



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 53/19

BEFORE: R. Woodrow : Vice-Chair
M. Christie : Member Representative of Employers
C.S. Mannella : Member Representative of Workers

HEARING: January 14, 2019 at Toronto
Oral

DATE OF DECISION: March 4, 2019

NEUTRAL CITATION: 2019 ONWSIAT 575

DECISION UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) dated June 13, 2017

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not participating

Interpreter: N/A

Workplace Safety and Insurance
Appeals Tribunal

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

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REASONS

(i) Preliminary issues

[1] At the outset of the hearing the worker's representative requested the Panel admit into evidence additional documents: 1) up to date job search chart (February 2016 to December 2018); 2) a copy of the Global Assessment of Functioning (GAF) Scale; 3) biography of specialist in internal medicine Dr. D. Doell; and 4) a selection from the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd edition (revised) (the AMA Guides).

[2] After a brief caucus to consider the submissions, the Panel admitted these documents into the hearing, as they were relevant to the issues before us and there was no prejudice to any other party as the employer was not participating in this appeal. This evidence will be weighed with the other evidence before us in this appeal.

(ii) Issues

[3] The issues under appeal are as follows:

1. Quantum of the Non-Economic Loss (NEL) award for psychotraumatic disability;
2. Suitability of the Suitable Occupation (SO) of Other Assemblers; and,
3. Quantum of Loss of Earnings (LOE) benefits beyond October 26, 2015.

(iii) Introduction

[4] The now 58-year-old worker worked as a groundsman equipment operator with the accident employer. He started with the employer in November 2012. He was injured on January 3, 2013 after he fell from a height. The worker was taken by ambulance to an emergency room and was admitted to a hospital on the date of the accident. The worker was discharged from hospital on January 5, 2013 with a discharge diagnosis of multisystem trauma, mild traumatic brain injury, left scapular fracture, acromial fracture, left coracoid fracture, and right temporal subarachnoid hemorrhage/contusion. A Form 8 dated January 8, 2013, provided by Dr. H. Tien, specialist in general surgery, from the hospital where the worker was admitted, provided the following diagnoses: traumatic brain injury; left temporal bone fracture; left zygomatic arch fracture; left rib fracture; and left clavicle, left scapula, and left coracoid fractures.

[5] A decision of the Board Case Manager, January 22, 2013, noted that the worker was unable to return to work at that time as he was totally disabled.

[6] The Board referred the worker to the Complex Injury Outpatient Rehabilitation Program (CIOR); an Intake Report was provided dated March 6, 2013.

[7] The worker returned to graduated hours and modified duties with the accident employer in August 2013. The employer was unable to continue providing the worker with modified duties in January 2014 and the worker went off work.

[8] On November 4, 2015 the worker was awarded a 13% NEL benefit for his moderate brain/head injury and chronic shoulder pain post left shoulder fractures.

[9] The worker was referred for Work Transition (WT) by the Board. The WT Specialist recommended Automotive Service Advisor NOC 1453, in a WT Plan Proposal Worksheet dated April 17, 2014. However, the WT Plan was put on hold after concerns were raised by the worker's representative; the parties had further discussions on other suitable occupations.

[10] The Board allowed entitlement for temporary psychotraumatic disability (Adjustment Disorder with Mixed Anxiety and Depressed Mood), in a decision dated October 24, 2014.

[11] In a decision dated July 27, 2015 of the WT Specialist, the worker was sponsored into a WT plan for the SO of Other Assemblers NOC 9498.

[12] The worker's WT plan was completed on October 23, 2015. In a decision dated October 16, 2015, the Case Manager determined the worker's partial LOE benefit would be based on anticipated earnings of \$450.00 per week in suitable employment, based on a 40 hour work week at \$11.25 per hour. Effective October 26, 2015 the worker's partial LOE benefit was reduced to \$333.62 per week.

[13] On November 4, 2015 the worker was awarded a 10% Class 2 – mild impairment for his Adjustment Disorder with Mixed Anxiety and Depressed Mood, which increased his total NEL benefit to 22%. This was reconsidered and upheld in a decision dated December 16, 2015.

[14] In a decision dated January 12, 2017, the Case Manager conducted the worker's annual LOE benefit review. The worker's LOE benefit remained \$346.31 per week effective January 3, 2017.

[15] In a decision dated February 24, 2017 a Case Manager determined that the worker "remains competitively employable post NEL assessment of November 2015;" the SO of Other Assemblers remained suitable, within the worker's precautions, was available, and within the educational requirements that the worker already possessed; the LOE benefit rate post WT (decision dated October 16, 2015) was upheld; and the decision of January 12, 2017 on LOE benefits was upheld.

[16] The worker appeals a decision of the ARO, after an oral hearing, which confirmed: the 10% NEL award for psychotraumatic disability; the SO of Other Assemblers was and remained suitable and the WT plan provided for the worker was sufficient; and the reduction of LOE benefits to partial based on full-time SO wages effective October 26, 2015.

(iv) Law and policy

[17] Since the worker was injured in 2013, 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 #8 – NEL Quantum for Mental Disorders
- Package #213 – NEL Quantum
- Package #224 – LOE Benefits – benefits as of July 15, 2011
- Package #231 – Work Transition & Suitable Occupation
- Package #235 – Work Reintegration Principles, Concepts, and Definitions
- Package #300 – Decision Making/Benefit of Doubt/Merits and Justice

[21] We have considered these policies as necessary in deciding the issues in this appeal

(v) **Analysis**

[22] The appeal is allowed in part for the reasons set out below.

(a) **Quantum of the 10% NEL award for psychotraumatic disability**

[23] The worker's representative submitted that the worker's psychological impairment had traits associated with a higher range of impairment and submitted that the worker's NEL quantum should be increased to a Class 3 moderate impairment in the lower range.

[24] After considering the evidence, we find the worker's psychotraumatic disability should be increased from a 10% Class 2 mild impairment to a 15% Class 2 category mild impairment.

[25] *Operational Policy Manual (OPM) Document No. 18-05-11, "Assessing Permanent Impairment Due to Mental and Behavioral Disorders"* states, in part,

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 the worker remains able 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 in complex integrated cerebral functions such that daily activities need some supervision and/or direction. There is also a 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 family members 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, depressive features, loss of appetite, insomnia, chronic fatigue, mild 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 significantly diminished stress tolerance. A phobic pattern or conversion reaction will surface with some bizarre behavior, 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.

[26] We have considered conceptual differences between a worker who is properly placed in Class 2, where the worker is currently rated, in the higher range of impairment, and a worker who is properly placed in Class 3, on a global or holistic basis rather than a “granular” analysis which uses the description under each Class as a kind of checklist (see for example *Decision No. 353/17*). We also note that there is some overlap in the two Classes, in particular, the Panel notes that the first sentence under the heading for each Class starts with the same words, “[t]here is a degree of impairment of/to complex integrated cerebral functions...” The Classes differ in how this sentence is concluded.

[27] We note that the worker has been granted a NEL award of 13% in recognition of his organic impairments for his left shoulder and moderate brain/head injury. The worker’s NEL quantum for his organic impairment was not an issue in this appeal. The NEL Evaluation of November 4, 2015 for the worker’s psychotraumatic impairment noted that:

Evaluation of central nervous system impairment combined with a psychological impairment is made difficult because of the complex relationships between the brain and the mind. It is impossible to avoid consideration of associated mental, emotional and personality processes. Chapter 14 has been used in conjunction with Chapter 4 page 103 AMA Guides. This current rating has been completed with consideration to the prior rating for traumatic brain injury.

[28] In order to be complementary to the organic award, and to avoid duplication, compensation for a worker’s psychotraumatic disability should generally not include any significant element attributable to the organic condition which has already been compensated. As such, consideration must be given to whether a worker’s deficit is attributable to organic or non-organic factors. The worker’s physical limitations are not deficits attributable to his non-organic psychological impairment, accordingly, they will not be considered in determining the quantum of his NEL award for psychotraumatic disability. We have also considered the worker’s limitations with respect to his moderate brain/head injury which will not be considered in determining the quantum of the NEL award for psychotraumatic disability.

[29] In our view, the worker’s psychotraumatic disability is not captured in the higher Class 3 moderate impairment as there is no significant evidence before us that the worker’s “daily activities need some supervision and/or direction.” The worker’s representative submitted that the worker needed some supervision and/or direction, noting the worker’s evidence on house cleaning. While we accept this evidence, we note that there is other evidence, the worker’s *viva-voce* testimony and some corroboration in the Case Record, before us with respect to the worker’s ability to drive, spend time alone, and attend social functions on his own. In our view,

on balance, this is persuasive evidence that the worker does not need supervision and direction noting his ability to perform these tasks on his own. In addition to the foregoing, the worker performed volunteer work at a chip truck, he testified that this work involved using a machine that peeled potatoes and another machine that cut the potatoes into chips as well as painting picnic tables. There was no significant evidence before us, nor did the worker's representative point us to such evidence, that this work required supervision or direction.

[30] The worker's representative made submissions on the significance of the workers' assessment on the GAF, as per a report dated March 31, 2014 of psychologist Dr. P. Pajouhandeh of 50-55 which is "moderate symptoms." While we have given the worker's GAF some weight as evidence before us, we prefer the medical reporting, along with the other evidence before us, in full as opposed to simply considering the GAF score in isolation as we find the former in its totality is more descriptive of the worker's psychotraumatic disability.

[31] We also note that the worker's representative submitted that the worker's evidence was that he could no longer take part in his long-term hobby of car repair, which he submitted was indicative that his confidence had diminished. The worker's representative also submitted that the worker had panic attacks, he testified once per month, which was indicative of a mild, episodic panic anxiety state. While the worker has some traits of the higher Class 3 moderate impairment; in our view, the balance of the evidence indicates that the worker's NEL rating for his psychotraumatic disability is more appropriately rated at the higher end of the Class 2 mild impairment. In addition our findings on supervision and direction above, we note that there was no significant evidence before us, nor did the worker's representative point us to any, on the following:

- the worker became "more dependent on family members in all activities" as he was able to perform his activities of daily living and perform many tasks on his own;
- "agitation with excessive fear of re-injury;"
- "nurturing strong passive dependency tendencies" noting his ability to perform many tasks on his own, such as driving, socializing, and volunteering at the chip truck;
- "definite limitations in social and personal adjustment" within the family noting his mostly positive relations with his spouse and children;
- "mild psychomotor retardation" related to his psychotraumatic disability; or,
- "clear psychological regression."

[32] However, in our view the balance of the evidence indicates that the worker's NEL rating for his psychotraumatic disability should be increased to a 15% Class 2 mild impairment for the following reasons:

- The last report of Dr. Pajouhandeh prior to the Maximum Medical Recover (MMR) date, March 26, 2015, noted that the worker reported reduced confidence in his abilities, difficulty making daily decisions, ongoing sleep disturbances, worry whether he could drive safely, and had stress related to the uncertainty of his vocational direction.
- Dr. Pajouhandeh also provided a report after the date of MMR, September 14, 2015, that noted his last session of Board sponsored treatment was on June 22, 2015 (the date of MMR); however, he had continued to meet the worker every three to four weeks to "maintain gains made to date." We consider that this report sheds light on the date of MMR noting it is shortly after the date of MMR and given the comment on "maintain

gains” from which we infer that gains had been made in and around the date of MMR. In this report Dr. Pajouhandeh noted that the worker had “improved somewhat in his ability to cope with stressful situations as related to vocational uncertainty and financial gain.”

- The combined reporting of Dr. Pajouhandeh’s two reports above, establish that the worker had a “mild to moderate emotional disturbance under ordinary stress” noting his worry with driving and stress related to his WT program. The worker’s worry that he was unable to drive safely also, in our view, is a subjective limitation in functioning as a result of the emotional impact of the accident as he had regained his driver’s licence in early 2015. In our view, the worker had some loss in personal or social efficacy noting his reduced confidence in his abilities and difficulty making decisions.
- While there are two reports of Dr. Pajouhandeh prior to those set out above (March 31 and September 15, 2014). We found these reports less persuasive in our determination of the worker’s psychotraumatic disability as they were completed quite some time prior to the worker’s date of MMR and receipt of further treatment.
- We also note the worker’s testimony before us which in our view, is more indicative of a higher range of Class 2 mild impairment. In coming to our determination we have also considered that the worker’s evidence is indicative of “impairment levels compatible with most useful function.” The worker’s testimony was that he tends to his own personal care, he job searches on his own (driving and speaking to potential employers), he does some work on his family vehicles although he does not engage in his car repair/restoration hobby and his activity is more limited, and he sees his friends socially (often on Monday nights), to discuss old cars.
- While we accept the worker’s evidence of his panic attacks, once a month, we note that there is no significant medical reporting on this, nor did the workers’ representative point us to such. Dr. Pajouhandeh did not report on panic attacks. In considering this evidence and the absence of significant reporting on it in the medical evidence, we find that it is more indicative of a “mild to moderate emotional disturbance under ordinary stress” or “a mild anxiety reaction.”

[33] Based on the preponderance of the evidence before us, on a balance of probabilities, we find that the worker’s psychotraumatic impairment is more appropriately rated at a 15% Class 2 mild impairment. Accordingly, we find that the worker’s NEL rating for his psychotraumatic disability should be increased from 10% to 15%.

(b) Suitability of the SO of other assemblers

[34] In considering this issue we have considered the provisions of *Operational Policy Manual* (OPM) Document No. 19-03-03 “Determining Suitable Occupation” which provides in part:

Suitable occupation (SO)

A SO represents a category of jobs suited to a worker’s transferable skills that are safe, consistent with the worker’s functional abilities, and that to the extent possible, restores the worker’s preinjury earnings. The SO must be available with the injury employer or in the labour market.

Determining a SO

...

In determining a SO, the WSIB works with the worker and employer and considers

- a worker's functional abilities
- a worker's employment-related aptitudes, abilities, and interests
- what jobs are available with the injury employer through direct placement, accommodation, or retraining
- labour market trends, and the likelihood of the worker being able to secure and maintain work within the occupation with another employer, and
- in accordance with the human rights legislation, any pre-existing non-work-related condition(s) (e.g., including non-physical disabilities such as a learning disability) a worker may have, as well as any other human-rights related accommodation requirements.

[35] For the following reasons, we are satisfied that NOC 9498 is unsuitable.

[36] The worker's restrictions were noted in the WT Plan Proposal Worksheet dated June 23, 2015 as:

- Avoid working at heights
- Lifting floor to waist 5 to 10 kilograms
- Lifting waist to shoulder 5 pounds
- Avoid bending and twisting and repetitive use of the left arm/shoulder
- Working at or above shoulder level
- Limited pushing and pulling with left arm less than 20 pounds
- No overhead work lifting greater than 5 pounds away from the body
- No prolonged repetitive work at shoulder height

[37] It was also noted in the WT Plan Proposal that the worker would (as per the Neuro-Psycho-Vocational Assessment Report dated February 10, 2014 of psychologist Dr. C. Friesen and psychometrist M. Wojcik-Marano):

... likely find learning new concepts much more challenging and consideration should be given to maintaining a routine of job duties/steps as it will put less demands on his attention and learning abilities. His personality testing results suggest that he would be best suited for occupations that are highly routinized, not emotionally taxing and involve some social contact.

[38] The WT Plan Proposal Worksheet provided the following information about NOC 9498:

...workers assemble and inspect a variety of products. They are employed by a wide variety of manufacturing companies. *The Career handbook identifies the physical demands as Body Position (4), Upper limb coordination (1), strength (medium). *[Injured worker] is right hand/arm dominant and this occupation appears to be within his precautions, allowing him to alter his posture frequently.

[39] We first note, as submitted by the worker's representative, that this SO was not suggested for the worker in the Neuro-Psycho-Vocational Assessment. Rather, this was a NOC suggested by the WT Specialist in the WT Plan Proposal.

[40] In considering the worker's physical restrictions and the physical demands, in our view NOC 9498 was unsuitable as it was contrary to his restrictions. In this we note that the worker had restrictions on pushing/pulling, lifting, and overhead work. In our view, NOC 9498 indicates that it is medium strength which would likely be beyond the worker's permanent restrictions. Further, NOC 9498 requires upper limb coordination which would also be beyond the worker's left arm permanent restrictions.

[41] We understood the worker's evidence to be that when he searched for employment in the SO, he was informed there would be heavy lifting, which was contrary to his restrictions. This was corroborated by the WT Specialist's notation in the WT Plan Proposal Worksheet of June 23, 2015 that there were postings that required heavy lifting that would not be within the worker's restrictions. The WT did some "filtering out" of the positions that required heavy lifting. We note that the EPS Specialist noted, in the Employment Placement Services (EPS), Closure Report dated October 28, 2015 that they had informed the WT Specialist that "there are not many suitable assembly positions as most require some lifting and are fast paced." In considering the evidence, the Panel finds that the worker's evidence on the results of his job search (that there was heavy lifting in the SO) was consistent with the documentary evidence before us. On balance, this suggests that the SO was unsuitable as the majority of the positions available involved heavy lifting.

[42] In our view, the evidence also suggests NOC 9498 was unavailable. After "filtering out the postings requiring heavy lifting" there were only seven postings where the lifting demands were less than 20 pounds. The WT Specialist also wrote that she considered postings that did not specify lifting demands which "suggests the demands would be between light to medium." We do not accept this given it is based on the assumption of the WT Specialist and there is other evidence before us on the heavy lifting involved in this SO. We also note that despite the efforts of the EPS, they were unable to find work for the worker within this SO which is further evidence that the SO was unavailable; the EPS Specialist was discussing minimum wage jobs towards the conclusion of EPS services. On balance, the evidence, in our view, suggests that the SO was unsuitable as it was unavailable.

[43] The worker's representative also submitted that the Board provided a \$1200.00 placement fee for an employer who was willing to provide an employment placement for the worker, and could not find a "free placement" for him. While we acknowledge that there was a \$1200.00 placement fee included in the Return to Work (RTW) plan and the RTW Specialist was unable to find a placement for the worker, we do not find this submission persuasive as there is no significant evidence supporting this submission. The worker's representative provided the Workplace Safety and Insurance Board (WSIB) EPS Fee Schedule but this evidence was general in nature as it was not relating to the worker's EPS.

[44] Accordingly, for the above noted reasons, on a balance of probabilities, we find that NOC 9498 was not suitable.

(c) Quantum of LOE benefits beyond October 26, 2015

[45] We agree with other Tribunal jurisprudence that have found it is preferable to focus the analysis in assessing claims for full LOE benefits, on the language of the WSIA and the applicable Board policy, rather than on the "competitively unemployable" test. In coming to our determination, we have considered that Tribunal jurisprudence recognizes the determination of a worker's employability is multifactorial and includes consideration of factors such as restrictions/limitations associated with the compensable injury; the worker's transferrable skills,

aptitude, and ability; pre-existing stable medical conditions; English language ability/literacy; and age.

[46] In our view, consideration of these factors support the worker's claim that he is unemployable.

[47] We first note that the Neuro-Psycho-Vocational Assessment Report, dated February 10, 2014, of psychologist Dr. Friesen and Vocational Evaluator M. Wojcik-Marano opined that the worker had difficulties in processing speed, learning and memory, and retrieval fluency "most likely primarily due to" the worker's moderate traumatic brain injury. The assessors noted that these neuropsychological impairment/disabilities would need to be considered in identifying alternate occupations/retraining options. They noted that this suggested that the worker would have a "very difficult time learning new procedures or other work-related information, quickly recalling information learned in the past and that he will have a difficult time efficiently processing information, quickly perceiving similarities and differences between stimuli and information, working within time parameters, and completing simple, rote tasks quickly." Dr. Friesen made a number of recommendations with regard to the worker's future work and home life including:

- Allow additional time to re-read material
- Allow additional training time for new tasks
- Offer training refreshers
- Reduce auditory distractions
- The worker could benefit from having information retrieved or repeated both orally and visually over time to learn new information
- The worker may benefit from the "see it and say it strategy?"
- The worker may benefit from using meaningful associations with information
- The worker may benefit from incorporating spaced repetition of information progressively over longer intervals
- The worker may benefit from writing new information/procedures to solidify his memory and to use as a reference
- Maintain a routine of job duties/steps to put less demand on attention and learning abilities
- Keep stress to a minimum to prevent memory errors
- Use of checklists for required responsibilities/procedures to ensure tasks are correctly completed
- Use of computerized brain training programs

[48] The assessors also wrote that, as per their assessment results, the worker would find learning new concepts "much more challenging than peers of the same age" and would likely benefit from a work trial/job shadowing which would allow him to reinforce his learned skills in a supportive employment setting. Also, consideration should be given to job placement services as well as job search training to assist the worker with employer contacts and marketing his skills.

[49] We next note the report of Vocational Evaluator and Rehabilitation Consultant M. Bachmann, dated September 30, 2016, who was retained by the worker's representative to evaluate the worker's employability. The worker's representative submitted that Mr. Bachmann was a "recognized expert," and provided Tribunal decisions that have accepted Mr. Bachmann's reports in the past (*Decision Nos. 1586/16, 11/13, 1136/07, and 1031/13*). Based on the information provided to us about Mr. Bachman's credentials, we are prepared to accept that he is an expert in the area of vocational rehabilitation.

[50] Mr. Bachmann's report provides an opinion on the worker's WT experiences and an opinion on his employability based on documentation from the Board file. In particular from this report we note the following:

- The worker had a "generally good occupational compatibility at the time of the subject injury" and was "suited to 326 occupations on the basis of his demonstrated aptitudes and level of education."
- After eliminating occupations that exceeded the worker's restrictions, Mr. Bachmann opined that the worker was only suited to 9 residual occupational matches (3 were "not realistic;" 1 was "very limited demand;" 2 were considered as "no relevant education, training, or experience;" 2 were "no relevant education, training, or experience and contraindicated by cognitive impairment;" and 1 was "likely contraindicated by cognitive impairment" and "typically restricted to existing employees with little opportunity for outside applicants"). On the basis of this, Mr. Bachman opined that the worker's functional limitations had led to, effectively, a complete loss of occupational compatibility. Further, Mr. Bachmann also noted that the worker's psychological and cognitive impairment was a further disabling factor.
- Mr. Bachmann opined that given the worker's cognitive impairment, his ability to meet employer hiring requirements was impaired, and that the worker's moderate brain/head injury contributed to his great difficulty in identifying and committing to an occupational goal.
- The worker's age and organic and non-organic impairments were noted as other factors that affected the worker's placeability in the workforce.
- Mr. Bachmann opined that the worker was a poor candidate for vocational rehabilitation due to his limitations affecting work capacity, cognition, psychological functioning, and advanced working age.
- Mr. Bachmann noted that there had been no follow-up neuro-psychological assessment at the two-year anniversary of the impairment, as recommended by the assessors in the Neuro-Psycho-Vocational Assessment.
- Mr. Bachmann noted that the Neuro-Psycho-Vocational Assessment did not provide aptitude testing and was therefore incomplete and insufficient to evaluate the worker's vocational potential and many of the recommendations were not implemented. He opined that "WT services were inadequate for a brain-injured client and the service provider was either unable or not mandated by the WSIB to provide the needed supported."
- Mr. Bachmann opined that the cumulative effect of multiple factors rendered the worker unemployable.

[51] The worker had a serious workplace accident that led to his permanent impairments (organic and non-organic) and restrictions.

[52] We accept that the worker had very few occupational options. It was the opinion of Mr. Bachmann that the worker had a “complete loss of occupational compatibility” without consideration of his psychological and cognitive impairment. However, we note that Mr. Bachmann used the restrictions provided in a Functional Work Capacity Assessment dated January 13, 2014 and there was a difference in the restrictions noted by Mr. Bachmann and those considered in the WT plan. Significantly, the worker had regained his driver’s licence (G licence) in March 2015 (although not his A licence) and therefore was able to operate some motorized vehicles, the worker’s stair climbing was no longer a restriction, and the worker did not have a restriction avoiding prolonged sitting and standing (although we did note that this was included on some of the subsequent Functional Abilities Forms). In our view, Mr. Bachmann’s report is deficient in this regard, and we give his opinion on occupational compatibility lower weight for this reason. However, we have considered the worker’s restrictions for his compensable left shoulder, the worker’s entitlement for psychotraumatic disability, and his documented neuropsychological impairment (as assessed in the Neuro-Psycho-Vocational-Assessment Report). We accept that given the worker’s permanent compensable organic and non-organic impairments, he would have very limited options in obtaining employment.

[53] We also find it significant, as submitted by the worker’s representative, that the worker did not receive a job placement noting his organic and non-organic compensable disabilities, including his psychological deficits as suggested by the Neuro-Psycho-Vocational Assessment Report. The evidence before us indicates that a job placement had been recommended but was not part of the WT program and the worker has been job searching for many years without success. We agree with the worker’s representative’s submission that the suggestion of a job placement, was not unreasonable in the specific circumstances of this worker, in particular his moderate brain/head injury. We accept that without this recommendation being implemented, the worker was unlikely to independently find a job.

[54] We noted above, the evidence of the worker’s extensive job search efforts, that we accept. The worker had the assistance of Job Search Training in his WT plan, however, even with this assistance, employment was not found in the SO or in other suitable employment. The worker’s job search has been ongoing since his WT ended, he did not limit himself geographically but rather searched in many surrounding geographic areas of varying distances, and he searched for various forms of employment (within NOC 9498 as well as other suitable employment). We accept that the worker, as per his evidence, has spent many hours job searching each week and has not been successful in obtaining employment. In our view the foregoing evidence further supports the worker is unemployable.

[55] In his response to a question from the Panel on whether he thought he could work, the worker’s response was he thought he could work part time but would require a flexible employer to accommodate his headaches that last as long as three to four consecutive days. Based on this evidence, as well as the evidence of the worker’s job search, we accept that the worker would like to work. We considered whether the worker could work part time, however, we find the worker would require a supportive employer to accommodate his ongoing headaches that are related to his compensable moderate head/brain injury as well as his other compensable restrictions and limitations, and that he is unlikely to find such an employer in the competitive labour market for suitable and sustainable work.

[56] As above, we have increased the worker's NEL award for his psychotraumatic disability, which gives him a combined 26% whole person NEL award. In our view, this is further supportive evidence that the worker is unemployable.

[57] The worker's representative submitted that the worker's NEL for his moderate brain/head injury was not a "slight interference with daily living," which was noted in the NEL Evaluation of October 31, 2014. The workers' representative made reference to the AMA Guides and in particular page 105 (from Chapter 4 The Nervous System). The issue of the quantum or a redetermination of the worker's organic NEL was not before us, and the Panel noted that the references the worker's representative made from Chapter 4 were, in any event, not those that were considered by the NEL Evaluator. The worker's representative acknowledged this and submitted that parts of the worker's thinking process were deficient which was an impediment to his ability to be employed. We have accepted this in coming to our decision.

[58] In our view the worker has a significant physical limitation with his left shoulder permanent impairment. In addition he has significant limitations with respect to his moderate brain/head injury that affect his processing speed, learning and memory, and retrieval fluency. As well the worker has entitlement to psychotraumatic disability. The worker's compensable injuries, in our view, are a significant contributor to his loss earnings and render him unemployable on either a part-time or full-time basis.

[59] On a balance of probabilities, for the reasons set out above, we find that the worker is entitled to full LOE benefits from October 26, 2015, as of that date he was unable to perform any work as a result of his compensable injuries, subject to statutory review.

(d) Reimbursement for the expert opinion obtained by the worker

[60] The worker's representative requested that we consider reimbursement of Mr. Bachmann's account for his report dated September 30, 2016. An invoice from Mr. Bachmann in the amount of \$2825.00 and cheque for payment from the worker's representative's law firm were included in the Case Record. The Tribunal's *Practice Direction: Expert Evidence* sets out guidelines concerning experts, including reimbursement. Experts are reimbursed only in exceptional circumstances based on an approved schedule of rates. This appeal concerned the worker's WT services. Mr. Bachmann's report provided us with information and opinion on the WT services and the worker's employability. We found that the report of Mr. Bachmann contributed to our understanding of the evidence and was significant to the decision making process. In this regard we note that the Tribunal has previously reimbursed the cost of the reports submitted in its proceedings. See for example *Decisions Nos. 1586/16* and *864/08*. The Panel is therefore satisfied, that the fee for Mr. Bachmann's report should be reimbursed, in accordance with the prescribed fee schedule.

DISPOSITION

[61] The appeal is allowed in part as follows:

1. The worker is entitled to an increase in his NEL award for psychotraumatic disability from 10% to 15%.
2. The SO of Other Assemblers is unsuitable.
3. The worker is entitled to full LOE benefits from October 26, 2015, subject to statutory review.
4. The Tribunal shall reimburse the cost of the expert report provided by M. Bachmann dated September 30, 2016 in accordance with the Tribunal's fee schedule.

DATED: March 4, 2019

SIGNED: R. Woodrow, M. Christie, C.S. Mannella