

WORKPLACE SAFETY AND INSURANCE BOARD

APPEALS RESOLUTION OFFICER DECISION

CLAIM:

**OBJECTION PARTY:
REPRESENTED BY:**

RICHARD FINK
FINK & BORNSTEIN PROFESSIONAL
CORPORATION

RESPONDANT:

(not participating)

**HEARING:
HEARD BY:**

Hearing in Writing
Mrs. A. Rivet, Appeals Resolution Officer

ISSUE(S)

This worker is objecting to the following decisions:

- 1) The decision of July 20, 2017 that determined the worker's Non Economic Loss (NEL) award quantum for CPD is 20%.
- 2) The decision of January 3, 2017 that determined the worker is capable of earning \$11.25 in the suitable occupation (SO) of "other assemblers" NOC #9498. The decision also determined the worker was entitled to partial Loss of Earnings benefits from April 17, 2015 based on the wage loss to offset the above SO earnings.
- 3) The decision of May 18, 2017 that confirmed ongoing LOE benefits would be paid based on the full time earnings for the above SO.

BACKGROUND

This history of the worker's injury is well documented in the Appeal Resolution Officer's decision of September 8, 2016. In summary, the worker was employed as a mechanic when on September 11, 2014 he lifted a transmission and sustained an inguinal and umbilical hernia. The worker had a surgical repair of both hernias on December 8, 2014.

The worker has been complaining of significant right groin pain despite treatment received to date. The Appeal Resolution Officer's decision of September 8, 2016 granted the worker entitlement to Chronic Pain Disability and recognized a permanent impairment for the condition. The worker was entitled to a NEL assessment. He was also granted entitlement to LOE benefits the quantum of which was to be determined once an appropriate Work Transition Assessment was completed.

The worker was initially granted a 15% NEL for CPD in January 2017. Following a review the submissions attached to the Appeals Readiness Form of June 13, 2017; the worker's NEL determination for CPD was increased to 20%. The worker's representative submits the worker's NEL should be rated at 30%. This is the first issue before me.

The worker participated with Work Transition Services. It was determined the worker is capable of earning \$11.25 in the suitable occupation (SO) of "other assemblers" NOC #9498 and was entitled to partial Loss of Earnings benefits from April 17, 2015 based on the wage loss to offset the above SO earnings. The worker objects to the suitability of the SO, this is the second issue before me.

The worker's LOE were based on full time earnings. The worker has been employed as a part time cashier/helper at . It is not clear when the worker first began working in this role but information indicated he was first paid on February 7, 2016 for 14 hours of work. The worker objects to the determination that he can work full time and maintains that he can only work up to 15 hours per week due to pain and emotional disability. This is the third issue before me.

AUTHORITY

Operational Policy Documents:

18-05-11 Assessing Permanent Impairment Due to Mental and Behavioural Disorders

18-03-02 Payment and Reviewing LOE Benefits (Prior to Final Review)

19-03-03 Determining Suitable Occupation

19-03-05 Work Transition Plans

ANALYSIS

In my determination entitlement, I considered the record, evidence and policy and find the 20% NEL granted to the worker for CPD to be appropriate. I also find the SO of "other assemblers" to be suitable and the worker has the ability to pursue employment and earn a minimum wage salary. However, I find the worker's tolerance for work is limited to 15 hours per week. I have only included a synopsis of the relevant evidence in my decision.

The worker was initially granted a 15% NEL for CPD on September 11, 2014. Upon review of the representative's submission of June 13, 2017 the worker's NEL was increased to 20%. The worker's representative submits the worker's NEL for Chronic Pain should be 30%.

In my review of the claim file I noted reports consistently indicate the worker has ongoing pain and that his activities have been limited by pain. Dr. Jeffries report noted the worker has limited concentration at work and is often forgetful. He has headaches, is not sleeping well and the worker reported that he was not benefitting from his medication. He continues to have right groin pain which is the most serious issue he has. He does feel sad and will cry, often feels hopeless and guilty. He has had some variation in appetite, has lost interest in sex and can be quite irritable. It was noted the Queensway Health Centre Report of February 23, 2015 stated the worker was incapable of doing the vast majority of self-care activities and his wife assists him with cleansing and dressing. He was not doing any housework. The May 8, 2015 assessment at the Toronto Polyclinic indicated the worker complains of inguinal groin pain, lower back pain, right leg pain, right abdominal pain, sleep problems, lack of energy, problems with sexual desire and performance and dizziness. The entry of October 23, 2015 states the worker's pain disturbs his sleep and he is unable to eat properly. It also noted the pain from his past hernia operation is causing the patient a lot of stress.

The psychologist's report of March 12, 2016 states the worker has been diagnosed with CPD associated with psychological factors and a general medical condition; anxiety disorder NOS and a sleep disorder. He states the prognosis for remission is extremely poor. In his opinion the worker is unable to work. He recommends supportive psychotherapy and review of pharmacotherapy. The subsequent report of April 5, 2016 indicates the worker suffers from a major depressive disorder which is a direct consequence of his work related injury.

Dr. Malkin's June 13, 2016 chart note entry indicates the worker is depressed and demoralized. He is trying to get out for short walks. The July 8, 2016 chart note indicates the worker sleeps long hours, goes for a walk for a couple of hours at a time which is good. The September 6, 2016 entry describes the worker was demoralized and angry but he was working 3 hours a day.

The June 18, 2016 psychiatrist's report noted the worker saw a psychiatrist when he first came to Canada in 1992. On examination the worker walked with a cane and appeared to be in pain and stressed. He has a depressed mood and a depressed affect. He was cognitively distracted and showed poor memory and concentration. The worker was diagnosed with an adjustment disorder with depressed mood. Antidepressant medication and cognitive therapy was recommended. He did not think the client could go to work.

The Psycho-Vocational Assessment report of November 30, 2016 noted the worker spends his time working part time, managing his self-care, doing chores and socializing. He sees his children and goes to the shops. The report noted the worker and his wife separated in 2014 due to his anger causing problems at home. The worker complained about being forgetful. He sometimes feels panicky, guilty and angry. He complains of sleep problems and reduced appetite. He sometimes feels normal from an emotional perspective, but mostly not. He sometimes has hopeless and suicidal thoughts but not that he would act on. The report noted the worker appeared depressed, was prone to self-blame and is feeling tense and emotion and has difficulty tolerating stress. The assessment found the worker has poor literacy and would require literacy training for occupations requiring more than basic conversational English skills and even rudimentary literacy skills. He would also require upgrading of his math skills for occupations requiring more than very rudimentary math skills.

There is an affidavit from the worker stating that he on average works 15 hours per week consisting of 3 hours a day, 5 days per week. His duties involve receiving payment from customers and giving the customer appropriate change. He also places orders prepared by other staff into bags. According to the affidavit the worker "sincerely and most passionately wish to work more hours, but my disability in terms of pain, being upset, and terrible emotions prevent me from working further hours per week." The representative noting in his submission the worker had worked up to 38 hours per week over the course of two weeks but only to find significant distress.

Dr. Jeffries indicates that when he interviewed the worker he was quite grim. He had no panic attacks and reported being forgetful and his memory and concentration seemed poor. Dr. Jeffries found the worker to have a moderately severe adjustment disorder with depressed, anxious and irritable mood and it is secondary to pain and the dysfunction caused by the pain.

Dr. Jeffries indicates the worker can work 15 hours a week in a situation where he is in a sheltered situation, working for a family business with a good deal of flexibility. Dr. Jeffries does not believe he can do any more than that. He does not feel the worker could work as a factory

assembler as his mood and concentration would make him unacceptable to the employer and the doctor doubts the worker could cope with the stress.

Dr. Jeffries finds the worker meets the NEL rating criteria for Category 2 - moderate impairment of total person (15% - 25%). He indicates the worker has become dependent on family and specifically his nephew who does the home maintenance. He indicates the worker has social withdrawal and depressive features and does describe loss of appetite, insomnia, fatigue and some mild psychomotor retardation. He also finds the description of mild episodic anxiety state, agitation with excessive fear of re-injury and nurturing of strong passive dependent tendencies certainly describes the worker. Dr. Jefferies also indicates the worker fits some of the Category 3 - major impairment of total person (30% - 50%) rating criteria and feels the worker may qualify for a 35% impairment rating. He states the worker has moderate anxiety, definite deterioration in family adjustment; break down of social integration and longer episodes of depression.

Issue of NEL Quantum:

In my review I find that I concur with the decision of July 20, 2017 that granted a 20% NEL for CPD and that the available evidence does not warrant a greater NEL at this time. The "Assessing Permanent Impairment Due to Mental and Behavioural Disorders" policy outlines the rating scale for CPD NEL ratings. The current 20% rating falls into the Class 3, Moderate impairment rating category which has a range of 20-45%; described as impairment levels compatible with some but not all useful function.

The worker's representative's submission includes an opinion from Dr. Jeffries to endorse a higher NEL rating. I find Dr. Jeffries in his opinion quotes sections of policy 18-05-11 and indicates the sections "describes" the worker or is a "fit to his presentation". I find this opinion fails to provide to correlating supportive evidence that shows consistency in the worker's physical, behavioural, social or emotional presentative.

It is evident from the medical reports the worker's physical activities are limited by his pain. The evidence indicates the worker is capable of managing his self-care, doing chores and socializing. The July 8 2016 chart note indicates the worker sleeps long hours, goes for a walk for a couple of hours. Though there is no question the worker is experiencing ongoing pain, this report suggests the worker has increased his coping abilities as well as physical tolerance when compared to the findings in 2015. It also indicates the worker is sleeping better then he used to.

Socially, though the worker has had a marital break-up he has not withdrawn from his family. The psychovocational assessment report of November 30, 2016 confirms this as well as the worker's activities include seeing his children and going to shops. He has not significantly socially or emotionally withdrawn as he is seeing family, coping with working in a family restaurant and interacting with the public as he bags food orders and receives payment and gives change to customers. The worker is residing with a nephew. Clearly has not become dependent on family members in *all* his activities which would be evident in a higher Class 3 impairment rating.

Dr. Jeffries report indicates the worker does not have panic attacks. He diagnosed a moderately severe adjustment disorder with depressed, anxious and irritable mood and it is secondary to pain and the dysfunction caused by the pain. Reports indicate the worker would get angry. He presented with depressed mood and a depressed effect, being cognitively distracted and he showed poor memory and concentration. The worker expressed feeling tense or panicky on

occasion and having difficulty tolerating stress. These findings are consistent with the lower end of the Class 3 impairment rating which description includes "The worker demonstrates a mild, episodic anxiety state, agitation with excessive fear of re-injury".

In completing my review I find the 20% NEL awarded to the worker for CPD to be appropriate and sufficient. The NEL decision of July 20, 2017 is confirmed. The worker's objection is denied.

Issue of SO and LOE benefits:

It was determined the worker is capable of pursuing to SO of "other assemblers" NOC #9498 at a wage of \$11.25. In my review I find the selected SO to be both suitable and attainable by this worker. In addition, I find the worker has the ability to pursue additional jobs and earn a minimum wage salary.

In assessing the worker's aptitudes and vocational characteristics I noted the worker did attend the Automotive Mechanic Apprenticeship program at Centennial Collage in the early 1990s and made several unsuccessful attempts to write his automotive mechanic licensing exam. The worker attributed the failure to his lack of English literacy. The worker does not have computer skills.

In terms of prior work experience when the worker first arrived in Canada he worked as a convenience store clerk NOC.6611. From June 2, 2008 – December 8, 2014 the worker was employed as an automotive mechanic. Since February 2016, the worker has been working as a counter clerk NOC 6421 as a family sandwich/shawarma restaurant.

Physically the worker has been determined capable of work is sedentary or light employment with permanent functional precautions of avoid lifting floor to waist, no repetitive or sustained bending, no low level work, avoid prolonged standing, ability to alternate between sitting, standing needed; load handling with the limited physical demands level (less than 10lbs). Though these restrictions were indicated to most recent surgeon's report indicates the worker is capable of full activity and would not harm himself by that activity. Again, it is evident the worker is limited by pain.

Dr. Jeffries does not believe he can do any more than the worker he is performing currently at the family owned restaurant. He does not feel the worker could work as a factory assembler as his mood and concentration would make him unacceptable. However, psychovocational testing during found the worker had the abilities to pursue the SO of other assemblers NOC 9498.

The psychovocational assessment indicates the worker has the ability to pursue employment in the SO of other assemblers NOC 9498, retails Salesperson and sales clerk NOC 6421, Cashiers NOC 6611, and other elemental service occupations NOC 6683. ESL and upgrading was recommended for these occupations. Noting the worker's past and current work experience I find the worker has already demonstrated that cognitively he is capable of performing the cashier and counter clerk positions.

The Work Transition Specialist (WTS) recommended the SO of NOC 9498 other assemblers at an entry level salary of \$11.25 per hour which is the equivalent of minimum wage. I concur with the WTS recommendations as the worker has applicable mechanical skills. I also concur that the worker has the ability to directly enter into such a position without the need for formal

training. The worker has worked as a mechanic in Canada for over 6 years being able to interact with customers and use manuals and follow instructions as needed. I find the worker has the ability to pursue light assembly entry level work in his geographic region. It is common to find immigrant workers in such positions. The worker will have to be selective in his pursuit of positions that are in the light or sedentary physical demand level in accordance to his limitations.

This worker was offered a Work Transition Plan but declined as he did not agree with the determination that he could work full time and he did not want to lose his job at the restaurant.

In summary, I find this worker has the ability to attain a minimum wage paying position in more than one occupation. As stated earlier the worker has in the past worked as a cashier and he is currently working as a counter clerk. As such, he is capable of obtaining work in these positions in addition to the selected SO of other assemblers. As such the worker's objection to the SO is denied.

Issue of Work Hours and LOE benefits:

As I have indicated above I find this worker to be capable of pursuing employment and earning a minimum wage salary. The worker is maintaining that due to his physical limitations, his chronic pain and his psychological condition he is unable to work full time.

This worker has been employed part time since approximately February 2016. It is evident the worker's psychiatrist was not aware the worker was working when the report of June 18, 2016 was written as the psychiatrist wrote he did not think the worker could work. In Dr. Jeffries opinion, the worker can work 15 hours a week in a sheltered situation, working for a family business with a good deal of flexibility. Dr. Jeffries does not believe he can do any more than that.

The worker has been employed for over year in a part time position and found that when he attempted to increase his hours he was unable to cope. The worker has consistently and continually complained of significant pain. In reviewing the payroll information for the worker's current employment; there have been weeks where the worker worked for more than 15 hours in a week. However, on average the worker only worked 15 hours per week.

In reviewing the medical history I noted the surgeon's report of November 19, 2016. The surgeon states that surgically the mesh could be removed but the scar tissue would still be there and could be irritating and make things worse. The surgeon told the worker it is important that he pushed through and is not going to do any harm but he should be able to do normal activity. Based on this report the worker is not limited by physical restriction but by his perception of pain.

The worker's compensable injury is not only physical in nature but psychological in nature due to his chronic pain disability. I find the worker has made an effort to pursue employment that he can sustain and that accommodates his pain related limitations. The issue before me is whether the worker has the ability to work full time or whether to accept the worker is limited to a 15 hour work week as he claims.

It is clear that physiotherapy and psychological interventions have not benefitted this work. The psychiatrist indicated in his 2016 report that the prognosis for remission is extremely poor. Given these factors, I find it is unlikely the worker will be able to increase his work hours or be able to cope with full time employment. This worker has made an effort to mitigate his wage loss and I accept the worker compensable injury limits him to a 15 hour work week.

The worker is granted entitlement to LOE benefits from April 17, 2015 based on earning a minimum wage salary 15 hours per week. The worker's objection is allowed.

CONCLUSION

- 1) The NEL decision of July 20, 2017 is confirmed.
- 2) The SO of "other assemblers" NOC #9498 is confirmed.
- 3) The worker is granted entitlement to LOE benefits from April 17, 2015 based on earning a minimum wage salary 15 hours per week.

The objection is allowed in part.

DATED

October 17, 2017



Mrs. A. Rivet
Appeals Resolution Officer
Appeals Services Division