagnosis and entitlement to benefits for CPD:
- The first clear implication of CPD is Dr. McGoey 9/06. Unfortunately her fam MD is enabling her by prescribing rest from Dec 05 to date. Clearly 1.5 years of bed rest will lead to mental and physical deconditioning. She has been attending her fam MD about every 2-4 wks acc these Rx notes.
- I note her young age thus she should be able to do something at least part time. She is partial.
- Before declaring MMR, one should offer her HRC or CBI Pain Mgmt program near her domicile... She will have CPD PI.
- [14] Entitlement to benefits for CPD, including a non-economic loss (NEL) award, were granted. The worker was assessed by psychiatrist Dr. L. Kiraly on February 8, 2008. Further to that assessment a 30% NEL award was granted. The NEL quantum was increased further to an ARO decision dated August 13, 2009. That ARO decision also granted entitlement for further psychological counselling.
- [15] In 2009, the worker was referred to, and participated in, a Functional Restoration Program. She was subsequently referred to Work Transition services and a psychovocational assessment was performed on October 29 and November 4, 2010. The worker objected to the decision to refer her to WT services.
- [16] The worker nonetheless participated in WT services, but struggled with the program. The Suitable Occupation was changed to Other Elemental Service Occupations. The worker also objected to this WT plan. At the conclusion of the WT services, the worker remained unemployed. Her ongoing LOE benefit was calculated on a deemed earning capacity of \$10.25 an hour. The ARO decision under appeal increased the worker’s LOE benefit by finding that the worker was capable of working only 20 hours a week.
- (iv) **Law and policy**
- [17] Since the worker was injured in 2004, the *Workplace Safety and Insurance Act, 1997* (the “WSIA”) is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.
- [18] Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280*.
- [19] The standard of proof in workers’ compensation proceedings is the balance of probabilities. Pursuant to subsection 124(2) of the WSIA, the benefit of the doubt is resolved in

favour of the claimant where it is impracticable to decide an issue because the evidence for and against the issue is approximately equal in weight.

[20] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #9, would apply to the subject matter of this appeal:

- Package # 226 – Final LOE Review – benefits from July 15, 2011 to February 14, 2013
- Package # 229 – Work Transition & Suitable Occupation – from December 1, 2010 to July 14, 2011
- Package # 300 – Decision Making/Benefit of Doubt/Merits and Justice.

[21] I have considered these policies as necessary in deciding the issues in this appeal, in particular:

- *Operational Policy Manual* (OPM) Document No. 19-03-03, “Determining Suitable Occupation, dated December 1, 2010”.

(v) Analysis

(a) Suitability of the WT plan and (SO) of Other Elemental Service Occupation

[22] The worker’s representative argued that the evidence supports a finding that the worker was competitively unemployable at the time the second WT plan was formulated and remains so. For the reasons which follow, I agree with this argument.

[23] Dr. L. Kiraly, the psychiatrist who assessed the worker for the purposes of rating the worker’s NEL award for CPD, wrote in her report dated February 8, 2008, the following:

- “The worker uses a cane to help her walk slowly,”
- “she is severely depressed. The Beck Self-Rated Depression Inventory confirms these clinical findings. [...] She has typical vegetative symptoms of poor sleep, appetite and libido. She has morbidness and suicidal thoughts. She has fatigue and irritability.”
- “The activities of daily living are severely affected. She needs helps [sic] with basic functions of self-care and personal hygiene.”
- “Her attention, concentration and memory are affected. The cognitive difficulties are due to her sleep problems and chronic pain and chronic depression. It is difficult for her to retain what she reads because of the poor concentration.”

[24] Dr. Kiraly concluded:

Receiving adequate treatment for her chronic pain and chronic depression including antidepressants and support would reduce her suffering but it would not change the overall prognosis in terms of work functions since there is chronicity. She has a poor prognosis. She is not a good rehabilitation candidate.

[25] The findings of the psychovocational report of November 11, 2010, are consistent with Dr. Kiraly’s professional opinion. The worker’s intellectual capacity and cognitive abilities were assessed as within the lowest percentiles. Psychometrist T. Palantzas and psychologist K. Zakzanis concluded: “For direct placement with a period of on-the-job training [the worker] could, in principle, consider some occupations within the following minor group areas, providing

they are within her physical restrictions." The "minor group areas" of employment were retail salespersons and sales clerks, security guards, other occupations in travel, accommodation, amusement and recreation, and other elemental service occupations.

[26] The worker participated in WT services which consisted of literacy and numeracy upgrading, and vocation specific assignments. The worker's attendance was relatively good but she took extended breaks, reportedly due to pain. The worker reported having significant difficulties with mathematics as a result of her cognitive and memory difficulties.

[27] She then participated in a job search with the assistance of the WT service provider. Two potential employers, both movie theaters, indicated that positions were available but that ticket takers were required to stand for extended periods of time and should also be able to perform light cleaning, stocking concession stands and the like. The WT service provider's efforts at finding suitable entry-level elemental service occupation employment for the worker were unsuccessful.

[28] In my view, the evidence concerning the worker's compensable pain symptomology, her related cognitive and affective impairments, in addition to her age and lack of a driver's license, support a finding that she is competitively unemployable. I find that the worker is incapable of remunerative work and, therefore, the SO of Other Elemental Service Occupation is unsuitable.

(b) Quantum of loss of earnings (LOE) benefits from April 23, 2012 to age 65

[29] It follows from the determination that the worker is competitively unemployable that she is entitled to full LOE benefits from April 23, 2012 to age 65.

DISPOSITION

[30] The appeal is allowed.

DATED: September 15, 2017

SIGNED: A. T. Patterson