



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3453/18

BEFORE:

J.E. Smith: Vice-Chair

HEARING:

December 7, 2018 at Toronto
Written

DATE OF DECISION:

January 9, 2019

NEUTRAL CITATION:

2019 ONWSIAT 87

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decisions dated
May 30, 2018 and June 6, 2018

APPEARANCES:

For the worker:

R. Fink, Lawyer

For the employer:

Not participating

Interpreter:

N/A

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 and background to appeal proceedings

- [1] The worker appeals two ARO decisions. In the first decision, dated May 30, 2018, the ARO confirmed the worker's entitlement to partial loss of earnings (LOE) benefits from December 9, 2014 to May 15, 2017. In the second decision, dated June 6, 2018, the ARO increased the worker's non-economic loss (NEL) award, for psychotraumatic disability, to 20%.
- [2] By way of background, the worker was injured at work on January 18, 2012, while working as a machine operator. Specifically, he pulled on the boot of a press thereby straining his left shoulder. He attempted to return to modified work with the accident employer until April 2012 when he was laid off by the employer. He was paid full LOE benefits from this date as a result of a 2013 ARO decision.
- [3] Following his layoff, the WSIB (the Board) referred the worker for work transition (WT) services. The worker underwent a psychovocational assessment in July 2013. A WT plan was developed which initially contemplated retraining for work in the suitable occupation (SO) electronics assembly. The WT plan consisted of a 26-week ESL program, which commenced on April 28, 2014, and a one month job placement. The goal of ESL upgrading was to improve the worker's English to a Canadian Language Benchmarks (CLB) level 6, from the level 2 he had been assessed at in 2013, in order to prepare him for employment in the SO. By the end of the WT program, the worker had achieved a CLB level 3 in listening, speaking, reading and writing English. The worker was not employed at the end of the WT plan, in October 2014, and his LOE benefits were adjusted based on mid-level wages achievable in the electronics assembly SO.
- [4] Subsequently, the WSIB's Medical Consultant found that the worker's tendonitis in the left shoulder, and myofascial pain, were compatible with the accident history. He was therefore granted entitlement, retroactively, for these conditions and the related surgery he underwent on October 28, 2014.
- [5] The Board accepted that the worker's compensable left shoulder injury was permanent. He was granted a NEL award of 11% for this permanent impairment.
- [6] The worker was retroactively awarded full LOE benefits for the October 2014 surgery and the period of recovery, to December 9, 2014.
- [7] The worker underwent a further surgery to the left shoulder on June 15, 2015 due to the failed surgery performed in October 2014. The Board accepted that the surgery was required as a result of the compensable injury but denied LOE benefits in relation to it on the basis that the worker had been unemployed prior to the surgery.
- [8] The WSIB (the Board) revisited the suitability of the electronics assembly SO in late 2016 following the submission by the worker's representative of a Vocational Consultant's report which stated that the electronics assembly SO was not suitable for the worker. On January 9, 2017, the Case Manager referred the issue of the suitability of the SO for reconsideration to a WT specialist. The Board referred the worker for a second psychovocational assessment in November 2017. In that assessment, his English skills were reported as Grade 3.8 reading, Grade 1.7 sentence comprehension, and Grade K.9 spelling. His math computation was reported to be at a Grade 5.1 level. Following that assessment, the Case Manager found that the SO remained suitable, but adjusted the worker's LOE benefits from December 9, 2014 to

May 15, 2017 (the date he began WT again) based on \$11.25 per hour, the deemed entry level wage in the SO. Full LOE benefits were granted beyond May 15, 2017 while the worker participated in WT services, and specifically further ESL classes, as the Case Manager accepted that the worker's English skills were not at a level that would allow him to work in the electronics assembly SO.

[9] In the May 2018 decision, the ARO denied the worker's claim for full LOE benefits from December 9, 2014 to May 15, 2017.

[10] The worker was also granted entitlement for psychotraumatic disability related to his compensable left shoulder injury. The Board accepted that the impairment was permanent, recognized with a 15% NEL award for the condition in March 2016. The worker objected to the NEL quantum. In the June 6, 2018 decision, the ARO increased the NEL award for psychotraumatic disability to 20%.

[11] The worker appeals the foregoing ARO decisions. The issues under appeal are as set out below.

(ii) Issues

[12] The issues under appeal are as follows:

1. The quantum of the worker's NEL award for psychotraumatic disability; and,
2. The quantum of the worker's LOE benefits entitlement from December 9, 2014 to May 15, 2017.

(iii) Law and policy

[13] Since the worker was injured in 2012, 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.

[14] Section 126 requires the Tribunal to apply Board policy when making its decisions.

[15] The standard of proof applicable in workers' compensation proceedings is the balance of probabilities. Pursuant to section 124(2), the benefit of the doubt is given to the claimant in resolving an issue where the evidence for and against is approximately equal in weight.

[16] Section 46 of the WSIA provides that if a worker's injury results in permanent impairment, the worker is entitled to compensation for non-economic loss. "Impairment" means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss. "Permanent impairment" means impairment that continues to exist after the worker reaches maximum medical recovery.

[17] Section 47 of the WSIA obliges the Board to determine the degree of permanent impairment "expressed as a percentage of total permanent impairment." Legislation and Board policy provide that the degree of a worker's permanent impairment is determined in accordance with the prescribed rating schedule or criteria, any medical assessments, and having regard to the health information on file. Specifically, the impairment determination must be made in

accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd edition (revised) ("the AMA Guides"), which is the prescribed rating schedule.

[18] The Board has adopted specific rating schedules for impairment due to psychological disability, fibromyalgia, chronic pain and other conditions. In particular, Board *Operational Policy Manual* (OPM) Document, No. 18-05-11 provides the following rating scale for compensable, permanent non-organic impairments:

Mental & Behavioural Disorders Rating Scale

The following scale applies to the assessment of permanent impairment benefits for psychotraumatic disability, chronic pain disability, and fibromyalgia syndrome.

Class 1 - No Impairment (0%) - No impairment noted

No impairments noted.

Class 2 - Mild Impairment (5% -15%) - Impairment levels compatible with most useful function

There is a degree of impairment of complex integrated cerebral functions, but there is ability to carry out most activities of daily living as well as before. There is also some loss in personal or social efficacy and the secondary psychogenic aggravations are caused by the emotional impact of the accident.

There is mild to moderate emotional disturbance under ordinary stress. A mild anxiety reaction may be apparent. The display of symptoms indicates a form of restlessness, some degree of subjective uneasiness and tension caused by anxiety. There are subjective limitations in functioning as a result of the emotional impact of the accident.

Class 3 - Moderate Impairment (20% - 45%) - Impairment levels compatible with some but not all useful function

There is a degree of impairment of complex integrated cerebral functions such that daily activities need some supervision and/or direction. There is also mild to moderate emotional disturbance under stress.

In the lower range of impairment the worker is still capable of looking after personal needs in the home environment but, with time, confidence diminishes and the worker becomes more dependent on the members of the family in all activities. The worker demonstrates a mild episodic anxiety state, agitation with excessive fear of re-injury, and nurturing of strong passive dependency tendencies.

The emotional state may be compounded by objective physical discomfort with persistent pain, signs of emotional withdrawal and depressive features, loss of appetite, insomnia, chronic fatigue, low noise intolerance, mild psychomotor retardation and definite limitations in social and personal adjustment within the family. At this stage, there is clear indication of psychological regression.

In the higher range of impairment, the worker displays a moderate anxiety state, definite deterioration in family adjustment, incipient breakdown of social integration, and longer episodes of depression. The worker tends to withdraw from the family, develops severe noise intolerance and a significant diminished stress tolerance. A phobic pattern or conversion reaction will surface with some bizarre behaviour, a tendency to avoid anxiety-creating situations, with everyday activities restricted to such an extent that the worker may be homebound or even roombound at frequent intervals.

Class 4 - Marked Impairment (50% - 90%) – Impairment levels significantly impede useful function

There is a degree of impairment of complex integrated cerebral functions that limits daily activities to directed care under confinement at home or in other domicile. The worker

clearly displays chronic limitation of adaptation and function in the home and outside environment that ranges from moderate to severe. The worker is withdrawn, forgetful, unable to concentrate, and needs continuous emotional support within the family setting. The worker is incapable of self-care and neglects personal hygiene.

There is a moderate to severe emotional disturbance under ordinary to minimal stress, which requires sheltering. There may be an obvious loss of interest in the environment and the worker becomes extremely irritable, showing significant emotional lability, changes of mood and uncontrolled outbursts of temper. The worker may be severely depressed with outstanding features of psychomotor retardation and psychological regression.

Class 5 - Extreme Impairment (95%) - Impairment levels preclude useful function

There is such a degree of impairment of complex integrated cerebral functions that the individual is unable to care for self in any situation or manner. There is severe emotional disturbance that continually endangers self or others.

(iv) Analysis

[19] This file was referred to me for determination by the Tribunal's Early Intervention Assessment project. After reviewing the file documentation in context with the applicable law and policy, I am satisfied that this appeal should be allowed. My reasons for arriving at this conclusion are as follows.

[20] First, I accept that an increase in the NEL quantum for psychotraumatic disability is appropriate, to 25%, as proposed by the worker's representative. I find that the medical evidence before me establishes that the worker suffers with a moderate depressed mood, anxious ruminations, low energy, and concentration and memory issues due to his pain associated with the compensable left shoulder impairment. I find this places the worker within the lower end of the moderate class 3 rating, under OPM Document No. 18-05-11, as described above, but above the lowest end of that class, which is associated with only mild and episodic emotional disturbances.

[21] With respect to the worker's LOE benefits entitlement during the period of time in question, I note that the record before me indicates that he made efforts to find employment and was unsuccessful due to his limited English skills. Further, in June 2015, the worker was unable to work at all while undergoing the second compensable left shoulder surgery, and during the recovery from that surgery. Lastly, I note that there is no dispute that the worker's limited English skills were insufficient for employment in the electronics assembly SO, to the extent that the Board referred the worker for further ESL programming in 2017. I note that the worker has a Grade 8 education completed in his country of origin and has only worked in physically demanding employment. The worker is precluded from physical work by his permanent, compensable left shoulder restrictions. When this barrier to employment is considered in the context of the worker's vocational profile and highly limited English skills, which was evidently a barrier to finding alternative employment in the period of time in question, I am satisfied that the worker was unable to work in any employment, during the period of time at issue, in the absence of further WT assistance from the Board. I find therefore that the worker has entitlement to full LOE benefits from December 9, 2014 to May 15, 2017.

DISPOSITION

[22] The appeal is allowed as follows:

1. The worker's NEL award for psychotraumatic disability is increased to 25%.
2. The worker is entitled to full LOE benefits from December 9, 2014 to May 15, 2017.

DATED: January 9, 2019

SIGNED: J.E. Smith